THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS **SUPERIOR COURT**

03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

LIQUIDATOR'S SUR-REPLY TO ACE COMPANIES' REPLY BRIEF ON EXPEDITED MOTION FOR STAY

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator of The Home Insurance Company, hereby responds to arguments raised in the ACE Companies' reply brief in further support of expedited motion for stay or declaration ("ACE Rep.").[1] As the ACE Companies seek a stay in an effort to prevent proceedings in England (see Motion ¶¶ 6-13), the Liquidator also notes that the English Court today issued a Judgment sanctioning the Scheme (copy attached as Exhibit A).

1. The ACE Companies first assert that there is no authority for the proposition that Superior Court Rule 74 does not apply in an insurer liquidation. ACE Rep. ¶¶ 1, 5. It is not surprising that there is no New Hampshire case law on the subject since this is the first liquidation of a property casualty insurer under RSA 402-C. The provisions of the pertinent rules are clear. By its terms Rule 74 is limited to actions "in which a verdict or decree is entered, or in which a motion for nonsuit or directed verdict is granted, or in which a bill in equity is dismissed, or in which any motion is acted upon after verdict or decree." Superior Court Rule 74. The text of the rule itself does not apply to orders issued on motions during the course of an insurer liquidation. The only two cases cited by the ACE Companies (ACE Rep. ¶ 4) involved

[1] The Liquidator uses the terms defined in the Liquidator's objection to the ACE Companies' expedited motion for stay ("Liq. Obj.").

decisions in typical adversary party cases, not *in rem* receivership proceedings supervised by the Superior Court. See RSA 402-C:21, 402-C:25.[2]

2. The ACE Companies also conflate the "verdicts or decrees" that are the subject of Rule 74 with the "decisions on the merits" that are the subject of Supreme Court Rule 7. See ACE Rep. ¶ 8. However, Supreme Court Rule 3 defines "decision on the merits" to include "orders" and "opinions," in addition to "verdicts" and "decrees," so that the matters subject to mandatory appeal under Supreme Court Rule 7 are broader than the matters subject to Rule 74. The fact that the appeal from the Court's September 2005 Order is a mandatory appeal under Supreme Court Rule 7 thus does not automatically implicate Rule 74.

3. The ACE Companies again contend that the appeal from the April 2004 Order was procedurally "confusing" and somehow interlocutory. ACE Rep. ¶¶ 9-10. This is simply inaccurate. The ACE Companies' motion to transfer was never allowed by the Court, see Order Relative to Stay of April 29, 2004 Order at 1 (June 1, 2004), and the only appeal ever filed with the Supreme Court was BMC's mandatory appeal under Supreme Court Rule 7. See Liq. Obj. Ex. 2, 5. The ACE Companies never "asked the Supreme Court for permission to appeal." ACE Rep. ¶ 9. There is no basis to suggest that the Supreme Court believed it was addressing an interlocutory appeal in its May 12, 2004 order on the ACE Companies' motion to waive filing in the Superior Court, which expressly referred to BMC's Notice of Mandatory Appeal. Liq. Obj. Ex. 6-8.[3]

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[2] Tommy Hilfiger Retail, Inc. v. North Conway Outlets LLC, 2000 U.S. Dist. LEXIS 1448 *8 (D.N.H. February 14, 2000), concerned the effect of a mall owner's appeal from a Superior Court decision upholding a planning board's site plan approval, while Rollins v. Rollins, 122 N.H. 6, 10 (1982), involved the effect of an appeal from a divorce decree.

[3] The assertion that if "the earlier appeal had been mandatory, there would have been no remand and the Supreme Court would have applied Rule 74" (ACE Rep. ¶ 10) is circular, as it depends on the correctness of the ACE Companies' new view of Rule 74, and purely speculative, as no one had ever suggested that Rule 74 applied.

4. The ACE Companies assert that (assuming Rule 74 applies), it is "too late" for the Court to direct that the September 2005 Order be effective. ACE Rep. ¶ 12. However, the Rule contains no requirement that a direction be made during the appeal period, and the cases cited by ACE (on a "see also" basis) do not stand for the proposition that the Court's authority is so limited. They merely note that the Superior Court had in fact given direction in connection with the decree at issue.[4] The ACE Companies offer no reason why the Court should not have such authority, and it is implicit in the Court's unquestioned power to address the ACE Companies' motion for stay. See Supreme Court Rule 7-A. Especially where the ACE Companies – in a procedurally identical appeal from an order in the same matter dealing with the same issues – had never raised the claimed application of Rule 74, there is no reason the Court cannot now give direction concerning the effectiveness of the September 2005 Order pending appeal based on the applicable factors: the ACE Companies' unlikelihood of success, the absence of harm to the ACE Companies from the Order, and the harm to the policyholders and other creditors of Home that would be caused by a stay.

