

THE STATE OF NEW HAMPSHIRE SUPREME COURT

In the Matter of the Liquidation of The Home Insurance Company

No. 2004-0319

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

Defendants, 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., move this Court to stay the order of the Merrimack County Superior Court (McGuire, J.), dated April 29, 2004 (the "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, pending the mandatory appeal by Benjamin Moore & Co. ("Benjamin Moore") to this Court.¹ This motion is made pursuant to Rule 7-A of the New Hampshire Supreme Court Rules (the "Supreme Court Rules") as the ACE Companies have unsuccessfully sought similar relief from the Superior Court. In support of this Motion, the ACE Companies respectfully state as follows:

I. Background

(1) In the Order, the Superior Court approved of an agreement (the "Proposed Agreement") that Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator (the "Liquidator" of Home Insurance Company ("Home")),

¹ Pursuant to Rule 7, the ACE Companies are a party to the appeal by virtue of the Notice of Mandatory Appeal filed by Benjamin Moore.

entered into with representatives of certain insurers who had ceded insurance risk to Home as a participating member of the American Foreign Insurance Association ("AFIA") reinsurance pool. (Those insurers will be referred to herein as the "AFIA Cedents" and the reinsurance contracts issued by Home to the AFIA Cedents will be referred to as the "AFIA Treaties.").

(2) In the motion for approval of the Proposed Agreement, the Liquidator alleged that the AFIA Cedents would have no reason to submit their claims in the Home liquidation because their claims are Class V claims under N.H. Rev. Stat. Ann. § 402-C:44, and Class V claimants are unlikely to receive a distribution in Home's liquidation. The Liquidator sought to justify the Proposed Agreement as a "compromise" or "settlement" of alleged threats by the AFIA Cedents to seek to satisfy their claims against Home through separate proceedings in England or otherwise outside the New Hampshire liquidation. Although the Liquidator acknowledged that such attempts would be without legal basis and could be defeated, the Proposed Agreement purports to provide an "incentive" to the AFIA Cedents to file their claims in the Home liquidation by setting into motion a "scheme of arrangement" under English law which would pay the AFIA Cedents half of the net proceeds that are recovered from companies who reinsured the liabilities under the AFIA Treaties.

(3) The ACE Companies, which are reinsurers of Home's AFIA liabilities and Class V creditors, objected to the Liquidator's motion. The ACE Companies alleged that the Proposed Agreement directly violates the mandatory order of distribution provisions in N.H. Rev. Stat. Ann. § 402-C:44 because the AFIA Cedents would receive a distribution before the claims of higher classes of creditors had been paid in full and in an

amount different from other Class V creditors. The ACE Companies further alleged that the Liquidator has no authority to enter into a "compromise" with certain creditors in violation of the order of distribution established by the Legislature. The ACE Companies also requested (in the event that the Superior Court held that the Liquidator had the discretion to effect such a settlement) an opportunity to conduct limited discovery and present evidence on the issue of whether the Proposed Agreement was a reasonable exercise of the Liquidator's authority.

(4) Without allowing any discovery and without holding an evidentiary hearing, the Superior Court approved the Proposed Agreement in the Order and found that the Liquidator had the power to enter into the agreement "to protect the interests of the insureds and creditors" of Home. (See Order, a copy of which is annexed as Exhibit A hereto, at 2.)

(5) On May 6, 2004, shortly after receiving the Order, the ACE Companies filed a Motion to Transfer Question of Law for Interlocutory Appeal, and had also planned to file a motion to stay with this Court pending the interlocutory appeal.

(6) On May 7, 2004, Benjamin Moore filed, pursuant to Rule 7 of the Supreme Court Rules, a Notice of Mandatory Appeal directly with the New Hampshire Supreme Court.²

(7) Also on May 7, 2004, the Liquidator filed its Opposition to Motion to Transfer Question of Law For Interlocutory Appeal and, in the opposition, agreed that the Order was final and appealable as of right. The Liquidator expressly stated in the opposition that he intended to begin to implement the Proposed Agreement approved by

² Pursuant to Rule 7, the ACE Companies are a party to the appeal by virtue of the Notice of Mandatory Appeal filed by Benjamin Moore.

the Court pending any appeal. (See Liquidator's Opposition to Motion to Transfer, a copy of which is attached hereto as Exhibit B, at 2.)

(8) Believing that the Benjamin Moore appeal divested the Superior Court of jurisdiction, on May 11, 2004, the ACE Companies filed a motion to stay with this Court and a motion to waive the requirement, in Rule 7-A of the Supreme Court Rules, that motions for a stay be filed with the Superior Court in the first instance. That same day, the Supreme Court informed counsel for the ACE Companies that the motion to waive filing of the motion to stay had been denied, and that the case was remanded to the Superior Court for the limited purpose of ruling on any motion to stay filed by the ACE Companies.

