Orr&Reno
Professional Association

One Eagle Square, P.O. Box 3550, Concord, NH 03302-3550
Telephone 603-224-2381 • Facsimile 603-224-2318
www.orr-reno.com

December 15, 2006

VIA HAND DELIVERY

Eileen Fox, Clerk
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301-6160

Re: In The Matter of the Liquidation of The Home Insurance Company
No. 2005-0740

Dear Clerk Fox:

Enclosed please find an original and seven copies of ACE Companies' Motion For Rehearing And Reconsideration Of Opinion Issued On December 5, 2006 for filing in the above-referenced matter.

Thank you for your attention to this matter.

Very truly yours,

Ronald L. Snow

RLS:pht
Enclosures
cc: Counsel of Record
430582_1

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In the Matter of the Liquidation of
The Home Insurance Company

No. 2005-0740

ACE COMPANIES' MOTION FOR REHEARING AND RECONSIDERATION OF OPINION ISSUED ON DECEMBER 5, 2006

Appellants Century Indemnity Company ("CIC"), ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (the "ACE Companies") respectfully move, pursuant to Rule 22 of the Supreme Court Rules, for a rehearing and reconsideration of this Court's opinion issued on December 5, 2006 (the "Opinion") affirming the Superior Court's approval of an agreement (the "Proposed Agreement") between the Liquidator of Home Insurance Company ("Home") and a subclass of creditors known as the "AFIA Cedents." In support of their motion, the ACE Companies respectfully state as follows:

Introduction

1. The Court has overlooked or misapprehended several points of law and fact by allowing the Liquidator to convert claims distributions to the AFIA Cedents into "costs of administration" (*see* Op. at 11-13), and by relying upon a proposed model act (the Insurer Receivers Model Act ("IRMA")) — which has not been adopted by any state and is the law nowhere — to support the finding that the Liquidator has the authority to vary the order of priority that the Legislature mandated in RSA 402-C:44. (*See id.* at 9-10.) The overlooked evidence includes the Liquidator's concession that the proposed payments to the AFIA Cedents would be distributions on their pre-liquidation claims. As a result, these payments cannot be converted into "costs of administration" under RSA 402-C:44, I.

2. It is vital that the Court rehear and reconsider the facts and law set forth below. The Opinion, as written, would have a dramatic and far-reaching effect on the interpretation of other liquidation statutes across the country. Those statutes, like the New Hampshire statute, are based on a

model liquidation act adopted by the National Association of Insurance Commissioners (the "NAIC").[1] Unless the Court reconsiders the Opinion and reverses the Superior Court's Orders, New Hampshire will be the only state to have allowed its liquidator to rewrite the well-established and mandatory order of priority to benefit one subclass of creditors above all others.[2]

3. It will not be enough, as the Court states in the Opinion (*see* Op. at 10), to have the liquidation courts oversee the process in order to prevent violations of the priority statute. Because its effect would be to condone payments to a subset of lower class creditors — and, ironically, only those creditors — the approval of the Liquidator's scheme here would embolden creditors in other liquidations to demand similar side deals. Claimants that should expect to get only a low percentage recovery would use this Court's approval as leverage and would negotiate for a greater percentage knowing that the estate could be forced to pay more. As a result, liquidators, creditors and the affected reinsurers would be embroiled in expensive negotiations and disputes over similar efforts to reverse the order of priority (which was itself the product of years of hard-fought debate). In short, the clarity and efficiency that the priority statutes currently bring would be lost, at great cost to the insurers' estates and in contravention of the clear legislative intent to give pre-liquidation claimants in Class V an equal right to payment (within their class) only after all higher priority classes have been paid.

Argument

I. The Court Overlooked Facts And Misapprehended The Law In Concluding That The Proposed Claims Distributions Were Transformed Into Administration Costs

4. In its ruling on the administrative cost issue, the Court states that "[t]he proposed payments do not arise from the AFIA Cedents' Class V claims themselves." (Op. at 12.) The Court,

---

[1] The NAIC model act that forms the basis of the New Hampshire statute and liquidation statutes across the country stands in marked contrast to IRMA, which has not been adopted by any state.

[2] In the Opinion, the Court refers to two cases where courts rejected the "ends justifies the means approach" taken by the Liquidator in this matter and it asserts that they are distinguishable. (*See* Op. at 8-9.) Those cases are directly on point and cannot be distinguished simply because they involve set-off. However, the ACE Companies have also cited many other cases (that the Opinion does not address at all) in which the courts

however, completely overlooked the Liquidator's repeated concessions — and a wealth of additional documentary evidence and witness testimony — demonstrating that the proposed payments to the AFIA Cedents would be distributions arising out of their claims against Home.

