THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2004-0319

In the Matter of the Liquidation of
The Home Insurance Company

APPEAL FROM A FINAL ORDER OF THE
MERRIMACK COUNTY SUPERIOR COURT

BRIEF FOR THE COMMISSIONER OF INSURANCE AS LIQUIDATOR OF THE HOME INSURANCE COMPANY

ROGER A. SEVIGNY, COMMISSIONER
NEW HAMPSHIRE INSURANCE
DEPARTMENT, in his capacity as
LIQUIDATOR OF THE HOME INSURANCE
COMPANY

Kelly A. Ayotte
Acting Attorney General

Peter C.L. Roth
Senior Assistant Attorney General
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3679

J. David Leslie (pro hac vice pending)
Eric A. Smith (pro hac vice pending)
RACKEMANN, SAWYER & BREWSTER, PC
One Financial Center
Boston, MA 02111
(617) 542-2300

July 7, 2004

To be argued by
Peter C.L. Roth (15 minutes)

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1. Do those indebted to an insolvent insurer in liquidation and others inextricably entangled with them have standing to appeal from a Superior Court order approving an agreement that will facilitate the collection of those debts for the benefit of the estate's creditors?

2. Does the Insurers Rehabilitation and Liquidation Act, RSA 402-C, authorize the liquidator of an insolvent insurer to endorse an agreement which enables the liquidator to marshal otherwise unavailable assets for distribution to policyholder creditors by providing for contingent payments to certain lower priority creditors?

3. Did the Superior Court reasonably exercise its discretion in approving the agreement as a proper exercise of the Liquidator's authority based on the record, which included extensive affidavits setting forth the factual circumstances and the reasons for the agreement?

STATUTORY PROVISIONS INVOLVED

This appeal involves the Insurers Rehabilitation and Liquidation Act, RSA 402-C (Supp. 2003) (the "Act"), in particular RSA 402-C:1, C:25, C:36, and C:44, as well as RSA 405:49 (Supp. 2003), which are set forth in the addendum along with the Superior Court's decisions.

STATEMENT OF THE CASE AND FACTS

This is an appeal from an order (the "Order") entered by the Superior Court for Merrimack County ("Superior Court") in liquidation proceedings for The Home Insurance Company ("Home"), a New Hampshire domiciled insurer that did business throughout the United States and in various other countries, including the United Kingdom. Home was declared insolvent and the commissioner of insurance ("Commissioner") was appointed as its Liquidator ("Liquidator") by the Superior Court in an Order of Liquidation entered on June 13, 2003.

Appendix to Liquidator's Brief ("L.A.") 5. *See* RSA 402-C:21.[1] The High Court of Justice in London ("English Court") appointed joint provisional liquidators for Home's unincorporated UK branch operation (the "Home UK Branch") in an English provisional liquidation proceeding on May 8, 2003. Joint Appendix of ACE Companies and Benjamin Moore & Co. ("J.A.") 29.

In the Order, the Superior Court, acting in its supervisory capacity under RSA 402-C:25, granted the Liquidator's motion for approval of the Liquidator's endorsement of a compromise reflected in a letter agreement dated January 22, 2004 (the "Agreement" (J.A. 54)). As described below, the Agreement provides for the implementation of an English "scheme of arrangement" ancillary to these proceedings. The Agreement was entered to facilitate the collection of a multimillion-dollar asset of Home (its rights to indemnity and reinsurance under an Insurance and Reinsurance Assumption Agreement (the "Assumption Agreement") and certain Excess of Loss Reinsurance Agreements (the "BAFCO Agreements") and to avoid costly, uncertain and protracted multi-jurisdictional litigation.

This appeal is pursued by four affiliated companies (the "ACE Companies"), one of whom, Century Insurance Company ("Century"), now bears the obligations under that Assumption Agreement, and by Benjamin Moore & Company ("BMC"), a policyholder claimant affiliated with an insurer that reinsures Century's obligations under the Assumption Agreement.

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[1] The rehabilitation or liquidation of troubled insurers in the United States is a matter of state law governed by a national scheme of interrelated state laws. Every state of the United States has now enacted a version of the Insurers Rehabilitation and Liquidation Model Act ("Model Act") approved by the National Association of Insurance Commissioners ("NAIC"), *see* III *NAIC Model Laws, Regulations and Guidelines* 555-1 (2004) ("*NAIC Model Laws*"), or the Uniform Insurers' Liquidation Act ("UILA") adopted by the Commissioners on Uniform State Laws, see 13 U.L.A. 321 (Master ed. 1986). *See NAIC Model Laws* 555-63 to 555-67. The New Hampshire Act, RSA 402-C, originally enacted by 1969 N.H. Laws 272:1, is based on the Wisconsin Insurers Rehabilitation and Liquidation Act, Wis. Stat. § 645, enacted by 1967 Wis. Laws c. 89, § 17, which was recommended for adoption by the NAIC in 1969. *See NAIC Model Laws* at 555-62. These statutes provide for coordinated United States proceedings for insolvent insurers centralized in a single state, the insurer's domiciliary state, with the possibility of ancillary proceedings in other states and foreign countries. Congress has recognized the historical role of the states in regulating insurance by enacting the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, and excluding insurers from the Bankruptcy Code. *See* 11 U.S.C. § 109(b).

1. Procedural history. In their briefs, the appellants fail to mention a critical order issued on April 9, 2004. That order scheduled the hearing for April 23, 2004, permitted further filings by April 16, 2004, and stated that if the question whether the Agreement is authorized under RSA 402-C "is answered affirmatively, the Court will consider the agreement and whether further hearing on its approval is necessary." L.A. 97 (emphasis added). It was thus no surprise that the Superior Court entered a final order after the April 23, 2004 hearing. Additional information concerning notice issues is contained in part IV below.

2. Statement of facts. The affidavits and other papers filed with the Superior Court, and counsel's concessions at the hearings, show the following:

a. The AFIA Treaties and the Assumption Agreement. The Home UK Branch wrote insurance and reinsurance business in the United Kingdom as a participating member of the American Foreign Insurance Association, an unincorporated association of American insurers ("AFIA"), and then reinsured that business with the AFIA members as well as a number of other third party reinsurers. Among other things, the Home UK Branch entered certain reinsurance treaties (the "AFIA Treaties") under which a number of insurers (the "AFIA Cedents") ceded insurance risk to Home through the Home UK Branch. In 1984, CIGNA and certain of its subsidiaries purchased AFIA. As part of that transaction, a CIGNA subsidiary, Insurance Company of North America ("INA"), agreed in the Assumption Agreement to assume the insurance and reinsurance liabilities with respect to the Home UK Branch business, administer that business, and bear the related costs and expenses. The AFIA Treaties, however, were never formally transferred under English law.[2] They accordingly remain an obligation of Home,

[2] Other parts of the Home UK Branch's AFIA business were formally transferred to a CIGNA subsidiary under English law in 1986. This effected a novation such that the transferred business became a direct obligation of the relevant CIGNA subsidiary, and Home no longer had any involvement with that business. J.A. 28.

through the Home UK Branch, subject to the protections afforded by the Assumption Agreement and the BAFCO Agreements.[3] Since 1984, claims submitted by the AFIA Cedents under the AFIA Treaties have been handled and paid on Home's behalf by INA or later Century or, when Century became part of the ACE organization, by Century or other members of the ACE group at their own expense pursuant to the Assumption Agreement. J.A. 28-29.

b. The effects of Home's liquidation. The insolvency of Home and its consequent liquidation had several significant effects:

First, all claims against Home must be filed with the Liquidator. *See* RSA 402-C:37; RSA 402-C:57. As a result, instead of being submitted to the ACE Companies for direct payment, the AFIA Cedents' claims under the AFIA Treaties must be filed with the Liquidator, who is vested with title to and charged with collecting the insolvent insurer's assets. *See* RSA 402-C:21; RSA 402-C:25, VI. J.A. 29.

Second, the Assumption Agreement contains an insolvency clause requiring that:

> In the event of the insolvency of [Home], this reinsurance shall be payable directly to [Home], or to its liquidator, . . . on the basis of the liability of [Home] without diminution because of the insolvency of [Home] or because the liquidator . . . has failed to pay all or a portion of any claim.

Assumption Agreement § 6; J.A. 84. The ACE Companies thus must now make payments under the Assumption Agreement to the Liquidator, not the AFIA Cedents. J.A. 29. The ACE Companies' liabilities under the Assumption Agreement for the AFIA Treaties are substantial assets of the estate. The ACE Companies themselves had valued the expected claims under the

[3] The BAFCO Agreements, which are governed by English law and are UK assets capable of repatriation from the UK, have now been assumed by Century Indemnity Reinsurance Company ("CIRC"), an affiliate of the ACE Companies. The BAFCO Agreements appear to overlap with the Assumption Agreement, so for clarity of presentation the Liquidator does not discuss them separately in this brief. They have substantial value estimated at $211 million after offsets. J.A. 133-134.

AFIA Treaties, and thus their obligations under the Assumption Agreement, at $231 million as of December 31, 2002 (the year end prior to the Home liquidation). J.A. 118, 263-264.

Third, claims of the AFIA Cedents fall in the priority class V. *See* RSA 402-C:44, V. While the ultimate collected assets of the Home estate and the total allowed claims in each class are not yet known, it is unlikely that Home will make a distribution to this class. The AFIA Cedents are thus unlikely to receive payment on their claims. J.A. 30, 265.

c. Problems and disputes arising from liquidation. The Liquidator faced several challenges in collecting the ACE Companies' liabilities under the Assumption Agreement:

First, and most importantly, the ACE Companies' obligations under the Assumption Agreement could only be collected if AFIA Cedents file and prosecute claims against Home with the Liquidator. J.A. 34, 37, 118-119, 256. The AFIA Cedents are class V creditors who are not expected to receive distributions in the liquidation, however, and they thus have no reason to file and prosecute claims against Home (except to the limited extent they would benefit by offset of their claims against Home against Home's claims against them). J.A. 30, 119, 253. This would prevent the Liquidator from collecting the ACE Companies' liabilities under the Assumption Agreement and provide them with a windfall because Century would avoid making payments it would have made if Home were not in liquidation. J.A. 37. Certain AFIA Cedents advised the Joint Provisional Liquidators and the Liquidator that they would not file and prosecute claims in these circumstances except to preserve offset rights. J.A. 30, 119, 135, 147-148, 162-163.

Second, certain AFIA Cedents threatened to obtain some payment on their claims by agreeing with the ACE Companies not to file claims with the Liquidator in exchange for a discounted payment directly from the ACE Companies. Such "cut through" arrangements would benefit the ACE Companies by depriving the Liquidator of the ability to collect under the

Assumption Agreement for those claims. The Liquidator and the Joint Provisional Liquidators advised the ACE Companies and certain AFIA Cedents that any such side arrangements would be subject to challenge, and could lead to potential duplicative liability on the part of the ACE Companies. This might not, however, fully preserve access to recoveries to which Home would otherwise be entitled. J.A. 30-31, 37, 119, 121, 135, 147-147, 163.

