

**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS**

**SUPERIOR COURT**

**Docket No. 03-E-0106**

**In the Matter of the Liquidation of  
The Home Insurance Company**

**LIQUIDATOR'S OPPOSITION TO BENJAMIN MOORE & CO.'S  
MOTION TO COMPEL INTERROGATORY RESPONSES AND  
PRODUCTION OF DOCUMENTS BY THE LIQUIDATOR**

Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby opposes Benjamin Moore & Co.'s ("BMC") April 11, 2005 Motion to Compel Interrogatory Responses and Production of Documents By the Liquidator. As reasons therefor, the Liquidator states:

**Background**

At the status conference held on October 4, 2004, the Court allowed the ACE Companies and BMC to pursue discovery "limited to the necessity, reasonableness, and fairness of the agreement" with AFIA Cedents. Order on Remand at 13 (October 8, 2004). That same day, the ACE Companies served interrogatories and document requests on the Liquidator. BMC served interrogatories and document requests on the Liquidator on October 13, 2004.

The Liquidator served written responses and objections to both the ACE Companies' and BMC's interrogatories and document requests on November 24, 2004. BMC Exs. A & B. The Liquidator made an initial document production to BMC and the ACE Companies on December 16, 2004, and supplemented that production on January 5, 2005. The Liquidator provided BMC and the ACE Companies with privilege logs on December 21, 2004 and January 5, 2005. In response to the ACE Companies' questions, the Liquidator subsequently provided revised

privilege logs and a revised legend (the “Legend”) identifying the persons appearing on the privilege logs (Exhibit 1).

BMC did not raise any issues concerning the Liquidator’s November 24, 2004, responses to BMC’s interrogatories and document requests until its March 2, 2005 letter, which was sent over three months after the Liquidator’s response and only two days prior to the March 4, 2005 status conference. BMC Ex. C.

The Liquidator responded to BMC’s March 2, 2005 letter in a letter dated March 11, 2005. BMC Ex. D. BMC waited until April 1, 2005 to declare an impasse (Exhibit 2), and then until April 11, 2005 to file this motion.

#### ARGUMENT

BMC’s motion challenges the Liquidator’s responses to individual requests, and the Liquidator accordingly addresses the objections seriatim below. However, as noted in the Liquidator’s Memorandum Concerning ACE Companies’ Motions To Compel Directed To Nonparty Witnesses (April 12, 2005), the objectors here are not entitled to conduct discovery as of right as litigants but only in the discretion of the Court and to the extent the Court deems appropriate.<sup>1</sup> Further, even in the usual litigation context, the Court has “broad discretion” in controlling discovery matters. See, e.g., YYY Corp. v. Gazda, 145 N.H. 53, 59 (2000); Bronson v. The Hitchcock Clinic, 140 N.H. 798, 809 (1996). The scope of discovery in this matter is “limited to the necessity, reasonableness, and fairness of the agreement.” Order on Remand at 13.

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<sup>1</sup> BMC’s suggestion (at BMC Motion ¶ 8) that Matter of Boston & Providence RR. Corp., 673 F.2d 11, 12 (1<sup>st</sup> Cir. 1982), supports discovery by objectors is wrong. Boston & Providence concerns the role of the court, acting “for the benefit of all creditors.” 673 F.2d at 13. It does not address or refer to objector discovery at all. 673 F.2d at 12-13.

**I. BMC's Motion Should Be Denied Because BMC's Interrogatories Seek Information That Is Not Relevant and Beyond the Scope of Discovery Contemplated By the Order on Remand.**

A. Principal Persons Considering Alternatives. BMC interrogatory 3 requests the identity of "all persons involved in the consideration of any alternatives to the Agreement, or the preparation of any estimates for recovery under any alternative scenarios." BMC Ex. A, No. 3. The Liquidator responded by identifying the five principal persons involved in the consideration of the recovery of indemnity/reinsurance held by Home on the risk it ceded through the Home UK Branch. Id. The Liquidator's response was appropriate. These persons (the Special Deputy Liquidator, Home's Chief Operating Officer, the Liquidator, the active Joint Provisional Liquidator at Ernst & Young, and an Assistant Director at Ernst & Young) were the decision makers and chief assistants responsible for determining how to proceed. While the interrogatory seeks the identity of "all persons," a listing of the principal persons' subordinates and counsel is not productive. Moreover, as the Liquidator pointed out in the March 11 letter, the other people involved with the Agreement are listed on the Legend to the Liquidator's privilege logs (Exhibit 1), and BMC can also identify persons of interest from the documents produced. The Liquidator's response is reasonable, and supplementing this interrogatory answer would serve no purpose as BMC has the information in any event.