5. At the evidentiary hearing, the ACE Companies took the position that the Agreement with AFIA Cedents was unnecessary because the Cedents would have filed and prosecuted claims in any event. See September 2005 Order at 14. In their reply, however, the ACE Companies assert that they will suffer harm in the absence of a stay "as they will need to expend significant resources in the process of determining whether the AFIA Cedents' claims

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[4] Scheidegg v. Dept. of the Air Force, 1990 U.S. App. LEXIS 17624 *8-*9 (1st Cir. Sept. 28, 1990) (Rule 74 "does not mean that all provisions of Superior Court orders are stayed and held in abeyance upon filing of a timely appeal. The Superior Court may order otherwise or may order that if the final decree does not take effect, a prior temporary decree shall remain in effect. The Superior Court did so here [in its final decree]."); Nicolazzi v. Nicolazzi, 131 N.H. 694, 695 (1989) (court approved master's recommendation that temporary decree remain in effect if there was an appeal); Rollins, 122 N.H. at 10 (court approved master's recommendation that child support order in final decree should remain in effect pending appeal). The fourth case does not even cite Rule 74 and only suggests that "[i]n future cases involving modification of custody orders the trial court may well consider entry of a stay of the effective date of the order, if it appears that appellate review will be sought and pursued." Hille v. Hille, 116 N.H. 109, 112 (1976).

should be paid." ACE Rep. ¶ 17. This admission that the Agreement will cause AFIA Cedents to prosecute claims that the ACE Companies would not otherwise have to determine fatally undercuts their principal factual argument against the Agreement. It does not, however, constitute harm that supports a stay because (1) the ACE Companies are required to handle the claims of AFIA Cedents under the Assumption Agreement in any event, and (2) the ACE Companies have further agreed on their involvement in the claims determination process in the Claims Protocol approved by the Court on November 12, 2004. See September 2005 Order at 9.

6. The ACE Companies finally assert that this Court has determined that they have a "legitimate interest in being involved in, and challenging, the U.K. proceeding" and add that they would be "remiss" if they do not challenge that proceeding. ACE Rep. ¶¶ 17, 18. However, the quotation offered by the ACE Companies only concerns proceedings in this Court on the Liquidator's motion, see Order on Remand at 5 (October 8, 2004), and the Court has made no determinations about the ACE Companies' interest in the U.K. proceeding. That is a matter for the English Court.

7. In fact, the English Court has now stated its views on the ACE Companies arguments. On November 10, 2005, the English Court issued its Judgment and sanctioned the Scheme. In the Matter of The Home Insurance Company, Case No. 4138 of 2004 (High Court of Justice, Chancery Division, Companies Court, November 10, 2005) (Exhibit A). After considering the interests and motivations of the ACE Companies (Judgment ¶¶ 12-13), the English Court rejected the ACE Companies' arguments for adjournment based on "supposed prejudice or disadvantage." Judgment ¶¶ 12, 14-21. In particular, the English Court rejected as "contrived and fanciful" the ACE Companies' concern that sanctioning the Scheme at this time would cause "confusion" in the New Hampshire courts. Judgment ¶¶ 16-17. The English Court

also rejected as lacking "any real weight" the ACE Companies' argument that sanctioning the Scheme now would lead to "wasted expenditure" that would burden the liquidation and its creditors. Judgment ¶¶ 19-21.

WHEREFORE, for these reasons and those set forth in the Liquidator's initial objection, the ACE Companies' motion for stay should be denied.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER OF INSURANCE OF THE STATE OF NEW HAMPSHIRE SOLELY AS LIQUIDATOR OF THE HOME INSURANCE COMPANY AND US INTERNATIONAL REINSURANCE COMPANY,

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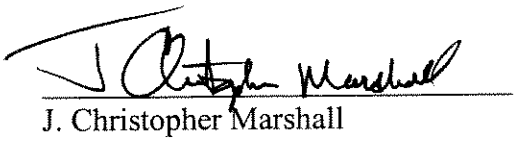
November 10, 2005

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Sur-reply to ACE Companies' Reply in Support of Expedited Motion to Stay was sent, this 10 th day of November, 2005, by email on counsel for the ACE Companies and first class mail, postage prepaid to all persons on the attached service list.