5. The starting point is the Proposed Agreement and the Liquidator's own description of it. The Proposed Agreement states that the AFIA Cedents will receive "Net Recoveries," which are defined as 50% of the "Proceeds." (Jt. App. 76, ¶ 1.2.) "Proceeds," in turn, are described as "the proceeds received by Home from the ACE Group or any 'Third Party Reinsurer' ... in relation to AFIA business." (Jt. App. 76, ¶ 1.3; emphasis added.) The term "AFIA business" is a reference to, among other things, the reinsurance treaties issued by Home to the AFIA Cedents (the "AFIA Treaties") under which the AFIA Cedents' claims against Home arise (as does Home's claim for reinsurance against CIC). In other words, the "Proceeds" of which the AFIA Cedents would receive 50% under the Proposed Agreement directly arise out of, and are manifestly dependent upon, the AFIA Cedents' claims against Home under the AFIA Treaties. Thus, the AFIA Cedents' right to payment is predicated on their claims arising pre-liquidation.

6. Paragraph 1.9.1 of the Proposed Agreement provides further evidence of the direct link between the AFIA Cedents' claims and the proposed payments. It states that "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." (Jt. App. 78, ¶ 1.9.1; emphasis added.) Thus, the calculation of the proposed payments to the AFIA Cedents is determined by their claims against Home under the pre-liquidation AFIA Treaties. Accordingly, no amount of post-liquidation activity would permit other claimants (even other claimants in Class V) to get access to these same payments; only those with pre-liquidation claims under the AFIA Treaties would be paid.

---

refused to vary from the order of priority. (*See, e.g.*, ACE Companies' Opening Br. at 19-20.) The Liquidator fails to cite any case where the courts have allowed the type of scheme that the Liquidator puts forth here.

7. Moreover, pursuant to Paragraph 1.5.2 of the Proposed Agreement, any claims payment to the AFIA Cedents as a result of the Liquidator's scheme reduces — dollar for dollar — "any distribution payable to you in your capacity as a creditor in Home's New Hampshire liquidation." (Jt. App. 77, ¶ 1.5.2.) The Liquidator's motion for approval of the Proposed Agreement (the "Approval Motion") describes Paragraph 1.5.2 as follows: "[I]n the event that AFIA Cedents may be entitled to a distribution as a creditor of Home in the New Hampshire proceeding, the distributions to AFIA Cedents under the Scheme will be taken into account in determining [the] appropriate New Hampshire distributions." (Jt. App. 70, ¶ 18; emphasis added.) It is telling that the Liquidator refers to both the payments under the Proposed Agreement and the payments to the AFIA Cedents as Class V creditors as "distributions." That is because they both represent payments arising out of the AFIA Cedents' pre-liquidation claims against the estate. Indeed, if the proposed payments were truly "costs of administration," there would be no reason to include the reduction mechanism in Paragraph 1.5.2.

8. The Liquidator repeats these concessions several times in the Approval Motion. He states, for example, that the Proposed Agreement would result in the payment "of a portion of the net proceeds received from ACE Group or any reinsurer other than an ACE Group company that reinsured Home for AFIA business ... in respect of the AFIA Cedents' claims for distribution to the AFIA Cedents." (Jt. App. 67, ¶ 12; emphasis added. *See also* Jt. App. 69, ¶ 15 (noting that the Proposed Agreement would provide for the reinsurance proceeds "to be distributed" to the AFIA Cedents "according to the value of their claims against Home under the AFIA Treaties as determined in the New Hampshire liquidation"); emphasis added.) In one of the final paragraphs describing the Proposed Agreement, the Liquidator asserts that "it is appropriate to agree that the AFIA Cedents may receive a portion of the net proceeds received on their claims." (Jt. App. 72, ¶ 21; emphasis added.) In

sum, the Liquidator freely admits in the Approval Motion that the proposed payments arise directly out of the AFIA Cedents' reinsurance claims against Home under the pre-liquidation AFIA Treaties.[3]

9. In light of this evidence, it is not surprising that the hearing witnesses also described the proposed payments as directly linked to the AFIA Cedents' pre-liquidation claims. Rhydian Williams of Equitas (one of the leading AFIA Cedents) testified as follows:

> Q. Are the payments that Equitas will be collecting under the agreement being made in partial satisfaction of the reinsurance claims that Equitas has against Home?
>
> A. Well, they're related to the claims that have been presented, yes.
>
> Q. Well, they're related to the claims that are being presented in the sense that, unless those claims are allowed in the estate, there's no way for Equitas to be paid, correct?
>
> A. Correct.