B. Estimates of Reinsurance. Interrogatory 4 asked for a description of "all estimates of reinsurance recoverable by Home on the risk ceded to Home through the Home UK Branch, in the absence of the Agreement." BMC Ex. A, No. 4 (emphasis added). The Liquidator has answered this interrogatory. The Liquidator incorporated the answer to interrogatory 2, in which the Liquidator explained that (a) there was no estimate of recovery from ACE in the context of a business resolution (commutation) because that would be a

negotiated amount and negotiations did not progress, and (b) under the “wait and see” approach (i.e., without the Agreement or commutation with ACE) the Liquidator believed AFIA Cedents would file and prosecute claims only to the extent necessary to preserve offset rights, and that this was estimated to be only a relatively small percentage of the AFIA Cedents’ claims. This is an appropriate answer to Interrogatory 4, and no more is required. The fundamental point is that absent the Agreement there would be no potential recovery except to the extent of AFIA Cedents’ claims necessary to protect their offset rights. While the post-Agreement illustration contains a rough number, no detailed projection of this amount was done (nor was one necessary since the Agreement provides that Home will retain recovery from ACE based on these amounts).

BMC’s March 2 letter and its motion are not focused on the information requested by interrogatory 4 but seek to compel production of other information about evaluation of ACE-INA Services U.K. Services Limited’s (“ACE-INA”) estimates of AFIA Cedents’ claims. This issue arises because in answers to both Interrogatories 2 and 4, the Liquidator noted that ACE-INA, acting for Home’s UK Branch, had provided an estimate (as of December 31, 2002) for the gross ultimate value of the AFIA Cedents’ claims, and thus the ACE group’s obligations, presuming that the AFIA Cedents pursued their claims. The Liquidator explained that information about ultimate gross liabilities beyond this figure existed but (as it assumed AFIA Cedents would pursue claims as they had prior to Home’s liquidation) was not an estimate of reinsurance recoverable absent the Agreement as requested in the interrogatory. The information is thus not responsive to interrogatory 4. Nor is it relevant to an evaluation of the necessity, reasonableness and fairness of the Agreement. This information does not involve an alternative to the Agreement because it presupposed that claims would be made, handled, and paid as they

had been before Home's liquidation. Other than establishing that the potential asset of the estate is substantial (as demonstrated by the December 31, 2002 financial statement, which was produced), information concerning ACE-INA's projections of AFIA Cedents' claims collections is irrelevant and unduly burdensome.

C. Principal Persons Preparing Estimates. BMC's interrogatory 5 sought the identity of all persons involved with the preparation of any estimates identified in the response to Interrogatory 4. BMC Ex. A, No. 5. The Liquidator answered by incorporating the answer to Interrogatory 3, which identified the five persons principally involved. For the reasons described in paragraph 5 above ("Principal Persons Considering Alternatives"), the Liquidator's response to interrogatory 5 was appropriate. A listing of their subordinates and counsel who may have been tangentially involved is not useful, and the identities of other people involved with the Agreement have been provided to BMC on the Legend BMC (Exhibit 1).