Third, certain AFIA Cedents questioned the application of the New Hampshire claims and distribution procedures to claims and assets located in the UK and suggested that UK assets should be "walled off" from United States creditors and distributed only to Home UK Branch creditors. While the Liquidator and Joint Provisional Liquidators do not believe that there is any legal merit to this, the issue raised the prospect of costly and time-consuming litigation over whether there should be separate US and UK liquidations or a global New Hampshire proceeding. If the "walling off" approach were to be upheld, proceeds from the BAFCO Agreements could well be kept from the Liquidator for exclusive distribution to the AFIA Cedents. J.A. 31, 119-120, 136, 147-148, 163.

d. The Agreement. To address these problems, the Joint Provisional Liquidators, supported by the Liquidator, negotiated the Agreement with the Informal Creditors' Committee in the English proceeding ("Committee"), which includes over 75% in value of the AFIA Cedents. The Agreement provides for a compromise to be implemented by a "scheme of arrangement" between Home and all AFIA Cedents under English law ("Scheme"). J.A. 32, 54.

As pertinent here, the Agreement provides for a portion of the net proceeds received from the ACE Companies with respect to the AFIA Cedents' claims to be allocated to the Scheme for distribution to the AFIA Cedents, with the remainder to vest with the Liquidator. Agreement § 1.9; J.A. 57-58. The determination of amounts to be allocated to the Scheme for AFIA

Cedents is shown on the illustration used at the Superior Court hearing (J.A. 350). As an initial matter, the amounts due from the ACE Companies with respect to claims under the AFIA Treaties that are allowed in the liquidation will be reduced by offset, in accordance with RSA 402-C:34, of amounts due from Home. Agreement § 1.3; J.A. 55. The proceeds actually received from the ACE Companies (*i.e.*, after application of offsets) will then be reduced by deductions reflecting costs incurred by Home and other amounts. *Id.*[4] The amounts deducted will be retained by Home. The most important deduction for purposes of this appeal is the deduction of amounts received by Home on account of Home AFIA liabilities which will be settled with the AFIA Cedents by way of offset (*i.e.*, amounts for which the AFIA Cedent concerned will receive a credit against its obligations to Home). Agreement § 1.3.4. Fifty percent of the amounts remaining after the deductions (the "Proceeds" as defined in the Agreement) plus any amounts received on cost orders will be paid to the AFIA Cedents as "Net Recoveries," and the other 50% will be retained by Home. Agreement § 1.2. *See* J.A. 33-34.

The Agreement required approval by the Superior Court, while the Scheme requires approval by the AFIA Creditors and the English Court and is conditioned upon entry of a global liquidation order by the English Court and approval by the UK insurance regulator, the Financial Services Authority ("FSA"). Agreement § 1.1.2, 1.1.3; J.A. 54-55. *See* J.A. 33. In light of this multi-jurisdictional process, the Agreement provided for a Standstill Period to June 1, 2004 (since extended by agreement to December 31, 2004) during which signatory AFIA Cedents will not seek to make "cut-through" agreements with the ACE Companies. Agreement §§ 1.5-1.7;

[4] The deductions are: (i) the costs of the UK provisional liquidation; (ii) the costs of collecting the proceeds; (iii) the costs of obtaining approvals from the New Hampshire and English courts; (iv) amounts received by Home on account of Home AFIA liabilities which will be settled with the AFIA Cedent by way of offset; and (v) amounts received by Home on account of any costs orders entered against it in disputed claims proceedings (which otherwise will not be paid by Home). Agreement § 1.3; J.A. 55-56.

J.A. 56-57. In light of the Order, on June 25, 2004, the Joint Provisional Liquidators filed an application with the English Court for direction to convene a meeting of AFIA Cedents to approve the Scheme. The English Court granted the direction in an order entered July 5, 2004.

SUMMARY OF ARGUMENT

This appeal seeks to overturn the Superior Court's Order approving the Agreement, which will benefit the policyholders of the insolvent insurer by enabling the Liquidator to collect significant assets for payment of their claims. These assets are the obligations – estimated at $231 million – of one of the appellant ACE Companies under the Assumption Agreement. They are of no value unless the AFIA Cedents submit and prosecute claims, which are a predicate for the Liquidator to recover under the Assumption Agreement. The Agreement also avoids efforts by the AFIA Cedents to circumvent the liquidation through agreements directly with the ACE Companies or to wall off UK assets for the exclusive benefit of UK creditors.

The appellants lack standing to appeal because they are not aggrieved by the Order. As purported creditors of Home, the appellants are benefited, not harmed. (As shown by the NCIGF amicus brief, the Agreement is supported by the principal policyholder level creditors of the estate, the insurance guaranty funds paying claims under Home's policies.) The appellants' interests as debtors seeking to delay and reduce claims against their own are not protected by the insurer liquidation statutes. The only non-debtor appellants, BMC and PEIC, are inextricably entangled with the debtors and lack independent standing.

The Agreement is authorized by the Act (and its analogs nationwide, as shown by the amicus NAIC). The Liquidator has express authority to take all "necessary and expedient" steps to collect and preserve the assets of the estate and otherwise act to further the purpose of the liquidation under RSA 402-C:25. The Act is to be "liberally construed" to effect its purpose of

protecting policyholders to the fullest possible extent. RSA 402-C:1, -C:44, II. The Agreement is within the Liquidator's broad powers and serves the statutory purpose by allowing the collection of assets to benefit creditors.

The Agreement complies with the Act's priority provision. That section expressly provides for the payment of the costs of collecting assets – the "actual and necessary costs of preserving or recovering the assets of the insurer" – as administration costs with first priority. RSA 402-C:44, I. Contingent payments to AFIA Cedents from collected assets under the Agreement are collection costs like finders' or contingency fees. They are not class V distributions on claims but payments to obtain recoveries. If the Liquidator is unable to collect recoveries from the ACE Companies in excess of the specified deductions, the AFIA Cedents will receive nothing regardless of their allowed claims in the liquidation.

The appellants' position not only fails to account for the express administration costs priority in RSA 402-C:44, I, but violates the established principle that statutory provisions are interpreted not in isolation but together and in light of the policy sought to be advanced by the entire statutory scheme. Their position frustrates the purpose of the Act and the priority provision in particular to protect policyholders. The statute does not compel the absurd result that any payment to lower priority creditors mandates depriving priority creditors of additional distributions. Appellants and their amicus RAA attempt to advantage debtors at the expense of creditors by allowing debtors to pay less than they would have paid absent the insurer's insolvency. This is contrary to the intent of the Legislature evidenced in RSA 402-C:36 and the insolvency clause statute, RSA 405:49.

The Superior Court reasonably exercised its discretion in approving the Agreement. The record reflects that it would benefit the liquidation and Home's creditors by (1) permitting

collection of assets (recoveries under the Assumption Agreement and the BAFCO Agreements) that would otherwise be unavailable because AFIA Cedents would not file and prove claims, (2) avoiding attempts by AFIA Cedents to circumvent the liquidation by entering "cut through" agreements with the ACE Companies, and (3) facilitating collection of assets from the UK by avoiding any attempt to "wall off" UK assets – the BAFCO Agreements – for the exclusive benefit of UK creditors. The Superior Court acted within its discretion in deciding that an evidentiary hearing "would not be helpful" given the record and denying the ACE Companies broad and unnecessary discovery.

The appellants were afforded ample process by the Superior Court, which advised them by order entered April 9, 2004 that it might decide the matter after the April 23, 2004 hearing but that they could file any additional materials by April 16, 2004. The appellants cannot complain of inadequate notice of the motion when they had actual notice and opportunity to be heard through filings and two hearings on the motion. Due process does not require an expensive mass mailing to policyholders and cedents and publication notice for every motion that might potentially affect creditors.

ARGUMENT

I. THE COURT SHOULD DISMISS THE APPEAL BECAUSE THE APPELLANTS LACK STANDING TO APPEAL.

The Liquidator has moved to dismiss this appeal because the appellants are not aggrieved by entry of the Order and so lack standing to appeal. *See* N.H. Sup. Ct. R. 25(7). The Agreement will benefit, not harm, the creditor interests asserted by appellants (in particular those of policyholders like BMC) by collecting an otherwise unavailable asset. Further, while the appellants have cloaked themselves in creditor clothing, their opposition is driven by more

wolfish debtor appetites seeking to retain a windfall for the ACE Companies and BMC's reinsurer affiliate. Those debtor interests, however, are not protected by the Act.

A. To Have Standing To Appeal, The Appellants Must Be Aggrieved By The Order.

Standing is particularly important in appeals from proceedings, like the Home liquidation, that involve the interests of many persons and that the Legislature intended would proceed expeditiously and efficiently. *See* RSA 402-C:1, IV (c); RSA 402-C:29, II; RSA 402-C:46, I. Insolvency proceedings involve a "myriad of parties, directly and indirectly involved or affected by each order and decision of the [supervising] court, [which] mandates that the right of appellate review be limited to those persons whose interests are directly affected." *In re el San Juan Hotel*, 809 F.2d 151, 154 (1st Cir. 1987). Bankruptcy courts have accordingly limited standing to appeal to "persons aggrieved" so that insolvency proceedings are "not unreasonably delayed by protracted litigation that does not serve the interests of either the [insolvent's] estate or its creditors." *Id.*[5] Thus, for a party to have standing to appeal, the order appealed from must in some way diminish its property, increase its burdens or detrimentally affect its rights. *E.g.*, *Spenlinhauer v. O'Donnell*, 261 F.3d 113, 118 (1st Cir. 2001); *San Juan Hotel*, 809 F.2d at 154.

B. The ACE Companies Are Not Aggrieved Because They Suffered No Injury And Their Debtor Interests Do Not Support Standing.

The ACE Companies are not aggrieved by the Order as creditors. Their claims fall in class V. J.A. 77, 252-253. Thus, to the extent that they have a creditor interest in the estate, that interest is at a priority which their counsel conceded is "not going to get anything." J.A. 265. As the Superior Court concluded (J.A. 283-284), where class V creditors will get nothing

[5] This Court has similarly required that a party be a "person aggrieved" to appeal in proceedings over estates. *See Swan v. Bailey*, 84 N.H. 73, 74 (1929); *Worthen v. New York C. & H. R.R.*, 77 N.H. 520, 522 (1915).

irrespective of the Agreement, members of that class are not harmed by it. The ACE Companies thus lack standing in their asserted creditor capacity.

The real interest of the ACE Companies, however, is in the avoidance of their liabilities, that is, to reduce their obligations as debtors of Home. Based on the affidavit presented by the ACE Companies to the Superior Court (J.A. 77), their claims against Home total approximately $13.5 million. The claims of the Liquidator against three of the ACE Companies vastly exceed – by over $260 million – the claims of those companies against Home, and each company is a net debtor to Home. J.A. 117-118. Only Pacific Employers Insurance Company ("PEIC") has net claims against Home, and those claims total approximately $25,000. J.A. 77.[6] The largest obligation of the ACE Companies to Home is the Assumption Agreement estimated at $231 million. J.A. 118, 263-264. Under that agreement, Century is obligated to pay the Liquidator for the claims of AFIA Cedents allowed through the liquidation process. J.A. 84. As the Superior Court recognized, the ACE Companies stand to benefit if the AFIA Cedents do not submit and prove claims because that will reduce Home's indemnity entitlements and give them a windfall. J.A. 118-119, 285. See J.A. 256, 266-267. It is thus in their interest to block the Liquidator from being able to effectively pursue their pre-liquidation liabilities under the Assumption Agreement.

