

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In the Matter of the Liquidation of
The Home Insurance Company

No. 2005-0740

EXPEDITED MOTION FOR STAY OF ORDER
PENDING MANDATORY APPEAL PURSUANT TO RULE 7

Appellants Century Indemnity Company (“CIC”), 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. and Lovells, respectfully move this Court for an order declaring that the order of the Merrimack County Superior Court (McGuire, J.), dated September 22, 2005 (the “September 22 Order”), on the Liquidator’s Motion for Approval of Agreement and Compromise with AFIA Cedents in *In the Matter of the Liquidation of the Home Insurance Company*, Superior Court No. 03-E-0106, is stayed by operation of New Hampshire law pending the appeal by the ACE Companies (and co-appellant Benjamin Moore & Company (“Benjamin Moore”)). In the alternative, the ACE Companies respectfully request that the Court stay the September 22 Order, pursuant to Rule 7-A of the Supreme Court Rules, which provides a mechanism for staying the orders of a lower court that are not stayed by the filing of a timely appeal.¹

In support of this Motion, the ACE Companies respectfully state as follows:

I. Summary

1. This Motion arises out of the effort by Roger A. Sevigny, as the liquidator (“Liquidator”) of Home Insurance Company (“Home”), to characterize the September 22 Order as a final and enforceable judgment in connection with proceedings before the High

¹ As noted below, the ACE Companies have requested expedited consideration of this Motion because it relates to a hearing to be held in England on November 3, 2005. The ACE Companies have also filed a separate motion for waiver of the requirement under Rule 7-A of the Supreme Court Rules that an application for a stay be made in the trial court first.

Court of Justice in England (the “High Court”), when, under clear-cut New Hampshire law, any enforcement of the September 22 Order is stayed pending appeal.

2. On November 3, 2005, the Liquidator, through the English Joint Provisional Liquidators for Home (“JPLs”), will request that the High Court “sanction” (*i.e.*, approve) an English scheme of arrangement (the “Scheme”) that is expressly conditioned upon the approval by the Superior Court of the agreement and compromise (the “Proposed Agreement”) between the JPLs and a group of Home’s creditors known as the AFIA Cedents. The U.K. provisional liquidation is ancillary to Home’s liquidation in New Hampshire. The JPLs exercise their powers at the request and direction of the Liquidator. (*See* trial testimony of Gareth Hughes, annexed hereto as Ex. A.)

3. After the Superior Court approved the Proposed Agreement in the September 22 Order, the ACE Companies and Benjamin Moore filed a timely appeal. Under Rule 74 of the Superior Court Rules (as confirmed by New Hampshire case law), a decision on the merits, such as the September 22 Order, is stayed and does not take effect as a final judgment if any party files an appeal within the requisite time period set forth in Rule 7.

4. The ACE Companies have pointed out to the Liquidator’s counsel that the September 22 Order is stayed by the operation of New Hampshire law, but the Liquidator will not agree to withdraw the petition to the High Court for approval of the Scheme. To the contrary, counsel for the JPLs have indicated that (a) they consider the September 22 Order to be “fully enforceable;” (b) they will be moving forward with the petition for Scheme approval; and (c) they will bring any approval of the Scheme to this Court’s attention. Having exhausted their efforts to achieve a withdrawal of the petition for approval of the Scheme, the ACE Companies respectfully request that this Court enter an order declaring that, by operation of New Hampshire law, the September 22 Order is stayed and may not be relied upon by the Liquidator or his representatives in the upcoming High Court proceedings.

5. Even if the September 22 Order were not automatically stayed as a result of the appeal, the ACE Companies respectfully submit that this Court should issue a stay under Rule 7-A. Under this Court's precedent, a stay is warranted where the merits of the appeal outweigh the prejudice to the opposing party in the event of a stay.

6. The merits of the appeal are evident and this Court, on an earlier appeal, already questioned whether the Proposed Agreement is permissible under New Hampshire law. Furthermore, the Liquidator cannot show that he would suffer any prejudice if the Court were to issue a stay. The Liquidator will likely argue that Home would be harmed if the Scheme is not approved because of a stay. As shown below, there is no reason why the Scheme must be approved now. The Scheme is for distribution purposes only, but it is unlikely that there will be any reinsurance recoveries to distribute to the U.K. AFIA Cedents before the Court decides this appeal.

7. Inasmuch as there is no real purpose to seeking Scheme approval now, the ACE Companies believe that the sole purpose of the Liquidator's request for Scheme approval is that he will attempt to rely on a ruling from the High Court to support his argument on this appeal that the underlying Proposed Agreement is fair and reasonable. Indeed, the recent statement by counsel for the JPLs that they would bring any approval of the Scheme to this Court's attention confirms the ACE Companies' suspicion.

8. However, as shown in the accompanying Affidavit of Richard Hacker QC (the "Hacker Affidavit"), any approval of the Scheme cannot be taken as an independent determination by the High Court of the Proposed Agreement's fairness or reasonableness. The Liquidator's desire to use the High Court proceedings to his advantage in this appeal is improper, and cannot constitute a valid reason for denying a stay of the September 22 Order.

II. Background

9. The Proposed Agreement, which is the subject of the pending appeal and has been before this Court on two previous appeals, provides for the implementation of a Scheme

under Section 425 of the Companies Act 1985. (Ex. B annexed hereto at ¶ 1.1.2.) The purpose of the Scheme is to distribute reinsurance recoveries under the Proposed Agreement to the AFIA Cedents in the U.K. (Third Witness Statement of Gareth Hughes, annexed hereto as Ex. C, at ¶ 17.2.)²

10. The parties expressly conditioned the existence of the Scheme upon the “approval of the supervising New Hampshire Court” of the Proposed Agreement. (See Ex. B at ¶¶ 1.1.2-1.1.3.) In the September 22 Order, which was after a five-day hearing in July 2005, the Superior Court granted the Liquidator’s motion for approval of the Proposed Agreement, holding (among other things) that the Proposed Agreement is “necessary, fair and reasonable.” (September 22 Order at 35.)

11. The September 22 Order is a “decision on the merits” under Rule 3 of the Supreme Court Rules, which means that it may be appealed under the mandatory appeal provisions in Rule 7 of the Supreme Court Rules. Pursuant to Rule 7, the ACE Companies and Benjamin Moore filed timely Notices of Appeal from the September 22 Order on October 20 and 21, respectively. (See Exs. D and E annexed hereto, without attachments.)

12. Notwithstanding the automatic stay under New Hampshire law triggered by the appeal, counsel for the JPLs recently informed U.K. counsel for the ACE Companies that they would seek the High Court’s approval of the Scheme based on the September 22 Order. One of the JPLs, in a draft witness statement to be submitted to the High Court, has described the September 22 Order as “final,” (see Ex. C at ¶ 31), and U.K. counsel for the JPLs similarly claimed that the September 22 Order is “fully enforceable” despite the pending appeals.

13. U.K. counsel for the ACE Companies requested, in a letter dated October 28, 2005, that U.K. counsel for the JPLs explain why the request for approval of the Scheme cannot, and should not, be delayed. (See Ex. F.) The response from the JPLs’ counsel (which is attached as Ex. G) was unsatisfactory and did not address the ACE Companies’ legitimate

² Counsel for the ACE Companies has only been provided with the draft version of the Hughes Third Witness Statement that will be filed in the English proceedings.

concerns. In fact, counsel for the JPLs confirmed that in the High Court proceeding they will be portraying the September 22 Order as “fully enforceable” and will bring any approval of the Scheme to this Court’s attention. (*See Ex. G.*)

14. On October 31, 2005, U.S. counsel for the ACE Companies also approached counsel for the Liquidator, and requested that he instruct the JPLs to withdraw the petition for Scheme approval in the High Court on the grounds the effect of the September 22 Order is automatically stayed by the appeals. Even though Gareth Hughes (one of the JPLs) has conceded in his witness statement to the High Court that a stay prevents the Scheme from becoming effective, (*see Ex. C annexed hereto at ¶ 23*), counsel for the Liquidator did not respond to the ACE Companies’ request to withdraw the petition. Accordingly, the ACE Companies filed this Motion.

III. Basis for Relief

A. Under New Hampshire Law, A Timely Appeal Results In An Automatic Stay Of The Appealed Order

15. New Hampshire law is clear. Rule 74 of the Superior Court Rules states that following a decision on the merits “final judgment shall be entered ... unless a notice of appeal has then been filed with the Supreme Court pursuant to its Rule 7.” Super. Ct. R. 74 (emphasis added). Therefore, “[i]f an appeal or review is claimed, the decree or verdict of the lower court is automatically stayed unless the trial court has specifically ordered that all or a portion of it shall remain in effect during the process of appellate review.” 5 R. Wiebusch, *New Hampshire Practice, Civil Practice & Procedure*, § 59.07, at 451 (emphasis added); *see also Rollins v. Rollins*, 122 N.H. 6, 10 (1982) (“Normally, by timely appealing the trial court’s final decree, the defendant would prevent it from going to judgment ...”).

16. The September 22 Order, which is a decision on the merits, does not state that it shall remain in effect during appellate review. When the ACE Companies and Benjamin

Moore filed timely notices of appeal under Rule 7, the September 22 Order was stayed under Rule 74 and it may not be relied upon as a final judgment.

17. As noted above, the Liquidator (through the JPLs) has disregarded New Hampshire law by informing the High Court that the September 22 Order is “final” and “fully enforceable” and by seeking relief in the High Court based upon an order that has been stayed.

18. Accordingly, the ACE Companies respectfully request a declaration from this Court that the September 22 Order is stayed under Rule 74 of the Superior Court Rules and that the Liquidator may not rely upon it in the High Court proceedings.

B. A Stay Is Also Warranted Under Rule 7-A Of This Court’s Rules

19. Rule 7-A provides a procedural mechanism for requesting a stay of an order that is not stayed by the filing of a timely appeal. In the event this Court finds that the September 22 Order was not automatically stayed under Rule 74, the ACE Companies respectfully request that the Court enter a stay pursuant to Rule 7-A.

20. In determining whether a stay should issue, this Court has examined whether the merits outweigh the delay and inconvenience caused to the other party by a stay. *See, e.g., Rautenberg v. Munnis*, 107 N.H. 446, 447 (1966). A balancing of the merits of the appeal versus the potential prejudice to the Liquidator demonstrates that a stay is warranted here.

21. In the September 22 Order (and the related Order on Remand dated October 8, 2004), the Superior Court decided issues that have been before this Court on previous appeals. In the first of the appeals, this Court, in an order dated September 13, 2004 (“September 2004 Order”), remanded the issues to the Superior Court with a specific direction to support its conclusions of law with evidence in the record. The Court also held that the Superior Court must determine, in accordance with the legal standard set forth in the September 13, 2004 Order, whether the Proposed Agreement is fair and reasonable. (*Id.*)

22. The Superior Court, however, erred in several ways in the September 22 Order. First, the Superior Court once again ruled (as it had in the October 8, 2004 Order) that the

payments to the AFIA Cedents under the Proposed Agreement qualify as “administrative costs,” even though such claims-related distributions to a subset of Class V creditors cannot be classified as administrative costs and would be in violation of the mandatory order of priority set forth in RSA 402-C:44. This Court, during the July 2004 oral argument on the first appeal, voiced considerable concern as to whether the Liquidator may circumvent the priority statute by seeking to re-classify the claims payments. Second, the Superior Court did not apply the cases cited by this Court in the September 13, 2004 Order, which set forth a multi-factor test for fairness and reasonableness. Third, the Superior Court failed to play the “quasi-inquisitorial role” required by those cases and instead gave undue (and improper) deference to the Liquidator’s “business judgment” with respect to the Proposed Agreement. Fourth, the Superior Court — applying a standard that is not found in the case law and was not even urged by the Liquidator — erroneously focused on the reasonableness of the Liquidator’s determination that the Proposed Agreement is “necessary,” rather than objectively examining whether the AFIA Cedents, in the absence of the Proposed Agreement, would have filed and prosecuted their claims in Home’s estate. (*See Ex. D.*)

23. As stated in Benjamin Moore’s Notice of Appeal, the Superior Court’s findings are also contradicted by the evidence adduced at the hearing. (*See Ex. E.*) Both Benjamin Moore and the ACE Companies will show that the Superior Court’s conclusions of law cannot be squared with the record or with its own findings of fact. The appellants, therefore, have raised a host of issues on this appeal that are meritorious.

