

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

**In the Matter of the Liquidation of
The Home Insurance Company**

No. 2004-0319

**ACE COMPANIES' MEMORANDUM IN
OPPOSITION TO LIQUIDATOR'S MOTION TO DISMISS**

Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, the "ACE Companies") respectfully submit this memorandum in opposition to the Liquidator's Motion to Dismiss (the "Motion"):

INTRODUCTION

In the Motion, the Liquidator asks the Court to dismiss the ACE Companies' appeal before the parties even have submitted briefs to the Court on the novel and far-reaching issues presented by the Liquidator's proposed scheme to pay "incentives" to certain creditors (the "AFIA Cedents") to file claims against Home Insurance Company ("Home") for the sole purpose of seeking recoveries for those claims from the ACE Companies. Both the Merrimack County Superior Court (McGuire, J.) and the Liquidator agree that the Liquidator's plan raises questions of first impression under New Hampshire law. (*See* April 29, 2004 Order (the "Order") at 1; Liquidator's Response to Motion to Expedite Appeal at 4.) The Motion, however, seeks to cast aside the "complex issues faced in this matter" and foreclose any consideration of the merits.

The Liquidator ignores the fact that the ACE Companies were granted the right to intervene in the Superior Court as a party with a direct and immediate interest in the Liquidator's scheme and as the very party prejudiced by it. Indeed, the Liquidator assented to the ACE Companies' standing in this proceeding, and the Court below recognized as much. As set forth

in *In re Petition for Admission of Demers*, 130 N.H. 31, 33 (N.H. 1987) (Souter, J), and the leading treatise NEW HAMPSHIRE PRACTICE, CIVIL PRACTICE AND PROCEDURE, an intervening party has all the rights of a party in the case as it then exists and thereafter develops -- including appellate review.

Moreover, the Liquidator has not met his considerable burden of demonstrating that the drastic remedy of summary dismissal is warranted here. Standing turns on whether the order appealed from diminishes a party's property or detrimentally affects its rights. Here, the ACE Companies are challenging an order that, according to the Liquidator, will cost the ACE Companies as much as \$231 million. (Liquidator's Memorandum of Law in Support of Motion to Dismiss ("Liquidator's Mem.") at 3). The Order approved an unprecedented scheme whereby the Liquidator will pay tens of millions of dollars to one subclass of Home's Class V creditors - the AFIA Cedents - to induce them to file claims with the Home estate that the Liquidator maintains will not be filed absent the incentives. The Liquidator readily concedes that the sole purpose of these incentives is to inflate Home's ability to collect reinsurance from certain of the ACE Companies. The rights of those ACE Companies thus have been detrimentally affected -- by tens, if not hundreds, of millions of dollars -- by the Order. Moreover, although the ACE Companies also are Class V creditors of Home, they will not receive any of the benefits the Liquidator proposes to provide to the AFIA Cedents, in violation of § 402-C:44 of the New Hampshire Insurers Rehabilitation and Liquidation Act (the "Act").

The Liquidator ignores the direct and tangible harm that the ACE Companies will suffer in the event the Order is upheld on appeal. Instead, the Liquidator tries to portray the ACE Companies as "debtors," and asserts that a debtor's interest do not support appellate standing. Even assuming that the ACE Companies are "net debtors" (which, in the event the Order is

reversed, they would not be), the authorities upon which the Liquidator relies do not support his claim. Where, as in this case, a party has a direct and tangible economic interest in the outcome of a matter before the court, the party is an "aggrieved person" and thus has standing to appeal.

Finally, the Liquidator complains that certain of the ACE Companies would receive a "windfall" if the Order were reversed, and that the Order imposes no new obligations upon the ACE Companies. Such assertions are wholly irrelevant to the issue here, which is whether the ACE Companies' property interests or rights are affected by the Order. That said, those ACE Companies that reinsure Home would not enjoy a "windfall" if the Order were reversed. The agreement proposed by the Liquidator unlawfully pays the AFIA Cedents to file claims they would not, in the ordinary course of business, bother to submit in a liquidation of Home that complies with New Hampshire law. Moreover, the ACE Companies are able to discern from the figures reported by the Liquidator that the claims that will be filed by the AFIA Cedents include claims that have been denied before or that have no merit. Therefore, the Liquidator's scheme does impose new obligations on the ACE Companies because it would force them to devote resources to adjust, determine and otherwise deal with claims that normally would not be submitted in a lawful liquidation -- including claims that previously have been denied (without objection by the cedent) as well as those that are time-barred.

PROCEDURAL BACKGROUND

In the Order, the Superior Court approved an agreement (the "Proposed Agreement") that the Liquidator entered into with representatives of certain of the AFIA Cedents -- insurers who had ceded insurance risk to Home as a participating member of the American Foreign Insurance Association ("AFIA") reinsurance pool. In his 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 they constitute Class V claims under § 402-C:44 of the Act, and Class V claimants are unlikely to receive a distribution in Home's liquidation. (Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents at 5.) 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 Home's New Hampshire liquidation proceedings. (*Id.* at 5-7) Although the Liquidator acknowledged that such attempts would be without legal basis and could be defeated, he nevertheless agreed to provide a cash "incentive" to the AFIA Cedents to file their claims in the Home liquidation by setting into motion a "scheme of arrangement" under English law that would pay the AFIA Cedents half of the net proceeds that are recovered from companies -- including certain ACE Companies -- who reinsured Home's liabilities to the AFIA Cedents.

The ACE Companies, all of which were reinsured by Home and thus are Class V creditors, and some of which are reinsurers of Home's AFIA liabilities, objected to the Liquidator's motion. The ACE Companies alleged that the Proposed Agreement directly violates the mandatory order of distribution provisions in RSA § 402-C:44 because the AFIA Cedents would receive a distribution before the claims of higher classes of creditors had been