(Williams Test., Vol. 4-B, at 138:10-18; *see also* Ellis Test., Vol. 2-B, at 135:10-12 ("Q. Some return on their claims under pre-liquidation contracts, that's what they [the AFIA Cedents] were looking for, right? A. Effectively.").)

10. The above evidence squarely contradicts the Court's ruling that the proposed payments do not arise from AFIA Cedents' Class V reinsurance claims. These facts, however, were clearly overlooked by the Court because they are not referred to in the Opinion and they cannot be reconciled with the Court's conclusion.[4]

11. The Court also misapprehended the law in finding that bankruptcy cases on "administrative expenses" are not relevant. The Court held that the bankruptcy cases do not apply to

---

[3] The Superior Court similarly found that the allowance of the AFIA Cedents' claims under the pre-liquidation AFIA Treaties is a condition to the proposed payments and that such payments would "be paid proportionally to all AFIA Cedents according to the value of their allowed claims." (Jt. App. 34-35.)

[4] Because the Court's finding on the creation of subclasses is dependent on an assumption that the proposed payments are not claims distributions (*see* Op. at 13), it too must fall when the payments are properly characterized as distributions on account of pre-liquidation claims.

this case on the sole ground that the definition of "administrative expenses" under the Bankruptcy Code is narrower than the definition of "costs of administration" in RSA 402-C:44, I. (*See* Op. at 11-12.) The basis of the Court's holding is an assertion that the Bankruptcy Code, 11 U.S.C. § 503, contains an enumeration of the items that may be considered "administrative expenses," whereas RSA 402-C:44, I does not enumerate specific items and instead defines "costs of administration" more generally to include "the actual and necessary costs of preserving or recovering the assets of the insurer." (Op. at 12.) The Court, however, has misread the two statutes.

12. Although Section 503(b) of the Bankruptcy Code contains a listing of "administrative expenses," it begins by defining them very broadly as "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). The New Hampshire statute begins with a similar definition, noting that the "costs and expenses of administration" include "the actual and necessary costs of preserving or recovering the assets of the insurer." RSA 402-C:44, I. The New Hampshire statute, like Section 503(b), then goes on to enumerate specific examples of "costs of administration": "compensation for all services rendered in the liquidation; any necessary filing fees; the fees and mileage payable to witnesses; and reasonable attorney's fees." RSA 402-C:44, I. The enumerated items in Section 503 are slightly more specific and there are a few more than in RSA 402-C:44, I, but the two statutes are qualitatively the same.[5] Accordingly, the only basis given by the Court for distinguishing between the New Hampshire and federal statutes does not withstand scrutiny.

13. In citing bankruptcy case law, the ACE Companies pointed out that RSA 402-C:44, I derives from the administrative expenses provisions in the Bankruptcy Code. The 1967 Wisconsin Insurers Rehabilitation and Liquidation Act (the "Wisconsin Act") formed the basis for the New Hampshire Insurers Rehabilitation and Liquidation Act (the "Act"), and Section 645.68(1) of the Wisconsin Act is identical to RSA 402-C:44, I. The Wisconsin Act states that Section 645.68(1) is

---

[5] In his appellate brief, the Liquidator conceded that the provisions in the RSA 402-C:44, I and Section 503(b) are "similar." (Liquidator's Br. at 24.)

"freely adapted" from Section 64a of the Federal Bankruptcy Act, which is in turn the basis for Section 503(b) of the Bankruptcy Code. *See* Senate Report No. 95-989, 11 U.S.C. § 503. Therefore, the bankruptcy case law on administrative expenses is highly relevant here.