24. By contrast, the issuance of a stay to preserve the *status quo* would not result in any harm to the Liquidator. The Liquidator may argue that a stay would prevent it from obtaining the approval of the Scheme until after the appeal is decided, but there is no reason why the Scheme must be approved now. The JPLs have admitted that the sole function of the Scheme is to distribute payments to the U.K.-based AFIA Cedents under the Proposed

Agreement. However, the Liquidator has not yet recovered any reinsurance assets from the ACE Companies, so there is nothing to distribute.

25. Moreover, one of the ACE Companies, CIC, is owed money by Home and it has asserted set-off rights in the tens of millions of dollars. Under New Hampshire law (as recently clarified by the Referee in a related proceeding below), the right to assert set-off arises as soon as an amount is claimed as due and owing. Therefore, the ACE Companies will not be required to make payments to Home under the applicable reinsurance until the claims allowed by Home (and the Superior Court) exceed the offset asserted against Home. It is very unlikely that those claims will exceed the offset before this Court decides the pending appeal.

26. In short, the approval of the Scheme currently sought by the JPLs is unnecessary and may be obtained later. Indeed, the High Court's approval of the Scheme before the appeal is decided could result in wasted effort and resources if the Court reverses the September 22 Order.

27. The Liquidator may also claim (as he has in the past) that a stay would affect his ability to put the Scheme into effect before the December 31, 2005 expiration date for the Proposed Agreement. The Liquidator, however, has extended the deadline three times before, and should be able to obtain another extension. Given that an appeal is pending and will probably not be decided before December 31, 2005, it stands to reason that the Liquidator would have to seek an extension (whether or not a stay issues) in order to ensure that the Scheme is not approved and then rendered ineffective by this Court's decision on the appeal.

28. Thus, the strong merits of the appeal and the lack of prejudice to the Liquidator demonstrate that a Rule 7-A stay should be issued.

C. The Approval Of The Scheme Should Have No Effect On This Appeal

29. It is apparent, under the circumstances, that the Liquidator has sought approval of the Scheme in the High Court in order to gain an advantage in this appeal. However, any approval by the High Court would have no relevance here. The issue before the High Court is

whether the Scheme would bring any “benefit” to Home and the AFIA Cedents. (Hacker Aff. at 5.) That is different from the issue before this Court, which is whether the Proposed Agreement (as the predicate for the Scheme) is fair and reasonable under the case law cited in the September 13, 2004 Order. The High Court will not independently evaluate the correctness of the September 22 Order, nor will it examine the evidence presented to the Superior Court on fairness and reasonableness. (Hacker Aff. at 6.) Therefore, in the event the High Court approves the Scheme, this Court should recognize that such approval has no bearing on the issues on appeal.

D. Expedited Consideration Of This Motion Is Warranted

30. The ACE Companies respectfully request that the Court rule on this Motion on an expedited basis.

31. As discussed above, the hearing in England at which the JPLs will seek to rely on the September 22 Order as “fully enforceable” will take place on November 3. The ACE Companies have worked diligently, albeit unsuccessfully, to persuade the Liquidator and JPLs to withdraw the petition for approval of the Scheme. To prevent the Liquidator (through the JPLs) from mischaracterizing and attempting to enforce the stayed September 22 Order, the ACE Companies request that the Court enter an order on this Motion before November 3.

32. Given the nature of this Motion and the Liquidator’s lack of response to the ACE Companies’ request that he withdraw the petition for Scheme approval, the ACE Companies have not sought the assent of the Liquidator.

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

A. Granting the ACE Companies’ request for expedited consideration of this Motion;

B. Declaring that the September 22 Order is automatically stayed by operation of New Hampshire law and, until further order, may not be relied upon by the Liquidator or his

representatives in the High Court proceedings relating to the request for approval of the Scheme; and

C. Granting such other and further relief as this Court deems just and proper.

Respectfully submitted,

ACE Companies

By Their Attorneys

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Dated: November 1, 2005

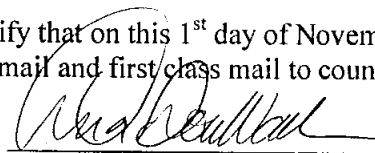
By:



Ronald L. Snow
Lisa Snow Wade

CERTIFICATE OF SERVICE

I, Lisa Snow Wade, Esq. hereby certify that on this 1st day of November, 2005, a copy of the within document was forwarded via email and first class mail to counsel of record.



Lisa Snow Wade

EXHIBITS

TO

EXPEDITED MOTION FOR STAY OF
ORDER PENDING MANDATORY APPEAL PURSUANT TO RULE 7

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8 is wider than that and can encompass, for example, promoting a
9 scheme of arrangement with creditors; but the principal role is
10 to safeguard, identify, secure and collect in assets.

11 Q. I refer you to what has been marked as Exhibit 26.
12 Would you please look at it.

13 A. Yes, I have that document.

14 Q. Please briefly describe what this document is.

15 A. This is the order of the Court appointing myself and
16 my partner, Margaret Elizabeth Mills, as Joint Provisional
17 Liquidators of The Home Insurance Company.

18 Q. What is the relationship between the New Hampshire
19 liquidation proceeding for Home and the UK provisional
20 liquidation proceeding?

21 A. The relationship is that The Home liquidation in the
22 US is the main liquidation and the provisional liquidation in
23 the UK is of the UK branch, which is part of the company in the

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1 US; and, as is evident on page 4 of the order, this -- the UK
2 proceedings are ancillary proceeding.

3 In particular, I draw your attention to the further
4 directions under which I was ordered by the Court to exercise
5 my powers after consultation with the rehabilitator of the US
6 company and, following the appointment of the US Liquidator, to
7 exercise those powers as requested and approved by the US
8 Liquidator; and so it's an ancillary proceeding.

9 Q. What is the purpose of the UK provisional liquidation
10 proceeding for Home?

11 A. The purpose of it is to protect, secure, take
12 possession of and collect the assets of the UK estate.

WITHOUT PREJUDICE AND FOR SETTLEMENT PURPOSES ONLY

Equitas Limited
33 St Mary Axe
London
EC3A 8LL

22 January 2004

For Attention of : Rhydian Williams

Dear Sirs

1. ACE Group proceeds

1.1 In compromise of disputed positions respecting the non-novated AFIA reinsurance treaties underwritten by or on behalf of The Home Insurance Company ("Home") through the Home's UK Branch (the "AFIA Treaties"), we agree that, as soon as reasonably practicable following the agreement of a number of Informal Creditors' Committee members sufficient to give adequate assurance to Home that the Scheme (as defined in sub-paragraph 1.1.2 below) will be approved by the requisite majorities of AFIA Cedents (as defined in sub-paragraph 1.1.2 below), we will take the following steps:

1.1.1 notify members of the Informal Creditors' Committee that a sufficient number of Informal Creditors' Committee members (as described in paragraph 1.1 above) have agreed to the arrangement reflected by the proposals set out in this letter agreement by returning a signed copy of this letter agreement to us;

1.1.2 seek the approval of the supervising New Hampshire Court ("New Hampshire Order") to a compromise involving the implementation of a scheme of arrangement pursuant to section 425 of the Companies Act 1985 ("Scheme") between Home and cedents of Home in respect of the AFIA Treaties ("AFIA Cedents"), the main features of which are described in sub-paragraph 1.9 below, such New Hampshire Order to be on terms that it is conditional upon:

- (1) the sanction of the English Court in respect of the Scheme;
- (2) an order of the English Court approving the remission of the Home's assets situated in England and Wales (other than the "Net Recoveries" (as defined in sub-paragraph 1.2 below)) to the New Hampshire liquidator for administration and distribution as part of the New Hampshire liquidation ("Global Liquidation Order"); and
- (3) the approval, or "non-objection", of the Financial Services Authority to the Scheme and to the making of the Global Liquidation Order ("FSA Approval");

■ The UK firm Ernst & Young LLP is a limited liability partnership registered in England and Wales with registered number OC300001 and is a member practice of Ernst & Young Global. A list of members' names is available for inspection at the above address which is the firm's principal place of business and its registered office.

- 1.1.3 as soon as reasonably practicable after the making of the New Hampshire Order:
- (1) make an application to the English Court for permission to convene a meeting of AFIA cedents to approve the Scheme; and
 - (2) following the approval of the Scheme by the requisite majorities of AFIA Cedents, seek the sanction of the English Court in respect of the Scheme,
- provided that the Scheme shall not become effective on its terms until after the making of the Global Liquidation Order and the granting of FSA Approval,

the New Hampshire Order and the Scheme to be upon such terms as may be approved by the New Hampshire Court and English Court; and

- 1.1.4 in order to reduce the costs of disputed claim proceedings to the Home estate, the Liquidator will recommend to the New Hampshire Court that in the resolution of reinsurance claims against Home under the AFIA Treaties, where the reinsurance contract under which the claim arises contemplates arbitration or other dispute resolution procedures with more limited discovery than that permitted under the Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company in Liquidation entered by the New Hampshire Court on December 19 2003 or such amended order as appropriate ("the Claims Procedures Order"), discovery in the disputed claim proceeding (including, without limiting the generality of the foregoing, requests for documents, interrogatories, requests for admissions, or evidence depositions) shall be limited to that available under the contractually contemplated procedures.

1.2 "Net Recoveries" means 50% of the "Proceeds" (as defined in sub-paragraph 1.3 below), plus 100% of those proceeds described in sub-paragraph 1.3.5 below.

