

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

REPLY IN FURTHER SUPPORT OF ACE COMPANIES
MOTION FOR RECONSIDERATION OF ORDER ON REMAND

At the hearing on March 4, 2005, the Court granted respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, the "ACE Companies") leave to file a reply brief regarding their motion for reconsideration of the Order on Remand (the "Motion"). In further support of the Motion, the ACE Companies have filed the accompanying affidavit of Pieter Van Tol (which attaches a partial transcript of the February 1, 2005 hearing on Senate Bill 74) and they respectfully state as follows:

1. In his opposition papers, the Liquidator argues that the Senate Committee's rejection of the Proposed Amendment in Senate Bill 74 is "simply irrelevant" here. (Opp'n at 2.) However, the Liquidator's own submissions and testimony in connection with the Proposed Amendment establish the relevance of the recent events in the New Hampshire legislature and the relevance to this Court in deciding the Motion.
2. The Liquidator's statement submitted on February 2, 2005 (which is annexed to the Van Tol Affidavit as Exhibit 1) referred to the Order on Remand and expressly noted:

The amendment is appropriate at this time because the issue [decided in the Order on Remand] is one of legislative intent that may be further contested before the New Hampshire Supreme Court. The Legislature could resolve the question of its intent through the clarifying amendment.

(Ex. 1 at ¶ 2; emphasis added.)¹ Thus, the Liquidator conceded that the Order on Remand turned on legislative intent and he sought to insulate the Order from any reversal at the Supreme Court by asking the Legislature to “clarify” its intent. By rejecting the language in the Proposed Amendment, the Senate Committee showed that there is no need for the purported “clarification” and it confirmed that the Legislature never intended to allow a Class V creditor to use the administrative expense provision to obtain payment of its pre-liquidation claim ahead of other Class V creditors (as well as creditors in higher classes).

3. At the February 1 hearing before the Senate Committee, counsel for the Liquidator similarly stated that the Proposed Amendment was an effort to “clarify” the Legislature’s intent and that it would apply to the ongoing litigation.

Senator Joseph A. Foster, D. 13: So this would have, in effect, retroactive application or prospective? What was the intention?

Attorney Smith: It would apply to payments made after its effective date and thus go to pending and any future litigation."

(See partial transcript of hearing, annexed to the Van Tol Affidavit as Exhibit 2, at 14-15.)

Jonathan Rosen also testified on behalf of Home and he too acknowledged the purpose of the Proposed Amendment. When asked why the Legislature should not simply let the New Hampshire Supreme Court decide this case, Mr. Rosen stated that the Supreme Court would be interpreting RSA 402-C:44 and there was very little legislative history on the issue of intent. The Proposed Amendment, according to Mr. Rosen, would fill the alleged gap for the Supreme Court by providing direction on the Legislature’s intent in passing RSA 402-C:44. (See Van Tol Aff. at ¶ 7.)


¹ The ACE Companies have never accepted the Liquidator’s characterization of the Proposed Amendment as a “clarification.” To the contrary, the Proposed Amendment would have effected a change in the existing law.

4. Thus, the Liquidator cannot be heard to complain that the rejection of the Proposed Amendment is “irrelevant.” Just as he sought to gain from any benefits flowing from the passage of the Proposed Amendment, the Liquidator must suffer the consequences of its rejection. The Court may — and should — draw a negative inference from the Liquidator’s failed attempt to change the law during the pendency of this case.

WHEREFORE, the ACE Companies respectfully request that the Court enter an Order:

- A. granting the Motion and reversing the Court’s conclusion in the Order on Remand that the proposed payments to the AFIA Cedents in settlement of their Class V claims may be given administrative expense priority; and
- B. granting such other and further relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that I served a copy of the foregoing on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail on March 23, 2005

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