

MERRIMACK, SS.

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

**ACE COMPANIES' OPPOSITION TO LIQUIDATOR'S
MOTION FOR RECONSIDERATION OF ORDER
APPROVING INTERLOCUTORY APPEAL STATEMENT**

Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company, and ACE American Reinsurance Company (collectively, the "ACE Companies") respectfully submit this opposition to the Liquidator's Motion for Reconsideration of Order Approving Interlocutory Appeal Statement (the "Motion") and state as follows:

1. The Liquidator has moved for reconsideration of the Court's October 27, 2004 Order approving the Interlocutory Appeal Statement (the "Approval Order"). (Motion at 1.) However, the Approval Order (along with the Court's second Order, also dated October 27, 2004, granting the ACE Companies' motion for interlocutory appeal) only had the effect of transferring to the New Hampshire Supreme Court the controlling question of law identified in the Interlocutory Appeal Statement. *See* Sup. Ct. R. 8(1).

2. The Liquidator has not requested reconsideration of the Order granting the ACE Companies' motion for interlocutory appeal. The Liquidator also agreed that the question of law that was identified in the Interlocutory Appeal Statement (albeit with minor proposed

modifications) should be transferred to the Supreme Court. (*See* Motion at ¶¶ 3, 11.)

3. Superior Court Rule 59-A requires that a party moving for reconsideration must “state, with particular clarity, points of law or fact that the Court has overlooked or misapprehended” in its “order or decision.” Super. Ct. R. 59-A(1). Here, the Liquidator has not even challenged the limited ruling in the two Orders, which is that the controlling question of law in the Interlocutory Appeal Statement should be transferred to the Supreme Court. Thus, there are no “points of law or fact that the Court has overlooked or misapprehended.”¹

4. The focus of the Motion is on the contents of the Interlocutory Appeal Statement, rather than the Court’s actual Orders. (*See* Motion at ¶¶ 5-13.) The Liquidator misapprehends the purpose of the Interlocutory Appeal Statement. Pursuant to Rule 8, such statements are required to include (among other things) a statement of the facts relating to the controlling question of law, the order from which the interlocutory appeal is sought and any other relevant documents. *See* Sup. Ct. R. 8(1) and (2). Those facts and documents are intended to assist the Supreme Court in deciding whether to accept the interlocutory appeal. If the appeal is accepted, the Supreme Court is not bound by the facts in the Interlocutory Appeal Statement. *See, e.g., Orcutt v. Town of Richmond*, 128 N.H. 552, 517 A.2d 1160 (1986) (noting that the Supreme Court had considered facts not contained in the interlocutory appeal statement).

4. Moreover, the documents referred to in the Interlocutory Appeal Statement (or

¹ The Liquidator claims that he was not given an opportunity to respond to the ACE Companies’ motion for interlocutory appeal and the Interlocutory Appeal Statement. (*See* Motion at ¶¶ 2-4.) In entering the Orders the Court justifiably assumed that the Liquidator would have no objection to the ACE Companies’ motion, since the Court had already determined (with the Liquidator’s concurrence) that the ACE Companies may appeal the Court’s ruling on administrative expenses. (*See* Order on Remand at 14.) Indeed, as noted above, the Liquidator has not objected to the transfer itself and instead objects to collateral matters that are properly dealt with on appeal.

appended to it) do not comprise the record on appeal considered by the Supreme Court. Rule 13 states that “[t]he papers and exhibits filed and considered in the proceedings in the lower court or administrative agency from which the questions of law have been transferred, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court or administrative agency shall be the record in all cases entered in the supreme court.” Sup. Ct. R. 13(1). The appellant must designate those documents prior to the date fixed by the Supreme Court for the filing of the opening brief. *See* Sup. Ct. R. 13(4). Of course, the Supreme Court only fixes a filing date after it has decided to accept the interlocutory appeal. Rule 13 further provides that “[i]f any other party seeks to have papers or exhibits filed in the court or agency below transmitted to the supreme court for review, then on or before the date established by the supreme court for filing the opposing brief, the party shall designate the papers and exhibits to be transferred in a letter to the clerk of the supreme court, with copies to the clerk of the court or agency below and all other parties.” *Id.*²

5. The Liquidator, therefore, is free to include in his appellate brief whatever facts he deems necessary and appropriate, and he may also submit documents to the Supreme Court as part of the record on appeal. In other words, there is no need for the Court to vacate the Orders and include the Liquidator’s desired facts or documents in the Interlocutory Appeal Statement.

² The parties followed this procedure in the previous appeal and were not limited by the documents identified in the ACE Companies’ interlocutory appeal statement. In fact, the Liquidator submitted a separate appendix in connection with that appeal. (*See* Motion at ¶ 12.)