1.3 "Proceeds" means the proceeds received by Home from the ACE Group or any "Third Party Reinsurer" (as defined in sub-paragraph 1.8 below) (after deducting amounts offset between Home and either the relevant ACE Group company concerned or any "Third Party Reinsurer" (as defined in sub-paragraph 1.8 below) in relation to AFIA business and after having taken all reasonable arguments and/or defences as regards the validity of such off-set) with respect to the AFIA Treaties (whether such proceeds are derived through an ongoing resolution process with the ACE Group or any "Third Party Reinsurer" (as defined in sub-paragraph 1.8 below) or through a commutation or similar compromise arrangement with any ACE Group company or any "Third Party Reinsurer" (as defined in sub-paragraph 1.8 below) relating to that company's indemnity and/or reinsurance obligations to Home) net of:

- 1.3.1 the costs of the UK provisional liquidation;
- 1.3.2 any collection costs;
- 1.3.3 costs incurred in our seeking the orders of the New Hampshire and English Courts set out in sub-paragraphs 1.1.1 and 1.1.2 above (including, without prejudice to the generality of the foregoing, the costs of any legal and other professional advisors in obtaining and implementing such approvals);
- 1.3.4 the proceeds received by Home from the ACE Group or any "Third Party Reinsurer" (as defined in sub-paragraph 1.8 below) with respect to those inwards liabilities of

Home under the AFIA Treaties which are, or will upon final adjudication be, settled by way of offset as between Home and the relevant AFIA Cedent concerned (whether such offset right derives from contract or statute); and

- 1.3.5 the proceeds received by Home from the ACE Group or any Third Party Reinsurer with respect to Home's liability under an adverse costs order as described in sub-paragraph 1.9.7 below (which amount shall be credited direct to Net Recoveries, as provided in that sub-paragraph).
- 1.4 We also agree that during the "Standstill Period" (as defined in paragraph 1.6 below) we will not enter into a commutation or similar compromise arrangement with any ACE Group company or any "Third Party Reinsurer" (as defined in sub-paragraph 1.8 hereof) relating to that company's indemnity and/or reinsurance obligations to Home in respect of the AFIA Treaties without first:
 - (1) promptly consulting with the Informal Creditors' Committee as to any such proposed commutation;
 - (2) providing all relevant documentation to the Informal Creditors' Committee at least 5 working days (where practicable) prior to such consultation (and to this end, members of the Informal Creditors' Committee shall be deemed to have requested notice and entered into a confidentiality agreement with the Liquidator pursuant to paragraph 3 of the Order Establishing Procedures for Review of Reinsurance Commutation Agreements entered by the New Hampshire Court on July 23, 2003 or any such amended order as appropriate ("the Commutations Order")). If it is not practicable for Home to comply with this 5 working days notice period, Home shall make all reasonable efforts to provide as much notice as is possible in the circumstances; and
 - (3) providing notice to the Informal Creditors' Committee in advance of any application to the supervising New Hampshire Court to approve the terms of any such proposed commutation, in accordance with the provisions of the Commutations Order.
- 1.5 You agree that:
 - 1.5.1 during the Standstill Period you shall not seek to reach any agreement or arrangement with any member of the ACE Group or any "Third Party Reinsurer" (as defined in sub-paragraph 1.8 below) whereunder you receive payment from any such entity in respect of the AFIA Treaties; and
 - 1.5.2 in determining your entitlement (if any) to receive any distribution payable to you in your capacity as a creditor in Home's New Hampshire liquidation you will bring into account, and give credit for, any payments received by you pursuant to the arrangements described in this paragraph 1.

- 1.6 "Standstill Period" shall mean the period commencing upon the date on which you agree to the arrangement reflected by the proposals set out in this letter agreement by returning a signed copy of this letter agreement to us and ending on the "Standstill Termination Date" (as defined in paragraph 1.7 below).
- 1.7 "Standstill Termination Date" shall mean the earlier of:
- 1.7.1 27 February 2004, if by that date Home has not notified members of the Informal Creditors' Committee that it has determined that a sufficient number of Informal Creditors' Committee members (as described in paragraph 1.1 above) have agreed to the arrangement reflected by the proposals set out in this letter agreement by returning a signed copy of this letter agreement to us by that date;
 - 1.7.2 the date upon which the New Hampshire Court denies the New Hampshire liquidator's motion for the approval of the New Hampshire Order in substantially similar terms to those described in paragraph 1.1 above;
 - 1.7.3 the date upon which the English Court refuses to grant permission to convene a meeting of AFIA Cedents to approve the Scheme in substantially similar terms to those described in paragraph 1.1 above;
 - 1.7.4 the date upon which a majority in number representing 75% in value of the AFIA Cedents do not approve the Scheme at the meeting specially convened for this purpose (or at any adjournment thereof) in substantially similar terms to those described in paragraph 1.1 above;
 - 1.7.5 the date upon which the English Court refuses to sanction the Scheme in substantially similar terms to those described in paragraph 1.1 above;
 - 1.7.6 the date upon which the English Court refuses to make the Global Liquidation Order;
 - 1.7.7 the date upon which the Financial Services Authority notifies Home that it will not grant the FSA Approval; or
 - 1.7.8 1 June 2004 (or such other date as Home and a sufficient number of Informal Creditors' Committee members (as described in paragraph 1.1 above) shall agree from time to time), if the English Court has not by that date sanctioned the Scheme under section 425 of the Companies Act 1985 as envisaged in paragraph 1.1.2 above.
- 1.8 "Third Party Reinsurer" shall mean a reinsurer (other than an ACE Group company), which has underwritten reinsurance in relation to AFIA business directly in favour of Home as reassured.
- 1.9 It is intended that the Scheme will have the following main features:
- 1.9.1 subject to sub-paragraph 1.9.7 below, Net Recoveries will be distributed pari passu (as far as reasonably practicable) to all AFIA Cedents according to the value of their claims against Home under the AFIA Treaties as agreed or adjudicated (net of any applicable set-off) in the New Hampshire liquidation of Home;

- 1.9.2 Net Recoveries (together with all investment income and gain accruing thereon) will be held on a segregated basis by the Scheme Administrators for application in accordance with the Scheme;
- 1.9.3 a Creditors' Committee will be established with the right to be consulted by the Scheme Administrators on any transaction or litigation as between Home and any ACE Group company which is likely to have a material impact upon Net Recoveries;
- 1.9.4 Home will not enter into a commutation or similar compromise arrangement with any ACE Group company or any Third Party Reinsurer relating to that company's indemnity and/or reinsurance obligations to Home in respect of the AFIA Treaties without first:
- (1) promptly consulting with the Creditors' Committee as to any such proposed commutation;
 - (2) providing all relevant documentation to the Creditors' Committee at least 5 working days (where practicable) prior to such consultation (and to this end, members of the Creditors' Committee shall be deemed to have requested notice and entered into a confidentiality agreement with the Liquidator pursuant to paragraph 3 of the Commutations Order). If it is not practicable for Home to comply with this 5 working days notice period, Home shall make all reasonable efforts to provide as much notice as is possible in the circumstances; and
 - (3) providing notice to the Creditors' Committee in advance of any application to the supervising New Hampshire Court to approve the terms of any such proposed commutation or arrangement, in accordance with the provisions of the Commutations Order;
- 1.9.5 in the event of a commutation with the ACE Group, the Scheme Administrators will propose to AFIA Cedents a cut-off mechanism;
- 1.9.6 the costs referred to in sub-paragraph 1.3 above are to be recovered out of the Proceeds on an incurred basis; and
- 1.9.7 should a claim be denied in the Home liquidation and a disputed claim proceeding ensue, nothing in the Scheme shall preclude an AFIA Cedent, pursuant to RSA 402-C:6, from seeking an adverse cost order against Home in such proceeding, although under the Scheme the AFIA Cedent concerned will not be permitted to enforce payment by Home of any adverse cost order that may be forthcoming as an administrative expense in the Home liquidation, but shall rather be entitled to reimbursement to the extent of any cash recovered with respect thereto from an ACE Group company or from a Third Party Reinsurer, which cash recovery shall be credited directly to the Net Recoveries and shall be payable in full to the AFIA Cedent concerned from the Net Recoveries in priority to any distribution of the Net Recoveries to AFIA Cedents pursuant to paragraph 1.9.1 hereof.

2. Information

You agree that you will provide to us by 13 February 2004 sufficient information concerning your claims under the AFIA Treaties (including reasonable details of paid losses, outstanding losses and IBNR) only to enable us to make the determination referred to in paragraph 1.7.1

hereof, and we will not use that information for the purposes of agreeing claims or obtaining payment from the ACE Group or Third Party Reinsurers until the Scheme is in place or you expressly agree otherwise.

3. Proof of Claim In Home's liquidation proceeding

We acknowledge that, by providing information to us pursuant to paragraph 2 of this letter, you shall not be deemed to be submitting a proof of claim or similar formal claim against Home, either in the New Hampshire liquidation proceeding or in any English proceeding. We acknowledge that, by providing us with the said information pursuant to this letter, you thereby reserve all your rights in that regard.

4. Confidentiality and Non-Disclosure

Save as provided above, we agree that we shall not, without your prior agreement, disclose any of the information provided under paragraph 2 above to any third party (save where required so to do so by law) with the exception of (a) our legal, accounting and actuarial advisers; (b) any applicable regulator; and (c) courts of competent jurisdiction for purposes of seeking judicial approval of the arrangement proposed herein.

We furthermore reaffirm that this letter and its contents constitute "Confidential Information" within the meaning of the Confidentiality Undertaking executed by you.

5. Authorisation

The New Hampshire Insurance Commissioner, Roger A. Sevigny, in his capacity as Liquidator of Home, has approved this proposal and authorised its circulation by the provisional liquidators to members of the Informal Creditors' Committee.

6. Acceptance by Informal Creditors' Committee members

If this proposal is acceptable to you, please indicate your acceptance to its terms by signing one copy of this letter agreement where indicated below and returning such copy, duly signed, to us as soon as possible.

G. H. Hughes

.....
Signed by G. H. Hughes
Joint Provisional Liquidator
for and on behalf of
The Home Insurance Company

We hereby agree to the arrangements reflected by the proposals set out in this letter agreement

[Signature]

.....2.2.04.....
Signed by Equitas Limited

hereof, and we will not use that information for the purposes of agreeing claims or obtaining payment from the ACE Group or Third Party Reinsurers until the Scheme is in place or you expressly agree otherwise.

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G. H. Hughes

Signed by **G. H. Hughes**
Joint Provisional Liquidator
for and on behalf of
The Home Insurance Company

We hereby agree to the arrangements reflected by the proposals set out in this letter agreement

[Signature]
Signed by ~~Weavers~~ **JAMES TYSON**
for and on behalf of
THE BERMUDA FIRE & MARINE INSURANCE COMPANY
(IN LIQUIDATION)

hereof, and we will not use that information for the purposes of agreeing claims or obtaining payment from the ACE Group or Third Party Reinsurers until the Scheme is in place or you expressly agree otherwise.

3. Proof of Claim in Home's liquidation proceeding

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6. Acceptance by Informal Creditors' Committee members

If this proposal is acceptable to you, please indicate your acceptance to its terms by signing one copy of this letter agreement where indicated below and returning such copy, duly signed, to us as soon as possible.

Gareth Hughes

Signed by G. H. Hughes
Joint Provisional Liquidator
for and on behalf of
The Home Insurance Company

We hereby agree to the arrangements reflected by the proposals set out in this letter agreement

A Brennan

Signed by Mentor Insurance Company (UK) Ltd

for and on behalf of

A Brennan, Director

led consulting by its duly authorised agent

hereof, and we will not use that information for the purposes of agreeing claims or obtaining payment from the ACE Group or Third Party Reinsurers until the Scheme is in place or you expressly agree otherwise.

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6. Acceptance by Informal Creditors' Committee members

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G. H. Hughes

.....
Signed by **G. H. Hughes**
Joint Provisional Liquidator
for and on behalf of
The Home Insurance Company

We hereby agree to the arrangements reflected by the proposals set out in this letter agreement

[Signature]

.....
Signed by **Unionamerica Insurance Company**

hereof, and we will not use that information for the purposes of agreeing claims or obtaining payment from the ACE Group or Third Party Reinsurers until the Scheme is in place or you expressly agree otherwise.

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6. Acceptance by Informal Creditors' Committee members

If this proposal is acceptable to you, please indicate your acceptance to its terms by signing one copy of this letter agreement where indicated below and returning such copy, duly signed, to us as soon as possible.