(9) On May 12, 2004, immediately after this Court's order, the ACE Companies filed a Motion to Stay with the Superior Court.³

(10) By order dated June 1, 2004, the Superior Court denied the ACE Companies' motion for stay and found that the ACE Companies had not "met their burden in z demonstrating irreparable harm" and that a stay was "likely to create uncertainty and unnecessary delay." (See Order Relative to Stay of April 29, 2004 Order ("June 1 Order"), a copy of which is attached hereto as Exhibit C, at 3.) With respect to the ACE Companies' argument that a stay will preserve the status quo pending appeal, the Superior Court stated that it was "unlikely that the ACE Companies will be at actual risk for performance of their obligations in the near future." (Id. at 3.) The Superior Court further

³ On May 13, 2004, the ACE Companies also filed with this Court a Motion to Expedite Consideration of Appeal and to Suspend Rules. The Liquidator filed his response to the motion to expedite on May 21, 2004. The Liquidator opposed the expedited schedule proposed by the ACE Companies, but recognized the need for a speedy appeal and asked the Court to grant the appeal high priority status.

found the ACE Companies' "Motion to Transfer Question of Law for Interlocutory Appeal is moot and/or denied." (Id.)

(11) Also on June 1, 2004, the Superior Court issued an Addendum to its Order rejecting the ACE Companies request for further evidentiary hearing, stating such a hearing "would not be helpful." (See Addendum to Order of April 29, 2004, a copy of which is attached hereto as Exhibit D, at 2.)⁴

II. Basis For Relief

(12) The ACE Companies have moved for a stay pursuant to Rule 7-A of the Supreme Court Rules, which provides the procedural mechanism for stays pending appeal. The courts may "make such orders and decrees as may be necessary for the protection and preservation of the subject matter of the appeal; and [they] may do anything that is necessary for the presentation of the case in [the Supreme Court], or in furtherance of the appeal." *Rautenberg v. Munnis*, 107 N.H. 446, 447 (1966). This includes the power to "preserve the status quo" pending appeal. *Id.* at 448. In determining whether a stay should be issued, this Court balanced the merits of the appeal against the "delay and inconvenience" to the opposing party. *Id.* In other cases, the Supreme Court has referred to the potential for irreparable harm to the movant. *See, e.g., In re Larry B.*, 125 N.H. 376, 377 (1984).

⁴ The ACE Companies believe that the after-the-fact reasons given by the Superior Court for the denial of due process do not withstand scrutiny. Even more fundamentally, the ACE Companies respectfully suggest that the Superior Court lacked any jurisdiction to issue an "addendum" to the Order. The filing of an appeal divests the trial court of general jurisdiction and, indeed, this Court recognized the limitation on the Superior Court's jurisdiction when it remanded the case to the Superior Court solely for a decision on the motion to stay. In the June 1 Order, the Superior Court recognized that "the case was remanded for the limited purpose of ruling upon any motion to stay filed by ACE Companies." (June 1 Order at 1.) Moreover, no party had asked the Superior Court to clarify, amend or supplement the Order prior to the filing of the appeal. The "addendum," therefore, is a nullity.

(13) It cannot be disputed that the ACE Companies' appeal has merit. The Superior Court recognized (and the Liquidator agrees) that the Proposed Agreement presents a question of "first impression" in New Hampshire. (See Order at 1; Liquidator's Response to the Motion to Expedite Appeal at 4.) The appeal raises important issues relating to the violation of a New Hampshire statute, and the resolution of the appeal will have an effect on liquidations in New Hampshire and elsewhere (as many other states have similar provisions). Moreover, the ACE Companies were not given the opportunity to take discovery or present evidence to the Superior Court on the myriad factual issues surrounding the Proposed Agreement. Instead, the Superior Court accepted as true the affidavits submitted by the Liquidator, even though the affiants were individuals with an interest in the outcome and their statements were never tested by cross-examination. Thus, the ACE Companies' appeal involves fundamental issues of statutory construction and due process rights.

(14) The merits of the ACE Companies' appeal far outweigh any prejudice to the Liquidator. The Liquidator has argued that the granting of a stay would create confusion and uncertainty among the AFIA Cedents about the ultimate outcome. The confusion and uncertainty cited by the Liquidator already exists because the AFIA Cedents will not conclusively know, until the appeal is determined, whether the Proposed Agreement is permitted under New Hampshire law. Indeed, the Liquidator has recognized (and addressed) the lack of certainty by amending its agreement with the AFIA Cedents to allow (i) an extension of the standstill from June 1, 2004 to December 31, 2004; and (ii) AFIA Cedents to withdraw without prejudice any proof of claim filed in the Home liquidation in the event that this Court rules against the Liquidator. (See May

25, 2004 letter from Gareth Hughes and other related letters, attached as Exhibit E.) Thus, the Liquidator cannot show that any of the AFIA Cedents would pursue a different course of action if the stay were granted. The AFIA Cedents now have an incentive to file a proof of claim, whether or not there is a stay, because they may always withdraw the proof of claim later.

