

**NEW HAMPSHIRE SUPREME COURT
RULE 7 NOTICE OF MANDATORY APPEAL**

This form should be used for an appeal from a final decision on the merits issued by a superior court, district court, probate court or family division court except for a decision from: (1) a post-conviction review proceeding; (2) a proceeding involving the collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; or (6) a probation revocation proceeding.

1. COMPLETE CASE TITLE AND DOCKET NUMBERS IN TRIAL COURT

**In The Matter Of The Liquidation Of The Home Insurance Company
Docket No. 03-E-0106, Merrimack Superior Court**

2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)

**Merrimack Superior Court
Judge McGuire**

3A. NAME AND ADDRESS OF APPEALING PARTY. IF REPRESENTING SELF, PROVIDE TELEPHONE NUMBER

**Benjamin Moore & Co.
51 Chestnut Ridge Road
Montvale, NJ 07645**

3B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF APPEALING PARTY'S COUNSEL

**Andre D. Bouffard
Eric D. Jones
Downs Rachlin Martin PLLC
P.O. Box 190
199 Main Street
Burlington, VT 05402
(802) 863-2375**

4A. NAME AND ADDRESS OF OPPOSING PARTY

Roger A. Sevigny
Insurance Commissioner of the
State of
New Hampshire, solely in his
capacity as liquidator of The Home
Insurance Company

(11/03)

4B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF OPPOSING PARTY'S COUNSEL

Peter C.L. Roth
Senior Assistant Attorney General
Environmental Protection Bureau
New Hampshire Department of
Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3679
and
J. David Leslie
Rackemann, Sawyer & Brewster
One Financial Center
Boston, MA 02111
617-542-2300

5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

Century Indemnity Company
ACE Property and Casualty Insurance Company
Pacific Employers Insurance Company
ACE American Reinsurance Company

Counsel:

Ronald Snow
ORR & RENO, PA
One Eagle Square
P.O. Box 3550
Concord NH 03302-3550
603-224-2381
and
Gary Lee
LOVELLS
900 Third Ave, 16th Fl.
New York, New York 10022
212-909-0600

6. DATE OF CLERK'S NOTICE OF DECISION OR SENTENCING. ATTACH COPY OF NOTICE AND DECISION.

April 30, 2004

DATE OF CLERK'S NOTICE OF DECISION ON POST-TRIAL MOTION, IF ANY. ATTACH COPY OF NOTICE AND DECISION.

Not applicable.

7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS

Not applicable.

8. APPELLATE DEFENDER REQUESTED? **Not applicable.**

IF SO, CITE STATUTE OR OTHER LEGAL AUTHORITY UPON WHICH CRIMINAL LIABILITY WAS BASED AND ATTACH FINANCIAL AFFIDAVIT (OCC FORM 4)

9. IS ANY PART OF CASE CONFIDENTIAL? IF SO, IDENTIFY WHICH PART AND CITE AUTHORITY FOR CONFIDENTIALITY. SEE SUPREME COURT RULE 12.

No.

10. IF ANY PARTY IS A CORPORATION, LIST THE NAMES OF PARENTS, SUBSIDIARIES AND

AFFILIATES. Benjamin Moore & Co. is a wholly owned subsidiary of Berkshire Hathaway, Inc.

11. DO YOU KNOW OF ANY REASON WHY ONE OR MORE OF THE SUPREME COURT JUSTICES WOULD BE DISQUALIFIED FROM THIS CASE? _____YES X NO

IF YOUR ANSWER IS YES, YOU MUST FILE A MOTION FOR RECUSAL IN ACCORDANCE WITH SUPREME COURT RULE 21A.

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY FOR THIS APPEAL?

X YES _____NO

IF YOUR ANSWER IS YES, YOU MUST COMPLETE THE TRANSCRIPT ORDER FORM ON PAGE 4 OF THIS FORM.

13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE SUPREME COURT RULE 16(3)(b).

Appellant Benjamin Moore & Co. ("Benjamin Moore") is a policyholder claimant in the insurance liquidation proceedings below. Benjamin Moore enjoys Class II priority with respect to its claims. Benjamin Moore objected to the Liquidator's Motion for Approval of an Agreement and Compromise with certain Class V claimants. This Agreement would bind the liquidation estate to treat these Class V claimants as super-priority Class I administrative claims. The Liquidator's Motion for Approval is based on unsupported assertions regarding future potentialities. In addition, even if the Liquidator could establish the requisite factual support for the assertions, the proposed settlement is impermissible as a matter of New Hampshire law.

In the course of the hearing on this issue, the trial court concluded that it would bifurcate consideration of this matter. Specifically, the trial court indicated that it would first consider whether the proposed agreement was allowable under New Hampshire law. In the event that it concluded that the agreement was allowable, the trial court stated that it would consider the factual assertions made by the Liquidator, giving ample opportunity to Benjamin Moore for inquiry and discovery (if needed). Instead, the trial court issued a ruling on April 30, 2004, that granted the Liquidator's Motion in full, without taking evidence or allowing inquiry into the factual assertions relied upon by the Liquidator.