Gareth Hyle
.....
Signed by G. H. Hughes
Joint Provisional Liquidator
for and on behalf of
The Home Insurance Company

We hereby agree to the arrangements reflected by the proposals set out in this letter agreement

[Signature]
.....
Signed by English and America Insurance Co Ltd

hereof, and we will not use that information for the purposes of agreeing claims or obtaining payment from the ACE Group or Third Party Reinsurers until the Scheme is in place or you expressly agree otherwise.

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6. Acceptance by Informal Creditors' Committee members

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G. H. Hughes

.....
Signed by G. H. Hughes
Joint Provisional Liquidator
for and on behalf of
The Home Insurance Company

We hereby agree to the arrangements reflected by the proposals set out in this letter agreement

[Signature]
.....
Signed by Excess Insurance Company Ltd

DAVID ROBERTS
MANAGING DIRECTOR

hereof, and we will not use that information for the purposes of agreeing claims or obtaining payment from the ACE Group or Third Party Reinsurers until the Scheme is in place or you expressly agree otherwise.

3. **Proof of Claim In Home's liquidation proceeding**

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We furthermore reaffirm that this letter and its contents constitute "Confidential Information" within the meaning of the Confidentiality Undertaking executed by you.

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The New Hampshire Insurance Commissioner, Roger A. Sevigny, in his capacity as Liquidator of Home, has approved this proposal and authorised its circulation by the provisional liquidators to members of the Informal Creditors' Committee.

6. **Acceptance by Informal Creditors' Committee members**

If this proposal is acceptable to you, please indicate your acceptance to its terms by signing one copy of this letter agreement where indicated below and returning such copy, duly signed, to us as soon as possible.

Gareth H. Hughes

Signed by G. H. Hughes
Joint Provisional Liquidator
for and on behalf of
The Home Insurance Company

We hereby agree to the arrangements reflected by the proposals set out in this letter agreement.

Jerry M. Dwyer

Signed by Continental Insurance Company New York

hereof, and we will not use that information for the purposes of agreeing claims or obtaining payment from the ACE Group or Third Party Reinsurers until the Scheme is in place or you expressly agree otherwise.

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6. Acceptance by Informal Creditors' Committee members

If this proposal is acceptable to you, please indicate your acceptance to its terms by signing one copy of this letter agreement where indicated below and returning such copy, duly signed, to us as soon as possible.

G. H. Hughes

.....
Signed by G. H. Hughes
Joint Provisional Liquidator
for and on behalf of
The Home Insurance Company

We hereby agree to the arrangements reflected by the proposals set out in this letter agreement

John Brown
.....
Signed by Riverstone Management Ltd

Claim No. 4138 of 2004

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

IN THE MATTER OF THE HOME INSURANCE COMPANY
AND
IN THE MATTER OF THE COMPANIES ACT 1985

THIRD WITNESS STATEMENT
OF
GARETH HOWARD HUGHES

I, **GARETH HOWARD HUGHES**, a licensed insolvency practitioner and partner in Ernst & Young LLP, of 1 More London Place, London SE1 2AF, **WILL SAY AS FOLLOWS:-**

Background

1. My partner, Margaret Elizabeth Mills, and I were appointed as joint provisional liquidators ("Joint Provisional Liquidators") of The Home Insurance Company (the "Company") on 8 May 2003 pursuant to an order of Mr Justice Pumfrey.
2. I make this witness statement in support of the Company's petition (the "Petition") to obtain the sanction of this Honourable Court of a scheme of arrangement pursuant to Section 425 of the Companies Act 1985 (the "Scheme") between the Company and those of its creditors (the "AFIA Creditors" or the "Scheme Creditors") with claims arising out of American Foreign Insurance Association treaty business (the "AFIA Treaties"). The statements contained in the Petition are true. Capitalised terms not otherwise defined herein have the meanings given to them in the Scheme.
3. I make this statement with the knowledge and approval of my Joint Provisional Liquidator, Ms Mills. I also make this statement with the knowledge and approval of Roger Sevigny, who is the Commissioner of Insurance of the State of New Hampshire and liquidator of the Company in the US (the "New Hampshire Liquidator").
4. The facts and matters set out below are either within my own knowledge gained through my extensive involvement in this matter, in which case I confirm that they are true, or are

based on information provided to me by others. Facts and matters set out in this statement which are not within my own knowledge are based on information supplied to me by (a) employees of Ernst & Young LLP who are working on this matter under my supervision, (b) the New Hampshire Liquidator and employees and staff of the New Hampshire Insurance Department (the "**Department**"), (c) Mr Peter Bengelsdorf, the Special Deputy Liquidator of the Company appointed by the New Hampshire Liquidator pursuant to an order of the New Hampshire Court on 13 June 2003; (d) Mr Jonathan Rosen, Chief Operating Officer of the Company and employees and staff of the Company; (e) Clifford Chance Limited Liability Partnership ("**Clifford Chance**"), English solicitors for the Joint Provisional Liquidators and the New Hampshire Liquidator (the Joint Provisional Liquidators and the new Hampshire Liquidator being referred to herein as the "**Liquidators**"); and (e) Rackemann Sawyer & Brewster, US legal advisers to the Liquidators. Where facts and matters are not within my own knowledge but based on information supplied to me, they are true to the best of my knowledge, information and belief.

5. There is now produced and shown to me Exhibit "GHH2" to this witness statement. This exhibit comprises various documents to which I refer hereinafter (the "**Second Exhibit**"). Where in this witness statement I refer to a "Tab" and/or page number of a Tab, I refer to a document and/or a page of that document located at that Tab in the Second Exhibit.
6. This statement is made further to my:
 - 6.1 first witness statement dated 25 June 2004, to which I shall refer in this witness statement as my "**First Witness Statement**"; and
 - 6.2 second witness statement dated 2 July 2004, to which I shall refer in this witness statement as my "**Second Witness Statement**".
7. My First Witness Statement was made in support of an application to this Court pursuant to Part 8 of the Civil Procedure Rules for an order that the Court give:
 - 7.1 permission to the Company to summon a single meeting of its AFIA Creditors for the purpose of considering and, if thought fit, approving the Scheme (the "**Meeting**"); and
 - 7.2 certain directions relating to the convening and conduct of that meeting.An order to that effect was given on 5 July 2004 (the "**Order to Convene the Meeting**"), exhibited at Tab 1.
8. My Second Witness Statement was supplemental to my First Witness Statement and was given in order to update the Court with respect to claims made by AFIA Creditors in the liquidation being conducted in New Hampshire (the "**New Hampshire Liquidation**"). Only claims which have been filed in the New Hampshire Liquidation by 13 June 2004 and determined in accordance with the procedure provided for therein will be eligible for a payment pursuant to the Scheme. In paragraphs 38 to 39 below, I provide a final summary of claims received from AFIA Creditors in the New Hampshire Liquidation.

9. The statements contained in paragraphs 2 to 11 (inclusive) of the Petition are true. In support thereof I refer to paragraphs 10 to 14 (inclusive), 23, 49 to 52 (inclusive) and 83 to 84 (inclusive) of my First Witness Statement.
10. The statements contained in paragraph 12 of the Petition are true. In support thereof I refer to the pack of documents which were despatched to the AFIA Creditors (exhibited at Tab 2), comprising:
 - 10.1 a letter from the Joint Provisional Liquidators to (i) each AFIA Creditor of whom the Joint Provisional Liquidators were aware or who they believed may be an AFIA Creditor and for whom they had a last known address and (ii) those existing London market brokers believed by the Joint Provisional Liquidators to have placed AFIA Treaty business with the Company and for whom they have a last known address, (together the "Intended Recipients");
 - 10.2 the printed document containing the Scheme, Explanatory Statement and notice of the meeting of AFIA Creditors;
 - 10.3 a voting form in respect of the Scheme (comprising a form of proxy and claims table for voting purposes) (the "Voting Form"); and
 - 10.4 a map showing the location of the Meeting,the documents referenced in sub-paragraphs 10.1 to 10.4 being, together, the "Pack".
11. In further support of the Statements contained in paragraph 12 of the Petition, I refer to the witness statement sworn in these proceedings by Matthew John Harrison, Chris John Callow and Keith Raymond Brown on 7 January 2005 (the "Posting Witness Statement").
12. The statements contained in paragraph 13 of the Petition are true. As at 23 July, 2004, the Joint Provisional Liquidators' staff identified 221 Intended Recipients to whom the Pack was to be distributed. However, as more specifically described in the Posting Witness Statement, it became apparent in mid-August 2004 that, due to an administrative error, (i) only 213 Packs were sent on 23 July 2004 and (ii) one AFIA Creditor had been left off the list of Intended Recipients, bringing the total number of Intended Recipients to 222. Packs were distributed to the 9 Intended Recipients who had not been sent the Pack on 23 July 2004, in mid-August 2004. For the reasons described in the Posting Witness Statement, the Joint Provisional Liquidators do not consider that the failure to provide the Pack to these 9 Intended Recipients affected the outcome of the voting at the Meeting. In particular:
 - 12.1 4 of these Intended Recipients who were omitted from the first distribution returned a Voting Form in advance of the Meeting and voted in favour of the the Scheme;
 - 12.2 2 of these Intended Recipients had not filed claims in the New Hampshire Liquidation and therefore are unlikely to be eligible to participate in the Scheme;

- 12.3 1 of these Intended Recipients is a broker with no direct interest in the Scheme; and
- 12.4 2 of these Intended Recipients have filed claims in the New Hampshire Liquidation for, respectively, only US\$0.14 and US\$172,700. As will be clear from paragraph 16 below, those creditors, even if they had voted against the Scheme, will have had no impact upon the final outcome of the vote.
13. Between 26 and 27 July 2004, a notice in the form mentioned in the Order to Convene appeared in each of The Financial Times (all editions), The Times (UK national edition), The New York Times (USA national edition), the Wall Street Journal (international edition), Business Insurance, Insurance Day (London) and Lloyd's List (London) (the "Publications"). In support thereof, I refer to copies of the Advertisement as it appeared in each of the Publications, exhibited at Tab 3.

The Meeting

14. The statements contained in paragraphs 14 to 16 (both inclusive) of the Petition are true. The Meeting of AFIA Creditors was duly held at the offices of Clifford Chance LLP at 10 Upper Bank Street, London E14 5JJ on 8 September 2004 at 10.30 am. I attended the Meeting and acted as Chairman thereof in accordance with the directions given in the Order to Convene the Meeting. The meeting considered the following resolution (the "Resolution"):

"That this meeting approves (subject to any modifications which the Court thinks fit) the scheme of arrangement dated 23 July 2004 between The Home Insurance Company and its AFIA Creditors, a print of which has been submitted to the meeting and signed by me as Chairman of the meeting for the purposes of identification."

15. I have prepared a report of the result of the Meeting (the "Report"), which is dated [] October 2005 and is exhibited at Tab 4. It contains a full and true report of the proceedings at and the result of the Meeting, and the copy Scheme annexed to such Report is a true copy of the Scheme as approved at the Meeting.
16. As can be seen from the Petition and the Report, 36 AFIA Creditors with claims in the aggregate amount of US\$482,769,278 (valued in accordance with the procedure set out in paragraphs 8 to 13 of my Report) voted in favour of the Resolution and no AFIA Creditors voted against the Resolution.