14. The Liquidator agrees because he cited several bankruptcy cases in the portion of his appellate brief discussing RSA 402-C:44, I. (*See* Liquidator's Br. at 24-26.) The Liquidator, the ACE Companies and appellant Benjamin Moore & Co. even cited several of the same bankruptcy cases interpreting Section 503(b), such as *Mass. Div. of Employment & Training v. Boston Reg'l Med. Ctr. (In re Boston Reg'l Med. Ctr.)*, 291 F.3d 111 (1st Cir. 2002); *Woburn Assocs. v. Kahn (In re Hemingway Transport, Inc.)*, 954 F.2d 1 (1st Cir. 1992); and *In re Food Barn Stores, Inc.*, 175 B.R. 723 (Bankr. W.D. Mo. 1994). These cases lay down a clear rule that a claim will qualify as an administrative expense only if "the right to payment arose from a postpetition transaction with the debtor estate, rather than from a prepetition transaction with the debtor." *Woburn Assocs.*, 954 F.2d at 5. Here, the Liquidator has conceded — and the evidence shows — that the right to payment does not arise unless the AFIA Cedents have a claim against Home under the AFIA Treaties, which were indisputably entered into pre-liquidation. In the absence of those pre-liquidation transactions, the AFIA Cedents would have no claims and hence no right to payment under the Proposed Agreement.[6]

15. The Liquidator tries to distinguish the applicable bankruptcy cases by insisting that they do not involve situations where the claimants took "post-petition action under a post-petition agreement." (Liquidator's Br. at 25; emphasis in original.) The Liquidator, however, does not cite any cases holding that such post-petition activity alters the analysis, which is whether the right to payment would exist without the pre-petition transaction. Furthermore, the Liquidator is wrong in suggesting that the cases cited by the ACE Companies do not involve any post-petition activity.

---

[6] The bankruptcy cases also recognize that the administrative costs provisions must be construed narrowly because the payment of such expenses reduces the funds available to pre-petition creditors. *See, e.g., id.* The Liquidator's broad interpretation of administration costs conflicts with this well-established principle.

16. In *Food Barn*, for example, the court held that a claim for indemnification arose pre-petition, even though the indemnitee did not have a right to seek payment, under Missouri law, from the indemnitor unless the latter settled the personal injury lawsuit post-petition. *See* 175 B.R. at 727-31. The *Food Barn* court pointed out that — notwithstanding the post-petition activity and rights that accrued under Missouri law — the original act giving rise to the indemnification claim (*i.e.*, the injury to the person bringing the lawsuit) occurred pre-petition and therefore barred the claim as an administrative expense. *See id.* at 728-29; *see also Woburn Assocs.*, 954 F.2d at 5-6 (holding that attorneys' fees incurred in defending post-petition action were not an administrative expense because they arose out of pre-petition indemnification agreement with debtor; court noted that "[a] right to payment predicated on an executed prepetition contract is not entitled to priority payment as an administrative expense"). By the same token, the AFIA Cedents' entry into the Proposed Agreement post-liquidation does not change the fact that they could not have been parties to the Agreement absent their claims against Home under the pre-liquidation AFIA Treaties.[7]

17. Thus, the "inducement" that Liquidator proposes paying to the AFIA Cedents is not just an incentive to file claims; it would constitute an improper payment on their pre-liquidation claims.

II. The Court Misapprehended Section 801 Of IRMA And Overlooked Relevant Facts In Concluding That The Proposed Revision Clarifies The Authority Of The Liquidator To Alter The Order Of Priority Through The Proposed Payments To AFIA Cedents

18. IRMA — which merely contains proposed revisions to the NAIC Model Act and still has not been adopted by any state legislature — does not lend any support to the Court's finding that the Liquidator may circumvent the order of priority by making Class I payments to the AFIA Cedents in relation to their Class V Claims.

---

[7] Because the ACE Companies have shown that the AFIA Cedents' right to payment arises from their claims under the pre-liquidation AFIA Treaties, there is no basis to distinguish this case from *Oxendine v. Comm'r of Ins. of North Carolina*, 494 S.E.2d 545 (Ga. Ct. App. 1997).

19. The Court relies heavily on the "drafting note" for Section 801 of IRMA, which deals with the order of distribution in a liquidation. (*See* Op. at 9-10.) As an initial matter, the Court has overlooked the fact that the drafting note was deliberately removed from the text of IRMA and is not part of the proposed revisions. (*See* Amicus Br. of Reinsurance Association of America at 2-4.) Even more significantly, the drafting note simply states that payments for administration costs to creditors who also have claims below Class I do not, by themselves, constitute claims distributions in violation of the order of priority. (NAIC App. at 93.) The drafting note says nothing about such payments under Class I to creditors that are on account of and directly related to their lower priority claims, nor the reclassification of those claims as "costs of administration." The drafting note does not address the issue here, which is whether the Liquidator — having admitted that the proposed payments are claims distributions on the AFIA Cedents' pre-liquidation claims — may recast those payments as Class I administration costs.