J. Christopher Marshall

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 03-E-0106

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Neutral Citation Number: [2005] EWHC 2485 (Ch)

Case No: 4138 of 2004

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2005

Before :

MR JUSTICE MANN

IN THE MATTER OF THE HOME INSURANCE COMPANY

AND

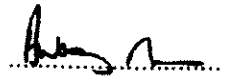
IN THE MATTER OF THE COMPANIES ACT 1985

MR. R. KNOWLES Q.C. and **MS. LUCY FRAZER** (instructed by **Clifford Chance LLP**) for **The Home Insurance Company.**
MR. R. HACKER Q.C. (instructed by **Messrs. Lovells**) for the **Ace Companies.**

Hearing dates: 3rd November 2005

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



MR JUSTICE MANN

Mr Justice Mann :

1. This is the hearing of a petition seeking the court's sanction of a scheme of arrangement proposed under S.425 of the Companies Act 1985 in respect of the affairs of The Home Insurance Company, a corporation incorporated in New Hampshire, U.S.A. It is the company's petition. For the purposes of bringing it, the company acts by provisional liquidators appointed in the circumstances appearing below.

Factual Background

2. Home Insurance was incorporated in 1973. Its business was conducting various types of insurance. Amongst the business that it transacted was contracting to reinsure certain risks, those contracts being in favour of a group of companies which can be described for present purposes as the AFIA Claimants. In its turn, Home Insurance reinsured those risks with a number of companies which can conveniently be described as the ACE Companies. The nature of the arrangements between the AFIA Claimants, Home Insurance and the ACE Companies is that no claim can be made against the ACE Companies on the outward reinsurance until a proper claim has been made on Home Insurance by the AFIA Claimants. That insurance and reinsurance business was carried on in this jurisdiction.

3. In March 1997 the New Hampshire Insurance Department placed Home Insurance and its insurance subsidiary under its supervision following an order made by the Merrimack County Superior Court of the State of New Hampshire ("the Superior Court"). In March 2003 a Rehabilitator was appointed by the Superior Court. In around May 2003 the Rehabilitator concluded that Home Insurance was insolvent and that further attempts to rehabilitate the company would be futile. Accordingly, on 8th May 2003 she filed a petition with the Superior Court seeking a winding up. That order was granted on 11th June 2003. On the same day as the petition was filed in New Hampshire, the Rehabilitator presented a winding up petition to the English court and, again on the same day, this court appointed Margaret Elizabeth Mills and Gareth Howard Hughes to be provisional liquidators. That provisional liquidation is still in force and no winding up order has yet been made. The order appointing the provisional liquidators clearly contemplates that, following the appointment of a liquidator in New Hampshire, the provisional liquidators should exercise their powers as requested and approved by that liquidator, save where the English court otherwise directs and save where to do so would cause them to contravene English law. The provisional liquidation is clearly subsidiary or ancillary to the New Hampshire liquidation.

4. In New Hampshire, insurance creditors do not all have an equal right to prove. Reinsurance creditors are Class V creditors, which means that their claims are subordinated. The AFIA Claimants are Class V creditors and submitted proofs in the New Hampshire liquidation proceedings in or before June 2004, but they have not pursued their claims. The state of assets and liabilities in the liquidation of Home Insurance is such that as things stand, as Class V creditors the AFIA Claimants will not make any recovery. It was therefore feared that they would not make properly formulated claims under their policies because they would have no incentive to do so. It would be costly and time-consuming for them to make claims, and the only result would be recovery on the ACE Companies' reinsurance in which the AFIA Claimants

would not participate (because of their subordination). If they made no claims that would mean that no claim could be made against the ACE Companies in respect of the relevant reinsurance, and that asset would be lost to everyone.

5. In order to avoid that consequence there were negotiations between the insolvency practitioners and the AFIA Claimants in order to try to come to an arrangement to extract some benefit from the reinsurance treaties effected with the ACE Companies. The overall effect of the arrangement is that the AFIA Claimants will make claims which will, so far as valid and proper, give rise to claims against the ACE Companies. It was agreed that the recoveries from the ACE Companies, after deduction of certain expenses, would be split as to 50% to the AFIA Claimants (sharing pari passu) and as to 50% for the other ordinary creditors of Home Insurance. The overall arrangement was summarised in a letter from the provisional liquidators to the various AFIA Claimants dated 22nd January 2004. As well as containing the arrangement just summarised (set out at rather greater length and more formally) it was stipulated that the approval of the supervising New Hampshire court would be sought to a compromise to that effect, involving the implementation of a scheme of arrangement pursuant to S.425 between Home Insurance and the AFIA Claimants. For their part, the AFIA Claimants agreed that they would not seek to enter into any direct arrangement with the ACE Companies during what was described as the "Standstill Period" which was a number of potential dates depending on the fate of various steps necessary to implement the details of the arrangements. For working purposes, Home Insurance says that the claim against the ACE Companies is worth about US$231m. I should say that that is only a working figure and the ACE Companies do not accept it. In particular, the ACE Companies claim to be entitled to set-offs and a number of other potential defences. I mention this at this stage in order to demonstrate that the claims potentially have a very significant albeit uncertain value.