Conditionality of the Scheme

17. It is a term of the Scheme that it shall not become effective until (a) a copy of the order sanctioning the Scheme has been delivered for registration to the Registrar of Companies in England and Wales as required by Section 425(3) of the Companies Act 1985 and (b) the first day on which all of the following conditions have been met:
- 17.1 the Merrimack County Superior Court of the State of New Hampshire (the "NH Superior Court") has granted an order (the "Approval Order") approving in principle the proposal for the agreement and compromise with AFIA Creditors to be embodied in the Scheme (the "Proposal"). Following a contested

application in the New Hampshire courts (as further described in paragraphs 18 to 28 below), the NH Superior Court granted approval of the Proposal by its orders dated 8 October 2004 and 22 September 2005 (exhibited at Tabs 5 and 6 respectively);

- 17.2 an order providing for the remission of all assets of the Company in England and Wales to the New Hampshire Liquidator, other than 50 per cent. of the indemnity / reinsurance recoveries to be paid to AFIA Creditors through the Scheme, has been made by this Honourable Court. The Company intends to make its application for such an order at the same time as the hearing of the petition herein; and
- 17.3 the Financial Services Authority has approved (or indicated its non-objection to) the Proposal. By letter dated 7 September 2004 (exhibited at Tab 7), the FSA has indicated that it has no objection to the proposed Scheme.

As such, the conditions set out in paragraphs 17.1 and 17.3 have been met, whilst the condition set out in paragraph 17.2 will be met if this Honourable Court makes the order described therein.

The proceedings in the New Hampshire courts leading to the making of the Approval Order

18. I refer the Court to paragraphs 67 to 82 of my First Witness Statement which set out a full summary of the proceedings which had taken place in New Hampshire in respect of the Approval Order up to 25 June 2004. However the Court may find it convenient if I briefly summarise the key hearings prior to advising the Court as to what has taken place in such proceedings subsequent to 25 June 2004.
19. On 11 February 2004, the New Hampshire Liquidator served a motion (the "New Hampshire Liquidator's Motion") with the NH Superior Court seeking that court's approval in principle of the proposed agreement and compromise with AFIA Creditors which is now set out in the Scheme.
20. Two objections to this motion were served:
- 20.1 the first on 18 March 2004 from a direct insurance claimant, Benjamin Moore & Co ("Benjamin Moore"); and
- 20.2 the second on 19 March 2004 from certain companies within the ACE group (the "ACE Companies").
21. Following the hearing of arguments on behalf of the New Hampshire Liquidator, the ACE Companies and Benjamin Moore on 23 April 2004, the NH Superior Court entered an order approving the New Hampshire Liquidator's Motion on 29 April 2004 (the "first Approval Order") (exhibited at Tab 8).
22. On 10 May 2004, Benjamin Moore appealed against that order, with the ACE Companies assuming active participation as an automatic party to that appeal (the "Appeal") (exhibited at Tab 9).

23. Following the filing of the Appeal, a number of interlocutory applications and hearings were made and heard in this matter. In particular, on 12 May 2004, the ACE Companies filed a motion with the NH Superior Court for the stay of the first Approval Order pending a hearing of the Appeal (exhibited at Tab 10). Such application, if successful, would have prevented the Scheme from becoming effective by virtue of the conditions set out therein (see, in particular, paragraph 17.1). The New Hampshire Liquidator objected to that motion (exhibited at Tab 11).
24. On 1 June 2004, the NH Superior Court rejected the ACE Companies' motion for a stay (exhibited at Tab 12). Judge McGuire stated that:
- "...[the] ACE Companies must demonstrate that absent a stay they will suffer irreparable harm and that harm to them will be greater than any harm imposed on the liquidation by a stay. The Court does not find that the ACE Companies have met their burden in demonstrating irreparable harm. Indeed, the Court fails to see any significant harm. On balance and to the contrary, the Court discerns significant potential for harm to the liquidation and to the policyholder creditors should a stay be granted, as such a stay is likely to create uncertainty and unnecessary delay..."*
25. On 9 June 2004, the ACE Companies filed another motion for a stay of the first Approval Order, this time with the New Hampshire Supreme Court (the "NH Supreme Court") (exhibited at Tab 13). The NH Supreme Court denied that motion by an order entered on 11 June 2004 (exhibited at Tab 14).
26. Oral argument on the Appeal was heard on 15 July 2004. By an order dated 13 September 2004, the NH Supreme Court vacated the first Approval Order and remanded the matter back to the New Hampshire Superior Court for further consideration (the "Remand Order") (exhibited at Tab 15). In summary, the NH Supreme Court noted that whilst the NH Superior Court had found the Proposal to be consistent with the goals and purposes of relevant New Hampshire legislation (RSA 402-C) to protect the interest of the insureds and creditors, it had reached this conclusion without conducting an evidentiary hearing. The NH Supreme Court declined to rule upon the arguments raised by the parties to the Appeal in the absence of a sufficient evidentiary record. As such, the NH Supreme Court remanded the matter back to the Superior Court and asked it to consider a number of specific questions.
27. The NH Superior Court delivered a further, more detailed, order on 8 October 2004 confirming the decision it had reached in the first Approval Order (exhibited at Tab 5). In particular it confirmed that an agreement and compromise of the nature proposed in the Scheme were permitted under the relevant provisions of RSA 402-C. The next question to then be determined was whether the agreement and compromise actually reached by the New Hampshire Liquidator with the AFIA Creditors, as embodied in the Scheme was necessary, fair and reasonable. Following extensive discovery, a hearing took place to consider that issue between 25 and 29 July 2005.
28. On 22 September, 2005 the NH Superior Court concluded that the agreement and compromise with AFIA Creditors as embodied in the Scheme was necessary, fair and reasonable, thereby dismissing the challenges of the ACE Companies and of Benjamin

Moore (see Tab 6). As such, the Liquidators consider that the condition that the NH Superior Court grants an Approval Order has now been met.

Appeal of the Approval Order

29. By a letter dated 29 September 2005, we were advised that the ACE Companies and Benjamin Moore intended to appeal the Approval Order (see Tab 16). The letter also requested that five business days' notice of any hearing to sanction the Scheme provided. By a letter dated 4 October 2005, Clifford Chance responded to that letter confirming that we would endeavour, on a 'no-obligation' basis, to provide such notice (see Tab 17).
30. Notices of appeal were filed by the ACE Companies and Benjamin Moore on 20 and 21 October 2005 respectively (see Tabs 18 and 19). Notwithstanding such appeal, the Liquidators wish to proceed to implement the Scheme as expeditiously as possible. The Liquidators believe that such a course is justified because:
 - 30.1 the condition requiring the Approval Order from the Superior Court has now been met;
 - 30.2 the ACE Companies sought and failed on two separate occasions (once before the NH Superior Court and once before the NH Supreme Court) to have the first Approval Order stayed. Given that the decision reached in the Approval Order has now been confirmed following a more detailed review of the case by the NH Superior Court, the ACE Companies and Benjamin Moore should not be permitted to delay the process any further. Indeed the comments made by Judge McGuire (see paragraph 24) are equally applicable now as they were then);
 - 30.3 given that a considerable period of time has already elapsed since the Meeting was held on 8 September 2004, further delay may give rise to significant additional costs to the Company should it prove necessary to convene another meeting of AFIA Creditors to reconsider the Scheme due to the sheer passage of time. In that eventuality, the Company will be forced to duplicate a significant amount of the work that it has already carried out, including amending the Scheme document, reprinting and recirculating it, seeking the Court's permission to convene a meeting of AFIA Creditors and holding another Scheme meeting;
 - 30.4 whilst the Company's major AFIA Creditors have agreed in a letter agreement dated 22 January 2004 (the "**Letter Agreement**") with the Joint Provisional Liquidators that if the Company agrees to implement a scheme of arrangement containing the principal provisions set out in the Letter Agreement, they would undertake certain obligations including not seeking to enter into separate side or "cut through" arrangements with the Company's reinsurers, the term of that agreement is due to expire on 31 December 2005 (the "**Expiry Date**"), having already been extended from 1 June 2004, 31 December 2004 and 30 September 2005 (see Tab 20). On this date, the obligations on the AFIA Creditors who are a party to that Letter Agreement, including the obligation on those creditors not to seek to enter into separate side arrangements, will terminate. Once the terms of the Letter Agreement have expired it is by no means certain that such AFIA

Creditors will agree to enter into a further extension of the Letter Agreement and if so upon what terms, particularly if it appears that Scheme is unlikely to become effective in the foreseeable future;

- 30.5 there is an express provision in the Scheme which provides that the Scheme shall terminate if the New Hampshire Liquidator determines in his sole discretion (following consultation with the Scheme Administrators and the Creditors' Committee, as such terms are defined in the Scheme) that the Scheme should terminate in the event that the NH Supreme Court enters a decision which has the effect of disapproving the proposal envisaged by the Letter Agreement.

Delay in seeking sanction of the Scheme

31. Notwithstanding the unanimous approval of the Scheme by those AFIA Creditors who voted on the Scheme, the Liquidators did not consider it appropriate to seek the English Court's sanction of the Scheme until the Approval Order had been obtained. Whilst the first Approval Order was obtained on 29 April 2004, the effect of the Remand Order was to vacate that order. As such the Liquidators have been waiting for the final Approval Order before making this application to sanction the Scheme. The AFIA Creditors were advised of this position by a notice dated 15 December 2004.
32. Notwithstanding the passage of time since the Meeting, the Joint Provisional Liquidators do not consider that there has been any material change to the information available to the Company since the date of the Meeting which would render it necessary or desirable to convene another meeting of AFIA Creditors to reconsider the Scheme in the light of such information. Indeed, following the final Approval Order, the Liquidators convened a meeting of the informal committee of AFIA Creditors to advise them that the Joint Provisional Liquidators were proposing to seek the sanction of the Scheme. No objections to that proposal were made known to the Joint Provisional Liquidators either during that meeting or subsequently. In addition, by a letter dated 19 October 2005, and publication in the same newspapers as described in paragraph 13, above, notice has been given to the AFIA Creditors and brokers referenced in paragraph 10.1 that the Joint Provisional Liquidators would proceed to seek the sanction of the Scheme at a hearing on 3 November 2005. Again, no objections have been made known to the Joint Provisional Liquidators.

Possible objections to the sanction of the Scheme

33. It should be noted that the ACE Companies have previously stated their intention to "pursue all available remedies on appeal and in England to redress the inequities and flaws of the proposed scheme of arrangement" (see the Memorandum of the ACE Companies in Support of their Objections and Response to the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents, filed before the NH Superior Court and served on 19 March 2004, Tab 21, page []). Among other points, the ACE Companies have questioned whether the Scheme infringes the *pari passu* principle.
34. As a courtesy and without in any way acknowledging any interest or right of the ACE Companies or Benjamin Moore & Co, Jonathan Rosen, Chief Operating Officer of the

Company, sent an e-mail to Thomas Wamser (Assistant General Counsel) and William O'Farrell at ACE USA on 28 June 2004, explaining the Liquidators' intention to apply for permission to convene a meeting of AFIA Creditors to consider the Scheme on 5 July 2004 (see Tab 22). Hard copies of the papers filed with the English Court in respect of that application were sent for the attention of Mr. Wamser by Clifford Chance on 25 June 2004 (see Tab 23).

