

THE STATE OF NEW HAMPSHIRE SUPREME COURT

In the Matter of the Liquidation of The Home Insurance Company

No. 2004-0319

**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.¹ This motion is made pursuant to Rule 7-A of the New Hampshire Supreme Court Rules (the "Supreme Court Rules") as the ACE Companies have unsuccessfully sought similar relief from the Superior Court. In support of this Motion, the ACE Companies respectfully state as follows:

I. Background

(1) In the Order, the Superior Court approved of an agreement (the "Proposed Agreement") that Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator (the "Liquidator" of Home Insurance Company ("Home")),

¹ Pursuant to Rule 7, the ACE Companies are a party to the appeal by virtue of the Notice of Mandatory Appeal filed by Benjamin Moore.

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. (See Order, a copy of which is annexed as Exhibit A hereto, at 2.)

(5) On May 6, 2004, shortly after receiving the Order, the ACE Companies filed a Motion to Transfer Question of Law for Interlocutory Appeal, and had also planned to file a motion to stay with this Court pending the interlocutory appeal.

(6) On May 7, 2004, Benjamin Moore filed, pursuant to Rule 7 of the Supreme Court Rules, a Notice of Mandatory Appeal directly with the New Hampshire Supreme Court.²

(7) Also on May 7, 2004, the Liquidator filed its Opposition to Motion to Transfer Question of Law For Interlocutory Appeal 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 Proposed Agreement approved by

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