6. Home Insurance duly sought to implement that arrangement and on 5th July 2004 Park J. granted permission for the company to convene a scheme meeting to implement the appropriate scheme of arrangement. The only class of creditors at whom the scheme is directed is the AFIA Claimants. The meeting of creditors was held on 8th September 2004. All creditors present and voting at the scheme unanimously approved it; the total in value of their claims exceeds US$482m. That meeting having been held, the scheme now comes before me for sanction. The extended period of time between that meeting and the presentation of the petition for sanction (which was presented on 3rd November 2005) seems to have been filled by proceedings in New Hampshire. In order to explain their significance, I need to refer to some of the terms of the detailed scheme.

Scheme

7. I do not think it is necessary for me to set out any of the terms of the scheme verbatim. It will suffice if I summarise those that are significant for present purposes. The significant terms are as follows:

   i) Clause 2.2 provides that the company, acting by the New Hampshire liquidator and the provisional liquidators, should procure that it uses all reasonable endeavours to collect in and realise the sums due from those companies who reinsured liabilities owing to the AFIA Claimants. Almost all of those companies are in fact the ACE Companies; I was told that there may be one or

two non-ACE Companies in that category, but that does not matter for present purposes. In essence, the liabilities to be recovered were those of the ACE Companies.

ii) After certain payments out in respect of expenses and the like, the company was to procure that 50% of the proceeds of that exercise was to be paid to the New Hampshire liquidator and 50% was to be paid to the scheme administrators to be held as scheme assets.

iii) Clause 2.4 prevented any of the AFIA Claimants from taking proceedings to enforce their claims against Home Insurance.

iv) Clause 2.7 preserved rights of set-off so far as they exist under New Hampshire law.

v) Clause 2.14 is an important clause for present purposes. It provides that scheme creditors are to give the New Hampshire liquidator and the provisional liquidators all reasonable assistance required by Home Insurance in connection with the scheme and with the recovery of scheme assets. In substance this seems to give the various liquidators the important power to compel the AFIA Claimants to follow through and provide them with relevant material with a view to being able to make onward claims against the ACE Companies.

vi) Clause 3 provides for payment pari passu to the AFIA Claimants as scheme creditors.

vii) Clause 7 deals with the duration of the scheme. Clause 7.1(d) is the most important event. It provides that the scheme shall terminate if the New Hampshire liquidator determines in his sole discretion (following consultation with the scheme administrator and the creditors' committee) that the scheme should terminate in the event that the New Hampshire Supreme Court entered a decision which had the effect of disapproving the proposal. As will appear below, at the time there were proceedings pending in that Court which went to the validity of the overall arrangement.

viii) Clause 8.3 contains certain provisions governing the date from which the scheme becomes effective. It provides that the scheme should only apply from the "Effective Date", which is described as being the date on which all of three specified conditions are fulfilled (and when the sanction order has been delivered for registration to the Registrar of Companies). The three conditions are:

a) The obtaining of an order of the New Hampshire court (defined as the "Superior Court") approving in principle the proposal to implement the scheme (as described in the letter that I have referred to above).

b) The obtaining of a "Global Liquidation Order" from this court, that order being an order approving the remission of Home Insurance's English assets to the New Hampshire liquidator for the administration and distribution as part of the New Hampshire liquidation. An

application has been made to me for such an order; I have not yet heard or determined it.

c) Obtaining approval from the FSA.

8. The third of those conditions (FSA approval) has been obtained. The second has not, but a decision on it can be made by me once this judgment has been delivered; I propose to hear the application at that point in time. Its fate will therefore very shortly be known. It was not suggested at the hearing before me that any uncertainties in that respect would have any effect on whether I should sanction the scheme. The first condition may or may not have been fulfilled, depending on the correct view as to the effect of certain proceedings in New Hampshire and the status of an order made by the Superior Court. It is those proceedings that have hitherto apparently been holding up this scheme. I therefore need to turn to a short description of those proceedings.

