

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

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

No. 2005-0740

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

Appellants 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., respectfully move this Court pursuant to Sup. Ct. R. 7-A for an order staying the effect of the order of the Merrimack County Superior Court (McGuire, J.), dated September 22, 2005 (the “September 22 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 after unsuccessfully seeking a stay in the Superior Court. The September 22, 2005 Order should be stayed by operation of Super. Ct. R. 74 pending appeal by the ACE Companies (and co-appellant Benjamin Moore & Company (“Benjamin Moore”)). In the alternative, the ACE Companies respectfully request that the Court order a discretionary stay of the September 22 Order under Rule 7-A.

In support of this Motion, the ACE Companies respectfully state as follows:

I. Summary

1. Superior Court Rule 74 automatically stays final decisions, like the September 22 Order, upon the filing of an appeal. Thus, the Liquidator was barred from enforcing the September 22 Order absent a ruling from the Superior Court – at the time the September 22 Order was entered – that the decision was not stayed and would have immediate effect. There was no such ruling here until well after the ACE Companies and Benjamin Moore invoked the mandatory stay provisions of Rule 74 by appealing the September 22 Order. On

that basis alone, this Court should enforce Rule 74 and hold that the Superior Court's attempt to craft an exception to Rule 74 in its December 9, 2005 Order ("December 9 Order") denying the ACE Companies' Expedited Motion for Stay, or Alternatively for Declaration That September 22, 2005 Order is Stayed Pursuant to Rule 74, dated November 3, 2005 (the "ACE Companies' Expedited Motion for Stay"), was ineffective.

2. Even assuming the Superior Court had the power to order an exception to Rule 74 after the appeals were filed, there is no basis to avoid an application of the automatic stay here. As discussed below, the reasons cited by the Superior Court in the December 9 Order do not justify any variation from Rule 74.

3. This Court may also order a discretionary stay pursuant to Rule 7-A, as the ACE Companies have amply satisfied their requirement under Rule 7-A of demonstrating that the merits of the appeal far outweigh any delay and inconvenience to the Liquidator.

II. Background

4. The Superior Court issued the September 22 Order, attached hereto as Exhibit A, approving the agreement and compromise between the English Joint Provisional Liquidators ("JPLs") for Home Insurance Company ("Home") and a group of Home's U.K. creditors known as the AFIA Cedents ("Proposed Agreement"). The ACE Companies and Benjamin Moore filed timely appeals of the September 22 Order pursuant to Rule 7 of the New Hampshire Supreme Court Rules. Under Rule 74, (as confirmed by New Hampshire case law), these timely appeals stayed the September 22 Order and precluded it from taking effect as a final judgment.

5. On October 26, 2005, counsel for the JPLs notified the ACE Companies that Roger A. Sevigny, as the liquidator ("Liquidator") of Home, would be seeking approval of an English scheme of arrangement ("Scheme") from the High Court of Justice in England (the "High Court") one week later, on November 3, 2005. The ACE Companies advised the JPLs that the Scheme, by which reinsurance recoveries would be distributed under the Proposed Agreement to the AFIA Cedents, is expressly conditioned upon the approval by the Superior

Court of the Proposed Agreement. That approval does not exist, as the September 22 Order was stayed by the timely-filed appeals under Rule 74.

6. The Liquidator, however, refused to withdraw the application. Because of the exigent circumstances presented in a one week period, the ACE Companies filed an Expedited Motion for Stay of Order Pending Mandatory Appeal Pursuant to Rule 7 with this Court on November 1, 2005, along with a motion requesting that the Court waive the requirement under Rule 7-A that the motion for stay first be filed with the Superior Court. On the day of the English hearing, the Court denied the motion to waive the Rule 7-A requirement, and further ruled that the motion to stay was moot, given its disposition of the motion to waive filing in the Superior Court. The ACE Companies renewed their motion for stay in the Superior Court that same day. *See* the ACE Companies' Expedited Motion for Stay, attached hereto with exhibits as Exhibit B. The Liquidator objected to this relief. *See* Liquidator's Objection to ACE Companies' Expedited Motion for Stay attached hereto as Exhibit C.¹