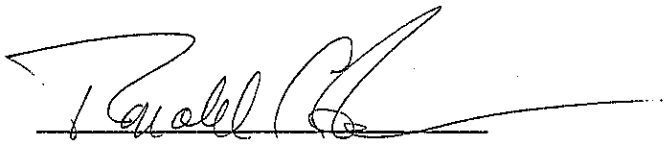
20. The Court tries to justify the reliance on IRMA and the drafting note by stating that it has previously relied on comments to another NAIC model act. (*See* Op. at 9 (citing *Benson v. N.H. Ins. Guaranty Ass'n*, 151 N.H. 590, 599 (2004)).) The difference, however, is that in *Benson* the New Hampshire Legislature had already adopted the model act to which the comments related. *Id.* at 596. In that sense, the NAIC comments in *Benson* were part of the statute's legislative history. In this case, by contrast, the New Hampshire Legislature has not adopted Section 801 of IRMA (nor has any other state), so the drafting note is irrelevant to the interpretation of the existing Act.

21. In addition, the Court made it clear in the Opinion that there is no need to look beyond the Act for "further indication of legislative intent." (Op. at 8.) The Court added that: "[W]e will not consider what the legislature might have said or add language the legislature did not see fit to include." (*Id.*) Here, the consideration of the drafting note was not necessary given the plain meaning of the statute and it violated the foregoing rule set forth by the Court.

22. Therefore, the Court should not have relied on IRMA in concluding that RSA 402-C:25 allows the Liquidator to override the mandatory order of distribution in RSA 402-C:44 because the statutory language is unambiguous and, in any event, IRMA is irrelevant to the issues before the Court.

WHEREFORE, the ACE Companies respectfully request that the Court enter an order granting (a) a rehearing and reconsideration of the facts and law referred to in this Motion; and (b) such other and further relief as it deems just and proper.[8]

Respectfully submitted,



Gary S. Lee
Pieter Van Tol

LOVELLS
590 Madison Avenue
New York, New York 10022
(212) 909-0600

and

Ronald L. Snow
Lisa S. Wade

ORR & RENO, P.A.
One Eagle Square, P.O. Box 3550
Concord, NH 03302-3550
(603) 224-2381

Attorneys for the ACE Companies

[8] Even if the Court were to deny the ACE Companies' motion for rehearing and reconsideration, the ACE Companies respectfully request that the Court amend the Opinion to reflect the proper relationship among the parties. The Opinion refers to the "ACE Companies" as reinsurers of Home. (*See, e.g.*, Op. at 1.) In fact, as the Insurance and Reinsurance Assumption Agreement reflects and the Opinion notes elsewhere, CIC is the reinsurer of Home (as the successor to Insurance Company of North America). (*See* Jt. App. 642; Op. at 3.) The term "ACE Companies," as used in this case, embraces several companies in addition to CIC, including those who are creditors of Home rather than its reinsurers.

Certificate of Service

I, Lisa Snow Wade, Esq., hereby certify that on this 15th day of December, 2006, I have caused a copy of the foregoing to be forwarded by first class US mail to:

Liquidator:
J. David Leslie, Esq.
Rackemann, Sawyer and Brewster
One Financial Center
Boston, MA 02111

J. Christopher Marshall, Esq.
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397

ACE Companies:
Gary S. Lee, Esq.
Lovells
590 Madison Avenue
New York, NY 10022

Lisa Snow Wade, Esq.
Orr and Reno, PA
One Eagle Square
Box 3550
Concord, NH 03302-3550

Benjamin Moore
Andre Bouffard, Esq.
Downs, Raichlin, Martin, PLLC
199 Main Street
Box 190
Burlington, VT 05402

NAIC:
Rebecca W. McElduff, Esq.
2301 McGee Street
Suite 800
Kansas City, MO 64108-2662

Bruce A. Harwood, Esq.
Sheehan Phinney Bass + Green
1000 Elm Street
Manchester, NH 03105-3701

NCIGF:
Doreen F. Connor, Esq.
Wiggin & Nourie, PA
P.O. Box 808
Manchester, NH 03105

Suzanne Sahakian, Esq.
Dykema Gossett PLLC
400 Renaissance Center
Detroit, MI 40243

Ronald L. Snow