The New Hampshire Proceedings

9. On 11th February 2004, before the application to Park J., the New Hampshire liquidator commenced proceedings in the Superior Court seeking that court's approval in principle to the proposed arrangement with the AFIA Claimants. There were two objectors to that approval. The first was a direct insurance claimant called Benjamin Moore and Co (who are said to have a Class II claim in the liquidation which is not subordinated in the same way as the Class V claims of the AFIA Claimants) and the second were the ACE Companies. I understand the main ground of opposition to have been that the proposed arrangements contravened the mandatory pari passu rule which is said to obtain in New Hampshire liquidations. On 24th April 2004 the Superior Court entered an order approving the scheme. On 7th May 2004 Benjamin Moore & Co appealed against that order, with the ACE Companies assuming active participation as an automatic party to that appeal. There were various applications to the Superior Court and to the Supreme Court for a stay of the first approval order. They were unsuccessful. The appeal was still pending at the date of the hearing before Park J. On 13th September 2004, the Supreme Court delivered its decision. It directed the Superior Court to address a number of specific issues, and directed it to conduct an evidentiary hearing. In essence, this order of the Supreme Court prevented the Superior Court's earlier order from being an approval within the relevant condition in clause 8.3 of the scheme. The scheme could therefore not be made effective. That had to wait, at the earliest, for the next determination of the Superior Court. That took some time, but on 22nd September 2005 the Superior Court issued an order confirming its previous position and holding, for the purposes of New Hampshire law, that the agreement was necessary, fair and reasonable. It therefore approved it.

10. The liquidators had not sought to obtain the sanction of the court to the arrangement pending the second determination of the New Hampshire Superior Court. Nor did the liquidators seek sanction immediately after the obtaining of the order. Before they did so, on 20th and 21st October 2005, both the ACE Companies and Benjamin Moore & Co filed appeals against the Superior Court's order of 22nd September. There has been some debate as to whether or not the commencement of those appeals means that there is a technical stay of the Superior Court's order so that the order cannot be treated as an order within condition 8.3 of the scheme. It is the ACE Companies'

contention that it does. Applications have been made in New Hampshire in order to clarify the position on a stay, and if necessary to obtain an order for a stay. I received some limited evidence from a partner in Lovells (who act for the ACE Companies) who was admitted to the New Hampshire bar, and he expresses the view that there is a stay and that that stay has an effect which means conceptually the relevant approval for the purposes of the conditionality of the scheme cannot be said to have been obtained. Neither Mr Hacker QC, who appeared for the ACE Companies, nor Mr Knowles QC, who appeared for the company, invited me positively to decide that point one way or the other. My decision in this case will have to reflect the fact that it remains an open question as to whether or not the stay has the effect contended for. It is not known when the latest appeals will actually be heard and determined by the New Hampshire Supreme Court, but nobody has suggested that it will happen imminently, and the sensible assumption is that it may well take several months. Mr Knowles accepted that if that Court's decision is against the validity of the overall arrangement, the scheme would probably have to be terminated, and if necessary clause 7.1(d) would be invoked.

Sanctioning the Scheme

11. Against that background, I need to consider whether it is right for me to sanction the scheme. I was taken to the appropriate authorities as to my function, and have well in mind the principles arising from those authorities. I have also considered the procedural requirements for the validity of a scheme. I am satisfied that the procedural requirements have been fulfilled. I am also satisfied that, subject to the points made by the ACE Companies at the hearing before me, it would be right for the court to sanction this scheme in accordance with the principles that I have just referred to. The real issues in this matter arise out of the submissions made on behalf of the ACE Companies. I shall therefore consider those in order to determine whether anything in them requires that I should not sanction the scheme at this stage. I say "at this stage" because Mr Hacker does not invite me simply to refuse sanction. His case is that the matter should be adjourned until the outcome of the pending appeal in the New Hampshire Supreme Court is known. Until that is known, he says it would be inappropriate to sanction the scheme because, if the Supreme Court allows the appeal and does not give the necessary approval, the scheme cannot go ahead, and would have to be brought to an end (under the provisions of clause 7). It is said by him to be neither necessary nor appropriate to sanction the scheme now in the face of that uncertainty, and he relies on certain prejudice were I to do so. He therefore says the petition should be adjourned.

12. Mr Hacker's case in this respect turns on two heads of supposed prejudice or disadvantage, but before dealing with them I should make a point about the loudness with which his client's voice should be heard. No point has been taken as to his client's locus standi to appear before me, but Mr Knowles has invited me to bear in mind what Mr Knowles says is the ACE Companies' real interest and real motivation in seeking to prevent the scheme (and indeed the overall arrangements) taking effect. If the overall arrangements are not implemented, then it seems highly likely that the ACE Companies will be very significant beneficiaries. If the AFIA Claimants do not make claims, then claims cannot be made against the ACE Companies. In that event, the ACE Companies would be able to keep such sums as they would otherwise be obliged to disgorge under the relevant reinsurance treaties. Their real motivation is

likely to be to prevent those claims being made, and the points that they make against the implementation of the scheme (and the arrangements) should be heard with that firmly in mind.