35. On 2 July 2004, Joe Bannister (a partner at Lovells) telephoned Philip Hertz (a partner at Clifford Chance) and stated that the ACE Companies and Benjamin Moore would not attend the hearing on 5 July 2004. Mr Bannister stated that he would confirm the position by letter. In a letter of the same date sent to the Company and copied to Clifford Chance, Lovells advised, amongst other things, that its client did not (a) accept that the Scheme as proposed was one that the English Court should sanction; and (b) propose to appear at the hearing of the application (see Tab 24). This letter was brought to the attention of the Court by Counsel, Robin Knowles QC, acting on behalf of the Company. A note of that hearing prepared by Clifford Chance is exhibited at Tab 25.
36. Following the Meeting, Lovells wrote to Clifford Chance on 10 September 2004 asking for confirmation that (a) the hearing to sanction the Scheme would not take place until the NH Supreme Court had ruled on his clients' appeal and (b) its clients would be given 5 business days' notice of any such hearing (see Tab 26). Clifford Chance responded on 21 September 2004 to advise that sanction of the Scheme would be sought when appropriate but that 5 business days' notice of any such hearing would be given (Tab 27).
37. Whilst it is not clear whether the ACE Companies still intend to make any formal objection to this Court in respect of the sanction of the Scheme, there remains a prospect that an objection will be made. However, the Joint Provisional Liquidators have taken advice on this matter and are confident that, such objections, even if raised, will have no sound legal basis. As indicated in paragraph 29 above, we shall endeavour to give the ACE Companies five business days' notice of the application to sanction the Scheme.

AFIA Creditor Claims filed in the New Hampshire Liquidation

38. I refer to paragraph 9 of my Second Witness Statement in which I advised the Court that:
 - 38.1 I had recently written to the AFIA Creditors reminding them that proofs of claim must be submitted in the New Hampshire Liquidation by no later than 13 June 2004 (the "Claims Filing Deadline") and informing them that an AFIA Creditor will only be eligible to receive a payment under the Scheme if its claims have first been determined in the New Hampshire Liquidation. A copy of my letters in this regard are exhibited at Tabs 28 and 29;
 - 38.2 the New Hampshire Liquidator had received approximately 190 boxes containing proofs of claim filed in the New Hampshire Liquidation on or about the Claims Filing Deadline (the "Submitted POCs").
39. I can now advise the Court that the New Hampshire Liquidator has completed going through the boxes containing the Submitted POCs and has identified a total of 138 Submitted POCs submitted by AFIA Creditors. Of these, 50 POCs had stated values of

in aggregate US\$266.8 million. A further 78 POCs were stated to be of unknown value but from the backup information which those creditors provided with their POCs the NH Liquidator estimates that their AFIA related claims amount to approximately US\$150.8 million. The remaining 10 POCs, likewise of unstated value, were unaccompanied by any backup material. However, these creditors submitted votes in favour of the Scheme at the Meeting in the aggregate value of US\$121.2 million which the Joint Provisional Liquidators accepted for voting purposes only.

40. In light of the above, I respectfully seek the order contained in the Minute of Order at Tab 30.

I believe that the facts stated in this witness statement are true.

Signed.....
Gareth Howard Hughes
Dated [] October 2005

Filed on behalf of the Applicant
Deponent; G Hughes (3); Exhibits "GHH2"
[] October 2005

Claim No. 4138 of 2004

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT**

**IN THE MATTER OF
THE HOME INSURANCE COMPANY**

AND

**IN THE MATTER OF THE COMPANIES
ACT 1985**

**THIRD WITNESS STATEMENT OF
GARETH HOWARD HUGHES**

Clifford Chance
Limited Liability Partnership
10 Upper Bank Street
London E14 5JJ
Tel: 020 7006 1000
Fax: 020 7006 5555
Ref: JXXB/24559/70-20247416/DJS

NEW HAMPSHIRE SUPREME COURT
RULE 7 NOTICE OF MANDATORY APPEAL

This form should be used for an appeal from a final decision on the merits issued by a superior court, district court, probate court or family division court except for a decision from: (1) a post-conviction review proceeding; (2) a proceeding involving the collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; or (6) a probation revocation proceeding.

1. COMPLETE CASE TITLE AND DOCKET NUMBERS IN TRIAL COURT
In the Matter of the Liquidation of The Home Insurance Company
Docket No. 03-E-0106

2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)
Superior Court of the State of New Hampshire, Merrimack County
Honorable Kathleen A. McGuire, Presiding Justice

3A. NAME AND ADDRESS OF APPEALING PARTY. IF REPRESENTING SELF, PROVIDE TELEPHONE NUMBER

Century Indemnity Company, ACE
Property and Casualty Insurance Company,
Pacific Employers Insurance Company,
and ACE American Reinsurance Company
(collectively, the "ACE Companies")

Two Liberty Place
1601 Chestnut Street
Philadelphia, PA 19103

3B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF APPEALING PARTY'S COUNSEL

Ronald L. Snow, Esq.
Lisa S. Wade, Esq.
Orr & Reno, Professional Association
One Eagle Square, P.O. Box 3550
Concord, New Hampshire
(603) 224-2381

Gary S. Lee, Esq.
Pieter Van Tol, Esq.
Lovells
900 Third Avenue, 16th Floor
New York, New York 10022
(212) 909-0600

Gail M. Goering, Esq.
Lovells
One IBM Plaza, Suite 1900
Chicago, Illinois 60611
(312) 832-4400

4A. NAME AND ADDRESS OF OPPOSING PARTY

Roger A. Sevigny, Commissioner of Insurance of the State of New Hampshire, as liquidator of The Home Insurance Company

4B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF OPPOSING PARTY'S COUNSEL

J. Christopher Marshall, Esq.
New Hampshire Attorney General's Office
Civil Bureau
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3650

J. David Leslie, Esq.
Eric A. Smith, Esq.
Rackemann, Sawyer & Brewster
One Financial Center
Boston, Massachusetts 02111
(617) 542-2300

5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

Benjamin Moore & Company

Andre Bouffard, Esq.
Eric D. Jones, Esq.
Downs Rachlin Martin PLLC
199 Main Street
Burlington, Vermont 05402

6. DATE OF CLERK'S NOTICE OF DECISION OR SENTENCING. ATTACH COPY OF NOTICE AND DECISION.

September 22, 2005 (and related interlocutory Order on Remand dated October 8, 2004)

DATE OF CLERK'S NOTICE OF DECISION ON POST-TRIAL MOTION, IF ANY. ATTACH COPY OF NOTICE AND DECISION.

7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS

N/A

8. APPELLATE DEFENDER REQUESTED?

N/A

IF SO, CITE STATUTE OR OTHER LEGAL AUTHORITY UPON WHICH CRIMINAL LIABILITY WAS BASED AND ATTACH FINANCIAL AFFIDAVIT (OCC FORM 4)

9. IS ANY PART OF CASE CONFIDENTIAL? IF SO, IDENTIFY WHICH PART AND CITE AUTHORITY FOR CONFIDENTIALITY. SEE SUPREME COURT RULE 12.

Yes. On August 24, 2005, in accordance with the Superior Court's oral ruling on July 29, 2005, the ACE Companies filed an affidavit from William E. O'Farrell under seal. The ACE Companies respectfully request, pursuant to Supreme Court Rule 12(2)(a), that the Supreme Court issue an order maintaining the confidentiality of the sealed filing.

10. IF ANY PARTY IS A CORPORATION, LIST THE NAMES OF PARENTS, SUBSIDIARIES AND AFFILIATES.

All of the outstanding capital stock of Century Indemnity Company ("CIC") is owned by Brandywine Holdings Corporation, a subsidiary of INA Financial Corporation ("INA Financial"). The latter is owned by INA Corporation which, since July 2, 1999, has been directly or indirectly owned by ACE Limited.

All of the outstanding capital stock of ACE Property and Casualty Insurance Company is owned by INA Holdings Corporation ("INA Holdings"). The latter is a subsidiary of INA Financial.

All of the outstanding capital stock of Pacific Employers Insurance Company is held by ACE American Insurance Company, which is wholly owned by INA Holdings.

All of the outstanding capital stock of ACE American Reinsurance Company is owned by CIC.

11. DO YOU KNOW OF ANY REASON WHY ONE OR MORE OF THE SUPREME COURT JUSTICES WOULD BE DISQUALIFIED FROM THIS CASE? ____YES __X__NO
IF YOUR ANSWER IS YES, YOU MUST FILE A MOTION FOR RECUSAL IN ACCORDANCE WITH SUPREME COURT RULE 21A.

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY FOR THIS APPEAL?
__X__YES ____NO
IF YOUR ANSWER IS YES, YOU MUST COMPLETE THE TRANSCRIPT ORDER FORM ON PAGE 4 OF THIS FORM.

13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE SUPREME COURT RULE 16(3)(b).

1. Did the Superior Court err in ruling that the Liquidator of The Home Insurance Company ("Home") was authorized pursuant to the general provisions of RSA 402-C:1 and RSA 402-C:25 to enter into an agreement (the "Proposed Agreement") with a subclass of Class V creditors (the "AFIA Cedents") whereby the AFIA Cedents, contrary to the mandatory provisions of RSA 402-C:44, would receive a distribution of assets before the claimants in prior classes have been paid in full and in an amount different from the rest of the Class V creditors?

2. Did the Superior Court err in ruling that the payments to the AFIA Cedents under the Proposed Agreement, which are indisputably distributions and settlements directly related to pre-liquidation claims, would qualify as administrative costs pursuant to RSA 402-C:44, I?

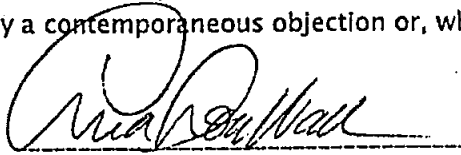
3. Did the Superior Court err in failing to evaluate the fairness and reasonableness of the Proposed Agreement in accordance with the multi-factor test set forth in the cases cited by the Supreme Court in the Order of September 13, 2004?

4. In determining whether the Proposed Agreement is fair and reasonable, did the Superior Court err in giving undue deference to the Liquidator's "business judgment" regarding the Proposed Agreement, where the controlling cases state that the Superior Court must play a "quasi-inquisitorial" role and the Liquidator's assessment of the fairness and reasonableness of the Proposed Agreement is contrary to the weight of the evidence?

5. Did the Superior Court err in focusing on the reasonableness of the Liquidator's determination that the Proposed Agreement is necessary under RSA 402-C:25 rather than objectively examining whether the AFIA Cedents, in the absence of the Proposed Agreement, would have filed and prosecuted their claims in Home's estate?

