

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**

INTERLOCUTORY APPEAL STATEMENT

Respondents Century Indemnity Company (“Century”), ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company, and ACE American Reinsurance Company (collectively, the “ACE Companies”) respectfully submit this Interlocutory Appeal Statement pursuant to Rule 8 of the New Hampshire Supreme Court Rules (“Supreme Court Rules”).¹

I. Statement of the Case

On February 11, 2004, Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator (“Liquidator”) of Home Insurance Company (“Home”), moved for Court approval of an agreement (the “Proposed Agreement”) entered into with representatives of certain insurers who had ceded insurance risk to Home as a participating member of the American Foreign Insurance Association (“AFIA”) reinsurance pool. (Those insurers will be referred to herein as the “AFIA Cedents” and the reinsurance contracts issued by Home to the AFIA Cedents will be referred to as the “AFIA Treaties.”)

The motion for approval of the Proposed Agreement (the “Motion”) alleges that the AFIA Cedents have no reason to submit claims in the Home liquidation because their claims are Class V claims under N.H. Rev. Stat. Ann. § 402-C:44, and Class V claimants are unlikely to

¹ The ACE Companies reserve their right to argue that the Court’s Order dated April 29, 2004 (the “Order”) is final and may be appealed as a matter of right.

receive a distribution in Home's liquidation. According to the Motion, as a result certain AFIA Cedents were threatening to institute a competing liquidation in England whereby the AFIA Cedents would have exclusive rights to reinsurance covering Home for their claims. The Liquidator sought to justify the Proposed Agreement as a "compromise" of a potentially protracted dispute involving allegedly complex questions of international law. In the Proposed Agreement, the Liquidator seeks to provide an "incentive" to the AFIA Cedents to file their claims in the Home liquidation by agreeing to pay the AFIA Cedents half of the net proceeds that are recovered from companies who reinsured the liabilities under the AFIA Treaties. The Liquidator has estimated that distributions to the AFIA Cedents under the Proposed Agreement would exceed \$50 million.

The ACE Companies, which are Class V creditors as well as reinsurers of Home's AFIA liabilities, filed objections to the Motion on March 19, 2004. In objecting to the Motion, the ACE Companies alleged that the Proposed Agreement would violate the mandatory order of distribution provisions in § 402-C:44 of the New Hampshire Insurers Rehabilitation and Liquidator Act, N.H. Rev. Stat. Ann. § 402-C:1 *et seq.* (the "Act"). The relevant portions of § 402-C:44 provide as follows:

Order of Distribution. The order of distribution of claims from the insurer's estate shall be as stated in this section [E]very 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. Administrative 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 litigation; any necessary filing fees; the fees and mileage payable to witnesses; and reasonable attorney's fees.

II. Policy Related Claims. -- All claims by policyholders ... beneficiaries and insureds arising from and within the coverage of ... insurance policies and insurance contracts issued by the company

...

V. Residual Classification. -- All other claims ... not falling within other classes under this section

N. H. Rev. Stat. Ann. § 402-C:44 (emphasis added). Thus, the Proposed Agreement directly contravenes § 402-C:44 because it would elevate the claims of a small subclass of Class V creditors (the AFIA Cedents) over both the higher classes of creditors, whose claims would not be paid in full, and similarly situated Class V creditors.

The ACE Companies further alleged that the Liquidator lacks the authority under the Act to violate the order of distribution established by the Legislature, and could not justify such a violation on the basis of an alleged “compromise.” The ACE Companies cited several cases to the Court in which similar attempts to circumvent a priority scheme had been rejected.

The ACE Companies also asked to take limited document discovery and depositions of the witnesses who submitted affidavits in support of the Motion (in order to test their factual assertions), and asked the Court to conduct an evidentiary hearing on the facts relating to the Motion. At a hearing on April 9, 2004, the Court announced that it would first decide the issue of whether the Liquidator has the authority, as a matter of law, to enter into the Proposed Agreement. The Court further stated that (assuming the Liquidator has such authority) it would permit the ACE Companies to conduct discovery and present evidence on the issue of whether the Liquidator’s discretion had been exercised reasonably. The Court heard argument on the question of the Liquidator’s authority on April 23, 2004.