13. I bear firmly in mind what Mr Knowles has said. Bearing in mind the nature of the objections that are made (which appear below) it would be naïve to put on one side the obvious benefits to the ACE Companies of suggesting barriers to the scheme and I will not fall victim to such naïvete. It seems to me to be obvious that the ACE Companies will have such a motivation. That does not mean that any other points advanced by them are necessarily bad, but so far as they make any points which involve an assessment of what the real practical impact of what I am being asked to sanction is, then I bear firmly in mind the fact that the points are being made on behalf of someone who cannot justifiably assert their own principal interest. In saying this, I do not ignore two things. The first is that in the New Hampshire courts, the arrangements were opposed by Benjamin Moore and Co, who are Class II creditors. Mr Hacker told me that that concern supported the ACE Companies' case in this court, but it was not represented before me. It is, however, the only Class II creditor that has indicated opposition to the arrangements (as far as I am aware). It is not at all surprising that the other Class II creditors have supported it – they are all likely to benefit. The second matter is the status of the ACE Companies as creditors. They claim to be creditors of Home Insurance. Throughout the proceedings in the New Hampshire courts, the ACE Companies have asserted that they are Class V (i.e. subordinated) creditors. Purely in that capacity, they would have little discernable interest in opposing the scheme. Without the scheme they get nothing; with the scheme they still get nothing. However, in Mr Lee's witness statement (referred to above) signed on 2nd November 2005, they assert for the first time that as well as being Class V creditors they are also Class II creditors. Mr Knowles says that this is the first time that they have asserted that they are Class II creditors, save that they have hitherto asserted a small (US$7,000) claim, and he invites me to treat that assertion with a certain degree of scepticism. I think that I should do no more than note that they have claimed to be Class II creditors and it has not been demonstrated that they are not. I am therefore prepared to assume for these purposes that they are Class II creditors. As such, they are capable of benefiting from the scheme, because they will be able to partake in a fund swelled by 50% of the recoveries on the reinsurance treaties; though of course they will have provided those monies themselves, which demonstrates where their real interests are likely to lie. Nevertheless, as Class II creditors, they would have an interest in making sure that there was no wasted expenditure, which is a point that Mr Hacker makes. They can, at least logically, make that case.

14. With all that in mind, I turn therefore to consider the grounds on which the ACE Companies say that I should not sanction the scheme and should do no more than adjourn the petition at this stage. Their grounds of objection can be grouped under two headings. The first heading concerns the current state of uncertainty as to the lawfulness of the overall arrangement under New Hampshire law and the relationship between any decision of this court and the deliberations of the New Hampshire court. The second relates to the potential waste of money which would arise if I were to sanction the scheme and if it were in due course to transpire that the New Hampshire courts withhold their approval. I shall take the points in that order.

The Interaction with the New Hampshire Proceedings

15. Mr Hacker made a number of points under this head. His first point was based on what he called comity. He said that the doctrine of comity required that I should defer to the New Hampshire court which has to rule on the lawfulness of the arrangement for New Hampshire purposes. It would, he said, be unsatisfactory for me to sanction a scheme where its lawfulness is in issue. He was unable to develop his case beyond making those points. I am afraid that in my view it is a case that is not susceptible to any development, or indeed any real exposition. Comity simply does not come into it. There is no material sense in which the activities which each court is conducting in its own jurisdiction can be said to trespass upon, or conflict with, the activities of the other. The New Hampshire courts are considering the overall arrangements from the point of view of New Hampshire law. I am not concerned with that law. I am considering the scheme from the point of view of English law relating to schemes of arrangement. Whilst our deliberations may to some extent turn on issues which are inter-dependent, in the sense that if the overall arrangement is unlawful under New Hampshire law then the scheme will fail, and in the sense that the New Hampshire arrangements require or envisage a scheme of arrangement, there is no relevant overlapping matter which in any way invokes the doctrine of comity or anything like it. This is no basis for declining to sanction the scheme of arrangement if I would otherwise do so.