As this Court held long ago, debtor's interests do not support appellate standing to challenge the administration of an estate. A debtor like the ACE Companies "is not a party interested in the estate. On the contrary, its interests are wholly adverse to the estate. Its avowed purpose . . . is not that the estate be more properly administered here, but that any administration

[6] After the proceedings below ended, the ACE Companies filed proofs of claim under penalties of perjury asserting claims totaling approximately $153 million. ACE Br. At 7. This obviously does not accord with their affidavit in the Superior Court, but the estimated value of the Liquidator's claims against the ACE Companies other than PEIC still exceeds their claims against Home by a good margin. *See* J.A. 118. PEIC now claims $17,896. ACE Br. 7 n.4.

in this jurisdiction be prevented." *Worthen*, 77 N.H. at 521.[7] *See also C-E Bldg. Prods., Inc. v. Seal-Rite Aluminum Prods., Inc.*, 114 N.H. 150, 151-52 (1974) (surety lacks standing to oppose judgment against principal); *San Juan Hotel*, 809 F.2d at 155 (potential defendant is not an "aggrieved person"); *In re Multiple Service Indus., Inc.*, 46 B.R. 235, 236-37 (E.D. Wis. 1985) (no guarantor standing to appeal: "the interests of the creditors of the bankruptcy estate would be severely impaired if the bankruptcy laws served to protect a guarantor").

Put another way, the ACE Companies' desire to retain the windfall resulting from the reduction of their obligations under the Assumption Agreement is not an interest that "the law was designed to protect." *Lake v. Sullivan*, 145 N.H. 713, 716 (2001) (quoting *Roberts v. General Motors Corp.*, 138 N.H. 532, 535 (1994)). The Act is designed to protect the interests of policyholders and creditors and promote expeditious and economical liquidation. *See* RSA 402-C:1, IV. Courts in other states have recognized that debtors, specifically reinsurers, lack standing to challenge actions under insurance statutes intended to protect the interests of policyholders or other creditors. *See In the Matter of Electric Mutual Liability Ins. Co.*, 689 N.E.2d 773, 773-74 (Mass. 1998); *LaFarge Corp. v. Pennsylvania Ins. Dept.*, 690 A.2d 826, 838 (Pa. Commw. Ct. 1997), *rev'd on other grounds*, 735 A.2d 74 (Pa. 1999). PEIC is the only ACE Company that is a potential creditor of the Home estate (with a small class V claim that will receive nothing either way), and it is asserting a common position with the other ACE Companies through common counsel. In these circumstances, PEIC is too "inextricably entwined" with the debtor ACE Companies to have independent standing. *See Palmer v. U.S. Sav. Bank of Am.*, 131 N.H. 433, 441-442 (1989) ("The other plaintiffs' entanglement with

[7] As the Court noted in *Worthen*, the rule against debtor standing to appeal has a long ancestry in law. *See Worthen*, 77 N.H. at 522, (citing *Veazie Bank v. Young*, 53 Me. 555, 560 (1866), and *Swan v. Picquet*, 20 Mass. (3 Pick.) 443, 473 (1826) ("a party aggrieved must be one who is interested in the administration of the estate, and not a debtor merely. If one debtor has a right to appeal, every debtor must have the same right; which would be inconvenient.")).

Lowell was evidenced by their continued representation in the action by Lowell's counsel . . . even after the court had found Lowell to have a conflict of interest.").

C. The Liquidator Did Not Acquiesce To Appellate Standing.

The ACE Companies' attempt to bootstrap appellate standing from their intervention before the Superior Court also fails. The Liquidator assented to intervention there because the Superior Court, in its supervisory capacity over the liquidation (*see* pages 32-33 below), appropriately may consider information and argument from any interested person. Such "intervention" in an *in rem* proceeding, however, does not confer appellate standing. *See Bryant v. Allen*, 6 N.H. 116, 118 (1833) ("every person whose rights are in any way involved in the proceeding [an estate] . . . has a right to become a party . . . and to be heard [but only a] person or party aggrieved . . . may appeal therefrom"). This distinction reflects the multifaceted nature of insolvency proceedings. *See also Harker v. Troutman (In re Troutman Enterps, Inc.)*, 286 F.3d 359, 363-64 (6th Cir. 2002); *In re PSNH*, 88 B.R. 546, 557 (Bankr. D.N.H. 1988) (appellate standing is "separate question" from intervenor status).[8] In any event, standing is a jurisdictional issue that properly may be raised at any time. *See Devere v. State*, 149 N.H. 674, 676 (2003); *Asmussen v. Commissioner*, 145 N.H. 578, 588-89 (2000).

D. BMC Is Not A Person Aggrieved As It Benefits From The Order, And Its Actions Can Only Be Explained As The Assertion Of The Debtor Interests Of Its Affiliates.

BMC is also not aggrieved as a creditor. It has asserted a policyholder (class II) claim against Home. J.A. 10. As a class II claimant, BMC will substantially benefit from the

[8] The ACE Companies' reliance on 4 R. Weibusch, New Hampshire Practice, Civil Practice and Procedure § 6.23 at 132-33 (1997), is misplaced in this context. Further, the only case cited in that part of the treatise, *In re Petition for Admission of Demers*, 130 N.H. 31 (1987), does not stand for the proposition that intervention gives rise to appellate standing. The Court there only chose "[f]or procedural convenience" to hear a matter on direct appeal by a person (the Superintendent of New Hampshire State Hospital) who intervened after entry of the order appealed from, which specifically directed action by him. *Id.* at 33.

Agreement, which will increase the amount of money available to be distributed to class II claimants by the Liquidator. Where BMC will benefit from the Agreement, it cannot fairly be said that BMC is also "aggrieved" by it, nor that BMC's interest as a creditor will be harmed.

Why is BMC pursuing an appeal that, if successful, will reduce its distribution? There is only one logical explanation: it is acting not for its own interests as a policyholder but for the debtor interests of the corporate group to which it belongs. In its Rule 7 Notice of Mandatory Appeal, BMC disclosed that it is a wholly owned subsidiary of Berkshire Hathaway, Inc. ("Berkshire"). Berkshire is also the parent of National Indemnity Company ("NICO"), which is in turn a reinsurer of Century's Assumption Agreement obligations for claims under the AFIA Treaties through reinsurance protection NICO provided to Brandywine Holdings Corporation. L.A. 99, 115, 118, 120. In addition, BMC's primary coverage for 20 years was through INA, for which Century (and thus NICO) is now obligated. L.A. 99. These factors explain why BMC has pursued opposition and appeal contrary to its own apparent economic interests. This entanglement between BMC and the debtor interests of NICO and the ACE Companies means it lacks independent standing. *See Palmer*, 131 N.H. at 441-442. The true interests of class II creditors are represented by the National Conference of Insurance Guaranty Funds ("NCIGF"), which supports the Agreement.[9] *See* J.A. 37-38; NCIGF amicus brief.

II. THE AGREEMENT DOES NOT VIOLATE THE NEW HAMPSHIRE INSURERS REHABILITATION AND LIQUIDATION ACT.

The Superior Court properly approved the Agreement as consistent with the Act. The insurer liquidation statutes authorize agreements that bring in otherwise uncollectible assets for

[9] The guaranty funds are the statutory entities established in each state to take over the handling and payment of "covered claims" under insurance policies issued by insolvent insurers as defined in their respective statutes. *See, e.g.*, RSA 404-B:5, IV, RSA 404-B:8, I (New Hampshire Insurance Guaranty Association). The guaranty funds' claims for reimbursement of these payments are policy related claims against the insolvent insurer's estate. *See* RSA 402-C:44, II. The guaranty funds are expected to be the largest policyholder level creditors of Home.

distribution to priority creditors at the cost of sharing a portion of the collections with certain lower priority creditors. Such issues of statutory construction are reviewed *de novo*. *Hutchins v. Peabody*, 849 A.2d 136 (N.H. 2004). The goal of statutory interpretation "is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." *State v. Whittey*, 149 N.H. 463, 467 (2003). As discussed below, the Agreement serves the fundamental remedial purpose of the Act – the protection of policyholders – and it is permitted by the Act.

A. The Agreement Is Authorized By The Insurer Liquidation Statutes As An Appropriate Action To Assist In The Collection And Preservation Of Assets For The Home Estate.

The Superior Court correctly held that the Agreement is "authorized under the broad array of powers granted the Liquidator under RSA 402-C:25." J.A. 284. That statute expressly authorizes the Liquidator, "[s]ubject to the Court's control," to "[c]ollect all debts and monies due and claims belonging to the insurer" and to "do such other acts as are necessary or expedient to collect, conserve or protect its assets or property, including sell, compound, compromise or assign for purposes of collection, upon such terms and conditions as he deems best, any bad or doubtful debts." RSA 402-C:25, VI (emphasis added). The Liquidator is also authorized to do other acts "as are necessary or expedient for the accomplishment of or in aid of the purpose of liquidation," RSA 402-C:25, XXII, and the Act specifies it is to be "liberally construed" to effect its purpose. RSA 402-C:1, III. *See In re Denton*, 147 N.H. 259, 260 (2001) ("all reasonable doubts in statutory construction" should be resolved so as "to give the broadest reasonable effect to [the statute's] remedial purpose"). The "purpose of the liquidation" is to protect policyholders and others with claims under policies. *See* RSA 402-C:1, IV (purpose of the Act is "the protection of the interests of insureds, creditors, and the public generally"); RSA 402-C:44, II

(liquidation priority for "policy related claims"). "The plainly stated intent of the statute is to protect policyholders to the fullest extent possible." *Minor v. Stephens*, 898 S.W.2d 71, 78 (Ky. 1995) (under the Kentucky Act). The Legislature provided broad and flexible powers so that the Liquidator would have the ability to address the varied and complex problems that arise in an insurer liquidation. *See Boedeker v. Rogers*, 746 N.E.2d 625, 630 (Ohio App. 2000) (statute "confers broad powers which enable liquidators to do what is 'necessary or appropriate' to vindicate the interests they are assigned by law to protect").

The Agreement falls well within the plain meaning of these statutory powers as it facilitates the collection of an otherwise unavailable asset for the benefit of policyholders and other creditors. It is an effort to untangle a web of problems arising in connection with efforts to collect the ACE Companies' liabilities under the Assumption Agreement. This contract represents a significant asset of the Home estate valued by the ACE Companies at $231 million. J.A. 261-263. It is not collectible, however, unless the AFIA Cedents file and prove their claims. J.A. 256 (ACE Companies' counsel: "In order for there to be any obligation by the ACE Companies that reinsure Home to pay, one thing must happen. First, there must be a claim against Home."). As the Superior Court concluded, "[i]n the absence of the agreement, AFIA Cedents, whose filing and prosecution of claims triggers the reinsurance and indemnification obligations of the ACE Companies, have little incentive to file claims." J.A. 286. As a result of the Agreement, however, "the Liquidator will be able to marshall substantial assets to distribute to creditors which would otherwise be unavailable." J.A. 284. In these circumstances, the Agreement is a "necessary and expedient" action to aid in the preservation and collection of the Assumption Agreement asset within RSA 402-C:25, VI and XXII, authorized by the Act.

B. The Contingent Payments To AFIA Cedents Are A Cost Of Collection Within The Administrative Expense Priority That Does Not Violate The Act's Priority Provision.

