

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

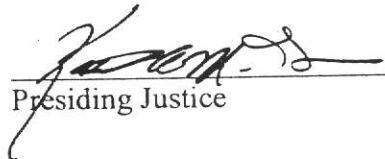
In the Matter of the Liquidation of  
The Home Insurance Company

ORDER

On October 27, 2004, the Court granted ACE Companies' Motion to Transfer Question of Law for Interlocutory Appeal and ordered transfer of ACE Companies' Interlocutory Appeal Statement. The October 27, 2004 order transferring the Interlocutory Appeal Statement is hereby vacated. The Joint Motion to Approve Agreed Interlocutory Appeal Statement is granted, and the agreed upon Interlocutory Appeal Statement is transferred.

So Ordered.

Dated: 11/5/04

  
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Presiding Justice

A TRUE COPY ATTEST;

Docket No. 03-E-0106

*William S. McGraw*  
CLERK

In the Matter of the Liquidation of  
The Home Insurance Company

**INTERLOCUTORY APPEAL STATEMENT**

**I. Statement of the Case and Statement of Facts**

This interlocutory appeal is taken by Century Indemnity Company (“Century”), ACE Property and Casualty Insurance Company (“ACE P & C”), Pacific Employers Insurance Company (“PEIC”), and ACE American Reinsurance Company (“AARE”) (collectively, the “ACE Companies”), and Benjamin Moore & Co. (“Benjamin Moore”) from the ruling issued on October 8, 2004 by the Merrimack County Superior Court (McGuire, J.) (the “Order on Remand”) in favor of Roger Sevigny, Insurance Commissioner for the State of New Hampshire, as Liquidator (the “Liquidator”) of the Home Insurance Company (“Home”) that potential payments to certain insurers who had ceded insurance risk to the Home’s UK branch (the “AFIA Cedents”) are administrative expenses authorized under RSA 402-C:1, III and IV; RSA 402-C:25, IV, VI and XXII; and RSA 402-C:44, I. (Order on Remand at 14.) The ACE Companies and Benjamin Moore had intervened, without objection, in the Home liquidation proceedings to challenge the agreement between the Liquidator and the AFIA Cedents (the “Agreement”), pursuant to which the AFIA Cedents would be provided financial incentive for their filing and prosecution of claims in Home’s liquidation.

In its Order issued on April 29, 2004 (the “April 29 Order”), the Superior Court ruled that “[t]he agreement proposed by the Liquidator is authorized under the broad array of powers granted the Liquidator under RSA 402-C:25 and is consistent with the goals and purposes of the

statute to protect the interests of the insured and creditors.” (April 29 Order at 2.) The New Hampshire Supreme Court accepted an appeal from the April 29 Order.

After briefing and oral argument, the New Hampshire Supreme Court, in an Order dated September 13, 2004 (the “September 13 Order”), vacated the April 29 Order approving the Agreement, and remanded the case to the Superior Court. It specifically directed the Superior Court to consider five issues upon remand:

- (1) Whether the New Hampshire liquidation proceedings should be stayed pending the completion of the regulatory and judicial proceedings in the United Kingdom;
- (2) Whether the Superior Court has an independent obligation to assess the fairness of the Agreement;
- (3) Whether the intervenors have standing to contest the Agreement;
- (4) Whether the “Necessity of Payment Doctrine” or some other equitable doctrine authorizes the Liquidator or the Superior Court to vary the mandatory priorities set forth in RSA 402-C:44; and
- (5) Whether the proposed payments to the AFIA Cedents qualify as administrative expenses under RSA 402-C:44, I.

(September 13 Order at 2.)

Following conferences with counsel and the submission of papers regarding a draft order, the Superior Court issued the Order on Remand and ruled, *inter alia*, that (1) the ACE Companies and Benjamin Moore have standing to contest the Agreement; (2) consideration of a stay of the New Hampshire proceedings is not appropriate in the circumstances; (3) equitable doctrines such as the Necessity of Payment doctrine may not override a statute enacted on a

particular topic; and (4) it recognized an independent obligation to assess the fairness of the Agreement. (Order on Remand at 4-6, 10-13).

In response to the Supreme Court's specific inquiry whether the proposed payments to the AFIA Cedents qualify as administrative expenses under RSA 402-C:44, I, the Superior Court ruled that such payments would be administrative expenses authorized under RSA 402-C:1, III and IV; 402-C:25, IV, VI, and XXII; and RSA 402-C:44, I. (See Order on Remand at 6-10.) The parties agreed that the Superior Court's determination as to whether the proposed payments to the AFIA Cedents qualify as administrative expenses under RSA 402-C:44, I is a matter of law. (See Order on Remand at 6).

The Superior Court granted the ACE Companies and Benjamin Moore leave to appeal the legal issue of whether the proposed payments to the AFIA Cedents qualify as administrative expenses. (*Id.* at 14). The facts forming the basis of the Superior Court's Order on Remand in this case are summarized in said Order which accompanies this statement, pursuant to Supreme Court Rule 8.

## **II. Question of Law**

The following controlling question of law is transferred in accordance with Supreme Court Rule 8 and RSA 491:17:

Whether, as a matter of law, the payments to the AFIA Cedents under the Agreement qualify as administrative expenses under RSA 402-C:44, I.

## **III. Statement of Reasons for Interlocutory Transfer**

Rule 8 of the Supreme Court Rules requires "a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an interlocutory appeal may materially advance the termination or clarify further proceedings of the litigation, protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an