

**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS.**

**SUPERIOR COURT**

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

**03-E-0106**

**MEMORANDUM OF LAW IN SUPPORT OF NATIONWIDE'S  
MOTION TO INTERVENE**

**I. INTRODUCTION**

Nationwide Mutual Insurance Company, one of the largest creditors in this liquidation, hereby moves to intervene as a party in the pending proceeding on the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents ("Liquidator's Motion"). As an AFIA Cedent, Nationwide's interests will be directly affected by this Court's disposition of the Liquidator's Motion. As such, New Hampshire's liberal intervention policy entitles Nationwide to be accorded party status. Nationwide's entry at this stage will not delay any evidentiary hearing, as was Intervenor ACE's prior concern, but will allow Nationwide to obtain full information as to the pending Agreement, to be heard as to the merits and to protect its interest on any appeal of this Court's ruling.

Although it falls within the definition of AFIA Cedent, Nationwide is not a member of the informal creditors' committee that negotiated the Agreement with the Liquidator and the Joint Provisional Liquidator in England. Nationwide's interests as a Class V creditor are not represented by Intervenor Benjamin Moore, a Class II creditor which opposes the Agreement. Nor are Nationwide's interests represented by Intervenor ACE, the interested debtor which opposes the Agreement and only incidentally a Class V creditor.

## **II. FACTS**

Nationwide is a Ruddy Pool member reinsured by Home. The Court has heard testimony that the Ruddy Pool members collectively are the largest single creditor of Home. Nationwide's claim exceeds \$50 million and Nationwide, as far as it can determine, is the fourth largest creditor in Home's liquidation. Whether the Court approves the Agreement, which allows a scheme of arrangement to proceed in the UK, and whether the New Hampshire Supreme Court sanctions the Agreement on appeal will substantially and directly affect Nationwide's claim. Just as Benjamin Moore was permitted to intervene on the basis of its contention that its Class II claim will be adversely affected by the pending litigation, Nationwide should be permitted to intervene to protect its right and interest in its potential administrative recovery and its Class V claim.

No Class V creditor or AFIA Cedent is currently before the Court to represent the interests of those categories of creditors.<sup>1</sup> Although the Liquidator is charged with representing the interests of all creditors, there is not a complete coincidence of interest between the Liquidator and Nationwide as either a Class V creditor or as an AFIA Cedent. Nationwide, therefore, requests intervention in order to insure that it has access to the entire record relating to the approval of the Agreement, including the discovery record, and to be able to put its position before the Court for consideration in the future when the Court has before it issues pertaining to the Agreement.

## **III. ARGUMENT**

### **A. General Standards**

Intervention in actions pending in the Superior Court is governed by N.H. Super. Ct. R. 188

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<sup>1</sup> Although the Liquidator has proved that the ACE Group intervened as a debtor, ACE purports to represent the interest of the Class V creditors. Regardless, ACE's position on the Agreement is diametrically opposed to Nationwide's, not least because Nationwide is an AFIA Cedent while ACE, as a reinsurer of Home's AFIA business, does not represent Nationwide's interest or those of the majority of the remaining AFIA Cedents.

(former Rule 139), which states in pertinent part:

Any person asserting an interest in the proceedings may seek to intervene as a party thereto upon petition to intervene briefly setting forth that person's relation to the subject matter of the case...

The New Hampshire Supreme Court recently repeated its liberal approach to intervention in *Brzica v. Trustees of Dartmouth College*, 147 N.H. 443 (2002). In affirming the trial court's decision to allow intervention the Supreme Court laid out the standard:

"The right of a party to intervene in pending litigation in this state has been rather freely allowed as a matter of practice." *Scamman v. Sondheim*, 97 N.H. 280, 281, 86 A.2d 329 (1952). A trial court should grant a motion to intervene if the party seeking to intervene has a right involved in the trial and a direct and apparent interest therein. *Snyder v. N.H. Savings Bank*, 134 N.H. 32, 35, 592 A.2d 506 (1991). We may not overturn the trial court's decision unless we are persuaded that the court's exercise of discretion is unsustainable. *See id.* at 34; *cf. State v. Lambert*, 147 N.H. 295, 787 A.2d 175 (decided December 17, 2001) (explaining "unsustainable exercise of discretion" standard).

*Id.* at 446-47. Nationwide's \$52,000,000 interest is direct and apparent, so under *Brzica* this court "should grant a motion to intervene." *Id.* at 446.