The appellants contend that the Agreement is nonetheless barred by the priorities provision of the Act. However, the payments to AFIA Cedents, which are contingent upon the allowance of their claims and any resulting collection from the ACE Companies, fully comply with that section as they constitute a cost of asset collection and consequently an administration cost within class I. RSA 402-C:44, I. The payments to the Scheme Administrators for the AFIA Cedents are a collection cost – the price of preserving and collecting the ACE Companies' liabilities under the Assumption Agreement, which, as of the date of Home's liquidation, would otherwise be uncollectible. It is an "actual and necessary cost[] of preserving or recovering the assets of the insurer" within the express language of RSA 402-C:44, I.[10]

Contrary to BMC's misleading suggestions, the payments will not reduce the assets otherwise available for distributions to creditors because they come only from proceeds actually received from the ACE Companies under the Assumption Agreement. Such contingent payments from realized assets to those who make collection possible have long been recognized as appropriate priority costs of collection. *See* 2 R.E. Clark, Law and Practice of Receivers § 637 (3d ed. 1959) ("When a fund is realized . . . for distribution among claimants, those who by their exertions and activities have brought this fund into court are entitled to be paid out of the fund before it is distributed. The actual expenses of preserving the property and the realization

[10] The ACE Companies' reliance on the principal of *ejusdem generis* is misplaced. The allocation of a portion of the proceeds to AFIA Cedents falls within one of the specific categories of administration costs listed in the statute ("costs of preserving or recovering the assets of the insurer"), so that cannon is inapplicable. In any event, the list of specific administration costs is not meant to be limiting, as the statute introduces the list with the phrase "including but not limited to." RSA 402-C:44, I. "The word 'include' is not generally considered a term of limitation," *Hull v. Town of Plymouth*, 143 N.H. 381, 383 (1999), and *ejusdem generis* does not apply. *See State v. Small*, 99 N.H. 349, 351 (1955) ("It is well established that the rule of *ejusdem generis* is neither final nor exclusive and is always subject to the qualification that general words will not be used in a restricted sense if the act as a whole indicates a different legislative purpose in view of the objectives to be attained.").

of the assets are frequently considered together as belonging to the same priority category."); *In re Barber*, 223 B.R. 830, 833 (Bankr. N.D. Ga. 1998) (33% contingency fee is administrative expense); *In re Foundation Group Sys., Inc.*, 141 B.R. 196, 200 (Bankr. E.D. Cal. 1992) (10% finders' fee is administrative expense).[11] The payment of a portion of realized collections as class I costs does not violate RSA 402-C:44 but is expressly contemplated by it.

The ACE Companies' and BMC's arguments are based on the erroneous premise that the payments under the Scheme are distributions on the AFIA Cedents' class V claims. They are not. Indeed, the absence of those claims prompted the Agreement. While under the Scheme the amount allocated to the AFIA Cedents will be distributed among them based on the value of their claims as finally determined in the liquidation, the allocation itself is strictly dependent on collections from the ACE Companies, who retain their rights under the Assumption Agreement to interpose defenses in the claims determination process. J.A. 84-85. The amount allocated is a portion of the Net Recoveries – amounts actually recovered from the ACE Companies under the Assumption Agreement less specified deductions. Assumption Agreement §§ 1.2, 1.3; J.A. 55. The amount paid is contingent because if nothing is recovered, or if recoveries do not exceed the specified deductions, AFIA Cedents will not receive anything under the Agreement regardless of their allowed claims in the liquidation.

For these reasons, the payments do not violate the priority statute's general bar on the creation of sub-classes or the requirement that every claim in each class be paid in full before members of the next class receive any payment. RSA 402-C:44. The payments, if and when

[11] The decision in *Oxendine v. Commissioner*, 494 S.E.2d 545 (Ga. App. 1997), has no bearing on whether payments made as part of post-liquidation efforts to preserve and collect assets are administration costs. That case involved only the question whether a rehabilitator's pre-liquidation settlement of a claim against the insurer had the effect of raising the claim to an administrative expense priority when the insurer was subsequently liquidated. The settlement had no connection with any post-liquidation collection of assets and did not benefit the estate in any way.

they are made, are administration costs within class I, and do not constitute distributions on class V claims. The Agreement accordingly creates neither a sub-class of class V claimants nor an illegitimate "super priority" class.

C. The Position Advocated By The ACE Companies And BMC Should Be Rejected Because It Violates Principles Of Statutory Construction, Frustrates The Purpose Of Protecting Policyholders, And Benefits Reinsurer Debtors Contrary To Legislative Intent.

The cramped interpretation of the Act advanced by the appellants fails on other fronts as well. *First*, its exclusive focus on the text of one paragraph of RSA 402-C:44 violates the well established principle that the Court does not view particular provisions in isolation. *In re Breault*, 149 N.H. 359, 361 (2003) ("[W]e interpret statutes in the context of the overall statutory scheme and not in isolation."); *Winnacunnet Coop. Sch. Dist. v. Town of Seabrook*, 148 N.H. 519, 524 (2002) ("'We interpret a statute to lead to a reasonable result and review a particular provision, not in isolation, but together with all associated sections.'"). Instead, the Court seeks to apply the statute in light of "the policy sought to be advanced by the entire statutory scheme." *State v. Whittey*, 149 N.H. at 467 (emphasis added). This is particularly the case here, since the Act itself is remedial and specifies that it is to be "liberally construed" to effectuate its purpose, RSA 402-C:1, III, a factor the Court has considered in other contexts. *See In re Shelby R.*, 148 N.H. 237, 241 (2002); *State v. Hayes*, 138 N.H. 410, 411 (1994).

The Act declares that its purpose is "the protection of the interests of insureds, creditors, and the public generally" through, among other things, "[e]quitable apportionment of any unavoidable loss." RSA 402-C:1, IV. *See Opinion of the Justices*, 113 N.H. 287, 289 (1973) ("A legislative declaration of purpose is ordinarily accepted as a part of the act."). The equitable apportionment of unavoidable loss is addressed through the priority statute. RSA 402-C:44. The statutory priorities reflect the overriding legislative intent of the Act to minimize the

insolvency's impact on persons who have sought the protection provided by insurance by paying their claims before others. *See Hager v. Iowa Nat'l Mut. Ins. Co.*, 430 N.W.2d 420, 422-423 (Iowa 1988) ("[T]he system of priority was chosen 'based on the relative social and economic importance of the claims likely to be asserted against an insurer . . . to carry out sound public policy by minimizing the damage done to the insured community when an insurer fails.'") (quoting official comment to Wis. Stat. § 645.68, the act on which RSA 402-C was based). The priorities are intended to maximize payment to the legislatively preferred creditors. *See Minor v. Stephens*, 898 S.W.2d at 78.

The contingent payments to AFIA Cedents contemplated by the Agreement serve this purpose by increasing the collected assets available for distribution to priority class II and other preferred creditors. The Agreement is thus consistent with the legislative intent of the priority provision and the Act as a whole. That intent is manifest here. Viewed in its proper context as part of the Act intended to protect policyholders, RSA 402-C:44 does not prohibit administration cost payments to lower priority creditors to benefit class II creditors.

Second, as this suggests, the appellants' restricted reading frustrates the purpose of the Act and produces an absurd result by prohibiting an agreement that would benefit all creditors by increasing the value of the estate. This Court has reiterated that all parts of a statute should be construed together "to effectuate its overall purpose and to avoid an absurd or unjust result." *See, e.g., Appeal of Estate of Van Lunen*, 145 N.H. 82, 86 (2000). Appellants' position reflects a mistaken, punitive view that the priority statute was only intended to ensure that lower priority creditors are not paid. However, the priorities are not meant to simply deny payment to innocent lower priority creditors. That would conflict with the Act's overall purpose of protecting "insureds, creditors, and the public generally." They are intended to maximize payments to

policyholders. Where the Agreement serves this policyholder protective purpose, the priority statute should not be applied to prevent it. It perverts the overall purpose of the Act to construe the statutory priorities, which are intended to achieve the equitable apportionment of "unavoidable loss," to prohibit efforts to increase the overall collected assets of the estate and reduce loss. The statute does not compel the absurd result that a payment of any kind to a lower priority creditor mandates depriving higher priority creditors of an additional distribution. *See State v. Warren*, 147 N.H. 567, 568 (2002) ("We do not presume that the legislature would pass an act leading to an absurd result, however, and we will consider other indicia of legislative intent where the literal reading of a statutory term would compel an absurd result.").

The cases cited by the ACE Companies and BMC only serve to underscore this point. Unlike this appeal, those cases involved unilateral attempts by creditors to circumvent priorities and seize assets through equitable remedies, which would reduce the amounts available to policyholders. For instance, the court in *In re Liquidation of Security Cas. Co.*, 537 N.E.2d 775, 781 (Ill. 1989), rejected application of a constructive trust because "[s]uch a recovery by shareholders diminishes the pool of assets available for distribution to other claimants."[12] The courts denied application of equitable remedies in these cases because they would frustrate the

[12] *See In re Liquidation of Coronet Ins. Co.*, 698 N.E.2d 598, 602 (Ill. App. 1998) (rejecting retaining lien: Liquidation statute "vests a [court] with the authority and means to *protect* the property of an insolvent insurer against dissipation and other forms of compromise, . . ., during liquidation proceedings. It does not vest a [court] with the authority or means to do otherwise"); *Northwestern Nat'l Ins. Co. v. Kezer*, 812 P.2d 688, 690 (Colo. App. 1990) (rejecting equitable lien: court refused to provide preference to those not "policyholders, beneficiaries and insureds"); *State v. Interstate Cas. Ins. Co.*, 464 S.E.2d 73 (N.C. App. 1995) (rejecting common fund doctrine: attorneys who represented insureds not entitled to priority payments to diminution of estate). *See also In re Conservation of Alpine Ins. Co.*, 741 N.E.2d 663 (Ill. App. 2000) (rejecting rehabilitation plan that merely shifted burden of the insolvency to policyholders who held policies with other insurers); *Commercial Nat'l Bank v. Superior Court*, 17 Cal. Rptr. 2d 884, 895 (Cal. App. 1993) (rejecting rehabilitation plan that valued substantially identical policies differently and "simply redirect[ed] a part of their entitlement for reasons unrelated to effectuation of the rehabilitation plan").

priority scheme by depriving preferred creditors of existing assets. None of the cases involved efforts to increase the assets of the estate for the benefit of policyholders.[13]

Third, the appellants' reading would benefit debtor reinsurers at the expense of policyholders, contrary to legislative intent. The ACE Companies and the amicus Reinsurance Association of America ("RAA") speculate that the Legislature "necessarily understood" that placing cedents in class V would reduce claims against reinsurers when an insurer becomes insolvent. ACE Br. 17, 24-25; RAA Br. 11. The suggestion that the Legislature intended reinsurers to benefit from an insolvency by paying less than they would have paid to a solvent insurer is wholly unfounded and inimical to the Act's remedial policyholder protective goals. It is equally absurd to suggest that an anticipated reduction of payment in instances of insolvency was a consideration in setting premiums for reinsurance.

