

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

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

No. 2004-0319

**LIQUIDATOR'S RESPONSE
TO THE MOTION TO EXPEDITE APPEAL**

NOW COMES the appellee, Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, in his capacity as Liquidator of The Home Insurance Company, (the "Liquidator") by and through counsel, the Office of the Attorney General and, pursuant to New Hampshire Supreme Court Rule 21, who submits this response to the Motion to Expedite Consideration of Appeal and to Suspend Rules made by the ACE Companies on May 13, 2004 (the "ACE Motion"). The Liquidator states in reply that while he does not disagree in principle with the notion of the appeal being resolved as soon as permissible, this should not be done at the expense of an adequate opportunity to address the complex issues faced in this matter through an orderly briefing process. Further, the Liquidator takes issue with the stated grounds for the ACE Motion because absent expedition, the ACE Companies will not be harmed in any way, much less irreparably.

Background

In the Liquidator's Motion for Approval of Agreement and Compromise With AFIA Cedents, dated February 11, 2004, the Liquidator sought approval from the Merrimack County Superior Court in its supervisory capacity under RSA 402-C:25 of the Liquidator's endorsement of a compromise, reflected in a written agreement (the

“Agreement”) between the Joint Provisional Liquidators appointed in the English provisional liquidation proceeding for Home’s United Kingdom Branch (“Home UK Branch”) and members of the Informal Creditors Committee established in that proceeding.

In an April 29, 2004 Order, the Superior Court, (McGuire, J.), granted the Liquidator’s motion. The Superior Court concluded that the Agreement is authorized under the “broad array of powers” granted by RSA 402-C:25 and is consistent with the purposes of the liquidation statute “to protect the interests of the insureds and creditors.” *See* RSA 402-C:1, IV. Order at 2. The Superior Court found that as a result of the Agreement, the Liquidator will be able to marshal substantial assets (the ACE Companies’ obligations) “which would otherwise be unavailable.” *Id.* Most significantly, the Superior Court found that “while the agreement assures that the Ace Companies will not receive a windfall of \$[231] million, it imposes no additional liability upon them than those they have already assumed.” *Id.* at 3.

On May 10, 2004, Benjamin Moore & Co. (“BMC”), another objecting party, filed a notice of mandatory appeal with this Court. On May 11, 2004, the ACE Companies filed a motion for stay of the Order with the Court in the mandatory appeal, together with a motion for waiver of the requirement of Supreme Court Rule 7-A that stays be initially sought in the trial court. On that same day, the Court denied the motion for waiver and, to the extent necessary, remanded the matter to the Superior Court for consideration of a motion to stay in the event the ACE Companies chose to file one. The ACE Companies filed a motion to stay on May 12, 2004.

¹ The ACE Companies note that they are a party to BMC’s mandatory appeal pursuant to Supreme Court Rule 7. ACE Motion to Stay at 3 n.1.

On May 13, 2004, the ACE Companies filed the ACE Motion.

**I. EXPEDITED DETERMINATION IS DESIRABLE
BUT AN ORDERLY PROCEDURE IS NECESSARY**

A. Expedition is Desirable

At stake in this case is approximately \$231 million of which a significant percentage would be made available to the policyholders of the insurer being liquidated by the New Hampshire Commissioner of Insurance pursuant to RSA 402-C. To get that money into the Home's liquidation estate, the Liquidator entered into the Agreement because the Agreement will make it possible for the Liquidator to collect the proceeds from an indemnity provided by one of the ACE Companies, Century Indemnity, Inc., and another ACE subsidiary, Century International Reinsurance Company Limited ("CIRC") (together the "ACE Indemnitors"). In light of the obligations of the ACE Indemnitors, the ACE Companies effectively assert debtor interests in the liquidation estate of Home.

The Agreement reached by the Liquidator that has been attacked by the ACE Companies and BMC was reached with the AFIA Cedents, creditors with a level V priority in the liquidation, to provide that the claims of the AFIA Cedents would be filed with the estate and to ensure that the AFIA Cedents would not pursue other remedies outside of the liquidation. In consideration for this, the Liquidator agreed with the AFIA Cedents to share with them a portion of the recoveries from obligations of the ACE Indemnitors on their claims through an English law "Scheme of Arrangement" to be sanctioned by the English High Court of Justice in London.

The AFIA Cedents agreed to a standstill with the Liquidator for a period expiring June 1, 2004. The Liquidator is negotiating with the AFIA Cedents representatives to extend the standstill until December 31, 2004. If the Scheme is not sanctioned, or this appeal is decided adversely to the Liquidator, the AFIA Cedents will attempt to seek their remedies, if any, outside of the liquidation, with the Liquidator reserving his rights to take legal action against them arising therefrom.

Because of this tension, the Liquidator agrees that expedited determination of the appeal would be desirable. A quick resolution to the legal issues raised in the appeal will provide the Liquidator and the AFIA Cedents the certainty that they need comfortably to proceed with the sanctioning of the Scheme of Arrangement in the English Court and its implementation.