D. Professional Fees and Costs. Interrogatory 6 seeks the amount of professional fees and costs incurred by Home "in connection with the negotiation, approval, and litigation concerning the Agreement." BMC Ex. A, No. 6. The Liquidator properly objected that this is not relevant and has no bearing on the necessity, reasonableness or fairness of the Agreement. The amounts incurred in negotiation of the Agreement have no bearing on the necessity, reasonableness, of fairness of the Agreement ultimately reached and before the Court for approval. The approval and litigation costs have been imposed on the Home estate by the opposition of BMC and the ACE Companies themselves, and it would be bootstrapping of the most blatant sort to use those costs as an excuse for their opposition. See Currier v. Allied N.H. Gas Co., 101 N.H. 205, 207 (1957) (discovery "should not be used as a means of harrassment or impertinent intrusion"). The burden imposed by debtors and those affiliated with them in

opposing an agreement do not reflect on the reasonableness of the agreement from the point of view of the policyholders and other creditors of the estate.

E. Commutation Agreements. Interrogatory 7 seeks a contract-by-contract listing (by insurer and “face amount of coverage”) of all reinsurance contracts involved in commutation agreements by the Liquidator, apparently including commutations entered after the Agreement was reached. BMC Ex. A, No. 7.<sup>2</sup> Such a listing is not relevant and would be unduly burdensome to produce. BMC apparently contends that other commutations would somehow shed light on whether reinsurance for the AFIA Cedents’ claims could be commuted. This ignores the voluntary nature of commutations. That various reinsurers of Home have been willing to commute with the Liquidator says nothing about whether Century Indemnity Company would commute the Assumption Agreement. Documents concerning the negotiations with ACE during the fall of 2003 have been produced, and – as stated in the answers to BMC’s interrogatories 1 and 2 – those negotiations did not meaningfully progress. The requests for contracts commuted with others are irrelevant and unduly burdensome. See Jarvis v. Prudential Ins. Co., 122 N.H. 648, 654 (1982) (upholding Trial Court determination that “production of all advertisements used by the defendant for the five years preceding this action and revelation of all law suits pending against the defendant were not reasonable because such information was not relevant to this action”). Furthermore, BMC’s theory of relevance implicitly assumes that the various commutations (approved by the Court) entered before and after the Agreement are analogous to the AFIA situation, and this discovery could only lead to inquiry into the facts and

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<sup>2</sup> The interrogatory asks the Liquidator to “[i]dentify all reinsurance contracts of Home that have been commuted or settled in this Liquidation proceeding under which Home ceded its risk as a reinsurer. With respect to each such contract, state the name of the insurer to which Home ceded risk, and the face amount of the coverage that was settled as between Home and its reinsurer(s).”

circumstances underlying the various commutations. The interrogatory goes far beyond the reasonable bounds for discovery this Court has set. See Order on Remand at 13, 14.

F. Proofs of Claim (Number and List). Interrogatory 8 requests a list of all proofs of claim, including the name of the claimant and amount of the claim, filed by “reinsureds of Home that have been or should be classified as Class V . . . , excluding claims by AFIA Cedents, and claims stating they are filed for offset purposes only.” BMC Ex. A, No. 8 (emphasis added).<sup>3</sup> Such information is not relevant and would be unduly burdensome to produce. The process of determining the approximately 18,000 proofs of claim filed with the liquidation is still in its early stages, and BMC’s request would require reviewing over 500 non-AFIA proofs of claim that may potentially involve assumed business. This is not appropriate. See Staargaard v. Public Serv. Co., 96 N.H. 17, 19 (1949) (“The Trial Court was not called upon to require production of records of all accidents to passengers, merely on the chance that some would disclose the type declared upon.”).

Even if a review that were done and responsive proofs identified, the result would not be relevant to the necessity, reasonableness and fairness of the Agreement. BMC’s theory appears to be that the filing of a proof of claim is evidence that the claimant intends to prosecute its claims, when the filing is merely the first step and may be just a placeholder. Inquiry into the facts and progress of each such proof of claim to assess the claimant’s intent to prosecute the claim to conclusion would be a distracting sideshow that is beyond the scope of reasonable discovery contemplated by the Order on Remand. See Robbins v. Kawall Corp., 120 N.H. 451, 453 (1980) (“[O]pen-ended ‘fishing expeditions’ are not permitted.”). Moreover, the vast

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<sup>3</sup> “State the number of proofs of claim filed to date by reinsureds of Home that have been or should be classified as Class V under RSA 402-C:44, excluding claims by AFIA Cedents, and claims stating they are filed for offset purposes only. As to all such proofs of claim, state the name of the claimant and the amount of the claim.”

majority of proofs of claim were filed after the Agreement was reached, and so do not shed light on the Liquidator's decision to enter it.