Benjamin Moore appeals from that ruling. The trial court's order is appealable pursuant to N.H. Supreme Court Rules 3 and 7, or alternatively, the collateral order doctrine. The trial court's order is a final decision on the merits with respect to the approval of the liquidator's proposed agreement. The core questions presented for review are:

- (1) Whether the trial court erred in concluding that the proposed settlement complies with New Hampshire's statutory insurance liquidation order of distribution.
- (2) Whether the trial court erred by summarily approving the agreement without exercising any independent review of whether the agreement is in the best interest of the estate and fair and equitable, or giving the opposing parties a fair opportunity to examine the factual underpinnings of the proposed agreement.
- (3) Whether the trial court should have approved the agreement based solely upon the factual assertions made in support of the Liquidator's Motion, even though the Motion failed to present sufficient evidence to support the factual assertions, and without making any findings on the disputed factual issues raised by the objections to the motion.

14. CERTIFICATIONS

I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

/s/

Appealing Party or Counsel

I hereby certify that on or before the date below, copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

5/7/04

Date

/s/

Appealing Party or Counsel

TRANSCRIPT ORDER FORM

INSTRUCTIONS:

1. If a transcript is necessary for your appeal, you must complete this form.
2. List each portion of the proceedings that must be transcribed for appeal, e.g., entire trial (see Superior Court Administrative Rule 3-1), motion to suppress hearing, jury charge, etc., and provide information requested.
3. Determine the amount of deposit required for each portion of the proceedings and the total deposit required for all portions listed. Do not send the deposit to the Supreme Court. You will receive an order from the Supreme Court notifying you of the deadline for paying the deposit amount to the trial court. Failure to pay the deposit by the deadline may result in the dismissal of your appeal.

LIST EACH PORTION OF CASE PROCEEDINGS TO BE TRANSCRIBED.						
DATE OF PROCEEDING	TYPE OF PROCEEDING	LENGTH OF PROCEEDING	NAME OF JUDGE(S)	NAME OF COURT REPORTER (IF PROCEEDING WAS RECORDED SO INDICATE)	PORTIONS PREVIOUSLY PREPARED **	DEPOSIT (SEE SCHEDULE BELOW)
4/9/04	Status conf.	1 hr.	McGuire	M. McGirr	1	\$450
4/23/04	Hearing	2 hr.	McGuire	M. McGirr	1	\$450
						\$
						\$
						\$
						\$
DO NOT SEND DEPOSIT AT THIS TIME.						TOTAL DEPOSIT: \$900

SCHEDULE OF DEPOSITS

Length of Proceeding

Hearing or trial of one hour or less
 Hearing or trial up to ½ day
 Hearing or trial of more than ½ day
 Previously prepared portions

Deposit Amount

\$ 175
 \$ 450
 \$ 900/day
 Number of pages x \$.50 per page per copy
 If additional copies are needed

NOTE: The deposit is an estimate of the transcript cost. After the transcript has been completed, you may be required to pay an additional amount if the final cost of the transcript exceeds the deposit. Any amount paid as a deposit in excess of the final cost will be refunded. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

** For portions of the transcript that have been previously prepared, indicate number of copies that were prepared.

THE STATE OF NEW HAMPSHIRE
Merrimack County Superior Court

163 N. Main Street
P. O. Box 2880
Concord, NH 03301 2880
603 225-5501

RECEIVED

MAY 03 2004

DOWNNS, RACHLIN & MARTIN
BURLINGTON

NOTICE OF DECISION

ANDRE BOUFFARD ESQ
DOWNS RACHLIN MARTIN PLLC
199 MAIN STREET PO BOX 190
BURLINGTON VT 05402-0190

03-E-0106 In the Matter of Rehabilitation of TheHome Insurance Company

Please be advised that on 4/29/2004 Judge MCGUIRE made the following order relative to:

Court Order ;

ORDER ESTABLISHING PROCEDURES FOR REVIEW OF CERTAIN AGREEMENTS TO ASSUME OBLIGATIONS OR DISPOSE OF ASSETS

Court Order ; Granted

RE; LIQUIDATOR'S MOTION FOR APPROVAL OF AGREEMENT & COMPROMISE WITH THE AFIA CEDENTS

Court Order ;

ORDER RELATIVE TO SERVICE LIST & WEBSITE MATTERS

04/30/2004

William McGraw
Clerk of Court

cc: Roger A. Sevigny, Commissioner of Ins.
Martin P. Honigberg, Esq.
Peter C.L. Roth, Esq.
Eric A. Smith, Esq.
Richard V. Wiebusch, Esq.
Michael D. Sandler, Esq.
Paula Rogers, Esq.
Ronald L. Snow, Esq.
Pieter Van Tol, Esq.
Adam Goodman, Esq.

Suzanne M. Gorman, Esq.
Peter Bengelsdorf
Sherilyn B. Young, Esq.
J. David Leslie, Esq.
Connie Rakowsky, Esq.
Paula T. Rogers, Esq.
Lucy J. Karl, Esq.
Eric Jones, Esq.
Gary S. Lee, Esq.
Gail M. Goering, Esq.

Eric A. Haab, Esq.

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 marshal 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 27, 2004

/s/

Kathleen A. McGuire
Associate Justice