The *Brzica* Court looked to *Snyder v. N.H. Savings Bank*, 134 N.H. 32 (1991), while reciting the test to be applied. *Snyder* was an equity action by one of several mortgagees to set aside the foreclosure sale of rental property for lack of proper notice. The tenant moved to intervene after the foreclosure buyer served it with notice to quit. The tenant argued that it was either an owner or lienholder entitled to notice under RSA 479:25, II because it possessed the property under a recorded lease. Failure to give notice to the tenant was therefore an additional ground for invalidating the foreclosure sale. The trial court denied intervention and the tenant appealed.

The Supreme Court stated the standard for intervention with textbook law:

[A] person who seeks to intervene in a case must have a *right* involved in the trial and his *interest* must be “direct and apparent; such as would suffer if not indeed be sacrificed were the court to deny the privilege.”

*Id.* at 35 (quoting R. Wiebusch, 4 NEW HAMPSHIRE PRACTICE, CIVIL PRACTICE AND PROCEDURE § 176, at 129-30 (1984)). The Supreme Court found the tenant was the “owner” of the leasehold interest conveyed by the mortgagor. That “direct and apparent” interest qualified the tenant as a party with the “right” to notice of the foreclosure proceeding under RSA 479:25, II. Having the right to receive notice of the foreclosure sale mandated the tenant’s joinder through intervention to the action to set aside the sale for lack of proper notice:

[The tenant] is entitled to notice under RSA 479:25, II (Supp. 1990), and therefore its motion to intervene was improperly denied.

*Id.* at 38.

Nationwide’s direct interest in this proceeding is therefore two-fold: it has the contractual right to receive an administrative payment and a potential liquidation dividend under the proposed Agreement and it had the right, as discussed in the next section, as an affected party to notice of the proceeding. The tenant in *Snyder* was entitled to intervene in the action to set aside the foreclosure even though the plaintiff mortgagor was already seeking to set the sale aside. As in *Snyder*, Nationwide’s interests differ from the current parties to the motion and it should be allowed to intervene regardless of whether it shares the same goals.

## **B. Intervention in Liquidation Proceedings**

General rules aside, Chapter 402-C is permeated with the policy that those directly affected by a proceeding have a right to notice and the express or implied right to intervene. For example, in summary proceedings initiated by the Commissioner, 402-C:14, IV, requires the proceedings to be adjourned in order that notice and opportunity to be heard be given to “any person whose interest is

or will be substantially affected.” In formal proceedings any objection to a claim determination requires the liquidator to arrange a hearing and provide notice to the claimant and “any other persons directly affected.” RSA 402-C:41, II. That procedure is incorporated into any proceedings arising from the recommended compromise or settlement of claims set forth in the liquidator’s reports. RSA 402-C:45, I.

This Court’s rules for this case have also adopted a liberal intervention policy. Section 9(b) of the Order Establishing Procedures Regarding Claims Filed with the Home Insurance Company in Liquidation recognizes the right of any party that is “directly affected” to intervene in a Disputed Claim Proceeding. No other specific instances for intervention appear in the Order, so the Superior Court Rules for intervention must apply in all other circumstances under the claims procedures.

Section 4 of this Court’s Order Establishing Procedures for Review of Certain Agreements to Assume Obligations or Dispose of Assets, dated December 19, 2003, required notice of filing or any motion by the Liquidator only to be served on current parties, including intervenors. The Order applied generally to motions to assume an obligation or dispose of an asset, including the compromise of a claim, where the cost to the estate exceeds \$1 million. This Court vacated and superseded that Order on April 29, 2004. Unlike the prior Order, which provided for notice to parties and intervenors and a 10-day objection period, the current Order contains no notice provisions or specific procedures. As such the general rules once again would apply.

**C. Nationwide Must Be Allowed to Intervene, Because Its Rights and Interests Are Directly and Apparently Affected.**

The Agreement will control Nationwide’s future rights in presenting its claims to the Home Liquidator. As such, Nationwide will be directly and apparently affected within the meaning of Superior Court Rule 188, the Supreme Court’s holdings in *Brzicka* and *Snyder*, RSA Chapter 402-C

and this Court's procedural rules. All authorities support Nationwide's request for party status.

This Court adhered to the foregoing authorities when it allowed ACE and Benjamin Moore to intervene. It would be inconsistent and a denial of Due Process not to apply those same principles in assessing Nationwide's motion to intervene. The right of intervention as set forth in the Rules and authorities is party-neutral: it matters not whether the intervenor seeks to enter the case as a plaintiff or defendant, or for the purpose of objecting to or supporting a motion. All that is required is that the interest and right affected be apparent. Nationwide's interest in the outcome of the motion, which will be directly and tangibly affected by the acceptance or rejection of the Agreement is more apparent and direct than Benjamin Moore's, which sought intervention simply to protect its potential piece of the pie.