16. The next point is to some extent related. Mr Hacker said that there was scope for creating confusion as between the courts of this jurisdiction and the New Hampshire courts unless I held my hand. He points to a statement in the judgment or order of the Supreme Court given on 13th September 2004, in which it said:

> "Nor did the court consider whether comity concerns require that the New Hampshire liquidation proceedings be stayed pending completion of the proceedings in the United Kingdom. See Allstate Ins Co v Hughes 174 BR 884 890 (SDNY 1994)(discussing whether the court may take action that calls into question the validity of scheme of arrangement approved by court in United Kingdom)."

This, I am told, did not reflect any submissions made to the New Hampshire court; it was a point that it expressed of its own notion. Neither Mr Hacker nor Mr Knowles suggested that the Supreme Court's concerns in this respect (if it had any) would be supported by either of their clients. Mr Hacker did say that it demonstrated the potential for confusion and the potential for a sanction decision in this jurisdiction to give rise to an unjustifiable impression that the decision of the New Hampshire court should somehow be affected by a sanction decision here. He said there was no basis on which that should be the case. Again, I do not think that that concern is in the least justified. While it is true that the Supreme Court did demonstrate an awareness of a potential point which in fact nobody would argue, it did not actually consider the point, and it is apparent from the next order in the Superior Court (following on the Supreme Court's decision) that the Superior Court appreciated that the point was not a material one because the judge in that court pointed out relevant differences between the Allstate case and the case before it. I can see no sensible basis on which it can be feared that the New Hampshire courts would give any unwarranted deference to any

order that I might make on this petition, bearing in mind our different respective functions.

17. In this context Lovells, as solicitors acting for the ACE Companies, wrote to Messrs Clifford Chance, acting for the company, on 28th October 2005, raising various points. They were answered by Clifford Chance in a latter dated 31st October 2005. One of the points, and the answer to it, was as follows:

> "1. *Please confirm that the JPLs (joint provisional liquidators) are able and willing to give an irrevocable assurance and confirmation that, if the application were to be heard now and the scheme were to be approved, such approval would not in any way be relied upon in any proceedings before the New Hampshire courts as evidencing the supposed benefit to the company in implementing the scheme or giving rise to some form of issue estoppel on that question.*
>
> [Answer] Whilst the NH liquidator will obviously bring the outcome of the hearing of the JPLs' application for sanction of the Scheme to the attention of the NH Supreme Court, he shall not seek to rely on the High Court's decision as further evidencing the benefit to the company of implementing the scheme or as giving rise to an estoppel on that issue."

Whilst accepting that the answer largely gives the assurance sought, Mr Lee in his witness statement seeks to say that the reference to the liquidators bringing the outcome of the hearing to the attention of the New Hampshire Supreme Court somehow reinforces the concern expressed in Lovells' letter. I am afraid I simply do not see how that can be so. I have difficulty in seeing how the company could properly take any other course than to draw the outcome of this hearing to the attention of the New Hampshire court, and the expression of such an intention, and indeed the event in question (assuming it happened) seem to me to be fundamentally unlikely to cause "confusion" in any material way. Even if I am wrong about that and there is some theoretical scope for confusion, I am quite satisfied that the Supreme Court will be able to resolve the confusion in a proper and accurate way. I have seen a page of the transcript of some of the evidence given before the Superior Court at the evidentiary hearing, and that page shows that counsel for the company sought to ask a question about the proposed scheme of arrangement on the footing that it somehow went to the question of fairness and reasonableness. The Superior Court ruled that that question was inadmissible. If proof be needed of the drawing of the necessary distinctions in the New Hampshire court, then that short exchange provides it. I am afraid that I regard this concern as contrived and fanciful. The same goes for the other way in which Mr Hacker sought to encapsulate this limb of his submissions, which was that by pursuing this petition, Home Insurance was somehow trying to obtain some "litigation advantage". I cannot imagine what that would be.

18. In the circumstances, I consider that there is nothing in this limb of the ACE Companies' case which points against my sanctioning the scheme.

Waste

19. The evidence and the submissions of the company and liquidators demonstrates that it would be the intention of the liquidators to continue to gather in and process the claims of the AFIA Claimants pending the decision of the Supreme Court in a few months' time. They will therefore be conducting some activities which will attract some expenditure. This is said by the ACE Companies to be wasted expenditure were it to transpire that the whole arrangement is unlawful under New Hampshire law so that matters have to come to a halt. That wasted expenditure would fall on the liquidation estate and diminish the amounts available for the creditors. It will be noted that unless the ACE Companies do indeed have a Class II claim, an assertion made only a couple of days ago, this submission is a purely altruistic one on the part of the ACE Companies, since on the available evidence they have no interest in the liquidation estate as Class V creditors. Of course, as debtors of the liquidation (so far as they indeed are) they have an interest in the non-pursuit of claims, but of course that is not to be taken as any part of the case they make before me.

