THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2005-0740

In the Matter of the Liquidation of
The Home Insurance Company

LIQUIDATOR'S OBJECTION TO ACE COMPANIES' MOTION FOR REHEARING AND RECONSIDERATION

Roger A. Sevigny, Commissioner of Insurance of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby objects to the ACE Companies' motion for rehearing and reconsideration of the Court's December 5, 2006 opinion. As reasons therefor, the Liquidator states:

1. A motion for rehearing or reconsideration must "state with particularity the points of law or fact that in the professional judgment of the movant the court has overlooked or misapprehended." Supreme Court Rule 22(2). The points raised in the ACE Companies' motion do not warrant rehearing or reconsideration because the Court addressed and rejected each of them in its decision. The motion is merely reargument, and it should be denied.

2. The ACE Companies first argue that the Court overlooked alleged "concessions" that payments to the AFIA Cedents are "distributions." The Court, however, did not miss these matters. The language from the agreement with AFIA Cedents, approval motion and testimony cited by the ACE Companies is drawn from descriptions of how the agreement works. See ACE Motion ¶¶ 5-9. The Court summarized the workings of the agreement with AFIA Cedents in its decision in similar terms. Opinion at 5 (E.g., "In exchange for the filing of their claims, the liquidator would distribute a portion of this recovery directly to AFIA Cedents."; "The distributions would be made to the AFIA Cedents proportionately, based upon the value of their

allowed claims against Home."). Given the summary of the agreement in the Opinion, there is no basis to contend that the Court overlooked the language cited by the ACE Companies.

3. In any event, the ACE Companies' reference to particular bits of wording or testimony as "concessions" is an attempt to reframe a legal issue (whether the payments may be classified as administration costs) as a factual one. The ACE Companies' argument, however, is a legal one. They contend that any link between the payments under the agreement and the AFIA Cedents' claims means that the payments cannot be administration costs. See, e.g., ACE Motion ¶ 6. The Court considered this issue and rejected the ACE Companies' attempt to disregard the reason for the payments. It focused instead on the operation and purpose of the agreement to bring in assets that otherwise would not be collected for the benefit of Home's creditors. See Opinion at 12-13.

4. The ACE Companies mischaracterize the Court's decision on this point. The Court did not merely state that "[t]he proposed payments do not arise from the AFIA Cedents' Class V claims themselves." ACE Motion ¶ 4 (quoting Opinion at 12). The Court continued – in words omitted by the ACE Companies:

> but rather as an inducement for the AFIA Cedents to file claims in the liquidation in order to bring a net benefit to creditors of the estate. Thus, while the AFIA Cedents' claims against Home arose pre-liquidation, their right to payment under the proposed agreement will arise post-liquidation.

Opinion at 12 (emphasis in original). See id. at 13. The complete quote makes clear that the Court properly recognized that the payments are only being made to obtain post-liquidation action to benefit Home's creditors and found that to be the dispositive factor.

5. The ACE Companies next contend that the Court misapprehended the law in distinguishing the bankruptcy cases regarding administrative expenses. However, the Court carefully distinguished the Bankruptcy Code provision at issue in those cases from the New

Hampshire statute. The Court correctly noted that the Bankruptcy Code contains a specific list of items that constitute administrative expenses, see 11 U.S.C. § 503(b), while the New Hampshire statute defines administration costs "more generally." Opinion at 12. The Court specifically quoted the "actual and necessary costs of preserving or recovering the assets of the insurer" language of RSA 402-C:44, I (emphasis added), which includes the underscored phrase not found in the Bankruptcy Code. The Court's distinction is well-grounded.