At a general level, collection of assets is an essential aspect of protecting policyholders, *see* RSA 402-C:1, III, RSA 402-C:25, VI, and the Act is intended to facilitate this. *See* RSA 402-C:1, IV (increasing jurisdiction over debtors).[14] More specifically, the Act expressly provides that reinsurance is to be payable "without diminution because of the insolvency." RSA

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[13] Even if priorities were affected by the contingent payments, a compromise may be warranted where it benefits the estate. *See In re Executive Life Ins. Co.*, 38 Cal. Rptr. 2d 453, 470-72, 474 (Cal. App. 1995) (approving settlement that avoided "considerable expense" and rendered litigation "more manageable"). Contrary to BMC's assertions, bankruptcy precedent in this area is "conflicting, to say the least." *Id.* at 471. The bankruptcy cases cited by BMC themselves recognize that there is no absolute rule and that the ultimate issue is benefit to the estate. *See In re American Reserve Corp.*, 841 F.2d 159, 162 (7th Cir. 1987) ("Properly viewed then, the 'fair and equitable' analysis – that is, comparing claims' relative priorities – is just one factor for the bankruptcy judge to consider in determining whether a settlement is in the estate's best interest."); *In re AWECO, Inc.*, 725 F.2d 293, 299 (5th Cir.) (expressing concern that a settlement with a junior creditor "depletes the estate" to the detriment of senior creditors), *cert. denied*, 469 U.S. 880 (1984); *In re C.P. del Caribe, Inc.*, 140 B.R. 320, 326 (Bankr. D.P.R. 1992) (proponents were unable to show why one claimant's claim should be paid before those of others of equal rank).

[14] The liquidation statute in appropriate instances will override inconsistent contractual provisions such as arbitration clauses. *See Benjamin v. Pipoly*, 800 N.E.2d 50, 58-60 (Ohio App. 2003); *Knickerbocker Agency, Inc. v. Holz*, 149 N.E.2d 885, 890 (N.Y. 1958). *See also Corcoran v. Ardra Ins. Co.*, 567 N.E.2d 969, 972 (N.Y. 1990) ("As a result of [the insurer's] insolvency, and [Superintendent's] substitution to liquidate its assets, the contractual parties and their relationship have changed."); *Grode v. Mutual Fire, Marine & Inland*, 572 A.2d 798, 804 (Pa. Commw. 1990) ("The Act and caselaw implicitly recognize that contractual terms are not sacrosanct when an insurance company is insolvent."), *issue aff'd, Foster v. Mutual Fire Ins.*, 614 A.2d 1086 (Pa. 1992).

402-C:36. This provision reinforces the "insolvency clause" statute found at RSA 405:49, I, which requires that for an insurer to take credit for reinsurance in its financial statements the reinsurance contract must provide, in substance, that

> in the event of the insolvency of the ceding insurer, the reinsurance shall be payable by the assuming insurer on the basis of the claims allowed against the ceding insurer in the insolvency proceedings, under contract or contracts reinsured without diminution because of the insolvency of the ceding insurer [except where there is a specific cut through provision or a novation by assumption]. (emphasis added)

These statutes are intended to ensure that policyholders and other creditors of an insolvent insurer are not deprived of the benefit of reinsurance because of the insolvency. As confirmed by amicus NAIC, insolvency clause statutes were enacted by state legislatures nationwide to "overcome" the decision in *Fidelity Deposit Co. v. Pink*, 302 U.S. 224 (1937), which held that a reinsurer was not obligated to pay where insolvency prevented an insurer from paying a claim. *See Commissioner v. Munich Am. Reins. Co.*, 706 N.E.2d 694, 697 (Mass. 1998); *Skandia Am. Reins. Corp. v. Schenk*, 441 F. Supp. 715, 725 (S.D.N.Y. 1977). They "permit a liquidator to collect from the reinsurer the amount of reinsurance proceeds that would have become due if the ceding company had not become insolvent." *In re Midland Ins. Co.*, 590 N.E.2d 1186, 1188-89 (N.Y. 1992). As a result, they "ensure that the reinsurer does not gain a windfall" because of the insurer's insolvency. *First Am. Ins. Co. v. Commonwealth Gen. Ins. Co.*, 954 S.W.2d 460, 465 (Mo. App. 1997).[15] This Court has long recognized the injustice of permitting reinsurers to escape obligations because of their reinsureds' insolvency. *See Hunt v. New Hampshire Fire Underwriters' Ass'n*, 68 N.H. 305, 306 (1895) ("The [reinsurers] received

[15] In light of the RAA's extensive discussion of the history of reinsurance and how reinsurance is a contract of indemnity (RAA Br. 6), the omission of any reference to *Pink* and the insolvency clause – which makes reinsurance a contract of liability in the insolvency context – is glaring. The RAA's repeated suggestions that facilitating the collection of reinsurers' pre-liquidation obligations in an insolvency somehow increases their contractual obligations (RAA Br. 9) ignore this history, which demonstrates that avoiding reductions in reinsurance recoveries is a

a full consideration for the risk against which they insured, and there is no reason why they should not be required to pay the full amount of the loss.").

D. Payments to the AFIA Cedents Are Also Supported By Longstanding Equitable Doctrines.

The Superior Court's approval of the Agreement is also bolstered by equitable doctrines of necessity and new value, which authorize a receiver to make payments of the estate's property out of the ordinary course when doing so is in the best interests of the creditors of the estate. The Superior Court overseeing an insurer liquidation has broad equitable power to maximize the estate for the benefit of creditors. *See* RSA 402-C:5, I (c), (k); RSA 402-C:25, XXI, XXII.

Equity courts in insolvency cases have long recognized that sometimes it is necessary for a receiver to spend senior creditors' money to make the receivership work for the benefit of all. *See Miltenberger v. Logansport Ry. Co.*, 106 U.S. 286, 311-312 (1882) ("Many circumstances may exist which may make it necessary and indispensable to . . . the preservation of the property, for the receiver to pay [debts out of order of priority] out of the earnings of the receivership or even out of the corpus of the property."); *Dudley v. Mealey*, 147 F.2d 268, 271 (2nd Cir. 1945) (Hand, J.). Such payments are based on the principle that equity receivers may pay creditors outside normal priorities when it is "necessary and indispensable" to the receivership for the benefit of all. *See Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U.S. 434, 455-58 (1886).[16]

Insolvency courts have also held that a creditor bringing needed new value to the receivership can have a superior participation in the estate in recognition of this contribution. *See Mason v. Paradise Irrigation Dist.*, 326 U.S. 536, 543 (1946) ("he who furnishes new capital

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legislative goal across the United States. Significantly, the ACE Companies acknowledged that the Agreement does not place them in a worse position than they would be absent Home's insolvency. *See* J.A. 266-267.

[16] *But see In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004), *petition for cert. pending* (under 1978 Bankruptcy Code, necessity doctrine may justify payment out of ordinary course only if in fact no other alternatives exist to solve critical supply problem).

to a distressed enterprise has long been accorded preferred treatment"); *Kansas City Term. Ry. Co. v. Central Union Trust Co.*, 271 U.S. 445, 455 (1926) ("Generally, additional funds will be essential to the success of the undertaking, and it may be impossible to obtain them, unless [lower priority claim holders] are permitted to contribute and retain an interest sufficiently valuable to move them. In such or similar cases the chancellor may exercise an informed discretion concerning the practical adjustment of the several rights."). *Accord In re Beauchesne*, 209 B.R. 266, 270 (Bankr. D.N.H. 1997).

Payments under these principles are not an entitlement of those creditors but instead are an exercise of the Liquidator's discretion and as such do not, as a matter of law, offend priority principles. *See, e.g., In re Boston & Maine Corp.*, 634 F.2d 1359, 1382 (1st Cir. 1980) (necessity of payment is not a rule conferring a right of recovery). There is no new priority or subclass, only a discretionary payment to further critical estate interests.

III. THE SUPERIOR COURT REASONABLY EXERCISED ITS DISCRETION IN APPROVING THE AGREEMENT.

The Superior Court, acting in its supervisory capacity, reasonably concluded that the Agreement had been shown to be in the best interests of Home's policyholders and was consistent with the Act and its fundamental purpose of protecting policyholders. The decision should be upheld "[a]bsent an unsustainable exercise of discretion." *See Telenger v. Telenger*, 148 N.H. 190, 191 (2002); *Rand v. Merrimack River Sav. Bank*, 86 N.H. 351, 354 (1933) (court may "in the exercise of discretion" authorize bank receiver to borrow funds).[17] The Court "review[s] only whether the record establishes an objective basis sufficient to sustain the discretionary judgment made." *In the Matter of Pfeuffer & Pfeuffer*, 150 N.H. 257, 259 (2003).

[17] Contrary to BMC's assertions, the Superior Court's decision is more than adequate. It sets forth, "in narrative form, findings of essential facts sufficient to support its decision." *V & V Corp. v. American Policyholders' Ins. Co.*, 127 N.H. 372, 381 (1985). *See Drucker's Case*, 133 N.H. 326, 332 (1990).

A. The Superior Court Reasonably Concluded That The Agreement Is In The Best Interests Of The Estate And The Policyholders And Other Creditors.

In determining to approve the Agreement, the Superior Court properly focused on whether the Agreement served the purpose of the Act to protect the interests of policyholders and creditors. *See* RSA 402-C:1, IV. On that point it is significant, as the Superior Court noted, that the NCIGF Subcommittee on the Home liquidation (representing guaranty funds nationwide who are the principal policyholder level creditors of the estate) had authorized the Liquidator to state that it had no objection to the Liquidator's motion (J.A. 37-38), and that the FSA, the UK insurance regulator, had expressed its "non-objection" and its view that the Agreement "envisages a better outcome for creditors compared with the potential availability of assets if a scheme is not approved." J.A. 138. The Superior Court also properly recognized that the Liquidator – who is the Commissioner, the disinterested public official charged with administering the insurance laws – has broad discretion under RSA 402-C:25.

1. The Agreement makes possible collection under the Assumption Agreement.

The central problem addressed by the Agreement – and that focused on by the Superior Court – is that the collection of the ACE Companies' pre-liquidation liabilities under the Assumption Agreement depends on the amount of the AFIA Cedents' claims allowed in the liquidation. Indeed, the ACE Companies have taken the position that there is no obligation under the Assumption Agreement at all until claims are filed. J.A. 256 ("And if there's no claim against Home, there's no obligation to pay."). As class V claimants, the AFIA Cedents have a disincentive to file and prosecute claims in the liquidation because they are unlikely to benefit from the claims except to the limited extent that the Liquidator has claims against them that could be offset. Contrary to the suggestion of BMC, it is not enough for a claimant to merely file

its claims. It must also prove its claims through the claim determination process under RSA 402-C:41 and RSA 402-C:45 and the Claims Procedures Order.[18]

It was undisputed below that the AFIA Cedents are not obligated to undertake these tasks, and their unwillingness to do so had been expressed to the Liquidator and Joint Provisional Liquidators. The affidavits submitted to the Superior Court showed that several of the AFIA Cedents had said that they would not file and prosecute claims (save possibly to the extent necessary to preserve any right of set-off they might have) because they would not wish to incur the time and expense of prosecuting claims where they would not receive payment. J.A. 119, 135. Two of the AFIA Cedents themselves confirmed this point by affidavit. J.A. 147, 148 ("I am mystified as to why the ACE Companies believe that an AFIA Cedent like Zurich would wish to incur the time and expense of pursuing a proof of claim in the absence of the proposed scheme." "I told Jonathan Rosen . . . that Zurich would not bother to file claims."); 162-163.