6. Even if the Court were to consider the Liquidator's interlocutory appeal statement, the proposed changes are unnecessary and unwarranted. As initial matter, the Liquidator has not shown (as he must under Rule 59-A) that the Court overlooked or misapprehended any points of law or fact in approving the Interlocutory Appeal Statement. The Court is well aware of the background and details of this case given the events of the last seven months, and the Motion raises no new matters that were not before the Court. Certainly, if the Court had disagreed with the ACE Companies' description of the Court's orders, the relevant facts or the controlling question of law, it would not have approved of the Interlocutory Appeal Statement.

7. The Liquidator contends that the "Statement of the Case" section in the Interlocutory Appeal Statement omits certain background information contained in the Order on Remand and "does not fairly summarize" portions of that order. (Motion at ¶ 6.) Since, however, the Order on Remand is attached to the Interlocutory Appeal Statement, there is no need (as the Liquidator has done in his proposed version) to restate the order or quote lengthy passages from it. Indeed, the Court reviewed the description of the Order on Remand and made no changes before approving the Interlocutory Appeal Statement.

8. The Liquidator also claims that the "Statement of Facts" in the Interlocutory Appeal Statement omits certain facts about the Proposed Agreement and that the statement is "argumentative." (See Motion at ¶¶ 9-10.) To the contrary, the ACE Companies described the Proposed Agreement and its prelude fairly and in detail, providing citations to the Proposed Agreement and other documents in the Joint Appendix. The Liquidator's proposed version of the facts also cites to the Joint Appendix (see Exhibit B at 5-6), but, in addition, it quotes from the Order on Remand and the Court's prior orders. Those orders will be in the record on appeal

before the Supreme Court and there is no need to repeat the Court's recitation of the facts in the Interlocutory Appeal Statement. Once again, the Court reviewed the ACE Companies' statement of the facts and did not find that there were any omissions or that it was argumentative.

9. The Liquidator further quibbles with the ACE Companies' description of the controlling question of law and their statement of the reasons for interlocutory transfer (primarily the section regarding the substantial basis for a "difference of opinion" on the controlling question of law). (*See* Motion at ¶ 11.) The Liquidator proposes removing the phrase "as a matter of law" from the description of the controlling question of law. (*See* Exhibit B at 9.) The Court, however, stated in the Order on Remand that "the Court's determination as to whether the payment to AFIA Cedents qualifies as an administrative expense under RSA 402-C:44, I is a matter of law." (Order on Remand at 6; emphasis added.) Thus, the ACE Companies have framed the controlling question of law in a manner that tracks the Court's language.

10. As for the Liquidator's objection to the statement of reasons for interlocutory transfer, there is ample basis for the ACE Companies' description of the Supreme Court's Order of September 13, 2004 and the actions of the Liquidator in "recasting" and "reclassifying" the proposed payments to AFIA Cedents as administrative expenses. Moreover, the ACE Companies were careful to point out that this section sets forth their "position" and arguments. (*See* Interlocutory Appeal Statement at 8-9.) Even the Liquidator recognizes that the section on the "difference of opinion" may "properly be argumentative." (Motion at ¶ 11.)

10. The Liquidator's final argument is that (a) the Interlocutory Appeal Statement does not include the appendix submitted by the Liquidator on the previous appeal; and (b) the

ACE Companies' transcription of the July 15, 2004 oral argument before the Supreme Court should not be part of the record. (*See* Motion at ¶¶ 12-13.) To the extent the Liquidator's objections relate to the contents of the record on appeal, he may raise those issues later (if the interlocutory appeal is accepted). The Liquidator asserts that the ACE Companies have not "offered any reason" for including the oral argument transcription in the Interlocutory Appeal Statement. (Motion at ¶ 13.) The ACE Companies, however, provided a basis for including the transcription, expressly noting in the Interlocutory Appeal Statement that the Supreme Court posed several questions on the administrative expense issue during oral argument. (*See* Interlocutory Appeal Statement at 9.) The Liquidator apparently agrees that the Supreme Court's questions are highly relevant because it retained the reference to oral argument in its proposed version of the interlocutory appeal statement. (*See* Exhibit B at 10.)³ By contrast, the Liquidator has given no specific reason for the inclusion of the Liquidator's appendix in the Interlocutory Appeal Statement. The record, as identified by the ACE Companies, provides more than enough information for the Supreme Court to decide whether to accept the interlocutory appeal.

For the reasons stated above, the ACE Companies respectfully request that the Court deny the Motion in its entirety.

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³ Any modifications that the Liquidator has to the ACE Companies' transcription will be taken into account when the ACE Companies assemble the record on appeal.

Respectfully submitted,



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The undersigned certifies that I served a copy of the foregoing on the following counsel via First Class mail on November 1, 2004.

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