

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2005-0740

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

**LIQUIDATOR'S OBJECTION TO THE
ACE COMPANIES' MOTION TO STRIKE**

Roger A. Sevigny, Commissioner of Insurance of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby objects to the motion of the ACE Companies to strike portions of the briefs and appendices filed by the Liquidator and the National Association of Insurance Commissioners ("NAIC"). As reasons therefor, the Liquidator states:

1. The ACE Companies seek to strike parts of the Liquidator's brief and appendices that refer to (a) procedural developments in England regarding the Agreement with AFIA Cedents, and (b) the § 801 drafting note of the Insurer Receivership Model Act ("IRMA") as finally adopted by the plenary session of the NAIC (the States' insurance commissioners themselves) in December 2005. The Liquidator properly included these matters. The subsequent judicial proceedings in England are matters that the Court may properly notice and are appropriately included so that the Court will be aware of the status of the Scheme contemplated by the Agreement, which requires proceedings both in New Hampshire and in England. The IRMA drafting note is also a legal matter relating to statutory construction that is properly the subject of judicial notice. Moreover, ACE itself raised the subject of the lower level NAIC proceedings regarding IRMA at the evidentiary hearing, and the Superior Court addressed the drafting note (then in an intermediate NAIC level draft) in the Approval Order. J.A. 52.

2. It is fully appropriate for the Liquidator to advise the Court of procedural developments concerning the status of the Scheme contemplated by the Agreement so that the Court will be aware of the current situation. The Liquidator accordingly reported in the procedural history part of the statement of the case that (a) the English Court sanctioned the Scheme on November 10, 2005, (b) the English Court issued the global liquidation order on December 19, 2005, and (c) the Joint Provisional Liquidator filed the sanction order with the English Companies on December 20, 2005, thus making the Scheme effective. See J.A. 34-35. The Liquidator included the two judicial orders and the filing letter in the Liquidator's Appendix to provide the necessary information. L.A. 580, 591, 594.

3. The Court may properly take judicial notice of foreign decisions and the filing when provided with appropriate support. See Walsh v. Public Serv. Co. of N.H., 92 N.H. 331, 334 (1943) (court may take notice of foreign law "as convenience and expediency suggest"); N.H. R. Evid. 201. The matters here are not subject to any dispute. Indeed, although ACE apparently would prefer to disregard these events, they have previously been presented to this Court in connection with ACE's Motion for Stay of Order Pending Mandatory Appeal Pursuant to Rule 7-A (filed December 30, 2005). ACE itself filed the sanction order as Exhibit G to that motion, while the Liquidator attached the global liquidation order and filing letter as Exhibits 2 and 3 to the Liquidator's Objection to ACE Companies' Motion for Stay (filed January 5, 2006).

4. This Court should be apprised of the progress in other courts of matters related to matters pending here. Thus, while ACE asserts that the Liquidator assured the ACE Companies that it would not rely on the sanction order in New Hampshire, Motion ¶ 4, counsel's letter specifically states the Liquidator will bring the outcome of the sanction hearing to the attention of this Court. Motion, Ex. A at 2, ¶ 1. Indeed, in rejecting ACE's arguments on the point, the

English Court observed that it had “difficulty in seeing how [the Liquidator] could properly take any course other than to draw the outcome of this hearing to the attention of the New Hampshire court” and that ACE’s concern that this would cause “confusion” was “contrived and fanciful.” L.A. 588.

5. It is also proper for the Liquidator to draw the Court’s attention to the regulatory position taken by the insurance commissioners of the States in adopting IRMA, which includes both proposed text and drafting notes. (Contrary to ACE’s suggestion, Motion ¶ 6, the NAIC plenary session – the entire body of commissioners – adopted IRMA.) Model acts and commentary to those acts are legal material appropriately relied on in construing statutes. See, e.g., Soraghan v. Mt. Cranmore Ski Resort, Inc., 881 A.2d 693, 696 (N.H. 2005); Estate of Gordon-Couture v. Brown, 152 N.H. 265, 267-68 (2005); Bensen v. New Hampshire Ins. Guar. Ass’n, 151 N.H. 590, 595-99 (2004). Subsequent revisions of model laws may illuminate the meaning of existing statutes. See Clark Equip. Co. v. Massachusetts Insurers Insolvency Fund, 423 Mass. 165, 168 n.6, 666 N.E.2d 1304 n.6 (Mass. 1996); Carlson v. Giacchetti, 35 Mass. App. 57, 63, 616 N.E.2d 810, 812-13 (Mass. App. 1993).