The only substantive point raised by the ACE Companies was the assertion that AFIA Cedents who are also debtors of Home would already have an incentive to file claims to preserve offset rights. As the Superior Court recognized (J.A. 284), however, the AFIA Cedents would only have an incentive to pursue claims up to the value of Home's claims against them, which is a relatively small percentage (estimated at 25%) of the value of their estimated total claims. J.A. 119. Moreover, the Agreement addresses this by providing that, to the extent that AFIA Cedents' claims are offset by Home's claims against them, the corresponding recoveries from

[18] The RAA and BMC suggest that the Agreement may somehow promote invalid or fraudulent claims. However, the AFIA Cedents (like all other claimants) must submit their claims to the Liquidator for determination in accordance with the statutes and the Claims Procedures Order (L.A. 20). Only claims that are allowed through that process can form the basis for recovery from the ACE Companies. The insolvency clause in the Assumption Agreement contemplates that claims will be determined in such a liquidation process, and it expressly provides that INA (now Century) has the right to interpose defenses in those proceedings. J.A. 84-85. *See* RSA 405:49, II. As the Liquidator has told the ACE Companies, the Liquidator intends that Century be involved in those determinations and to respect Century's right to interpose defenses in the claim determination proceedings. J.A. 120, 123-130.

Century are retained entirely by Home. Agreement ¶ 1.3.4; J.A. 55. Thus, Home retains those funds whether or not the Agreement is in place.

2. The Agreement avoids efforts to circumvent the liquidation.

The Agreement also addresses the potential for the ACE Companies to enter individual side agreements with AFIA Cedents to circumvent the liquidation. Agreement ¶ 1.5.1; J.A. 56. Such an agreement would involve a discounted payment by the ACE Companies to an AFIA Cedent in exchange for the Cedent's agreement not to file claims with the Liquidator, thus preventing the Liquidator from seeking to recover from the ACE Companies. *See* J.A. 147-148, 163. Such arrangements benefit reinsurers by allowing them to pay less to the claimant than they would have paid to the liquidator or to the insurer before it was placed in liquidation. *See Ainsworth v. General Reins. Corp.*, 751 F.2d 962, 966 (8th Cir. 1985). Certain AFIA Cedents had said that they were considering methods of "cutting through" or negotiating a direct agreement with the ACE Companies and bypassing the Home estate. J.A. 119, 135, 147-148, 163. In light of that threat, the Liquidator and Joint Provisional Liquidators were compelled to advise Century that such agreements would be unlawful. *See* J.A. 119, 121.[19]

In the Superior Court, the ACE Companies did not deny they would do such a thing (to the contrary, they implicitly suggested they have the right to) but asserted the Liquidator should wait to see if it happens. L.A. 72. But if such agreements were entered, to the extent the Liquidator was able to learn of them, the Liquidator would need to file suits to set them aside. Such proceedings could be expected to involve complex factual and legal issues that would

[19] There is a long history of attempts by creditors of insolvent insurers to "cut through" and obtain payment directly from reinsurers of the insolvent insurers to the detriment of other creditors. *See* J.A. 270 (ACE Companies' counsel: "It is not unusual for creditors of an insolvent company to try and make an end-run around the insolvency."). *E.g.*, *Koken v. Legion Ins. Co.*, 831 A.2d 1196 (Pa. Commw. 2003); *Barhan v. Ry-Ron Inc.*, 121 F.3d 198 (5th Cir. 1997); *Reid v. Ruffin*, 469 A.2d 1030 (Pa. 1983); *General Reins. Corp. v. Missouri Gen. Ins. Co.*, 596 F.2d 330 (8th Cir. 1979); *Melco Sys. v. Receivers of Trans-Am. Ins. Co.*, 105 So.2d 43 (Ala. 1958); *Hunt*, 68 N.H. 305.

involve considerable time and cost. *See* J.A. 182. They are particularly possible here, as Century and the AFIA Cedents had dealt directly with each other for almost twenty years before the liquidation, and the Assumption Agreement had contemplated assumption of the AFIA Treaties by novation. J.A. 28-29, 119, 148. Side agreements thus presented a very serious threat to the Liquidator's ability to collect from the ACE Companies under the Assumption Agreement that was "rapidly and economically" addressed by the Agreement. RSA 402-C:29, II.

3. The Agreement addresses repatriation of Home's UK assets to the New Hampshire Court's Jurisdiction.

Finally, the Committee members suggested that UK assets could be ear-marked for the exclusive benefit of UK creditors. J.A. 119, 136, 147-148, 163. While the Liquidator and Joint Provisional Liquidators agree that UK assets should not be "walled off," the issue would be costly and time-consuming and require a full hearing (and potentially appeals) to resolve if it were litigated. J.A. 181. Further, contrary to the assertions of the ACE Companies (ACE Br. 10 n.9), there are significant assets that could be the subject of such an argument – the BAFCO Agreements with an estimated value, after set-off, of $211 million. J.A. 120, 133-134. There is a substantial UK nexus with the BAFCO Agreements, as those contracts are subject to English law and have historically been used to pay AFIA Cedents on Home's behalf. J.A. 134.[20]

B. The Superior Court Reasonably Concluded That An Evidentiary Hearing And Discovery Would Serve No Proper Purpose.

1. The appellants do not show any prejudice from the absence of an evidentiary hearing.

In a filing with the Superior Court, the ACE Companies stated that "'complex, protracted

[20] The issue is further complicated because the ACE Companies previously asserted that the BAFCO Agreements were assigned to INA in 1984. The Liquidator and Joint Provisional Liquidators disagree; Home was expressly party to an amendment entered in 1985, and one of the ACE Companies' predecessors advised the FSA later in 1985 that the BAFCO Agreements protected Home. *See* J.A. 135, 143.

and costly' litigation is assured" because they intended to fight the Liquidator every step of the way. L.A. 70. In this context, the Superior Court reasonably determined that the essential circumstances warranting approval of the Agreement had been shown so that "a further evidentiary hearing into whether the Liquidator has reasonably exercised his authority in endorsing the agreement would not be helpful." J.A. 287. The ACE Companies and BMC fail to meet their burden of showing substantial prejudice from the Superior Court's ruling because they failed to identify material issues that require trial. The basic elements which underlay the Superior Court's evaluation were not contested, and there is no need for evidentiary proceedings on peripheral issues. *Cf. Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *New England Tel. & Tel. Co. v. City of Franklin*, 141 N.H. 449, 452 (1996). BMC, for instance, asserts a hearing is required because the amount to be allocated to the AFIA Cedents is "unclear." BMC Br. at 3 n.1. A hearing on that issue is both unnecessary (because a reasonable approximation of the number was presented based on certain assumptions set forth in the illustration (J.A. 350)) and wasteful (because the precise number is not discernable, given that it will be the product of the agreed formula that depends on the amounts recovered from the ACE Companies and the actual amounts of the deductions (J.A. 55)). The ACE Companies dispute whether attempts to "wall off" UK assets would be harmful (in the face of evidence such attempts could create significant delay and involve the BAFCO Agreements (J.A. 119-120, 134-135, 181)), but this issue concerns only the third and least of the reasons for entering the Agreement – a reason that the Superior Court did not even expressly address.

2. The appellants were not prejudiced by the Superior Court's procedure.

Although the ACE Companies and BMC suggest that they were deprived of due process because the Superior Court chose to decide the motion after the hearing on April 23, 2004, they

fail to mention that the Superior Court had advised them that it might do just that while affording them an opportunity to make supplemental filings. In its April 9, 2004 order scheduling the April 23, 2004 hearing and permitting further filings by April 16, 2004, the Superior Court advised all parties that if the question whether the agreement is authorized under RSA 402-C "is answered affirmatively, the Court will consider the agreement and whether further hearing on its approval is necessary." L.A. 97 (emphasis added). This order put the appellants on notice that the Superior Court might decide all issues after the April 23 hearing, and they had a week after the order to submit any additional materials they deemed appropriate. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 897 (1990) ("a litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk"). They thus had ample opportunity to be heard. *See Securities & Exchange Comm'n v. Basic Energy & Affiliated Res., Inc.*, 273 F.2d 657, 668-669 (6th Cir. 2001).

3. The ACE Companies were not entitled to pursue unnecessary and burdensome discovery.

The ACE Companies contend that the Superior Court should have allowed document, interrogatory and deposition discovery at the same time they vowed to pursue "complex, protracted and costly litigation." L.A. 70. Discovery is not a matter of right in liquidation proceedings, and in any event the Superior Court's denial was well within its discretion. *See State v. DeLong*, 136 N.H. 707, 709-10 (1993) (court has discretion in discovery matters and error not reversible unless shown to harm substantive rights). The liquidation is an *in rem* proceeding in which the Court, through the Liquidator, has assumed control over Home to effect its liquidation. *See* RSA 402-C:21, I; Liquidation Order ¶¶ (f), (g) (L.A. 6). It is not an adversary proceeding to which the usual rules necessarily apply. *See Ainsworth v. Old Security Life Ins. Co.*, 685 S.W.2d 583, 585-586 (Mo. App. 1985) (receivership not an "action" to which

intervention rule applies). The Liquidator's motion for approval of the Agreement was not an adversary motion but a request directed to the Superior Court in its supervisory capacity under RSA 402-C:25. *See Rand*, 86 N.H. at 351 (court has authority to approve borrowing by bank commissioner appointed as receiver as it has custody of and administers estate through the commissioner). Consistent with the injunctions against interference with the Liquidator, see Liquidation Order ¶ (n) (L.A. 7); RSA 402-C:5, discovery may only be allowed on application.

The discovery sought by the ACE Companies was based only on metaphysical doubts and was not "limited" (ACE Br. 31) but burdensome and unlikely to provide meaningful information. The interrogatories mostly requested information covered in the affidavits and contentions and other legal matters addressed in the briefs. L.A. 52-54. The document requests broadly sought documents concerning anything mentioned in the Liquidator's motion, even mere background. L.A. 63-65. The Superior Court reasonably declined such a fishing expedition.

IV. THE APPELLANTS LACK STANDING TO ATTACK THE NOTICE OF THE MOTION, AND THE ACE COMPANIES' DUE PROCESS ARGUMENTS HAVE NO MERIT.

The appellants lack standing to raise notice issues. They cannot challenge notice because they had actual notice and opportunity to be heard. *See Malnati v. State*, 148 N.H. 94, 98 (2002). The Liquidator provided the ACE Companies with the motion directly, BMC learned of it, and both were afforded ample time to file papers and then be heard. Nor can they raise the alleged insufficiency of notice to others. *See Nottingham v. Bonser*, 146 N.H. 418, 424 (2001). A person "has standing to raise a constitutional issue only when his own personal rights have been or will be directly and specifically affected." *Petition of Burling*, 139 N.H. 266, 272 (1994).

In any event, the ACE Companies' broad assertions are unsupportable. They assert that "[e]ach creditor of Home is potentially affected by the Motion and had a right to be heard with

regard to it." ACE Br. 31 (emphasis added). However, such speculative effects do not require notice to all creditors of Home. There is no statutory requirement for notice to potential creditors of motions during a liquidation. The Liquidator gave appropriate notice by (1) serving the motion on counsel for all persons who intervened in the liquidation proceeding (which itself had been the subject of broad mailing and publication notice pursuant to RSA 402-C:26, *see* L.A. 130-138), J.A. 8, and (2) posting the motion and supporting papers on the New Hampshire Department of Insurance website in accordance with procedures directed by the Superior Court on December 19, 2003. *See* L.A. 14-15.[21] Due process required no more.

