

**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 BENJAMIN MOORE & CO.'S
MOTION FOR REHEARING AND RECONSIDERATION**

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 for rehearing and reconsideration of the Court's December 5, 2006 opinion filed by Benjamin Moore & Co. ("BMC"). As reasons therefor, the Liquidator states:

1. A motion for rehearing or reconsideration must "state with particularity the points of law or fact that in the professional judgment of the movant the court has overlooked or misapprehended." Supreme Court Rule 22(2). BMC fails to identify any such points. Instead, BMC disregards (a) the Court's analysis of the agreement and the administration cost issue, (b) the language of RSA 402-C:44, and (c) the Superior Court's findings and the applicable standard of review. The motion is merely reargument, and it should be denied.

2. BMC first contends the Court overlooked the "nexus" between the payments under the agreement and the AFIA Cedents' claims against Home. BMC Motion at 2. However, the Court understood how the agreement works. See Opinion at 5. It just rejected BMC's argument that any relation between the payments and the claims precluded approval. Instead, the Court focused on the operation and purpose of the agreement to bring in assets that otherwise would not be collected for the benefit of Home's creditors. Opinion at 12-13. The Court held:

The proposed payments do not arise from the AFIA Cedents' Class V claims themselves, but rather as an inducement for the AFIA Cedents to file claims in the liquidation in order to bring a net benefit to creditors of the estate. Thus, while

the AFIA Cedents' claims against Home arose pre-liquidation, their right to payment under the proposed agreement will arise post-liquidation

Opinion at 12 (emphasis in original). The Court did not overlook BMC's argument; it disagreed.

3. BMC next contends that the Court's decision provides the Liquidator discretion to reorder priorities by agreement. BMC Motion at 5. This ignores the Court's holding that the payments are administration costs and thus are first priority payments consistent with the statutory priorities. Opinion at 13. It also disregards the limitations expressly stated in the Court's decision. Such an administration cost agreement (a) must result in a "net benefit to the creditors of the estate," and (b) "requires court approval." *Id.* at 10. Court approval involves findings that the agreement is "necessary" and "fair and reasonable." See *id.* at 13, 16. The Court's decision does not leave liquidators with unfettered discretion.

4. BMC's further suggestion that the Court "defer" to the Legislature (BMC Motion at 2; see *id.* at 6) is just another way of asserting that the existing administration cost statute does not apply. Again, the Court held to the contrary and concluded that the payments under the agreement with AFIA Cedents are administration costs within RSA 402-C:44, I. Opinion 10-13. It is actually BMC that seeks to disregard the Legislature. Instead of addressing the actual language of RSA 402-C:44, I, which encompasses "the actual and necessary costs of preserving or recovering the assets of the insurer," BMC attempts to rewrite the statute to say "those costs and expenses the payment of which is essential to the conduct or operation of the liquidation." BMC Motion at 5. The Legislature chose the broader language construed by the Court. The Legislature also directed that the Act be liberally construed to effectuate its purpose of protecting the interests of insureds and other creditors. See RSA 402-C:1, III, IV; Opinion at 8, 16.

5. BMC finally argues that the Court misapprehended "facts" regarding the loss of assets in the absence of the agreement. BMC Motion at 7. BMC's argument, however,

disregards the facts found by the Superior Court and the applicable standard of review. The Court noted that it upholds the Superior Court's findings "unless they lack evidential support or are legally erroneous" and that it defers to the trial court's "resolution of conflicting testimony, evaluation of credibility, and determination of the weight to be given evidence." Opinion at 14 (citing Cook v. Sullivan, 149 N.H. 774, 780 (2003)). The Court reviewed the record, and it concluded that "there was sufficient evidence to support the superior court's finding that the AFIA Cedents would not file and prosecute claims without a financial incentive." Id. It further held that "the evidence supports the superior court's finding that the proposed agreement was necessary" and that without it the ACE Companies would "reap a substantial windfall . . . by depriving Home's creditors of the amounts they would have paid but for Home's insolvency." Id. at 16. BMC offers nothing to warrant revisiting these conclusions.

WHEREFORE, BMC's motion should be denied.

Respectfully submitted,

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

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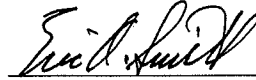


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December 21, 2006

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Objection to Benjamin Moore & Co.'s Motion for Rehearing and Reconsideration was sent, this 21st day of December, 2006, by first class mail, postage prepaid, to counsel on the attached service list.



Eric A. Smith

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