In the Order, the Court held that “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.”

(Order at 2.) The Court also granted the Motion in its entirety, thus approving the Proposed Agreement, even though the ACE Companies had no opportunity to take discovery and no evidentiary hearing was held on the myriad factual issues relating to the Motion.

II. Statement of Facts

For purposes of this Statement, the following facts are relevant:

1. The Motion concerns obligations that were assumed by Home in its capacity as an AFIA pool participant. As a consequence of the 1982 merger between Insurance Company of North America (“INA”) and Connecticut General Insurance Company, which created the CIGNA Corporation (“CIGNA”), the rights and interests in the AFIA business were sold to CIGNA in 1984. As part of the transfer of the AFIA business to CIGNA, Home (and other AFIA companies) entered into an Insurance and Reinsurance Assumption Agreement (the “Assumption Agreement”) with INA dated January 31, 1984, pursuant to which INA reinsured 100% of Home’s liabilities under the insurance and reinsurance contracts Home had issued through AFIA.²

2. Century became the successor to INA with respect to the Assumption Agreement by virtue of a corporate restructuring under Pennsylvania law. Century thereafter was acquired by the ACE Group when ACE purchased the CIGNA Property and Casualty Companies in 1999. Thus, Century is now Home’s counterparty with respect to the Assumption Agreement and a reinsurer of Home’s liabilities under the AFIA Treaties. Century, as well as the other ACE Companies, are also substantial Class V creditors of Home.

² In their objection to the Motion, the ACE Companies expressly reserved their right to argue that no sums are due and owing to Home under the Assumption Agreement for the AFIA liabilities. The Order did not address that issue because it was not before the Court.

3. On February 11, 2004, the ACE Companies were served with a copy of the Motion. In the Motion, the Liquidator described the Proposed Agreement as a “settlement” and “compromise” that would be implemented by an English “scheme of arrangement” ancillary to these proceedings. As noted above, the scheme provides for an “incentive” payment to the AFIA Cedents that affords a special preference to a particular subclass of Class V creditors, in direct violation of the order of distribution provisions in § 402-C:44 and applicable case law.

III. Question of Law

The question of law for which the ACE Companies seek an interlocutory transfer in accordance with Rule 8 of the Supreme Court Rules and N.H. Rev. Stat. Ann. § 491:17 is as follows:

Does the New Hampshire Insurers Rehabilitation and Liquidator Act, N.H. Rev. Stat. Ann. § 402-C:1 *et seq.*, permit a liquidator to enter into an agreement with a subclass of creditors classified as Class V creditors under § 402-C:44 whereby the creditors would receive a distribution of assets from the estate of an insolvent insurer before all claimants in a prior class have been paid in full, and in an amount different than other Class V creditors?

IV. Statement of Reasons for Interlocutory Transfer

Rule 8 of the Supreme Court Rules requires “a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an interlocutory appeal may materially advance the termination or clarify further proceedings of the litigation, protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice.” N.H. Sup. Ct. R. 8(1)(d) (emphasis added). All the requirements of Rule 8 are met here.

A. Difference of Opinion

The ACE Companies have a substantial basis for their contention that, contrary to the Court’s ruling, the Liquidator lacks the authority to enter into the Proposed Agreement. The Proposed Agreement violates the order of distribution set forth in § 402-C:44 of the Act because it provides for payment to the AFIA Cedents before claimants with higher statutory priority are paid in full, and before other Class V creditors are paid in kind. The provisions of § 402-C:44 are clear, comprehensive and mandatory. The Liquidator has been unable to cite any relevant case where a court accepted a similar attempt to deviate from a statutory order of distribution. By contrast, the ACE Companies have cited several cases — none of which the Liquidator could distinguish in any meaningful way — where the courts have rejected such schemes.

