

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In the Matter of the Liquidation of  
The Home Insurance Company

Docket No.

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

Defendants, Century Indemnity Company, 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., move this Court to stay the order of the Merrimack County Superior Court (McGuire, J.), dated April 29, 2004 (the "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, pending the mandatory appeal by Benjamin Moore & Co. ("Benjamin Moore") to this Court. (A copy of the Order is attached hereto as Exhibit A.) In support of this Motion, the ACE Companies respectfully state:

(1) In the Order, the Superior Court approved of an agreement (the "Proposed Agreement") that Roger A. Seigny, Insurance Commissioner of the State of New Hampshire, as Liquidator (the "Liquidator" of Home Insurance Company ("Home")), entered into with representatives of certain insurers who had ceded insurance risk to Home as a participating member of the American Foreign Insurance Association ("AFIA") reinsurance pool. (Those insurers will be referred to herein as the "AFIA

Cedents” and the reinsurance contracts issued by Home to the AFIA Cedents will be referred to as the “AFIA Treaties.”)

(2) In the motion for approval of the Proposed Agreement, the Liquidator alleged that the AFIA Cedents would have no reason to submit their claims in the Home liquidation because their claims are Class V claims under N.H. Rev. Stat. Ann. § 402-C:44, and Class V claimants are unlikely to receive a distribution in Home’s liquidation. The Liquidator sought to justify the Proposed Agreement as a “compromise” or “settlement” of alleged threats by the AFIA cedents to seek to satisfy their claims against Home through separate proceedings in England or otherwise outside the New Hampshire liquidation. Although the Liquidator acknowledged that such attempts would be without legal basis and could be defeated, the Proposed Agreement purports to provide an “incentive” to the AFIA Cedents to file their claims in the Home liquidation by setting into motion a “scheme of arrangement” under English law which would pay the AFIA Cedents half of the net proceeds that are recovered from companies who reinsured the liabilities under the AFIA Treaties.

(3) The ACE Companies, which are reinsurers of Home’s AFIA liabilities and Class V creditors, objected to the Liquidator’s motion. The ACE Companies alleged that the Proposed Agreement directly violates the mandatory order of distribution provisions in N.H. Rev. Stat. Ann. § 402-C:44 because the AFIA Cedents would receive a distribution before the claims of higher classes of creditors had been paid in full and in an amount different from other Class V creditors. The ACE Companies further alleged that the Liquidator has no authority to enter into a “compromise” with certain creditors in violation of the order of distribution established by the Legislature. The ACE Companies

also requested (in the event that the Superior Court held that the Liquidator had the discretion to effect such a settlement) an opportunity to conduct limited discovery and present evidence on the issue of whether the Proposed Agreement was a reasonable exercise of the Liquidator's authority.

(4) Without allowing any discovery and without holding an evidentiary hearing, the Superior Court approved the Proposed Agreement in the Order and found that the Liquidator had the power to enter into the agreement "to protect the interests of the insureds and creditors" of Home. (Order Exhibit A at 2.)

(5) On May 6, 2004, shortly after receiving the Order, the ACE Companies filed a Motion for Interlocutory Transfer from Ruling with the Merrimack County Superior Court, and had planned to file a motion to stay the Court's Order with the Superior Court pending its interlocutory appeal.

(6) On May 7, 2004, Benjamin Moore filed a Rule 7 Notice of Mandatory Appeal directly with this Court, divesting the Superior Court of the jurisdiction to rule on a motion to stay.<sup>1</sup> As a result, the ACE Companies are seeking a stay from this Court rather than the Superior Court.

(7) Also on May 7, 2004, the Liquidator filed its Opposition to Motion to Transfer Question of Law For Interlocutory Appeal in the Superior Court and, in the opposition, agreed that the Order was final and appealable as of right. The Liquidator expressly stated in the opposition that he intended to begin to implement the Agreement

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<sup>1</sup> Pursuant to Rule 7, the ACE Companies are a party to this appeal by virtue of the Notice of Mandatory Appeal filed by Benjamin Moore. If this Court rules that the Benjamin Moore appeal does not divest the Superior Court of jurisdiction, the ACE Companies will promptly file a stay motion before Judge McGuire.

approved by the Court pending any appeal. *See* Liquidator's Opposition to Motion to Transfer, a copy of which is attached hereto as Exhibit B, at 2.

(8) A stay of the Order would preserve the status quo and the ultimate relief that the ACE Companies and Benjamin Moore seek in this appeal, which is a reversal of the Superior Court's decision that the AFIA Cedents may receive a multi-million distribution in violation of N.H. Rev. Stat. Ann. § 402-C:44. In the absence of a stay, the ACE Companies would suffer irreparable injury because the Liquidator (as he has already stated) will begin to implement the U.K. scheme of arrangement contemplated in the Proposed Agreement. That would include the initiation of proceedings in a court in England for approval of the scheme of arrangement, which, as noted above, would ultimately result in a payment to the AFIA cedents in violation of New Hampshire's mandatory order of distribution. The English court, in deciding whether to approve the scheme, would likely take into account the Superior Court's conclusion that the Liquidator's plan does not violate New Hampshire law. If, however, this Court agrees with the ACE Companies that the Proposed Agreement violates New Hampshire law, then the proceedings in the U.K. will have been unnecessary and wasteful. In order to avoid such a result, this Court should stay the Order while the appeal is heard.

(9) The ACE Companies will also be filing a motion with this Court for expedited consideration of the Order. However, in order to prevent the Liquidator from implementing the Proposed Agreement before even an expedited appeal may be heard, this Court should stay the Order pending appeal.