**II. BMC's Motion Should Be Denied Because the Liquidator Has Provided Responsive Documents and BMC's Document Requests Are Otherwise Not Relevant to the Necessity, Reasonableness and Fairness of the Agreement.**

A. Documents Regarding Estimates of Reinsurance. BMC document request 2 seeks documents that refer to "estimates of reinsurance recoverable by Home on the risk ceded to Home through the Home UK Branch." BMC Ex. B, No. 2. The Liquidator understands BMC's request to seek estimates of indemnity or reinsurance recoverable by the Liquidator or Joint Provisional Liquidators with respect to claims under AFIA Treaties in the absence of the Agreement. The Liquidator said that such documents would be produced in response to the document request. BMC Ex. B, No. 2. BMC's motion is again directed not to the subject of its request but to the Liquidator's clarification. As explained in the response, the Liquidator objected to producing documents concerning ACE-INA's projections of ultimate gross liabilities under the AFIA Treaties (other than the December 31, 2002 financial statement, which was produced) because that information assumed that the AFIA Cedents would pursue claims as they had before the liquidation. As explained in paragraph 7 above, the information is not an "estimate of reinsurance recoverable" by the Liquidator, is not responsive, and is not relevant to the necessity, reasonableness or fairness of the Agreement.

B. Proofs of Claim (Copies). BMC document request 3 seeks the proofs of claim discussed with respect to interrogatory 8 above ("Proofs of Claim (Number and List)": the proofs of claim that "have been or should be" classified as Class V (other than AFIA Cedents and proofs stating they are filed for offset purposes only). BMC Exs. A, No. 8; B, No. 3. For the reasons described in connection with interrogatory 8, these documents are not relevant and



would be unduly burdensome to produce. The Liquidator is in the process of determining the approximately 18,000 proofs of claim filed with the liquidation, and BMC's request would require reviewing over 500 non-AFIA proofs of claim that may potentially involve assumed business. BMC appears to believe (mistakenly) that the filing of a proof of claim is evidence that the claimant intends to prosecute its claims, when the filing is merely the first step and may be just a placeholder. BMC's suggestion that the Liquidator "provide BMC with access to the 500 or so proofs of claim within the scope of the request, for its own review" is an invitation to the type of "open-ended fishing expedition" that should not be permitted. Robbins, 120 N.H. at 453. BMC notes that the proofs of claim date from after the period the Liquidator has specified in the document response. The Liquidator specified that his production would encompass the period from September 1, 2003 (before the September discussions with the ACE Companies and the October 21, 2003 first Informal Creditors' Committee meeting following which the Agreement was negotiated) through February 11, 2004 (when the Liquidator served the motion for approval of the Agreement). BMC Ex. B at 2. This is another reason for the irrelevance of the proofs of claim, as documents dated after this time period do not shed light on the reasonableness of the Liquidator's decision to enter the Agreement. Such reasonable time restrictions are appropriate to limit the burden of uncontrolled discovery. See Scotsas v. Citizens Ins. Co., 109 N.H. 386, 387 (1969) (upholding discovery subject to court-imposed time period restrictions).

**CONCLUSION**

For the reasons stated above, the Court should deny BMC's motion.

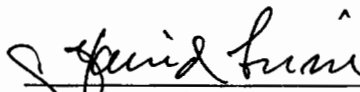
Respectfully submitted,

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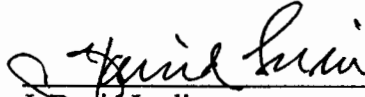
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April ~~20~~, 2005

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Opposition to Benjamin Moore & Co.'s Motion to Compel Interrogatory Responses and Production of Documents By the Liquidator was sent, this 20th day of April, 2005, by first class mail, postage prepaid to all persons on the attached service list.

  
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J. David Leslie

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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The Home Insurance Company  
Docket No. 03-E-0106

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