In approving the Proposed Agreement, the Court found that a liquidator has broad discretion under § 402-C:25 to act in the best interests of the estate. No other New Hampshire court (or a court from another jurisdiction overseeing a liquidation matter) has similarly held that this general discretion permits a liquidator to trump the specific statutory priorities that the legislature established. Moreover, while the Court stated that the Proposed Agreement would protect the interests of insureds and creditors generally, there was no showing (and it is premature to assume) that the distribution to the creditors in the classes above the Class V

creditors will be equal to or more than the amount the AFIA Cedents would receive under the Proposed Agreement. Finally, it is clear that the ACE Companies were deprived of their fundamental due process right to take discovery and participate in an evidentiary hearing on the Motion.

B. Opportunity to Decide Issue of Importance

The Court stated in the Order that the issue presented by the Proposed Agreement “is one of first impression.” (Order at 1.) An interlocutory transfer, therefore, would provide an opportunity for the New Hampshire Supreme Court to decide an issue that has not been confronted by the courts of this State before. The order of distribution statute is the core provision of the Act. Whether a liquidator may reach an agreement with certain creditors to circumvent the statutory scheme is an issue of critical importance in the Home liquidation and in any future liquidations in the State of New Hampshire. Also, given that virtually every state has enacted a similar order of distribution statute, a decision on this issue could have far-reaching ramifications for insurance company liquidations throughout the United States.

C. Protection of ACE Companies from Substantial and Irreparable Injury

The Order clearly affects the economic interests of the ACE Companies because the Proposed Agreement pays the AFIA Cedents for filing claims that they allegedly otherwise would not file, and provides an incentive to inflate the claims against the estate and hence the reinsurance claims against certain ACE Companies. The Proposed Agreement also discriminates against Class V creditors who will not be receiving the special distribution being afforded the AFIA Cedents. In the absence of an interlocutory transfer, the ACE Companies would suffer irreparable injury because they would not be able to appeal the Order until the conclusion of the liquidation, which would take place after distributions to Home’s creditors already had been

made. By that time, the Liquidator and the ACE Companies will have spent vast resources adjusting the AFIA Cedents claims, as well as resolving the reinsurance claims against the ACE Companies. An interlocutory transfer will allow the ACE Companies to seek a reversal of the Order on an expedited basis and thereby avoid substantial and irreparable injury.

D. Material Advancement of Litigation and Clarification of Proceedings

It cannot be doubted that a definitive ruling from the New Hampshire Supreme Court on the question of law identified above would advance the litigation and clarify further proceedings in this action. Such a ruling would permit the AFIA Cedents and the ACE Companies to assess their rights and obligations with far more certainty than presently exists. For example, if the Proposed Agreement were to be rejected on appeal after distributions had been made, the AFIA Cedents will have spent resources pursuing claims only to learn later they are not entitled to any distribution.

V. Counsel

The name, address and telephone number of the lawyers involved in this appeal and the names of their respective clients are as follows:

See Appendix annexed hereto.

VI. Exhibits

- Exhibit 1: Letters setting forth the terms of the Proposed Agreement and reflecting the assent of the AFIA Cedents' representatives
- Exhibit 2: Assumption Agreement
- Exhibit 3: Transcript for April 9, 2004 Court hearing
- Exhibit 4: Court Order dated April 29, 2004
- Exhibit 5: Statutes cited by Court in April 29, 2004 Order

Transfer Ordered:

