

**THE STATE OF NEW HAMPSHIRE  
SUPREME COURT**

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

**No. 2005-0740**

**ACE COMPANIES' MOTION TO STRIKE PORTIONS OF  
BRIEFS AND APPENDICES FILED BY NATIONAL ASSOCIATION OF  
INSURANCE COMMISSIONERS AND THE COMMISSIONER OF  
INSURANCE AS LIQUIDATOR OF THE HOME INSURANCE COMPANY**

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, Lovells and Orr & Reno P.A., respectfully move for an order striking portions of the briefs and appendices of the National Association of Insurance Commissioners (the "NAIC") and the Commissioner of Insurance as Liquidator of the Home Insurance Company (the "Liquidator") on the grounds that they fall outside of the evidentiary record established in the Superior Court.

In support of their motion, the ACE Companies respectfully state as follows:

**Introduction**

1. The Liquidator and the NAIC have disregarded the express provisions in the New Hampshire Supreme Court Rules (the "Rules"), which prohibit the consideration of any matter that was not actually presented and established as part of the evidentiary record in the proceedings below. The Liquidator and the NAIC attempt to introduce matters from outside the evidentiary record (a) by referring, in their briefs, to events that occurred after the July 2005 evidentiary hearing and the Superior Court's ruling on September 22, 2005 (the "September 2005 Order"); and (b) by submitting documents in their appendices relating to those events. This evidence was not considered by the Superior Court below and is thus outside the record on appeal.

2. Accordingly, the ACE Companies respectfully request that the Court strike those portions of the briefs and appendices submitted by the Liquidator and the NAIC that fall outside of the evidentiary record.<sup>1</sup>

### **Factual Background**

3. The ACE Companies have appealed from two orders (the “Orders”) by the Superior Court. The first is the Order on Remand, dated October 8, 2004, and the second is the September 2005 Order, which was issued after a five-day evidentiary hearing on July 25 through 29, 2005.

4. On November 3, 2005, following the issuance of the September 2005 Order, the Liquidator (through the Joint Provisional Liquidators (“JPLs”) in the U.K.) sought the approval of the High Court of Justice in London (the “High Court”) for the scheme of arrangement (the “Scheme”) that would take effect if the Proposed Agreement at issue were approved by the New Hampshire courts. The High Court approved the Scheme on November 10, 2005. The High Court, however, expressly stated that its ruling was to have no bearing on the matters pending in the New Hampshire courts regarding the legality of the Proposed Agreement giving rise to the Scheme. (*See* L.A. 587, 590.) Moreover, the Liquidator gave assurances to the ACE Companies in correspondence preceding the petition to the High Court that it would not rely on the High Court’s decision in the New Hampshire proceedings. (*See* letter from JPLs’ counsel to counsel for the ACE Companies, dated October 31, 2005, annexed hereto as Exhibit A, at 2, ¶ 1.)

5. Nevertheless, the Liquidator refers to the events in the High Court in his appellate brief and included the High Court’s decision in the appendix. (*See* Liquidator’s Br. at 3-4; L.A. at 580-94.) It cannot be disputed that evidence concerning the High Court proceedings was not before the Superior Court in connection with the Orders.

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<sup>1</sup> The portions of the Liquidator’s brief that the ACE Companies are seeking to strike are on pages 3-4 and 21. The portions of the NAIC’s brief that the ACE Companies are seeking to strike are on pages 5-8. The portions of the appendices that the ACE Companies are seeking to strike are L.A. 577-605 and pages 52, 92-93 and 115-121 in the NAIC Appendix.

6. At the NAIC proceedings in December 2005, the Executive Committee of the NAIC adopted the Insurer Receivership Model Act (“IRMA”), which is a revision to the prior NAIC model act (but has to yet to be adopted by any state). IRMA includes a provision stating that a liquidator may pay Class I administration costs “where the payments assist in or result in the collection or recovery of property of the insurer that provides a net benefit to creditors of the estate.” (IRMA § 504(A)(3)(b); NAIC Appendix at 52.) There is also a drafting note for another section of IRMA setting forth the general principle that payments to lower priority creditors under Section 504(A)(3)(b) do not, by themselves, constitute distributions in violation of the priority statute. (NAIC Appendix at 93.) The drafting note is not in the text of IRMA.

7. Both the Liquidator and the NAIC refer to the post-September 2005 proceedings before the NAIC and rely on the provision in IRMA cited above (as well as the drafting note). (*See* Liquidator’s Br. at 21; NAIC Br. at 5-8.) The Liquidator and the NAIC have also included in their appendices a copy of IRMA and other NAIC-related materials from the post-September 2005 period. (*See* L.A. 595-605; NAIC Appendix at 10-121.) As with the evidence relating to the High Court proceedings, this evidence was not before the Superior Court in connection with the Orders.<sup>2</sup>

### Argument

8. The Rules make it clear that in an appeal from a lower court decision, the Supreme Court will not consider matters that are outside the evidentiary record before the Superior Court. Therefore, the portions of the briefs and appendices submitted by the NAIC and the Liquidator relating to events that occurred after the July 2005 hearing should be stricken.