6. Moreover, this difference in statutory language is not the Court's "sole ground" or "only basis" (ACE Motion ¶¶ 11, 12) for distinguishing the bankruptcy cases cited by the ACE Companies. The Court described those cases as holding that administrative expenses "include only rights to payment that arise post-liquidation, and exclude claims that arise pre-liquidation." Opinion at 11. After distinguishing the Bankruptcy Code, the Court went on to hold that the payments here arose not from the Class V claims but as an inducement to bring a net benefit to Home's creditors so that "while the AFIA Cedents' claims against Home arose pre-liquidation, their right to payment under the proposed agreement will arise post-liquidation." Opinion at 12. The Court thus held that the test posed by the bankruptcy cases – whether "the right to payment arose from a post-petition transaction with the debtor estate" and the "consideration supporting the right to payment was beneficial to the estate" (e.g., Woburn Assocs. v. Kahn (In re Hemingway Transport, Inc.), 954 F.2d 1, 5 (1st Cir. 1992)) – is satisfied here.[1]

7. In sum, the ACE Companies' contentions regarding the classification of the payments to AFIA Cedents as administration costs are no more than reassertions of arguments

[1] CIC's reliance on In re Food Barn Stores, Inc., 175 B.R. 723 (Bkrtcy. W.D. Mo. 1994), is misplaced. The court there acknowledged and applied the two part Woburn Assocs. test. See id. at 726. The court held that a pre-petition indemnity claim was not an administration expense merely because it accrued post-petition under state-law, id. at 728, and it concluded that the claim failed the first part of the test because it arose pre-petition. Id. at 730. It further held that the claim failed the second part of the test because the estate received no benefit. Id. at 731. The case is thus readily distinguishable because it involved no post-liquidation transaction and because the asserted administrative expense provided no benefit to the estate. This is consistent with this Court's reasons for distinguishing Oxendine v. Comm'r of Ins. of North Carolina, 494 S.E.2d 545 (Ga. Ct. App. 1997). Opinion at 13.

previously rejected by the Court. The Court did not overlook or misapprehend anything so as to warrant rehearing or reconsideration.

8. CIC's arguments regarding IRMA similarly fail to support a motion under Rule 22. The Court properly looked to the regulatory position taken by the national body of state insurance commissioners in adopting IRMA, including text and drafting notes. See 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 32 (4th Quarter 2005) (vote of plenary session approving IRMA); id. at 113 (text of IRMA § 801 including drafting note).[2]

9. As an initial matter, the ACE Companies' position that IRMA should not be considered is ironic: the ACE Companies themselves first raised IRMA before the Superior Court. As the Superior Court noted, ACE's witness Mr. Craig "took issue with the pending agreement, testifying that these very issues had been the subject of recent discussions within a drafting group at the NAIC charged with updating the Model Receivership Act." J.A. 52. "Only on cross-examination did Mr. Craig acknowledge that the current draft recently approved by the NAIC intermediate levels, included a drafting note" that the Superior Court found "completely undermined" ACE's evidence. Id. See Tr. V 112-114. The drafting note has now been adopted by the full NAIC as part of IRMA. 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 113 (4th Quarter 2005), reprinted in III NAIC Model Laws, Regulations and Guidelines at 555-84. Having raised the lower level NAIC proceedings regarding IRMA before the Superior Court, the ACE Companies' cannot now reasonably ask the Court to ignore the final version as "irrelevant". ACE Motion ¶ 22.

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[2] It is worth noting that – contrary to the ACE Companies' assertion (ACE Motion ¶¶ 18, 20) – IRMA has already been enacted by one state legislature despite its relative youth. See Tex. Code Ann. Ins. §§ 21A.001 to 21A.402 (2005). III NAIC Model Laws, Regulations and Guidelines at 555-100 (2006).