First, procedural due process only becomes an issue where proposed state action will adversely affect a person's legally protected property interests. *See Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 488 (1988); *Dime Savings Bank v. Pembroke*, 142 N.H. 235, 238 (1997). The Agreement does not deprive creditors of Home of anything; it benefits them by bringing additional assets into the estate for eventual distribution to them. There is thus no basis for a due process requirement that potential creditors of Home be notified of the motion.[22]

Second, due process only requires that notice be reasonable under the particular circumstances. *Tulsa*, 485 U.S. at 484, (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *Berube v. Belhumeur*, 139 N.H. 562, 567 (1995) ("The decisive question is whether the notice was fair and reasonable in the circumstances."). This includes consideration of "the fiscal and administrative burdens that additional or substitute procedural requirements would entail." *Riblet Tramway Co. v. Stickney*, 129 N.H. 140, 149 (1987). The

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[21] As a matter of practice, the Liquidator also provided copies of the motion to the NCIGF Subcommittee, the ACE Companies, and – through the Joint Provisional Liquidators – the members of the Committee.

[22] None of the cases cited by the ACE Companies or BMC concern notice of motions filed in a liquidation or support the contention that notice is required of matters that may "potentially affect" a possible creditor. The only decision that addressed due process rights of creditors of an estate is *Tulsa*, 485 U.S. 478. That case concerned notice of a filing deadline, whose adverse impact on a protected property interest was "all too clear" – the effect of

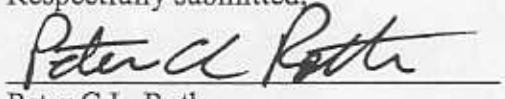
ACE Companies' position would require the Liquidator to provide notice of the motion – and every other motion that might "potentially affect" debtors or creditors – to all of Home's policyholders and other creditors and all of its reinsurers. *See* ACE Br. 30, 31. This would require the Liquidator to give notice equivalent to the initial notice of the liquidation itself. Notice of the liquidation to potential claimants under RSA 402-C:26 required a 330,000 piece mass mailing and publication in 95 newspapers at an external cost of approximately $276,000. L.A. 132, 134, 136-138, 166-167, 168-179.

This is unreasonable, and due process does not require such a mass mailing and publication (to give notice to potential creditors not reached by mail) of any motion that might affect creditors. The pendency of the liquidation and the availability of information on the website had been broadcast widely, and interested persons had an opportunity to seek to intervene in the proceeding. In these circumstances, it was reasonable to provide notice of motions by service on persons that had intervened and placing them on the website as ordered by the Superior Court. *Cf. Appeal of Catholic Med. Ctr.*, 128 N.H. 410, 416 (1986).

CONCLUSION

The appeal should be dismissed or the Order of the Superior Court should be affirmed.

Respectfully submitted,



Dated: July 7, 2004

Peter C.L. Roth
Senior Assistant Attorney General
Environmental Protection Bureau
NEW HAMPSHIRE DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3679

Of counsel:
J. David Leslie (pro hac vice pending)
Eric A. Smith (pro hac vice pending)
Rackemann, Sawyer & Brewster
One Financial Center
Boston, MA 02111
(617) 542-2300

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the nonclaim statute was "to forever bar untimely claims" such that the appellants' claim had been "completely extinguished." *Id.* at 488. The motion here has no such impact.

CERTIFICATE OF SERVICE

I, Peter C.L. Roth, do hereby certify that on July 7, 2004, I served a two true copies of the *Brief for the Commissioner of Insurance as Liquidator of The Home Insurance Company* upon the parties named below in the manner indicated:

Ronald L. Snow, Esquire
Orr & Reno,
One Eagle Square, P.O. Box 3550
Concord, New Hampshire 03302-3550
(U.S. mail, postage prepaid)

Andre D. Bouffard, Esq.
Eric D. Jones, Esq.
Downs, Racklin, Martin PLLC
PO Box 190, 199 Main Street
Burlington, Vermont 05402-190
(Overnight, United Parcel Service)

Gary Lee, Esq.
Eric Haab, Esq.
Gail M. Goering, Esq.
Pieter Van Tol, Esq.
Adam Goodman, Esq.
Lovells – 16th Floor
900 Third Avenue
New York, New York 10022
(U.S. mail, postage prepaid)

Dated: July 7, 2004

Peter C.L. Roth

ADDENDUM

402-C:1 Title, Construction and Purpose.

I. SHORT TITLE. This chapter may be cited as the "Insurers Rehabilitation and Liquidation Act."

II. CONSTRUCTION: NO LIMITATION OF POWERS. This chapter shall not be interpreted to limit the powers granted the commissioner by other provisions of the law.

III. LIBERAL CONSTRUCTION. This chapter shall be liberally construed to effect the purpose stated in paragraph IV.

IV. PURPOSE. The purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of proprietors, through:

(a) Early detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures, neither unduly harsh nor subject to the kind of publicity that would needlessly damage or destroy the insurer;

(b) Improved methods for rehabilitating insurers, by enlisting the advice and management expertise of the insurance industry;

(c) Enhanced efficiency and economy of liquidation, through clarification and specification of the law, to minimize legal uncertainty and litigation;

(d) Equitable apportionment of any unavoidable loss;

(e) Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process, and by extension of the scope of personal jurisdiction over debtors of the insurer outside this state; and

(f) Regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business.

HISTORY

Source. 1969, 272:1, eff. June 23, 1969.

402-C:25 Powers of Liquidator. The liquidator shall report to the court monthly, or at other intervals specified by the court, on the progress of the liquidation in whatever detail the court orders. Subject to the court's control, he may:

I. Appoint a special deputy to act for him under this chapter, and determine his compensation. The special deputy shall have all powers of the liquidator granted by this section. The special deputy shall serve at the pleasure of the liquidator.

II. Appoint or engage employees and agents, legal counsel, actuaries, accountants, appraisers, consultants and other personnel he deems necessary to assist in the liquidation. RSA 98 shall not apply to such persons.

III. Fix the compensation of persons under paragraph II, subject to the control of the court.

IV. Defray all expenses of taking possession of, conserving, conducting, liquidating, disposing of or otherwise dealing with the business and property of the insurer. If the property of the insurer does not contain sufficient cash or liquid assets to defray the costs incurred, the liquidator may advance the costs so incurred out of any available appropriation. Any amounts so paid shall be deemed expense of administration and shall be

repaid for the credit of the insurance department out of the first available moneys of the insurer.

V. Hold hearings, subpoena witnesses and compel their attendance, administer oaths, examine any person under oath and compel any person to subscribe to his testimony after it has been correctly reduced to writing, and in connection therewith require the production of any books, papers, records or other documents which he deems relevant to the inquiry.

VI. Collect all debts and moneys due and claims belonging to the insurer, wherever located, and for this purpose institute timely action in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts; do such other acts as are necessary or expedient to collect, conserve or protect its assets or property, including sell, compound, compromise or assign for purposes of collection, upon such terms and conditions as he deems best, any bad or doubtful debts; and pursue any creditor's remedies available to enforce his claims.

VII. Conduct public and private sales of the property of the insurer in a manner prescribed by the court.

VIII. Use assets of the estate to transfer policy obligations to a solvent assuming insurer, if the transfer can be arranged without prejudice to applicable priorities under RSA 402-C:44.

IX. Acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon or otherwise dispose of or deal with any property of the insurer at its market value or upon such terms and conditions as are fair and reasonable, except that no transaction involving property the market value of which exceeds $10,000 shall be concluded without express permission of the court. He also may execute, acknowledge and deliver any deeds, assignments, releases and other instruments necessary or proper to effectuate any sale of property or other transaction in connection with the liquidation. In cases where real property sold by the liquidator is located other than in the county where the liquidation is pending, the liquidator shall cause to be filed with the register of deeds for the county in which the property is located a certified copy of the order appointing him.

X. Borrow money on the security of the insurer's assets or without security and execute and deliver all documents necessary to that transaction for the purpose of facilitating the liquidation.

XI. Enter into such contracts as are necessary to carry out the order to liquidate, and affirm or disavow any contracts to which the insurer is a party.

XII. Continue to prosecute and institute in the name of the insurer or in his own name any suits and other legal proceedings, in this state or elsewhere, and abandon the prosecution of claims he deems unprofitable to pursue further. If the insurer is dissolved under RSA 402-C:23, he may apply to any court in this state or elsewhere for leave to substitute himself for the insurer as plaintiff.

XIII. Prosecute any action which may exist in behalf of the creditors, members, policyholders or shareholders of the insurer against any officer of the insurer, or any other person.

XIV. Remove any records and property of the insurer to the offices of the commissioner or to such other place as is convenient for the purposes of efficient and orderly execution of the liquidation.

XV. Deposit in one or more banks in this state such sums as are required for meeting current administration expenses and dividend distributions.

XVI. File any necessary documents for record in the office of any register of deeds or record office in this state or elsewhere where property of the insurer is located.

XVII. Assert all legal and equitable defenses available to the insurer as against third persons. A waiver of any defense by the insurer after a petition for liquidation has been filed shall not bind the liquidator.

XVIII. Exercise and enforce all the rights, remedies and powers of any creditor, shareholder, policyholder or member, including any power to avoid any transfer or lien that may be given by law and that is not included within RSA 402-C:30-32.

XIX. Intervene in any proceeding wherever instituted that might lead to the appointment of a receiver or trustee, and act as the receiver or trustee whenever the appointment is offered.

XX. Enter into agreements with any receiver or commissioner of any other state relating to the rehabilitation, liquidation, conservation or dissolution of an insurer doing business in both states.

XXI. Exercise all powers now held or hereafter conferred upon receivers by the laws of this state not inconsistent with this chapter.

XXII. The enumeration in this section of the powers and authority of the liquidator is not a limitation upon him, nor does it exclude his right to do such other acts not herein specifically enumerated or otherwise provided for as are necessary or expedient for the accomplishment of or in aid of the purpose of liquidation.

HISTORY

Source. 1969, 272:1, eff. June 23, 1969.

References in text. RSA 98, referred to in par. II, was repealed by 1986, 12:12, I, effective March 27, 1986. See now RSA 21-I.

CROSS REFERENCES

State personnel system, see RSA 21-I.

402-C:36 Liability of Insurer. The amount recoverable by the liquidator from a reinsurer shall not be reduced as a result of delinquency proceedings unless the reinsurance contract provides, in substance, that in the event of the insolvency of the ceding insurer, the reinsurance shall be payable by the assuming insurer on the basis of the claims allowed against the ceding insurer in the insolvency proceedings, under contract or contracts reinsured without diminution because of the insolvency of the ceding insurer directly to the ceding insurer or to its domiciliary liquidator or receiver except:

I. Where the contract specifically provides another payee of such reinsurance in the event of the insolvency of the ceding insurer; or

II. Where the assuming insurer with the consent of the direct insured or insured has assumed such policy obligations of the ceding insurer as direct obligations of the assuming insurer to the payees under such policies and in substitution for the obligations of the ceding insurer to such payees.

HISTORY

Source. 1969, 272:1, eff. June 23, 1969. 2003, 218:3, eff. Aug. 30, 2003.

Amendments—2003. Amended section generally.

402-C:44 Order of Distribution. The order of distribution of claims from the insurer's estate shall be as stated in this section. The first $50 of the amount allowed on each claim in the classes under paragraphs II, V, and VI except claims of the guaranty associations as defined in RSA 404-B, 404-D, and 408-B shall be deducted from the claim. Claims may not be cumulated by assignment to avoid application of the $50 deductible provision. Subject to the $50 deductible provision, every claim in each class shall be paid in full or adequate funds retained for the payment before the members of the next class receive any payment. No subclasses shall be established within any class.

