THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In the Matter of the Liquidation of
The Home Insurance Company

No. 2004-0319

TRANSCRIPT OF JULY 15, 2004 ORAL ARGUMENT

The first case this morning is 2004-319, *In the Matter of the Liquidation of Home Insurance Company.*

GAIL GOERING:

May it please the Court. My name is Gail Goering and I represent the Ace Companies. We are one of the appellants in this matter.

The proposed Agreement that is at issue in this appeal was entered into because §44 of the New Hampshire Insurers Rehabilitation and Liquidation Act provides a disincentive to certain creditors that the Liquidator doesn't like. He therefore seeks to make an end-run around §44 of that Act to pay a subclass of creditors that are not entitled to receive a distribution of assets for their claims before the claims of higher priority creditors are paid in full. The assets that the Liquidator seeks to distribute to this subclass of classified creditors are assets that they intend to collect from companies that are members of the Ace Group, my client. To get around §44, the Liquidator has made various arguments why his payments either don't violate §44 or even if they do, nonetheless should be approved. The original justification was that the Agreement was a compromise of a dispute and that therefore it should be approved on that basis. Later the argument was, well, these are an administrative expense and can be justified therefore to be paid as a Class 1 expense of the estate before any creditor claim is paid. That seems to be the lead argument that is being made on this appeal. Finally, and also the basis adopted by the

JUSTICE ?:

Is that an administrative expense, or what is that?

PETER ROTH:

We are treating that as an administrative expense.

JUSTICE ?:

If it is not an administrative expense, You lose.

PETER ROTH:

I submit that if it is not an administrative expense there remains the equitable doctrines that were discussed in the brief, the new value corollary to the absolute priority rule, as well as the necessity doctrine.

JUSTICE ?:

How do you apply general equitable principles that violate the statute? In other words, the statute says, for instance, for Class 5 creditors, there will be no subclasses. If it is not an administrative expense bumped into Class 1, then you have created a subclass, haven't you? What am I missing? - in that

PETER ROTH:

It really has to be an administrative expense.

JUSTICE ?:

It is not, if you create a subclass in violation of the statute, haven't you?

PETER ROTH:

The equitable doctrines that we cite in the brief have been treated by bankruptcy courts and receivership courts since really the later part of the 19th century. They have operated under similar statutory setups such as this, where there was an absolute priority of distribution

PETER ROTH:

We submit that there is just not a distribution to Class 5 creditors in respect of their Class 5 claims. It just doesn't happen and the Agreement is not set up to work that way.

JUSTICE ?:

Let me see if I understand. If this is not an administrative expense, but a payment of a claim to a Class 5 creditor, is that being paid before all the claimants in Class 2,3 or 4 are paid?

PETER ROTH:

That is correct.

JUSTICE ?:

That violates the statute.

PETER ROTH:

We are sort of going around in circles, I understand. But it is an administrative expense because it is not in satisfaction of their Class 5 claim.

JUSTICE ?:

Understood. Go back to my original question. If it is not an administrative expense, you lose.

PETER ROTH:

I disagree because the equitable doctrines that we spoke of, the doctrine of necessity and the doctrine of the new value corollary to the absolute priority rule which is really this situation.

JUSTICE?

Why is it an expense? It doesn't look or sound much like an expense.

PETER ROTH:

Well, the statute was written very broadly and the statute - excuse me a minute. §44(1) doesn't speak of how you can parse it out and say well, it's too big or it's to the wrong people. All it says is "including, but not limited to, the actual necessary costs of preserving or recovering the assets of the insurer" and the courts around the country that have interpreted administrative expenses have looked at that language in similar circumstances in bankruptcy contexts because it is very similar to what is the treatment in bankruptcy courts that finders fees, a percentage of the action, or a contingent fee for a lawyer also can be an administrative claim. Sometimes these claims can be very large - so the size and the nature of the payee doesn't determine whether it is an administrative expense or not.

JUSTICE ?:

Well, it looks to me like you are paying and distributing an asset to a claimant that doesn't look and sound like an expense of collecting assets.

PETER ROTH:

Well, we have a situation, and I think it is undisputed in the Superior Court, that without the claims being made by the AFIA Cedents, there would be no assets. There would be nothing to distribute to the Class 2 creditors or anybody else.

JUSTICE ?:

That doesn't necessarily make it an expense, does it?

PETER ROTH:

Oh, absolutely. It does. In order to induce, and this was again not disputed in the Superior Court, to induce the claimants to file their proofs of claim and I think it was also undisputed that they were unwilling to file their claims. And because they were unwilling to file