Honorable Kathleen A. McGuire

Appendix

<u>Lawyer</u>	<u>Address</u>	<u>Telephone #</u>	<u>Client</u>
Peter C.L. Roth, Esq. Senior Assistant Attorney General	Environmental Protection Bureau New Hampshire Department of Justice Attorney General's Office 33 Capitol Street Concord, NH 03301-6397	603-271-3679	Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, Solely in His Capacity as Liquidator of the Home Insurance Company
Suzanne M. Gorman, Esq.	Environmental Protection Bureau New Hampshire Department of Justice Attorney General's Office 33 Capitol Street Concord, NH 03301-6397	603-271-3679	Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, Solely in His Capacity as Liquidator of the Home Insurance Company
J. David Leslie, Esq.	Rackermann, Sawyer & Brewster One Financial Center Boston, MA 02111	617-542-2300	Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, Solely in His Capacity as Liquidator of the Home Insurance Company
Eric A. Smith, Esq.	Rackermann, Sawyer & Brewster One Financial Center Boston, MA 02111	617-542-2300	Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, Solely in His Capacity as Liquidator of the Home Insurance Company
Sherilyn R. Young, Esq.	Rath, Young & Pignatelli, P.A. One Capital Plaza Box 1500 Concord, NH 03302-1500	603-226-2600	Joy Ann Gardner, Robert Blangeres and 7-State Representation
Andrew W. Serell, Esq.	Rath, Young & Pignatelli, P.A. One Capital Plaza Box 1500 Concord, NH 03302-1500	603-226-2600	Joy Ann Gardner, Robert Blangeres and 7-State Representation

<u>Lawyer</u>	<u>Address</u>	<u>Telephone #</u>	<u>Client</u>
Lucy J. Karl, Esq.	Shaheen & Gordon, PA 107 Storrs Street Box 2703 Concord, NH 03302	603-225-7262	59 Maiden Lane Associates
Andre Bouffard, Esq.	Downs, Rachlin, Martin PLLC 199 Main Street P.O. Box 190 Burlington, VT 05402	802-863-2375	Benjamin Moore
Eric D. Jones, Esq.	Downs, Rachlin, Martin PLLC 199 Main Street P.O. Box 190 Burlington, VT 05402	802-863-2375	Benjamin Moore
Michael Ram, Esq.	Levy, Ram & Olson, LLP 639 Front Street, 4th Street San Francisco, CA 94111-1913	415-433-4949	Joy Ann Gardner, Robert Blangeres and 7-State Representation
Michael Sandler, Esq.	Sandler, Ahearn & McGonaughty, PLLC 1200 Fifth Avenue, Suite 1900 Seattle, WA 98101-3135	206-346-1750	Joy Ann Gardner, Robert Blangeres and 7-State Representation
Richard V. Wiebusch, Esq.	Hale & Dorr, LLP 60 State Street Boston, MA 02109	617-526-6000	Consolidated Cooper Co., Phelps Dodge Corporation, and Phelps Dodge Miami
Thomas J. Wamsler, Esq.	ACE USA Legal Department 1601 Chestnut Street, T1 15A Philadelphia, PA 19103	215-640-1000	ACE USA
Martin P. Honigberg, Esq.	Sulloway & Hollis, PLLC 9 Capitol Street - Box 1256 Concord, NH 03302-1256	603-224-2341	Risk Enterprise Management
Gregory W. Swope, Esq.	Swope & Nicolosi, PLLC 58 Pleasant Street Concord, NH 03301	603-223-0847	ACE INA Services, U.K. Ltd.
Connie Rakowsky, Esq.	Orr & Reno, PA One Eagle Square P.O. Box 3550 Concord, NH 03302-3550	603-224-2381	Freightliner
Ronald L. Snow, Esq.	Orr & Reno, P.A. One Eagle Square P.O. Box 3550 Concord, NH 03301	603-224-2381	ACE Companies

<u>Lawyer</u>	<u>Address</u>	<u>Telephone #</u>	<u>Client</u>
Gary S. Lee, Esq.	Lovells 900 Third Avenue, 16th Floor New York, NY 10022	212-909-0600	ACE Companies
Eric A. Haab, Esq.	Lovells One IBM Plaza 330 N. Wabash Avenue Suite 1900 Chicago, IL 60611	312-832-4400	ACE Companies
Gail M. Goering, Esq.	Lovells One IBM Plaza 330 N. Wabash Avenue Suite 1900 Chicago, IL 60611	312-832-4400	ACE Companies
Pieter Van Tol, Esq.	Lovells 900 Third Avenue, 16th Floor New York, NY 10022	212-909-0600	ACE Companies
Adam Goodman, Esq.	Lovells One IBM Plaza 330 N. Wabash Avenue Suite 1900 Chicago, IL 60611	312-832-4400	ACE Companies