Nor is ACE in a position to disagree. While seeking intervention for itself, ACE asserted that the Liquidator was violating the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution and Part I, Article XV of the N.H. Constitution. *See* Memorandum of the ACE Companies in Support of Their Objections and Response to the Liquidator's Motion for Approval and Agreement and Compromise with AFIA Cedents, at 20-22. The crux of ACE's argument was the proposed Agreement affected it yet ACE was essentially without knowledge as to the factual predicates for the settlement.<sup>2</sup> *Id.* at 22-23. ACE concluded its Due Process argument by declaring: "Each creditor of Home is potentially affected by the Motion and has a right to be heard with regard to it ...." *Id.* at 21. This applies to Nationwide as well as the current intervenors.

Although its interests lie on the other side of the table, Nationwide is in precisely the same position as ACE with regard to the settlement negotiations between the Liquidator and the AFIA Cedent group. Nationwide's direct and apparent interests are undeniably affected yet it lacks, as did

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<sup>2</sup> This requires not only knowledge of the evidence adduced at trial but also evidence produced in discovery. Nationwide has not had access to the latter.

ACE, pertinent information upon which it can assess the impact and advisability of the Agreement. ACE cannot have it both ways and argue the door was open for ACE and Benjamin Moore to intervene but closed to Nationwide.

**D. Nationwide Should Be Allowed to Intervene to Protect Its Right to Participate in Appellate Review.**

Nationwide remains a non-party to these proceedings absent intervention. Pursuant to New Hampshire Supreme Court rules only “parties” have the right to appellate review. *See* N.H. Sup. Ct. R. 7; R. Wiebusch, 4 NEW HAMPSHIRE PRACTICE, CIVIL PRACTICE AND PROCEDURE § 61.03 (1997). Supreme Court Rule 7 states in pertinent part:

all parties to the proceedings in the court from whose decision on the merits the appeal is being taken shall be deemed parties in this court, unless the moving party shall notify the clerk of this court in writing of his belief that one or more of the parties below has no interest in the outcome of the transfer...

*Id.* The term “party” as defined under the Supreme Court rules refers to parties in this Merrimack County Superior Court proceeding. In order to participate in appellate review, in the event that is required, Nationwide must to be accorded “party” status.

Nationwide anticipates that this Court’s order on the recently concluded evidentiary hearing will constitute a final decision on the merits subject to appellate review. *Accord*, Supreme Court Rule 3. In support of that position, the Liquidator has represented that any rulings by this Court on the Liquidator’s applications for approval of agreements and other transactions are final decisions on the merits and subject to appeal:

The need for the Liquidator and other parties to the agreements to be able to act on the Court’s approvals and their reliance interest when they have acted require that the Court’s decisions be final and subject to appeal with the thirty day period allowed by Supreme Court Rule 7.

*See* Liquidator’s Opposition to Motion to Transfer Question of Law for Interlocutory Appeal, at 3, ¶

1. Pursuant to Supreme Court Rule 7(1) a “party” who seeks appellate review of a “decision on the merits” must file a Notice of Appeal with the Supreme Court within thirty days of the decision on the merits. Because this Court’s order on the recently concluded evidentiary hearing will constitute a final decision on the merits subject to appellate appeal, it is imperative that Nationwide acquire “party” status through intervention if it is to participate in any further proceedings.

**E. No Party Can Successfully Claim Prejudice or the Defense of Laches**

Neither ACE nor Benjamin Moore nor the Liquidator can demonstrate prejudice if this Court grants Nationwide’s Motion to Intervene. The primary objection to Nationwide’s previous motion to intervene was that it would prejudice ACE, the sole party opposing Nationwide’s intervention, by delaying the evidentiary hearing. Now that the evidentiary hearing is over, ACE’s objection is moot.

ACE’s objection that Nationwide should not be allowed to intervene because its counsel might be called as a witness is also moot. Attorney Cohen was present in the courtroom throughout the hearing and ACE made no attempt to call him. Nationwide has already identified why ACE’s contention in this regard is without merit in its Motion to reconsider the Court’s denial of Nationwide’s first Motion to Intervene, at 2. As neither Nationwide nor Attorney Cohen were in any way involved in the settlement agreement or its negotiation, it is difficult to conceive of a basis for ACE’s posture.

Neither Chapter 402-C nor any rule of this Court sets limitations on when an interested creditor may seek to become actively involved in the case. ACE’s claim that Nationwide is barred from the proceeding by the equitable doctrine of laches is inapposite. The defense of laches does not apply because Nationwide has not filed suit or asserted a substantive claim but has simply intervened as a procedural matter to protect its interests. “*Laches* is an equitable doctrine that bars litigation



when a potential plaintiff has slept on his rights.” *Town of Seabrook v. Vachon Management*, 144 N.H. 660, 668 (2000) (quotation omitted).