7. Before the Superior Court could rule on the motion for stay, the High Court approved the Scheme. Not wishing to impose its own judgment on whether the September 22 Order was stayed or not, the High Court noted in its order that "it remains an open question" whether there is a stay pursuant to Rule 74. (High Court Order, dated November 10, attached hereto as Exhibit G at ¶ 10.) The Liquidator conceded that the Scheme, even if approved, will be rendered ineffective upon confirmation that there is in fact a stay in place under Rule 74. (*See* Exhibit F to Exhibit B at ¶23 (Third Witness Statement of Gareth Hughes).) The High Court also made the express caveat that its ruling was to have no bearing on the matters pending in New Hampshire. (*See* Exhibit G at ¶¶ 15, 22.)

¹ The ACE Companies' Reply Brief in Further Support of Expedited Motion for Stay, Or Alternatively For Declaration That September 22, 2005 Order is Stayed Pursuant to Rule 74 is attached as Exhibit D. The Liquidator's Sur-reply to the ACE Companies' Reply Brief on Expedited Motion for Stay (without exhibits) is attached as Exhibit E. The ACE Companies' Objection to the Sur-reply is attached (without exhibit) as Exhibit E.

8. Notwithstanding this express caveat, the Superior Court denied the ACE Companies' motion for stay in the December 9 Order after giving "practical consideration to the effect of the recent actions of the Liquidator and Joint Provisional Liquidators in conjunction with their Petition to the High Court." (December 9 Order, attached hereto as Exhibit H at 2 [Exhibit Appendix at 223])

9. The Superior Court also based its decision on the fact that the parties will be moving forward with the adjustment of the AFIA Cedents' claims. However, the adjustment of claims is a matter exclusively remitted to the jurisdiction of the Superior Court and has nothing to do with the Scheme sanctioned by the High Court. This factor, therefore, is irrelevant to the question of whether the Superior Court should have carved out an exception to the mandatory stay as it did.

10. Accordingly, the ACE Companies respectfully request a declaration from this Court that the September 22 Order is automatically stayed by operation of Rule 74, or alternatively, Rule 7-A.

III. Basis for Relief

A. Under New Hampshire Law, A Timely Appeal Results In An Automatic Stay Of The Appealed Order

11. Rule 74 makes clear that following a decision on the merits, "final judgment shall be entered ... unless a notice of appeal has then been filed with the Supreme Court pursuant to its Rule 7." Super. Ct. R. 74. Therefore, "[i]f an appeal or review is claimed, the decree or verdict of the lower court is automatically stayed unless the trial court has specifically ordered that all or a portion of it shall remain in effect during the process of appellate review." 5 R. Wiebusch, *New Hampshire Practice, Civil Practice & Procedure*, § 59.07, at 451; *see also Rollins v. Rollins*, 122 N.H. 6, 10 (1982) ("Normally, by timely appealing the trial court's final decree, the defendant would prevent it from going to judgment....").

12. The September 22 Order, which is a decision on the merits, does not state that it shall remain in effect during appellate review. When the ACE Companies and Benjamin Moore filed timely notices of appeal under Rule 7, the September 22 Order was thus stayed under Rule 74.

13. The Superior Court, in the December 9 Order, nevertheless attempted to alter the Rule 74 automatic stay after the fact. The plain language of Rule 74, particularly its use of the past tense, shows that any exception under Rule 74 must be made at the time the appealed order was entered. *See* Rule 74 (“... all appeals relating to the action shall be deemed waived and final judgment shall be entered as follows, unless the Court *has otherwise ordered*, or unless a notice of appeal has then been filed with the Supreme Court pursuant to its Rule 7.”) (emphasis added). Once an appeal is filed, the stay becomes automatic and cannot be varied.