14. CERTIFICATIONS

I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

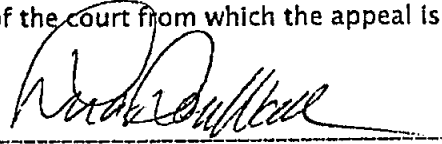


Counsel for the ACE Companies

I hereby certify that on or before the date below, copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

10/20/05

Date



Counsel for the ACE Companies

RULE 7 CO-APPELLANT'S NOTICE OF MANDATORY APPEAL

This form should be used for an appeal from a final decision on the merits issued by a superior court, district court, probate court or family division court except for a decision from: (1) a post-conviction review proceeding; (2) a proceeding involving the collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; or (6) a probation revocation proceeding

1. COMPLETE CASE TITLE AND DOCKET NUMBERS IN TRIAL COURT
In The Matter Of The Liquidation Of The Home Insurance Company
Docket No. 03-E-0106, Merrimack Superior Court

2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)
Merrimack Superior Court
Judge McGuire

3A. NAME AND ADDRESS OF APPEALING PARTY. IF REPRESENTING SELF, PROVIDE TELEPHONE NUMBER
Benjamin Moore & Co.
51 Chestnut Ridge Road
Montvale, NJ 07645

CO-APPELLANTS:
Century Indemnity Company;
ACE Property and Casualty Insurance Company;
Pacific Employers Insurance Company;
ACE American Reinsurance Company

3B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF APPEALING PARTY'S COUNSEL
Andre D. Bouffard
Eric D. Jones
Downs Rachlin Martin PLLC
P.O. Box 190
199 Main Street
Burlington, VT 05402
(802) 863-2375

4A. NAME AND ADDRESS OF OPPOSING PARTY

Roger A. Sevigny
Insurance Commissioner of the
State of
New Hampshire, solely in his
capacity as liquidator of The Home
Insurance Company

(11/03)

4B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF OPPOSING PARTY'S COUNSEL

J. Christopher Marshall
New Hampshire Attorney General's
Office—Civil Bureau
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3679
and
J. David Leslie
Rackemann, Sawyer & Brewster
One Financial Center
Boston, MA 02111
617-542-2300

5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

Century Indemnity Company
ACE Property and Casualty Insurance Company
Pacific Employers Insurance Company
ACE American Reinsurance Company

Counsel:

Ronald Snow
ORR & RENO, PA
One Eagle Square
P.O. Box 3550
Concord NH 03302-3550
603-224-2381

and

Gary Lee
LOVELLS
900 Third Ave, 16th Fl.
New York, New York 10022
212-909-0600

6. DATE OF CLERK'S NOTICE OF DECISION OR SENTENCING. ATTACH COPY OF NOTICE AND DECISION.

October 8, 2004, and September 22, 2005

DATE OF CLERK'S NOTICE OF DECISION ON POST-TRIAL MOTION, IF ANY. ATTACH COPY OF NOTICE AND DECISION.

Not applicable.

7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS

Not applicable.

8. APPELLATE DEFENDER REQUESTED? Not applicable.

IF SO, CITE STATUTE OR OTHER LEGAL AUTHORITY UPON WHICH CRIMINAL LIABILITY WAS BASED AND ATTACH FINANCIAL AFFIDAVIT (OCC FORM 4)

9. IS ANY PART OF CASE CONFIDENTIAL? IF SO, IDENTIFY WHICH PART AND CITE AUTHORITY FOR CONFIDENTIALITY. SEE SUPREME COURT RULE 12.

No.

10. IF ANY PARTY IS A CORPORATION, LIST THE NAMES OF PARENTS, SUBSIDIARIES AND AFFILIATES. Benjamin Moore & Co. is a wholly owned subsidiary of Berkshire Hathaway, Inc.

11. DO YOU KNOW OF ANY REASON WHY ONE OR MORE OF THE SUPREME COURT JUSTICES WOULD BE DISQUALIFIED FROM THIS CASE? ____YES XNO
IF YOUR ANSWER IS YES, YOU MUST FILE A MOTION FOR RECUSAL IN ACCORDANCE WITH SUPREME COURT RULE 21A.

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY FOR THIS APPEAL?
X YES ____NO
IF YOUR ANSWER IS YES, YOU MUST COMPLETE THE TRANSCRIPT ORDER FORM ON PAGE 4 OF THIS FORM.

13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE SUPREME COURT RULE 16(3)(b).

Appellant Benjamin Moore & Co. ("Benjamin Moore") is a policyholder claimant in the insurance liquidation proceedings below. Benjamin Moore enjoys Class II priority with respect to its claims. Benjamin Moore objected to the Liquidator's Motion for Approval of an Agreement and Compromise with certain Class V claimants.


Benjamin Moore appeals from the Superior Court's Order on Remand dated October 8, 2004, and its Order of September 22, 2005, made after an evidentiary hearing.

Benjamin Moore incorporates by reference the questions to be raised on appeal as set forth in the Notice of Appeal filed by Co-Appellants Century Indemnity Company, et al., and raises the following question:

1. Do the findings made by the Superior Court as to the fairness and reasonableness of the agreement before the Court for approval lack a sound and substantial basis in the record because, inter alia, they ignore key, uncontroverted evidence undermining the reasonableness of the Liquidator's action in entering into the agreement, and the fairness of the agreement.

14. CERTIFICATIONS

I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

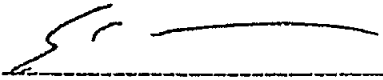


Appealing Party or Counsel

I hereby certify that on or before the date below, copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

10/21/05

Date



Appealing Party or Counsel

28 October 2005

By fax and post

Direct line 020 7296 5457
philip.wilkinson@lovells.com
Direct fax 020 7296 2001

Our ref F1PJW/JBB1878650.2
Matter ref U0288/00018

Clifford Chance LLP
10 Upper Bank Street
London
EC4 5JJ

For the attention of David Steinberg Esq

Dear Sirs

**CENTURY INDEMNITY COMPANY AND OTHER ACE GROUP COMPANIES (THE "ACE COMPANIES")
THE HOME INSURANCE COMPANY (IN PROVISIONAL LIQUIDATION) (THE "COMPANY")**

We refer to the hearing of the Company's application set down for 3 November 2005 (the "Hearing") for sanction of the Scheme of Arrangement (the "Scheme") approved by Scheme Creditors (as defined in the Scheme) on 8 September 2004.

As you are aware, the proposed Scheme represents the implementation of an agreement reached between the English Joint Provisional Liquidators of the Company ("JPLs") and those selected by them to be Scheme Creditors ("the Agreement"). The role of the JPLs has always been recognised to be subsidiary to that of the New Hampshire Liquidator (the "Liquidator") and we believe it to be common ground that the JPLs act in accordance with his direction. This is reflected in the fact that the Agreement specifically refers to the Liquidator's approval of the Agreement.

The ACE Companies are concerned as to the timing of the current application and the potential implications of that timing for the orderly conduct of the Company's New Hampshire liquidation. In particular, they are concerned that the Company (acting by the JPLs) has made this application when it is on notice that, on 21 October 2005, the ACE Companies filed Notice of Appeal to the New Hampshire Supreme Court ("Supreme Court") against the decision of the New Hampshire Superior Court ("Superior Court") in its Order of 22 September 2005 (the "Approval Order"). By that Notice of Appeal, the ACE Companies seek a ruling of the Supreme Court including in particular on whether the Superior Court:

- (i) erred in ruling that the Liquidator was authorised pursuant to the general provisions of RSA 402-C:1 and RSA 402-C:25 to enter into the proposed agreement and compromise with AFIA Cedants (being the agreement comprised in and to be effected by the Scheme);

- (ii) erred in ruling that the payments to AFIA Cedants under the proposed agreement and compromise would qualify as administrative costs pursuant to RSA 402-C:44,1; and
- (iii) erred in failing to evaluate the fairness and reasonableness of the proposed agreement and compromise in accordance with the test set forth in the cases cited by the Supreme Court in the Order of the Supreme Court of 13 September 2004.

A parallel appeal has been filed by Benjamin Moore & Co., which is another party in interest which also challenges the decision of the Superior Court. For simplicity we refer below (save where otherwise noted) only to the appeal made by the ACE Companies, although what is said in relation to their appeal applies equally to the Benjamin Moore & Co. appeal.

If the Supreme Court reverses the decision of the Superior Court, the consequence will be that the proposed agreement and compromise will have been held to be contrary to New Hampshire law.

The prospect of the Supreme Court taking such a course is by no means a remote possibility given that the Supreme Court has already, on two occasions, remitted the matter back to the Superior Court on the basis that the Superior Court had failed adequately or at all to address relevant issues.

The ACE Companies question the appropriateness of an application being made to approve the Scheme (and, therefore, of the Hearing taking place) whilst there remains on foot litigation before the courts of the domiciliary liquidation, in which the propriety or otherwise of the proposed agreement and compromise which the Scheme is intended to implement, remains to be finally resolved. They consider that this issue should be finally resolved by the New Hampshire courts before steps are taken which are directed to enable the implementation of the Scheme. If that does not happen there could be unsatisfactory consequences.

Benefit to the Company

By way of example of the consequences mentioned above, we note that in paragraph 18 of the Petition there is an express averment that:-

"It will be for the benefit of the Company that the Scheme should be sanctioned by this Court."

This averment is not a mere formality as it is central to the approval process that the court will have to specifically address the issue of benefit to the Company in deciding whether to sanction the Scheme.

However, this is one of the central issues raised by the appeal to the Supreme Court. The Order of the Superior Court contains, at pages 26 – 33, a lengthy analysis of the supposed benefit to the liquidation estate of the Agreement (which is the foundation on which the Scheme is built and without which it must fall). The Court made findings concerning the potential benefits to the Company which involved a rejection of the arguments advanced by the ACE Companies and by Benjamin Moore & Co. before that Court and which are challenged by Question 3 of the ACE Companies' Notice of Mandatory Appeal and by Question 1 of the Mandatory Notice of Appeal filed by Benjamin Moore & Co.

Whilst nothing said by the English court can or should have any probative or evidentiary value in the proceedings before the New Hampshire courts (including the pending appeals) there is plainly a risk of confusion if the English court is asked to make findings of fact in relation to the benefits

of the Scheme to the liquidation estate in advance of a final determination by another court already exclusively seised of that same issue at the appellate level.

This leads us to question the motivation underlying the decision to press ahead now with this application. The ACE Companies are concerned that the Company is only making a sanction application in respect of the Scheme at this time to obtain a litigation advantage in the pending appellate proceedings. They fail to see otherwise how the making of such an application at this time (with its attendant costs), where there are pending appellate proceedings, furthers the interests of the Company's creditors.

Whilst we are clearly of the view that any findings of fact by the English court can have no relevance to the pending appeals and that nothing said by the English court should affect the outcome of the pending appeals, we are nonetheless, as we note above, concerned that there may be scope for confusion before the New Hampshire courts as to the status in the New Hampshire proceedings of any findings made by the English court. Please therefore confirm whether the JPLs 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 (including the pending appeals to the Supreme Court) as evidencing the supposed benefit to the Company in implementing the Scheme or giving rise to some form of issue estoppel on that question?

When assessing the question of benefit to the Company in sanctioning the Scheme at this stage rather than awaiting the outcome of the pending appellate proceedings, the court will have to have regard to the costs implications of giving its sanction now. This in turn depends upon whether the ACE Companies are justified in their concern that there is potential for significant wasted costs to be incurred if the appeals are successful. We address this question in the following section of this letter.

What if the Supreme Court appeal is successful?

We are unclear what it is intended should happen if the New Hampshire appeal is successful. In paragraph 30.5 of Gareth Hughes' 3rd Witness Statement he indicates that it will be a matter for the Liquidator following consultation with the Scheme Administrators and the Creditors' Committee to determine whether the Scheme should then terminate. We assume that before embarking upon the present application in the face of a pending appeal, there must have been discussion between the Liquidator and the JPLs (as JPLs and as proposed Scheme Administrators) as to what would happen in the event that the appeal is successful. Could you please confirm whether or not there have been any such discussions and, if so, what (if any) conclusions have been reached. We believe that the court (and we) are entitled to full and frank disclosure on this issue.

There are a number of questions which are not addressed in Gareth Hughes' 3rd Witness Statement. In particular, what do the JPLs presently anticipate will happen in or to the Scheme if it is sanctioned and the Approval Order is reversed? For example (and hypothetically), if the Scheme were to be terminated after a distribution had been made, is there any mechanism for it to be clawed back?