20. On the evidence, the extent of work that will be done on the incoming claims side of the scheme of arrangement over the next few months is not spelled out. It is probably impossible to say with any precision what will be required. Only two numbers are available. The first is the sum of $4m which apparently has been spent over the two years to date in relation to (as I understand it) these matters. The other is the sum of $20m, which is an estimate given to the AFIA Claimants at a presentation of the scheme as being an estimate of the sums which would or might have to be spent on the exercise of receiving claims, dealing with them appropriately, passing them on to the ACE Companies and achieving payment and distribution. There is no suggestion that there was any great science behind that number. Faced with this evidence, it is obviously impossible for me to form anything like a reliable view as to how much money will be spent on relevant exercises in the next few months. However, it does not seem to me that it is likely it will be great. Furthermore, there are at least two classes of significant people who think that it is worthwhile spending that money in order to keep the matter going. The first is the liquidators (the provisional liquidators and the New Hampshire liquidator) whose business it is to run the relevant affairs of Home Insurance. They are apparently of the view that it will be in the interests of the creditors for them to carry on. It seems to me that I should give considerable weight to that judgment. They are in a position to be able to form a view as to the amount that would have to be spent, the prospects of the success in the Supreme Court, the chances of the money turning out to be wasted and so on. The second class of people are the unsecured creditors of Home Insurance. There is apparently an informal creditors' committee. I have seen a clip of consents signed by or on behalf of various members of that committee in which they express support for the scheme and support the view that sanction should be given. I have to be careful about how much weight I give to those letters. That is for at least two reasons. First, all but one of those letters come from entities who I am told are AFIA Claimants, so looking at their own interests they would, of course, be likely to support the grant of sanction because they voted for the scheme in the first place. However, one of them is from a non-AFIA Claimant creditor, namely US Property and Casualty Guaranty Association. That claims to be a creditor in the substantial sum of $122m. That indicates, not surprisingly, that at least one substantial creditor supports the sanctioning of the scheme. The second reason I have to be careful is that those letters do not expressly

approve expenditure on dealing with claims between now and whenever it is that the New Hampshire Supreme Court delivers its judgment. However, the scheme itself caters for the possibility that sanction would be given before a ruling in the then pending appeal in the Supreme Court. The liquidators made it plain to Lovells in their letter of 31st October 2005 that:

> "The initial stages in the implementation of the scheme will include the determination of the AFIA Claimants' claims....as well as the collection of amounts due to the company from the ACE group of companies."

It seems to me to be likely that the creditors' committee would know that activities were going to continue and would be content with that course. That would not be at all surprising. First, there have already been significant delays in this matter overall, and another six months' delay would not be without significance. Second, if activities continue, AFIA claims might be brought to such an extent that, whether or not there is a scheme, they can then be passed on to the ACE Companies. Were that to happen, and were the overall arrangements (and therefore the scheme) to fail, there would still be the prospect of a recovery from the ACE Companies which would, on these supposed facts, accrue to the benefit of the general body of creditors.

21. In the light of that, I do not think that these submissions of the ACE Companies, whether motivated by altruism or not, have any real weight, and again I reject them as being a reason or reasons for not sanctioning the scheme. If, as creditors of Home Insurance, the ACE Companies really think that the liquidators are wasting money in respect of which they might otherwise benefit, then it seems to me to be likely that they have a remedy elsewhere in the form of seeking the court's direct intervention against the liquidators. That would seem to me to be a more appropriate avenue for pursuing this sort of claim if it is a good claim honestly made. It is not appropriate to invite me to control the liquidators indirectly by declining to sanction the scheme. In fact, even if I did decline to sanction the scheme, it does not follow that any money will be saved, because there is no evidence that the liquidators would then cease the activity of gathering in the AFIA claims and (so far as possible) pursing the ACE Companies.

Conclusions

22. I have already concluded that, leaving out of account the ACE Companies' objections, this is a scheme which I would approve. Since I do not consider that there is anything in the ACE Companies' submissions which point away from an approval, I shall therefore sanction the scheme. I reiterate that I do so taking into account the matters which it is proper for an English court to take into account in sanctioning a scheme of arrangement. My attention was drawn in particular to the decision of Lewison J. in *British Aviation Insurance Co Ltd [2005] EWHC 1621* where various principles are set out, and I apply those principles. I do not seek to trespass in any way on the matters which are germane to the deliberations of the New Hampshire Supreme Court in the pending appeal.