9. Rule 13(1) expressly states that the record consists of the “papers and exhibits filed and considered in the proceedings in the lower court ... from which the questions of law have been

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<sup>2</sup> To the extent that the ACE Companies refer to the IRMA revision and drafting note in their appellate reply brief, it is solely in response to the arguments by opposing parties and in the event that the Court denies this motion to strike.

transferred, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court....” Rule 13(1). The parties must rely on and reference this record when presenting their arguments. *See, e.g.*, Rule 16(3)(b) (“After each statement of a question presented, counsel shall make specific reference to the volume and page of the transcript where the issue was raised and where an objection was made, or to the pleading which raised the issue.”). Failure to comply with this requirement “shall be cause for the court to disregard or strike the brief in whole or in part....” *Id.* In addition, the arguments in the brief should “exhibit[ ] clearly the points of fact and of law being presented, citing the authorities relied upon.” Rule 16(3)(f).

10. This Court has consistently held that its appellate review is limited to the record in the trial court. *See Verizon New Eng., Inc. v. City of Rochester*, 151 N.H. 263, 272-3 (2004); *LaMontagne Builders, Inc. v. Bowman Brook Purchase Group*, 150 N.H. 270, 274 (2003); *State v. Johnson*, 130 N.H. 578, 587 (1988); *State v. Stearns*, 130 N.H. 475, 486 (1988); *State v. Cassell*, 129 N.H. 22, 23-24 (1986); *State v. Laliberte*, 124 N.H. 621, 621-22 (1984); *Daboul v. Hampton*, 124 N.H. 307, 308-9 (1983); *Carbur’s v. A & S Office Concepts*, 122 N.H. 421, 423 (1982); *Badr Export & Import v. Groveton Papers Co.*, 122 N.H. 101, 103 (1982); *Sperl v. Sperl*, 119 N.H. 818, 821 (1979); *Hauser v. Calawa*, 116 N.H. 676, 677 (1976); *Wiggin v. Kent McCray of Dover, Inc.*, 109 N.H. 342, 348 (1969).

11. Here, as noted above, both the Liquidator and the NAIC have made repeated references to matters that were not considered below, and they have compounded this disregard for the Rules by including materials in the appendices that relate to events occurring after the Superior Court issued the September 2005 Order.<sup>3</sup> This is a clear violation of the Rules, and it requires an order striking the matters that are outside of the record on appeal.

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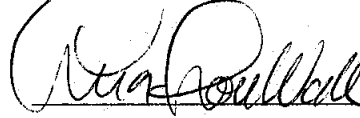
<sup>3</sup> The Liquidator may not rely on the NAIC to discuss the IRMA revision and drafting note. “Although an *amicus curiae* is permitted to make useful suggestions to the court on matters of law which may escape the court’s attention, an *amicus curiae* is bound by the issues presented by the parties [in the trial court below].” *Appeal of Town of Hampton Falls*, 126 N.H. 805, 814 (1985) (citing *Cerri v. Russell*, 506

WHEREFORE, the ACE Companies respectfully request that this Court enter an order:

- A. Striking the portions of the briefs and appendices submitted by the Liquidator and NAIC that are identified above; and
- B. Granting such other and further relief as this Court deems just and proper.

Dated: March 2, 2006

Respectfully submitted,



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Certificate of Service

I, Lisa Snow Wade, Esq., hereby certify that on this 2nd day of March, 2006, I have caused a copy of the foregoing to be forwarded by first class US mail to:

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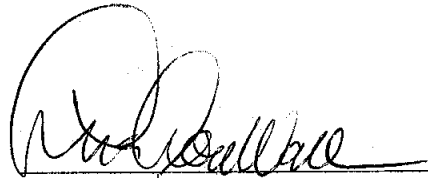
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EXHIBIT A

YOUR REFERENCE  
F1PJW/JBB1878650.2

IN REPLY PLEASE QUOTE  
JXXB/245559/70-20247416/DJS

DATE  
31 October 2005

DIRECT DIAL  
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Lovells  
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J Bannister, Esq.  
P Wilkinson, Esq.

Dear Sirs

The Home Insurance Company (in liquidation and in provisional liquidation) (the "Company")  
Century Indemnity Company and other ACE Group Companies ("ACE")

We write in response to your letter of 28 October 2005.