This will largely depend on what steps will have been taken in the Scheme prior to the determination of the pending appeal. This gives rise to two further questions:-

1. Is it intended to implement the Scheme, if sanctioned (and assuming satisfaction of the other matters on which the Scheme is conditional, as set out in paragraph 8.2 of the Scheme) prior to the decision of the Supreme Court on the propriety of the proposed

agreement and compromise under New Hampshire law being handed down? If not, what is the intention?

2. What do the JPLs (as the proposed Scheme Administrators of a Scheme for which approval is being sought in a week's time) anticipate will have happened in the Scheme before the determination of the Supreme Court appeal, which we are told will have occurred no later than mid 2006?

There is also a significant costs issue. In the New Hampshire proceedings the uncontroverted evidence showed that the JPLs estimate of the total anticipated costs of the Scheme (and the provisional liquidation) were around US\$ 20 million, of which \$4 million have already been incurred as fees payable to the JPLs and their professional advisers. This leaves a further US\$ 16 million of potential additional costs yet to be incurred. We would like to be informed as to the JPL's current best estimate as to what part of those additional costs is it anticipated will have been incurred by mid 2006 if the Scheme is approved now? If those additional costs are incurred and the Scheme is then ultimately abandoned, it is our understanding that those costs will be irrecoverable. Can you please confirm whether this accords with the JPL's own understanding?

The position of the ACE Companies at the Hearing

In order to decide what stance to take at the Hearing, the ACE Companies require the JPL's responses to the various issues and questions identified above by 5.00 pm on Monday 31 October 2005. Whilst we recognise that this gives you only a limited time to respond, this is as a result of time constraints entirely of your own making. A slightly longer lead time would, no doubt, have given both parties the opportunity to identify and seek to resolve or address in proper form, the issues to which the application is likely to give rise. In this regard we note that we were only supplied with copies of drafts of the documents that you intend to rely upon at the Hearing at 3.54 PM on Wednesday 26 October (effectively one working day ago) and that you have advised us that the documents may not be finalised until a day or two before the Hearing. What is said in this letter reflects the issues which we believe arise on the basis of the existing drafts. If the drafts change, there may be other issues which arise.

The ACE Companies will be represented at the Hearing and to the extent that these questions are not answered adequately, we will draw this fact to the attention of the court at the Hearing.

Although the ACE Companies have not been invited to participate in the Scheme, the Superior Court has previously determined that they have a legitimate interest in opposing the Liquidator's attempts to implement the Scheme. We remind you in this regard that, by its Order of 10 August 2004, the Superior Court made a specific finding that:-

"the direct interest of ACE Companies and Benjamin Moore & Co. are interests that would be prejudiced absent an opportunity to respond and demonstrate the potential harm that might be posed by the Liquidator's endorsement of the agreement at issue....Accordingly, ACE Companies and Benjamin Moore & Co. have standing to challenge the agreement."

In those circumstances, we believe that they have a legitimate interest in seeking the confirmation and the information identified above.

Further and in any event, the application for sanction is one made with no named respondent and is properly to be regarded as one in respect of which the JPLs (as officers of the court) owe an obligation of full and frank disclosure to the court. We regard the information sought in this letter as material to the exercise of the court's discretion and as information with which the court should therefore, in any event, be provided.

We await your response.

Yours faithfully

Lovells

cc Gary Lee - Lovells, New York
Joe Bannister - Lovells, London
Tom Wamser - Century Indemnity

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IN REPLY PLEASE QUOTE
JXXB/245559/70-20247416/DJS

DATE
31 October 2005

DIRECT DIAL
020 7006 1621 / 020 7006 1612

Lovells
Atlantic House
Holborn Viaduct
London EC1A 2FG

J Bannister, Esq.
P Wilkinson, Esq.

Dear Sirs

The Home Insurance Company (in liquidation and in provisional liquidation) (the "Company")
Century Indemnity Company and other ACE Group Companies ("ACE")

We write in response to your letter of 28 October 2005.

Before turning to the specific questions raised in your letter, we wish to make the following comments:

- (i) ACE misunderstands the reasons for our clients' seeking sanction of the Scheme at this time. It is not, as you have asserted, to seek a "litigation advantage". The joint provisional liquidators (the "JPLs") and the liquidator appointed by the New Hampshire Superior Court ("the NH Liquidator") believe such an application is appropriate for the reasons set out in paragraph 30 of the Third Witness Statement of Gareth Howard Hughes. They do not consider that any further delay in seeking sanction for the Scheme is appropriate. Neither do they accept that a sanction order of the English High Court would give rise to "confusion" on the part of the New Hampshire Supreme Court (the "NH Supreme Court").
- (ii) You note that the NH Supreme Court has, on two occasions, remitted the matter back to the NH Superior Court. These were in quite different circumstances and your description of them is in any event inaccurate. The order handed down by the NH

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Superior Court on 22 September 2005 ("the Approval Order") follows the NH Superior Court's thorough review of the issues and evidence.

- (iii) You assert that the ACE companies have a "legitimate interest" in seeking certain confirmations and information. Whilst we provide a response to your questions below, we would point out for the record that, for the most part, the ACE companies are substantial net debtors of the Company, the one exception being Pacific Employers Insurance Company who has submitted a proof of claim against the Company's estate in the amount of a mere U\$7,266.

We now turn to address your specific questions. Please note that, where a number of questions cover the same issue, such questions have been dealt with together.

1. *Please confirm that the JPLs 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.*

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.

2. *Could you please confirm whether or not any discussions [between the JPLs and the Liquidator as to what would happen in the event that the appeal is successful] have taken place and if so what (if any) conclusions have been reached?*

The NH Liquidator is a public official appointed as liquidator by the NH Superior Court. If the NH Supreme Court were to issue a decision definitively holding that the Agreement is unlawful, the NH Liquidator's intention is that (after appropriate consultation) he would terminate the Scheme, as provided for therein.

3. *What do the JPLs presently anticipate will happen in or to the Scheme if it is sanctioned and the Approval Order is reversed?*

Please refer to the responses to question 2 above and questions 5 and 6 below.

4. *After a distribution has been made, is there any mechanism for it to be clawed back?*

There is no mechanism for any payments made under the Scheme to be clawed back. However, please see further below.

5. *Is it intended to implement the Scheme if sanctioned prior to the decision of the NH Supreme Court on the propriety of the proposed agreement and compromise under New Hampshire law being handed down? If not, what is the intention?*

The Approval Order handed down on 22 September 2005 is fully enforceable notwithstanding the pending appeals lodged by ACE and by Benjamin Moore & Co. In

all the circumstances, the JPLs intend to commence the implementation of the Scheme if it is sanctioned by the High Court on the current application. The JPLs and the NH Liquidator will be able to take account of the progress of the appeal at each point in the implementation of the Scheme, including at the stage of making payments to scheme creditors.

6. *What do the JPLs anticipate will have happened in the Scheme before the determination of the NH Supreme Court appeal, which we are told will have occurred no later than mid 2006?*

Please see 5 above.

The initial stages in the implementation of the Scheme will include the determination of the AFIA cedants' claims (a process in which ACE will take part in accordance with the claims protocol agreed between ACE and the NH Liquidator (and approved by the NH Superior Court)), as well as the collection of amounts due to the Company from ACE group companies.

We would point out that, as you are aware, there are no assurances that the NH Supreme Court will have delivered its decision on the appeal by mid 2006.

7. *We would like to be informed of the JPLs' current best estimate as to what part of those additional costs it is anticipated will have been incurred by mid 2006 if the Scheme is approved now? If those additional costs are incurred and the Scheme is ultimately abandoned, it is [ACE's] understanding that those costs will be irrecoverable. Can you please confirm that this accords with the JPLs' own understanding?*

The costs from today to mid 2006 will depend on a range of factors, including progress in the two initial stages referred to under 6 above. The costs of this process, once incurred, will remain incurred. The NH Liquidator and the JPLs will throughout have regard to the interests of creditors.

Yours faithfully


Clifford Chance LLP

cc: Gary Lee - Lovells, New York

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In the Matter of the Liquidation of
The Home Insurance Company

No. 2005-0740

AFFIDAVIT OF RICHARD DANIEL HACKER Q.C.
IN SUPPORT OF THE ACE COMPANIES' MOTION
FOR A STAY PENDING MANDATORY APPEAL

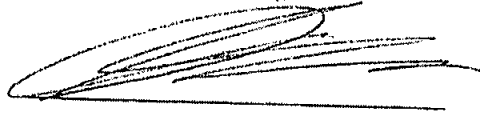
I, RICHARD DANIEL HACKER, one of Her Majesty's Counsel, of 3-4 South Square, Gray's Inn, London, England, hereby depose and say:

1. I am a member of the English Bar admitted to practice law in England. I received an Honours Degree in Law from the University of Cambridge in 1976 and a License Speciale en Droit Europeen (with Distinction) from the University of Brussels in 1978. I was admitted to the English Bar in 1977 and have been continuously in practice as a Barrister since 1980. As a member of the Bar, I am qualified to advise and deliver opinions on matters of English law.
2. I specialise in business law with a heavy emphasis on insolvency matters and have been involved in many of the contentious insolvencies which have come before the English courts since I began to practice. A true and correct copy of my Summary Curriculum Vitae setting out my professional qualifications and experience in greater detail is attached as Exhibit A. I have previously provided expert evidence of English law in this matter and in relation to a number of matters proceeding before the United States Bankruptcy Court for the Southern District of New York.

3. I am aware that I was recently qualified as an expert in English law by the Superior Court in this case.
4. I submit this affidavit in connection with the ACE Companies' motion for stay of the Superior Court's order of September 22, 2005 pending the mandatory appeal. More specifically, I wish to provide the Court with information on the process for the approval of the scheme of arrangement (the "Scheme") that the Joint Provisional Liquidators ("JPLs") for Home Insurance Company are currently seeking in the High Court of Justice in England (the "High Court").
5. In their Petition, the JPLs have asked the High Court to sanction the Scheme on the grounds that it will benefit Home and the AFIA Creditors. They have not asked the High Court to make a ruling on whether the agreement and compromise between Home and the AFIA Creditors (the "Proposed Agreement") is fair and reasonable under New Hampshire law. The High Court would consider that issue to be the province of the New Hampshire courts. Instead, the High Court's inquiry on the sanction petition will be limited to the Scheme itself.
6. The High Court will typically base its decision in this type of matter on the written evidence and the written and oral submissions of the parties, and it would be highly unusual for the High Court in this case to undertake any significant review the evidence from the New Hampshire proceedings on the fairness and reasonableness of the Proposed Agreement under New Hampshire law. I do not believe that the High Court will evaluate that evidence or issue any ruling regarding the Proposed Agreement's fairness and reasonableness.
7. I would expect that, as a matter of comity, the High Court would defer to and respect the decisions of the New Hampshire courts and the applicable New Hampshire law, including any rules relating to stays of orders pending appeal.

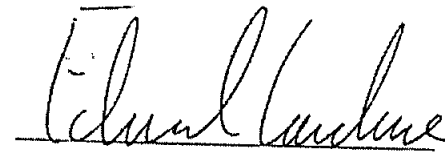
Signed under the penalties of perjury this 1st day of November
2005.

Executed at London, England
On 1st November 2005



Richard Daniel Hacker Q.C.

Subscribed and sworn to me before me this 1st day of November
2005 at London, England



Notary Public, LONDON, ENGLAND

EDWARD GARDNER

M4 COMMISSION G411166 WITH C1166