6. IRMA is not a new issue. ACE itself raised the lower level NAIC proceedings concerning IRMA before the Superior Court, and the final text and drafting notes adopted by the NAIC are clearly pertinent to interpretation of the New Hampshire statutes. As the Superior Court noted, ACE’s witness Mr. Craig “took issue with the pending agreement, testifying that these very issues had been the subject of recent discussions within a drafting group at the NAIC charged with updating the Model Receivership Act.” J.A. 52. “Only on cross-examination did Mr. Craig acknowledge that the current draft recently approved by the NAIC intermediate levels, included a drafting note” that the Superior Court found “completely undermined” ACE’s

evidence. Id. See Tr. V 112-114. The drafting note has now been unanimously adopted by the full NAIC as part of IRMA, as described in the NAIC amicus brief. See 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 32, 113 (4th Quarter 2005) (forthcoming). It properly may be cited in briefs and included in appendices for the convenience of the Court and parties. L.A. 601.

7. ACE refers to Supreme Court Rule 16 and cites cases purportedly concerning the record. Motion ¶¶ 8-10.¹ None are relevant here because the Liquidator is not bringing new evidentiary matter before the Court, and the rules contemplate that other matters subsequent to the trial court proceedings may be presented to the Court. Supreme Court Rule 16(7) expressly provides that “[w]henever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief,” he may file and distribute “such new matters up to and including the day of oral argument, or by leave of the supreme court thereafter.” If such new matters may be filed after the brief, they clearly may be included in the brief.

8. The inclusion of materials concerning IRMA in the NAIC’s amicus brief and appendix is appropriate for the same reasons.

¹ Not one of the cases cited by ACE (Motion ¶ 10) addresses the issue whether subsequent procedural history or legal materials may be included in briefs or appendices or discusses the appropriate scope of the record. They all concern preservation of issues for appeal. See Verizon New Eng., Inc. v. City of Rochester, 151 N.H. 263, 272-3 (2004) (striking portion of an amicus brief that set forth preemption argument because the court has “consistently held that we will not consider issues raised on appeal that were not presented in the trial court”); LaMontagne Builders, Inc. v. Bowman Brook Purchase Group, 150 N.H. 270, 274 (2003) (refusing to consider argument not preserved for appellate review by objection in trial court); State v. Johnson, 130 N.H. 578, 587 (1988) (same); State v. Stearns, 130 N.H. 475, 486 (1988) (same for issue not raised in trial court); State v. Cassell, 129 N.H. 22, 23-24 (1986) (same); State v. Laliberte, 124 N.H. 621, 621-22 (1984) (same); Daboul v. Hampton, 124 N.H. 307, 308-9 (1983) (same); Carbur’s v. A & S Office Concepts, 122 N.H. 421, 423 (1982) (same); Badr Export & Import v. Groveton Papers Co., 122 N.H. 101, 103 (1982) (declining to consider issues “as they are not properly before us” (citing Sperl)); Sperl v. Sperl, 119 N.H. 818, 821 (1979) (“It is elementary that issues not raised at trial cannot be raised on appeal to this court.”); Hauser v. Calawa, 116 N.H. 676, 677 (1976) (question “is technically not before us” where not raised before trial court); Wiggin v. Kent McCray of Dover, Inc., 109 N.H. 342, 348 (1969) (“It has long been the law here that an issue not raised at the trial will not be considered by this court”).

WHEREFORE, the ACE Companies' motion to strike should be denied in its entirety.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER OF
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SOLELY AS LIQUIDATOR OF THE HOME
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March 9, 2006

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Objection to the ACE Companies' Motion to Strike was sent, this 9th day of March, 2006, by first class mail, postage prepaid, to counsel on the attached service list.



Eric A. Smith

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