(15) The Liquidator has also asserted that a stay would delay the implementation of the scheme by at least a year. The ACE Companies, however, filed a motion for expedited consideration and, in response, the Liquidator agreed that the appeal should be given a higher priority (although he disagreed with the schedule proposed by the ACE Companies). Thus, the time for deciding the appeal is likely to be much shorter than the Liquidator anticipates, and such a short delay pales in comparison to the harm that will be caused if the Liquidator proceeds with the Proposed Agreement and scheme only to have this Court reverse the Order that allowed the Liquidator to go forward.

(16) It is clear that both parties would suffer if they were to participate in a scheme that this Court later finds to be contrary to New Hampshire law. The Liquidator has stated that he will take steps in England to implement the scheme and then will begin adjusting and determining the AFIA Cedents' claims. These actions are all at great expense to the Home liquidation. The ACE Companies would also incur substantial costs in opposing the scheme in England. If the scheme is approved, the ACE Companies will also expend significant resources in the process of determining whether the AFIA Cedents' claims should be paid. All of these efforts by the parties - *i.e.*, the participation in the U.K. proceedings and the claims determination process - would be wasted if the Supreme Court were to find that the Proposed Agreement violates New Hampshire law.

(17) In sum, the ACE Companies' appeal raises several meritorious issues concerning the complex and novel scheme proposed by the Liquidator, as well as the manner in which the Superior Court approved the Proposed Agreement. Given that any potential prejudice to the Liquidator is far outweighed by the merits and that a denial of the stay could cause harm to both parties, the ACE Companies respectfully submit that the prudent approach would be for the Court to preserve the status quo by issuing a stay pending a determination of the appeal.

(18) The ACE Companies also respectfully submit that this Court should not be swayed by the Superior Court's denial of the earlier motion for a stay. The June 1 Order is flawed in several ways, as outlined below.

(19) First, the Superior Court applied the wrong legal standard, citing a bankruptcy case, *In re Public Service Co. of N.H.*, 116 B.R. 347 (Bankr. N.H. 1990), which involved a motion for a stay pursuant to Rule 8005 of the Federal Rules of Bankruptcy. The First Circuit has held that a party seeking a stay of an order of a bankruptcy judge must meet the same four-prong test used to determine whether a preliminary injunction should issue.⁵ This Court, however, has established a more straightforward test that balances the merit so the appeal against the potential harm if a stay is not granted. (*See supra.*)

(20) Second, the only harm that the Superior Court found was that a stay would likely "create uncertainty and unnecessary delay." (June 1 Order at 2.) As discussed

⁵ The movant must show (1) a likelihood of success on the merits on appeal; (2) irreparable harm to the movant if relief is not granted; (3) that the harm to the movant if the stay is denied is greater than the injury the opposing party will suffer if the stay is granted; and (4) the stay would not harm the public interest. *Public Service*, 116 B.R. at 348. The Superior Court did not even apply the four-prong test from *Public Service* (which would have required some consideration of the merits), and instead held that the "ACE Companies must demonstrate that absent a stay they will suffer irreparable harm and that harm to them will be greater than any harm imposed on the liquidation by a stay." (June 1 Order at 2.)

above, the Liquidator has mitigated any such uncertainty in its agreement with the AFIA Cedents and the appeal should cause only minimal delay (which is outweighed by the merits of the appeal and the fact that the efforts of both parties would be wasted in the event of a reversal).

(21) Third, the Superior Court stated that the ACE Companies would not be harmed because it is "unlikely" they "will be at actual risk for the performance of their obligations in the near future." (Id. at 3.) Even if the Superior Court were correct, the harm to the ACE Companies is not that they might have to perform under their agreements in the future. The harm, which could be eliminated by the issuance of a stay, is that the ACE Companies will be forced to participate in the claims determination process, only to find that such participation is for naught because this Court reversed the Order.

(22) Accordingly, this Court should make its own determination and find that the ACE Companies have met the standards for the issuance of a stay pending appeal.

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

- A. To stay the Superior Court's Order pending appeal; and
- B. To grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

ACE Companies

By Their Attorneys

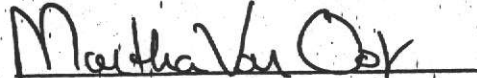
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Dated: June 9, 2004

By: Matthew Van Orsdel
Ronald L. Snow

CERTIFICATE OF SERVICE

I, Ronald L. Snow, certify that I served by first-class mail a copy of the foregoing Motion for Stay of Order Pending Mandatory Appeal Pursuant to Rule 7 on June 9, 2004 to the attached service list.



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