14. New Hampshire case law has reinforced the requirement that a trial court must have directed that its order be effective pending the appeal period *during the appeal period* if the stay is to be modified in any way. *See Scheidegg v. Dept. of the Air Force*, No. 90-1127, 1990 U.S. App. LEXIS 17624, * 8-* 9 (1st Cir. Sept. 28 1990) (Superior Court directing that order would remain in effect pending appeal period at the commencement of such period); *Nicolazzi v. Nicolazzi*, 131 N.H. 694, 695 (1989) (same); *Rollins v. Rollins*, 122 N.H. 6, 10 (1982) (same); *Hille v. Hille*, 116 N.H. 109, 111 (1976) (“In future cases involving modification of custody orders the trial court may well consider entry of a stay of the effective date of the order, *if it appears* that appellate review *will be sought and pursued.*”) (emphasis added).²

² The Superior Court sought to justify its after-the-fact ruling by relying upon *In re Nyhan*, 151 N.H. 739 (2005). *Nyhan* stands for the unremarkable proposition that the Superior Court retains the power to issue collateral orders (such as a stay to preserve the status quo). It does not permit a court to reverse the automatic stay under Rule 74 after an appeal is filed.

B. Even If Exceptions To The Automatic Stay Were Permitted, The Circumstances Here Do Not Justify An Exception

15. Instead of adhering to the automatic and mandatory effect of Rule 74, the Superior Court carved out an exception because of the “regulatory context within which the matters under appeal rest....” (Ex. H at 2 [Exhibit Appendix at 223].) Even assuming the Superior Court had the power to order an exception to Rule 74 after the appeals were filed, this is not a basis to avoid an application of the automatic stay here.

16. The Superior Court’s statement indicates the Superior Court’s willingness to adopt the Liquidator’s curious argument that Rule 74 does not apply here because the text of the rule does not specifically refer to insurance liquidations, which, the Liquidator contends, are somehow exempt from the Superior Court rules. (*See Ex. C* at ¶¶ 11,12.)

17. In fact, the text of Rule 74 makes clear that it is not limited, and applies to “all actions at law or in equity.” Super. Ct. R. 74 (emphasis added). The Superior Court’s approval of this argument is inconsistent with its prior rejection of the Liquidator’s attempt to carve out exceptions to the Superior Court Rules for liquidations. For example, the Liquidator tried to avoid his discovery obligations by arguing that this proceeding “is an in rem action” and that the “usual rules” do not apply. (*See* Liquidator’s Objection to Objector’s Requests for Evidentiary Hearing and Liquidator’s Motion Concerning Discovery, dated April 2, 2004, attached hereto as Exhibit 1 to Exhibit F, at 5 [Exhibit Appendix at 207].) The Court overruled the Liquidator’s objection, and discovery in this case, as well as the hearing on the merits, proceeded in accordance with the Superior Court Rules.

18. In addition, the Superior Court disregarded the automatic and mandatory effect of Rule 74 and instead gave “practical consideration to the effect of the recent actions of the Liquidator and Joint Provisional Liquidators in conjunction with their Petition to the High Court.” (Ex. H at 2 [Exhibit Appendix at 223].) Given that the High Court made clear that its ruling was to have no bearing on the matters pending the New Hampshire, the

Superior Court should have decided the motion for stay without reference to the High Court proceedings. (See Ex. G at ¶ 10.) Indeed, given the automatic and mandatory effect of Rule 74, the Superior Court should have determined that the very application of the Liquidator to the High Court for approval of the Scheme violated the September 22 Order, as the Scheme is expressly conditioned upon the approval by the Superior Court of the Proposed Agreement.

19. The Superior Court also determined that (a) any distribution to the AFIA Cedents (which is the sole function of the Scheme) will be months or years in the future; and (b) the claims adjudication process will continue whether or not the Scheme is approved. (See Ex. H at 3 [Exhibit Appendix at 224].) These facts, however, do not support a finding that the September 22 Order is not stayed pending appeal. The claims adjudication process, which is within the sole province of the New Hampshire liquidation, is not affected by the Scheme (as the Superior Court noted). The September 22 Order also does not preclude the adjudication of claims. Accordingly, enforcement of Rule 74 would not impair the determination of claims. While the September 22 Order could have an impact on the distribution of assets through the Scheme, there will be no such effect here, as the parties have agreed (and the Court found) that those distributions will not take place before the appeal is decided.