Before turning to the specific questions raised in your letter, we wish to make the following comments:

- (i) ACE misunderstands the reasons for our clients' seeking sanction of the Scheme at this time. It is not, as you have asserted, to seek a "litigation advantage". The joint provisional liquidators (the "JPLs") and the liquidator appointed by the New Hampshire Superior Court ("the NH Liquidator") believe such an application is appropriate for the reasons set out in paragraph 30 of the Third Witness Statement of Gareth Howard Hughes. They do not consider that any further delay in seeking sanction for the Scheme is appropriate. Neither do they accept that a sanction order of the English High Court would give rise to "confusion" on the part of the New Hampshire Supreme Court (the "NH Supreme Court").
- (ii) You note that the NH Supreme Court has, on two occasions, remitted the matter back to the NH Superior Court. These were in quite different circumstances and your description of them is in any event inaccurate. The order handed down by the NH

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Superior Court on 22 September 2005 ("the Approval Order") follows the NH Superior Court's thorough review of the issues and evidence.

- (ii) You assert that the ACE companies have a "legitimate interest" in seeking certain confirmations and information. Whilst we provide a response to your questions below, we would point out for the record that, for the most part, the ACE companies are substantial net debtors of the Company, the one exception being Pacific Employers Insurance Company who has submitted a proof of claim against the Company's estate in the amount of a mere US\$7,266.

We now turn to address your specific questions. Please note that, where a number of questions cover the same issue, such questions have been dealt with together.

1. *Please confirm that the JPLs are able and willing to give an irrevocable assurance and confirmation that, if the application were to be heard now and the Scheme were to be approved, such approval would not in any way be relied upon in any proceedings before the New Hampshire courts as evidencing the supposed benefit to the Company in implementing the Scheme or giving rise to some form of issue estoppel on that question.*

Whilst the NH Liquidator will obviously bring the outcome of the hearing of the JPLs' application for sanction of the Scheme to the attention of the NH Supreme Court, he shall not seek to rely on the High Court's decision as further evidencing the benefit to the Company of implementing the Scheme or as giving rise to an estoppel on that issue.

2. *Could you please confirm whether or not any discussions [between the JPLs and the Liquidator as to what would happen in the event that the appeal is successful] have taken place and if so what (if any) conclusions have been reached?*

The NH Liquidator is a public official appointed as liquidator by the NH Superior Court. If the NH Supreme Court were to issue a decision definitively holding that the Agreement is unlawful, the NH Liquidator's intention is that (after appropriate consultation) he would terminate the Scheme, as provided for therein.

3. *What do the JPLs presently anticipate will happen in or to the Scheme if it is sanctioned and the Approval Order is reversed?*

Please refer to the responses to question 2 above and questions 5 and 6 below.

4. *After a distribution has been made, is there any mechanism for it to be clawed back?*

There is no mechanism for any payments made under the Scheme to be clawed back. However, please see further below.

5. *Is it intended to implement the Scheme if sanctioned prior to the decision of the NH Supreme Court on the propriety of the proposed agreement and compromise under New Hampshire law being handed down? If not, what is the intention?*

The Approval Order handed down on 22 September 2005 is fully enforceable notwithstanding the pending appeals lodged by ACE and by Benjamin Moore & Co. In



all the circumstances, the JPLs intend to commence the implementation of the Scheme if it is sanctioned by the High Court on the current application. The JPLs and the NH Liquidator will be able to take account of the progress of the appeal at each point in the implementation of the Scheme, including at the stage of making payments to scheme creditors.

6. *What do the JPLs anticipate will have happened in the Scheme before the determination of the NH Supreme Court appeal, which we are told will have occurred no later than mid 2006?*

Please see 5 above.

The initial stages in the implementation of the Scheme will include the determination of the APFA cedants' claims (a process in which ACE will take part in accordance with the claims protocol agreed between ACE and the NH Liquidator (and approved by the NH Superior Court)), as well as the collection of amounts due to the Company from ACE group companies.

We would point out that, as you are aware, there are no assurances that the NH Supreme Court will have delivered its decision on the appeal by mid 2006.

7. *We would like to be informed of the JPLs' current best estimate as to what part of those additional costs it is anticipated will have been incurred by mid 2006 if the Scheme is approved now? If those additional costs are incurred and the Scheme is ultimately abandoned, it is [ACE's] understanding that those costs will be irrecoverable. Can you please confirm that this accords with the JPLs' own understanding?*

The costs from today to mid 2006 will depend on a range of factors, including progress in the two initial stages referred to under 6 above. The costs of this process, once incurred, will remain incurred. The NH Liquidator and the JPLs will throughout have regard to the interests of creditors.

Yours faithfully,

  
Clifford Chance LLP

cc: Gary Lee - Lovells, New York