B. An Orderly Proceeding is Necessary and Prudent

John Heywood long ago elucidated the proverb that “haste makes waste.” While completing this appeal quickly is desirable, completing it correctly is imperative. While the basic question is simple, the issues surrounding that question are complex and multifaceted. As noted by the Superior Court, the issues presented are of “first impression.” Consequently, in order for them to be given the attention they deserve, the Liquidator believes that a standard briefing schedule ought to be followed but, subject to the Court’s discretion, a scheduling order be issued quickly and oral argument be scheduled on a fast track, with the Court, respectfully, granting a relatively high priority to reaching a decision on the merits. Bound into this is the expectation that the Liquidator will be making a motion for summary dismissal of the appeal pursuant to Supreme Court Rule 25.

II. THE ACE COMPANIES WILL NOT SUFFER IRREPARABLE HARM

In the ACE Motion it is alleged that the ACE Companies will be irreparably harmed if the Liquidator proceeds with the implementation of the Agreement and the English Scheme of Arrangement. ACE Motion at ¶ 2. They suggest that “the ultimate relief they seek in this appeal will not be preserved” if expedited determination is not granted. *Id.*

It is no detriment to the ACE Companies, however, to be denied a windfall from the happenstance of Home’s bankruptcy and be required to meet their obligations to Home under long standing pre-existing agreements. *See Heckler v. Community Health Care Servs. of Crawford County, Inc.*, 467 U.S. 51, 61-62 (1984) (no detriment to be denied the ability to retain money that party is not entitled to keep); *Lewis v. Manufacturers Nat’l Bank*, 364 U.S. 603, 609 (1961) (no windfalls because of the happenstance of bankruptcy); *State v. Tallman*, 139 N.H. 223, 225 (1994) (“Self created hardships hold little weight in balancing of the equities.”) All that the Agreement approved by the Superior Court will do is to establish that Home’s insolvency will not provide an escape for the ACE Companies from their obligations to Home. The Superior Court recognized this point in its Order when it found that “the agreement assures that the ACE Companies will not receive a windfall of \$[231] million [and] it imposes no additional liability upon them than those they have already assumed.” Order at 3. Consequently, the operation of the Agreement will not harm the ACE Companies in any way.

In addition, there will be no irreparable harm to the ACE Companies if the appeal is decided against them later rather than sooner. In making a motion to this

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Court the ACE Companies bear the burden of demonstrating the need for the relief sought. The ACE Companies allege that expedition is required because of the irreparable harm they may suffer if their appeal is mooted. The mere possibility of mootness of their appeal, however, does not by itself constitute irreparable harm. *E.g.* In re Convenience USA, Inc., 290 B.R. 558, 563 (Bankr. M.D.N.C. 2003) (collecting cases). The test of mootness in this case is whether the approval of the Agreement will extinguish or modify rights to such an extent that effective judicial relief is no longer practically available. Irreparable harm must be actual and imminent. To demonstrate irreparable harm by mootness, the ACE Companies thus should have shown how the Agreement being carried out and implemented would extinguish or modify their rights. Thus far in the matter below, and in their pleadings before this Court, the ACE Companies have not been able to articulate how being forced to honor their agreements with Home will extinguish or modify their rights. As a result, without more, the ACE Companies have not carried their burden of showing that the expedited relief they seek is justified for the reasons that they submit.

WHEREFORE, the Liquidator requests that the Court grant an appropriate priority in the scheduling of this appeal on the Court's argument and decisional calendar, but that the standard briefing and motions schedule be adhered to, and grant such other and further relief as may be just.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE
COMMISSIONER OF THE STATE OF NEW
HAMPSHIRE, SOLELY IN HIS CAPACITY AS
LIQUIDATOR OF THE HOME INSURANCE
COMPANY,

By his attorneys

PETER W. HEED, ATTORNEY GENERAL

/ s /

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May 21, 2004

STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company
2004-0319

CERTIFICATE OF SERVICE

I, Jacqueline L. Johnson , do hereby certify that on May 21, 2004, I served a true copy of the foregoing upon Ronald Snow, Esq. of Orr & Reno, One Eagle Square, PO Box 3550, Concord, New Hampshire 03302-3550 and Andre Bouffard, Esq. of Rachlin, Downs, Martin PLLC, 199 Main Street, PO Box 190, Burlington, Vermont 05402-0190, by first class mail, postage prepaid.

Dated: May 21, 2004

/ s /
Jacqueline L. Johnson

STATE OF NEW HAMPSHIRE

SUPREME COURT

In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 2004-0319

CERTIFICATE OF SERVICE

I, Peter C.L. Roth, do hereby certify that on May 21, 2004, I served a true copy of the *Liquidator's Response to the Motion to Expedite Appeal* upon Ronald Snow, Esquire, Orr & Reno, One Eagle Square, P.O. Box 3550, Concord, New Hampshire 03302-3550 and Andre Bouffard, Esquire, Rachlin, Downs, Martin PLLC, 199 Main Street, P.O. Box 190, Burlington, Vermont 05402-0190, by first class mail, postage prepaid.

Dated: May 24, 2004

/ s /

Peter C.L. Roth