C. A Stay Is Also Warranted Under Rule 7-A Of This Court's Rules

20. Rule 7-A “provide[s] a procedural mechanism for requesting a stay of the judgment of a lower tribunal that is not stayed by the filing of a timely appeal.” (Sup. Ct. R. 7-A, Comment.) The comments to Rule 7-A expressly refer to *Rautenberg v. Munnis*, 107 N.H. 446 (1966), in which the Supreme Court balanced the merits of the appeal against the “delay and inconvenience” to the opposing party in determining whether a stay should be issued. *Id.* at 448.

21. The merits of the appeal are as obvious as they are compelling, as the Proposed Agreement presents a question of first impression in New Hampshire. The appeal

raises important issues relating to the violation of a New Hampshire statute. Resolution of the appeal will have an effect on liquidations in New Hampshire and elsewhere, as many other states have similar provisions.

22. Further, the merits of the appeal outweigh any prejudice to the Liquidator. The “confusion” among the AFIA Cedents over their claims that the Liquidator alleges would occur if a stay were upheld (*see* Ex. C at ¶ 19) is present in any event until the Proposed Agreement survives or fails the appellate process. A stay will also not delay “the commencement of steps necessary to collect the estate asset for the time required for the appeal.” (*Id.*) The parties agree that adjustment of AFIA Cedent claims is continuing pending the appeal.

23. In its December 9 Order, the Superior Court did not consider whether the ACE Companies had satisfied these *Rautenberg* requirements, but instead based its decision not to stay the September 22 Order under Rule 7-A because “matters on appeal are fully preserved without it.” (Ex. H at 3 [Exhibit App. at 224].)

24. On the contrary, by denying the stay, the Superior Court has allowed at least some steps of the Scheme to go forward, realizing the ACE Companies’ concern that “the Company is only making a sanction application in respect of the Scheme at this time to obtain a litigation advantage in the pending appellate proceedings,” as well as their concern that “there may be scope for confusion before the New Hampshire courts as to the status in the new Hampshire proceedings of any findings made by the English court.” (Letter from the ACE Companies’ counsel to counsel for the JPLs, dated October 28, 2005, attached as Exhibit F to Exhibit B, at 48.) Not only, however, is the sanction of the Scheme unnecessary at this point, it will undoubtedly cause the parties to expend efforts and money that will be wasted if the Proposed Agreement is not upheld by the appellate process. In short, the Scheme alters the status quo in these proceedings, which is the very reason why the ACE Companies are seeking a stay of the September 22 Order.

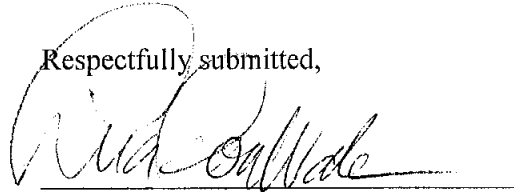
Conclusion

Accordingly, the ACE Companies respectfully request that the Court enter an Order:

- A. Declaring that the September 22 Order is automatically stayed by operation of Rule 74;
- B. Or, alternatively declaring that the September 22 Order is stayed pursuant to Rule 7-A; and
- C. Granting such other and further relief as this Court deems just and proper.

Dated: December 30, 2005

Respectfully submitted,



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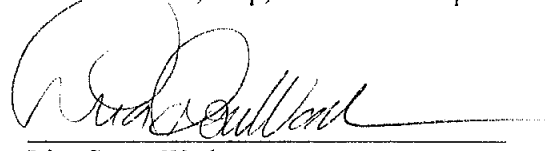
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CERTIFICATE OF SERVICE

I, Lisa Snow Wade, Esq., hereby certify that I have caused a copy of the foregoing document to be forwarded by first class US mail to J. David Leslie, Esq., and J. Christopher Marshall, Esq., counsel for the Liquidator.

A handwritten signature in cursive script, appearing to read "Lisa Snow Wade", written over a horizontal line.

Lisa Snow Wade