10. Even if the ACE Companies had not introduced IRMA into the case, the Court properly referred to it. Contrary to the ACE Companies' suggestion (ACE Motion ¶ 19), the placement of the NAIC's comment in a "drafting note" only makes it more pertinent. Having the comment in a note, and not as an addition to the model act, shows – in the language of the note – that the Liquidator's power to pay administrative costs to lower priority creditors is "implicit", and need not be express. The Court properly rejected the ACE Companies' cramped view of the drafting note, which clarifies that payments of administration costs by a liquidator (subject to approval of the court) to lower priority creditors where that assists in collection of assets for the benefit of creditors "do not constitute distributions so as to circumvent priority classes or establish subclasses within a class." Opinion at 9 (quoting the IRMA § 801 drafting note). It is hard to see how the note could be more on point, and the ACE Companies do not so much attempt to distinguish the note as simply to deny it.[3]

11. The ACE Companies' other arguments concerning IRMA also plow old ground. The Court recognized that "[t]he New Hampshire legislature has not adopted IRMA," Opinion at 9, but it considered the common ancestry of the New Hampshire statutes and IRMA in the Wisconsin Act, which underlies both the New Hampshire statutes and the NAIC Model Act, the precursor of IRMA. Id. The Court also noted that IRMA § 801 and RSA 402-C:44 are "analogous" sections concerning priorities of distribution and, more generally, the "similarities" between IRMA and the New Hampshire statute. Id. at 9, 10. The Court rejected the distinctions proffered by the ACE Companies in light of these factors, which plainly support the relevance of IRMA and the drafting note. The Court has relied on similar factors in referring to model acts

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[3] The ACE Companies' assertion that consideration of the drafting note violated the Court's own principles of statutory construction "given the plain meaning of the statute" (ACE Motion ¶ 21) ignores the fact that the Court rejected the ACE Companies' strained plain meaning argument before turning to the drafting note. See Opinion at 8 ("[T]he plain language of RSA 402-C contains no bar on payment of administration costs to lower priority creditors in order to collect an asset.").

before. See, e.g., Estate of Gordon-Couture v. Brown, 152 N.H. 265, 267-68, 273 (2005); Benson v. N.H. Ins. Guaranty Assoc., 151 N.H. 590, 595-99 (2004).[4]

12. The Court's citation of IRMA serves to refute the attempt by the ACE Companies and their amicus, the Reinsurance Association of America, as well as Benjamin Moore & Co., to portray the Court's decision as placing New Hampshire out of the mainstream. The drafting note and the amicus brief of the NAIC confirm the position of the national body of insurance regulators that liquidators have authority to make administration cost payments to lower priority creditors in these circumstances without violating the priority statutes. See NAIC Amicus Br. at 5 ("IRMA clarifies that, in order to maximize the collection of estate assets, the necessity will arise for the liquidator to enter agreements to incentivize the prosecution of a claim, provided the agreement results in a net benefit to creditors of the estate."); id at 6 ("The drafting note, in addressing an IRMA provision similar to that in the New Hampshire Act, makes clear that the Liquidator has the implicit authority to make the type of administrative payment at issue in this case."). That the interests of policyholder-level creditors nationwide are also served by this decision is similarly confirmed by the amicus brief submitted by the National Conference of Insurance Guaranty Funds, the national body of guaranty funds who are collectively the largest policyholder-level creditors in insurer liquidations across the country.

13. In sum, the ACE Companies fail to identify any matters that the Court overlooked or misapprehended in its decision. There is accordingly no basis for their motion for rehearing or reconsideration under Supreme Court Rule 22.

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[4] The ACE Companies mischaracterize the Court's decision when they assert that the Court "tries" to support its reference to IRMA by citing Benson v. N.H. Ins. Guaranty Assoc., 151 N.H. 590, 599 (2004). ACE Motion ¶ 20. The Court actually cited Benson only in summarizing the Liquidator's argument. Opinion at 9.

WHEREFORE, the ACE Companies' motion should be denied.

Respectfully submitted,

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December 21, 2006

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Objection to the ACE Companies' Motion for Rehearing and Reconsideration was sent, this 21st day of December, 2006, by first class mail, postage prepaid, to counsel on the attached service list.

Eric A. Smith

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