I. ADMINISTRATION COSTS. The costs and expenses of administration, including but not limited to the following: the actual and necessary costs of preserving or recovering the assets of the insurer; compensation for all services rendered in the liquidation; any necessary filing fees; the fees and mileage payable to witnesses; and reasonable attorney's fees.

II. POLICY RELATED CLAIMS. All claims by policyholders, including claims for unearned premiums in excess of $50, beneficiaries, and insureds arising from and within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company, and liability claims against insureds which claims are within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company and claims of the New Hampshire Insurance Guaranty Association, the New Hampshire Life and Health Insurance Guaranty Association and any similar organization in another state. All claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds or investment values, shall be treated as loss claims. That portion of any loss for which indemnification is provided by other benefits or advantages recovered or recoverable by the claimant shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligations of support or by way of succession at death or as proceeds of life insurance, or as gratuities. No payment made by an employer to an employee shall be treated as a gratuity.

III. CLAIMS OF THE FEDERAL GOVERNMENT.

IV. WAGES.

(a) Debts due to employees for services performed, not to exceed $1,000 to each employee which have been earned within one year before the filing of the petition for liquidation. Officers shall not be entitled to the benefit of this priority.

(b) Such priority shall be in lieu of any other similar priority authorized by law as to wages or compensation of employees.

V. RESIDUAL CLASSIFICATION. All other claims including claims of any state or local government, not falling within other classes under this section. Claims, including those of any non-federal governmental body, for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction or proceeding out of which the penalty or forfeiture arose with reasonable and actual costs occasioned thereby. The remainder of such claims shall be postponed to the class of claims under paragraph VIII.

VI. JUDGMENTS. Claims based solely on judgments. If a claimant files a claim and bases it both on the judgment and on the underlying facts, the claim shall be considered by the liquidator who shall give the judgment such weight as he deems appropriate. The claim as allowed shall receive the priority it would receive in the absence of the judgment. If the judgment is larger than the allowance on the underlying claim, the remaining portion of the judgment shall be treated as if it were a claim based solely on a judgment.

VII. INTEREST ON CLAIMS ALREADY PAID. Interest at the legal rate compounded annually on all claims in the classes under paragraphs I through VI from the date of the petition for liquidation or the date on which the claim becomes due, whichever is later, until the date on which the dividend is declared. The liquidator, with the approval of the court, may make reasonable classifications of claims for purposes of computing interest, may make approximate computations and may ignore certain classifications and time periods as de minimis.

VIII. MISCELLANEOUS SUBORDINATED CLAIMS. The remaining claims or portions of claims not already paid, with interest, as in paragraph VII:

(a) Claims under RSA 402-C:39, II;

(b) Claims subordinated by RSA 402-C:61;

(c) Claims filed late;

(d) Portions of claims subordinated under paragraph V;

(e) Claims or portions of claims payment of which is provided by other benefits or advantages recovered or recoverable by the claimant.

IX. PREFERRED OWNERSHIP CLAIMS. Surplus or contribution notes, or similar obligations, and premium refunds on assessable policies. Interest at the legal rate shall be added to each claim, as in paragraphs VII and VIII.

X. PROPRIETARY CLAIMS. The claims of shareholders or other owners.

HISTORY

Source. 1969, 272:1. 1975, 348:14. 1977, 499:1, eff. Sept. 12, 1977. 1998, 99:1, eff. July 19, 1998.

Amendments—1998. Rewritten to the extent that a detailed comparison would be impracticable.

405:49 Reinsurance Insolvency.

I. No credit shall be allowed, as an admitted asset or deduction from liability, to any ceding insurer for reinsurance, unless the reinsurance contract provides, in substance, that in the event of the insolvency of the ceding insurer, the reinsurance shall be payable by the assuming insurer on the basis of the claims allowed against the ceding insurer in the insolvency proceedings, under contract or contracts reinsured without diminution because of the insolvency of the ceding insurer directly to the ceding insurer or to its domiciliary liquidator or receiver except:

(a) where the contract specifically provides another payee of such reinsurance in the event of the insolvency of the ceding insurer; or

(b) where the assuming insurer with the consent of the direct insured or insured has assumed such policy obligations of the ceding insurer as direct obligations of the assuming insurer to the payees under such policies and in substitution for the obligations of the ceding insurer to such payees.

II. A reinsurance contract may provide that the domiciliary liquidator or receiver of any insolvent ceding insurer shall, within a specified or reasonable time after the claim is filed in court or in the receivership, give written notice to the assuming insurer of all or part of any claim against the ceding insurer on the policy or bond reinsured. During the pendency of the claim, any assuming insurer may investigate the claim and, unless forbidden to do so by the reinsurance agreement, may intervene in the proceeding in which the claim is pending and interpose any defenses it considers available which have not been raised by the ceding insurer, its liquidator or receiver. The expenses incurred by the assuming insurer in this type of action are payable up to the amount of the expenses or the amount of the benefit produced, whichever is less, as expenses of the receivership. If 2 or more assuming insurers have potential liability because of the same claim, the expenses shall be apportioned among them in proportion to the benefit received.

HISTORY

Source. 1899, 86:3. PL 275:48. RL 325:48. RSA 405:49. 1986, 196:1, eff. Aug. 2, 1986.

Amendments—1986. Amended section generally.

CROSS REFERENCES

Allowance of credit for reinsurance generally, see RSA 405:46, 47.
Reinsurance contracts generally, see RSA 405:50.

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of The Home Insurance Company

Before the Court is the Liquidator's Motion for Approval of Agreement and Compromise with the AFIA Cedents. The Ace Companies and Benjamin Moore & Co., interveners in this action, object to approval of this agreement. The Court has reviewed the pleadings and submissions of the parties and held a hearing on the motion on April 23, 2004.

The issue raised by this motion is whether the proposed agreement is consonant with RSA Chapter 402-C, and consistent with the powers of the Liquidator as contemplated by that statute. The Liquidator characterizes the agreement as marshalling assets as authorized by RSA 402-C:1, III and IV; and RSA 402-C: 25, V and XXII. The Ace Companies and Benjamin Moore argue that the agreement is in effect a distribution of assets in violation of the statutory distribution scheme of RSA 402-C:44. It appears that the concept formulated in the pending agreement is one of first impression.

By way of brief background, the agreement involves non-novated AFIA treaty exposures which are reinsured or indemnified by the Ace Companies. These Ace Companies' liabilities are substantial assets, estimated at $231 million, of the Home Insurance Company Liquidation. They are collectible by the Liquidator only if and when the AFIA Cedents file and prosecute claims with the Liquidator. Because the AFIA Cedents' claims are in Class V under the statute, however, they will not be reached and

paid. Thus, it is uncertain at best whether the AFIA Cedents will file their claims since they have no apparent reason to expend the resources necessary to do so except to the extent that they may have setoff opportunities. If the AFIA Cedents fail to file their claims, the Liquidator will not be able to access the substantial assets of the Ace Companies. With the purposes of addressing the uncertainty as to whether AFIA Cedents will file and prosecute their claims to trigger access to Ace Companies' assets, and of providing an incentive to do so, the Liquidator has endorsed the pending agreement between the provisional liquidators in the United Kingdom and the Informal Creditors' Committee. Neither the Financial Services Authority (FSA) nor the National Conference of Insurance Guaranty Funds Reinsurance Commutation Subcommittee on the Home Insurance Company in Liquidation has objected to the proposed agreement and compromise. Pursuant to the agreement, the AFIA Cedents will receive approximately $72.5 of the estimated $231 million the Liquidator will receive from the Ace Companies when the AFIA Cedents' Claims are filed and prosecuted.

After reviewing the pleadings and statute, and considering the oral arguments of the parties, the Court is persuaded that, under the circumstances of this liquidation as explained below, the agreement proposed by the Liquidator is authorized under the broad array of powers granted the Liquidator under RSA 402-C:25 and is consistent with the goals and purposes of the statute to protect the interests of the insureds and creditors. RSA 405-C:1, IV. As a result of the agreement, the Liquidator will be able to marshall substantial assets to be distributed to creditors which would otherwise be unavailable. Also, although under the agreement AFIA Cedents will receive payments which, as Class V claimants, they would not otherwise receive, these payments are not to the detriment of

other Class V claimants who will receive nothing with or without the agreement. Moreover, the agreement benefits Class II claimants, including Benjamin Moore, because the amount to be distributed to members of this class will increase. Finally, while the agreement assures that the Ace Companies will not receive a windfall of $213 million, it imposes no additional liability upon them than those they have already assumed. For the above reasons, the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents is **GRANTED**.

While this matter has been decided favorably to the Liquidator, the Court is nevertheless concerned that the Ace Companies were not included in discussions whereby the proposed agreement was reached and that protracted litigation over this issue will ensue. Accordingly, the Court urges the parties to reach a global agreement on this issue. The Court schedules a further hearing on Friday, June 4, 2004 at 9 a.m. to discuss where the parties are at that time regarding any resolution of this matter.

So Ordered.

DATED: April 29, 2004

Kathleen A. McGuire
Associate Justice

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

ADDENDUM TO ORDER OF APRIL 29, 2004

The Court Order of April 29, 2004 granted the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents. The Order did not expressly address the alternative request by ACE Companies and Benjamin Moore & Co. for further evidentiary hearing to determine whether the Liquidator exercised his authority reasonably by endorsing the agreement. The matter is clarified below.

The agreement at issue was pursued in conjunction with the Provisional Liquidation in the United Kingdom. The Joint Provisional Liquidators appointed by the High Court and the Informal Creditors Committee established under English law negotiated the terms. In endorsing the agreement, the Liquidator moved to marshal assets and secure access to an estimated $231 million of ACE Companies reinsurance and indemnification obligations. The ACE Companies interest is directly contrary to the liquidation's interest which is to maximize opportunity to access this asset.

In the absence of the agreement, AFIA Cedents, whose filing and prosecution of claims triggers the reinsurance and indemnification obligations of ACE Companies, have little incentive to file claims. Under the specific financial realities of this liquidation, Class V claimants would bear the expense of filing and prosecuting claims without realistic prospect of any distribution.

Under the agreement and in conjunction with their filing and prosecution of claims, AFIA Cedents in the aggregate will retain approximately $50 million for distribution to approximately 200 member companies under a formula governed by the terms negotiated. The remainder will be largely available for distribution to policyholder claimants with approximately $10 to be retained for administrative expenses in the United Kingdom Provisional Liquidation.

As noted above, the terms of the agreement were negotiated in conjunction with the Provisional Liquidation in the United Kingdom. The agreement will be the subject of further proceedings and applications for approval in both regulatory and judicial settings in the United Kingdom. Further, as noted in the April 29, 2004 Order, neither the Financial Services Authority, the regulator in the United Kingdom, nor the National Conference of Insurance Guaranty Funds Reinsurance Commutation Subcommittee on the Home Insurance Company in Liquidation, both of which have reviewed the agreement, have objections to it.

The Court hereby clarifies that, under these circumstances, a further evidentiary hearing into whether the Liquidator has reasonably exercised his authority in endorsing the agreement would not be helpful.

SO ORDERED:

DATED: 6/1/04

Kathleen A. McGuire
Associate Justice