Even if laches was an applicable defense to Nationwide’s request for intervention, mere delay in the assertion of a claim<sup>3</sup> does not amount to laches. *New Hampshire Donuts v. Skipitaris*, 129 N.H. 774, 783 (1987) (“This is obviously so where the complainant can show an excuse for his failure to seek relief more promptly.”). A party asserting the defense of laches bears the burden of proving that the delay was unreasonable and that prejudice resulted. *Bogardus v. Zinkevicz*, 134 N.H. 527, 530 (1991). Even where considerable time passes before a claim is asserted, laches does not bar the claim where there is a reasonable excuse for delay and prejudice is not apparent.

The parties cannot claim prejudice by the addition of Nationwide because substantial new discovery is not required. *See Curran, Inc. v. Auclair Transp., Inc.*, 128 N.H. 743, 746 (1986); *V.S.H. Realty Inc. v. City of Rochester*, 118 N.H. 778 (1978). Nationwide seeks to gain access to discovery already completed, to assess the impact of the pending Agreement, and to protect its interest in any potential appeal; this does not create prejudice to the parties.

Even if the Liquidator or Intervenors could show some prejudice, laches also does not apply where there is a reasonable excuse for delay. *Healey v. Town of New Durham Zoning Bd. of Adjustment*, 140 N.H. 232 (1995) (laches rejected for lack of prejudice or unreasonable delay); *State Employees’ Ass’n v. Belknap County*, 122 N.H. 614 (1982) (laches did not preclude claim despite six year delay); *Wood v. General Elec. Co.*, 119 N.H. 285 (1979) (laches rejected because defendant was aware of claim and there was no valid contention of surprise); *Board of Water Comm’rs v. Mooney*, 139 N.H. 621 (1995) (remanded for lack of prejudice or inequity). Nationwide intervened only after

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<sup>3</sup> As noted previously, laches does not apply as Nationwide is not asserting a claim, but rather seeks party status to obtain copies of all ongoing negotiations and to protect its independent interest in any further hearings or appeals.

attempting unsuccessfully to determine the impact of a prior agreement, to gain assurance from the Liquidator that its rights would not be prejudiced and to obtain access to discovery to perform its own inquiry.<sup>4</sup> Nationwide acted when it became apparent that it was neither getting essential discovery nor assurance from the Liquidator.

Nationwide's intervention request should not be denied on timeliness grounds as the New Hampshire Supreme Court has demonstrated its aversion to denying a remedy on technical or procedural grounds, citing Chief Justice Doe:

Within constitutional and statutory limits, and upon due consideration of what is just and convenient in a legal view that may be broader than the facts of a single case, parties are entitled to the most just and convenient procedure that can be invented.

*In re Public Serv. Co.*, 125 N.H. 595, 601 (1984). "Until his [Chief Justice Doe's] memory is forgotten, cases in New Hampshire will be tried expeditiously and upon their merits; justice will not be 'strangled in the net of form.'" *Id.* (quotations omitted).

Pursuant to the requirements of Superior Court Rule 57-A, Nationwide made diligent, however, unsuccessful attempts to obtain concurrence to the relief requested herein. Given the complexities of these proceedings, Nationwide asks this Court to schedule oral arguments consistent with Superior Court Rule 58 to assist this Court in ruling upon this Motion. Such a hearing will provide Nationwide an opportunity to be heard and to respond to any new and different objections and to respond to this Courts concerns.

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<sup>4</sup> On February 17, 2005 Nationwide attended a hearing on the Liquidator's Motion for Approval of its recommendations in order to assess the impact of the recommendations on its rights and responsibilities. Nationwide was rebuffed in its effort to secure a non-redacted copy of the agreement, or in the alternative, assurances from the Liquidator as to the impact of the agreement as to Nationwide. Attorney Eric A. Smith, on behalf of the Liquidator, represented to this Court in unequivocal terms that the pending agreement would have no adverse impact upon Nationwide or any other Rutty Pool member. Upon hearing said assurances, the Court indicated its intent to approve the settlement. Nationwide requested that the Liquidator execute a simple Stipulation confirming the representations made by Attorney Smith, however, he refused to execute the foregoing Stipulation as "unwarranted." See Letter of March 9, 2005, from Attorney Smith to Attorney Connor.

WHEREFORE, Nationwide requests this Honorable Court to:

- A. Grant its Motion to Intervene; or, in the alternative,
- B. Schedule oral argument to assist the court in determining the pending issues; and
- C. Grant such other and further relief as may be just and equitable.

Respectfully submitted,

Nationwide Mutual Insurance Company.  
By Its Attorneys,

WIGGIN & NOURIE, P.A.

Dated: August 10, 2005

By: 

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#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was this day forwarded to all counsel of record.

  
Doreen F. Connor

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