

**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**

**ACE COMPANIES' MOTION IN LIMINE ON  
PRECLUDING EVIDENCE POST-AGREEMENT**

Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, the "ACE Companies"), by their attorneys, Orr & Reno P.A., move in limine for an order limiting the admission of evidence during the upcoming evidentiary hearing relating to the time period leading up to the February 11, 2004 execution of the Agreement at issue in this litigation.

The Liquidator has repeatedly refused to provide discovery (including but not limited to responses to interrogatories and requests for production of documents) relating to the time period after February 11, 2004 on the grounds that such information is irrelevant to this Court determination of the necessity, fairness and reasonableness of the Agreement. ACE Companies accepted this discovery limitation in good faith, and did not seek discovery of information after that date.

The Liquidator now refuses to stipulate to the very thing they insisted upon – an agreement that evidence of matters after February 11, 2004 will not be introduced during the upcoming evidentiary hearing. Accordingly, in order to avoid the Liquidator taking advantage of the very discovery limitation they insisted upon pretrial, which would give the Liquidator what

can only be described as an overwhelmingly prejudicial advantage at trial, the ACE Companies make this motion. The ACE Companies further state:

1. The Court ordered that ACE Companies and Benjamin Moore could engage in “discovery limited to the necessity, fairness, and reasonableness of the compromise and agreement.” Order on Remand dated October 8, 2004 at 14. Both ACE Companies and Benjamin Moore served interrogatories and document requests on the Liquidator following that order.

2. In response to ACE Companies’ interrogatories, the Liquidator objected to describing communications regarding the Agreement with the AFIA Cedents and other creditors “insofar as [the interrogatory] could be construed to seek communications after February 11, 2004. . . as not relevant to the necessity, reasonableness, and fairness of the Agreement, beyond the scope of discovery permitted by the Order on Remand, overbroad and unduly burdensome.” Exhibit A (Liquidator’s Answers and Objections to the ACE Companies’ Interrogatories) at interrogatory response 5, pp 11-12. The Liquidator, therefore, took the position in relation to ACE Companies’ interrogatories that post February 11, 2004 communications were not relevant to the determinations that the Court must make in the hearing commencing July 25, 2005.

3. The Liquidator also objected to ACE Companies’ document requests to the extent that they sought documents created after the February 11, 2004, execution date of the Agreement as such documents were “not relevant to the necessity, reasonableness, and fairness of the Agreement, beyond the scope of discovery permitted by the Order on Remand, overbroad and unduly burdensome.” See Exhibit B (Liquidator’s Response to the ACE Companies’ Document Request) at 3. Thus, with respect to documentary evidence as well, the Liquidator took the position in relation to ACE Companies’ document requests that post-February 11, 2004

documents were not relevant to the determinations that the Court must make in the hearing commencing July 25, 2005.

4. The ACE Companies agreed to a February 11, 2004 cut-off date for discovery and interrogatory responses as sought by the Liquidator. Thus, they did not receive any documents, or evidence by way of interrogatory responses, that post-date February 11, 2004.

5. Counsel to the Liquidator reiterated his objection to producing documents post February 11, 2004 in correspondence to ACE Companies' counsel, see Exhibit C (letter dated 1/14/05 at pp. 3-4, ¶ 2.2), as well as agreed to this limitation during deposition questioning. See, e.g., Exhibit D (excerpt from Wamser Deposition pp. 208 ln 16 - 209 ln 10), Exhibit E (email thread agreeing on date limitation of 2/11/04 for deposition questioning in advance of O'Farrell Deposition), and Exhibit F (excerpt from O'Farrell Deposition) at 4 lines 11-20.

6. Except for limited inquiry to establish what portions of the AFIA Cedents' claims relate to setoff and when or if they became known, or when discrete post-execution issues were raised in deposition by the Liquidator's witnesses, ACE Companies and Benjamin Moore have respected this time limitation on discovery, and refrained during depositions from asking the witnesses questions about post-February 11, 2004 matters. ACE respected the Court's Order on Remand and the direction that the hearing will be limited to whether it was reasonable, fair and necessary to enter the agreement.

7. Discussion with Liquidator's counsel has lead to the belief that the Liquidator will now offer evidence dated after February 11, 2004 to buttress his position in this litigation. The liquidator's counsel apparently does not now agree that evidence should be so limited. See Exhibits G and H.

8. The Liquidator should not be allowed to have it both ways – insisting that discovery be limited to pre-February 11, 2004 matters, but then assert that he is not so limited in presenting his evidence despite the fact that the Liquidator has consistently refused to provide any discovery after that date. Given that the Liquidator has to concede, given his position on producing discovery, that such evidence is irrelevant, the Court should exclude it pursuant to N.H. R. Evid. 402.

9. However, to the extent the Court would deem evidence offered by the Liquidator post-February 11, 2004 relevant, such evidence should be excluded under N.H. R. Evid. 403. The admission of such evidence would clearly be more prejudicial to Respondents given their inability to conduct discovery on such matters, than probative on the issues to be decided in the hearing. Indeed, admission of evidence post-February 11, 2004 given the Liquidator's consistent refusal to produce such evidence during discovery would almost certainly constitute an unsustainable exercise of discretion.

10. Based on opposing counsel's email today, see Exhibit H, it is presumed that the Liquidator does not concur in the relief requested herein.

WHEREFORE, ACE Companies respectfully request for the reasons set forth above that the Court:

- A. Issue an order precluding the Liquidator from offering evidence which post-dates the February 11, 2004 execution of the Agreement at issue in this litigation; and
- B. Grant such further relief as the Court deems just.

Respectfully submitted,

Date: July 15, 2005



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing pleading has been served on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail on July 15, 2005:

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