

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**

**LIQUIDATOR'S MOTION FOR RECONSIDERATION OF
ORDER APPROVING INTERLOCUTORY APPEAL STATEMENT**

Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby moves, pursuant to Superior Court Rule 59-A, for reconsideration of the Court's order of October 27, 2004 approving the Interlocutory Appeal Statement submitted by the ACE Companies. As reasons therefore, the Liquidator states:

A. The Liquidator's Response To The Motion To Transfer Question Of Law For Interlocutory Appeal (Including ACE's Proposed Interlocutory Appeal Statement) Is Timely.

1. The ACE Companies filed their Motion to Transfer Question of Law for Interlocutory Appeal ("Motion") on October 21, 2004. The Motion included a proposed Interlocutory Appeal Statement ("ACE Interlocutory Appeal Statement").
2. The Motion stated that the concurrence of the Liquidator to the Motion was not sought. Motion ¶ 3. The Motion was served by mail on Thursday, October 21, 2004, and received at the Attorney General's Office on October 22, 2004 in counsel's absence and by Liquidator's counsel on Monday, October 25, 2004. Pursuant to Superior Court Rules 12 and 58, the Liquidator had until November 1, 2004 to respond to the Motion.
3. The Liquidator agrees that the question of law identified in the Order on Remand entered October 8, 2004 ("Order on Remand") should be transferred for interlocutory appeal.

However, for the reasons set forth below, the Liquidator was preparing a partial objection to the Motion, including an alternative Interlocutory Appeal Statement.

4. On October 27, 2004, before the period for response had run, the Court issued two orders concerning the Motion, the first granting the Motion and the second approving the ACE Interlocutory Appeal Statement. A copy of the Clerk's Notices concerning these orders is attached as Exhibit A. The Liquidator learned of these orders on October 28, 2004. To address the problems with the ACE Interlocutory Appeal Statement discussed below and to provide the Supreme Court with a more helpful Interlocutory Appeal Statement, the Liquidator moves for reconsideration of the order approving the ACE Interlocutory Appeal Statement. The Liquidator does not request reconsideration of the order granting the Motion.

B. The Court Should Vacate The Approval Of The ACE Interlocutory Appeal Statement And Should Instead Approve The Interlocutory Appeal Statement Submitted By The Liquidator.

5. The ACE Interlocutory Appeal Statement is inappropriate in three ways. *First*, the Statement of the Case does not provide sufficient background and mischaracterizes aspects of the Court's Order on Remand entered October 8, 2004 (the "Order on Remand"). *Second*, the Statement of Facts both omits important facts necessary to an understanding of the questions of law and includes irrelevant and disputed factual points. *Third*, the record incorporated by reference in the Interlocutory Appeal Statement omits the appendix submitted by the Liquidator and seeks to include an incomplete transcript of the argument before the Supreme Court.

6. The Statement of the Case. The Statement of the Case in the ACE Interlocutory Appeal Statement does not include background concerning the New Hampshire and UK proceedings that may assist the Supreme Court, and it does not fairly summarize the Court's

ruling concerning evaluation of the fairness of the agreement with AFIA Cedents (“Agreement”) in the Order on Remand.

7. The ACE Interlocutory Appeal Statement also inaccurately asserts that the Court ruled that “an evidentiary hearing . . . will be deferred until a further ruling by the Supreme Court on the administrative expenses issue.” ACE Interlocutory Appeal Statement at 3. In fact, the Court asked the parties to request clarification on the need for a further hearing from the Supreme Court and reserved the nature of any such hearing for further determination. Order on Remand at 11-14.¹ The statement also stretches the Court’s ruling on the equitable doctrines issue as stating that the Necessity of Payment Doctrine does not “authorize the Liquidator to deviate from the statutory distribution scheme set forth in RSA 402-C:44,” ACE Interlocutory Appeal Statement at 3, which implies that the Liquidator has so deviated. The Court actually said that such equitable doctrines do not “override a statute enacted upon a particular topic.” Order on Remand at 10. But it said nothing about the priority statute because it had “determined that the statute allowed such an agreement.” Id.

8. To address these issues, the Liquidator proposes to add background to the Interlocutory Appeal Statement as set forth in the Order on Remand, expand the description of the Court’s treatment of the fairness issue by quoting from the Order on Remand, and correct the inaccuracies. An alternative Interlocutory Appeal Statement is attached as Exhibit B hereto.

¹ In the Order on Remand, the Court made clear that it had previously recognized that it had an independent obligation to assess the Agreement, noted that the June 1, 2004 supplemental order had clarified that a further hearing was not necessary to determine the issue, and stated that in the circumstances, “the Court was satisfied that the agreement was fair and reasonable.” Order on Remand at 11-12. The Court added that it was unsure whether the Supreme Court’s Order of September 13, 2004 found there were inadequate bases to find that the agreement is fair and reasonable, and it “ask[ed] the parties to request clarification on this point when this case returns to the Supreme Court.” Order on Remand at 13. It concluded that “[t]his Court will hold a further hearing on the matter if its ruling that the payment to AFIA Cedents qualifies as an administrative expense is upheld by the Supreme Court and the Supreme Court finds that a further hearing is necessary to determine the fairness and reasonableness of the agreement.” Id. The Court added that the nature of any such hearing (by offer of proof or by taking evidence) would be determined at a future scheduling conference. Id.

9. The Statement of Facts. Rule 8 provides that an interlocutory appeal statement is to contain a statement of facts “necessary to an understanding of the controlling question of law.” Supreme Court Rule 8(1). The Statement of Facts in the ACE Interlocutory Appeal Statement, however, omits facts concerning the reasons for the Agreement and how the Agreement works and does not fully reflect the purposes of the Agreement or the most pertinent provisions of the Agreement. The essential facts necessary to understand these matters are set forth in the Court’s orders. To assist the Supreme Court, the Liquidator has quoted from those orders to add the facts in the alternative Interlocutory Appeal Statement attached as Exhibit B.

10. The Statement of Facts also contains numerous argumentative assertions of irrelevant facts with which the Liquidator disagrees or which properly should be considered in the context of additional facts that are also not relevant to the question of law. The assertions principally concern (a) the existence and location of UK assets, (b) Century’s claims handling activities, (c) the timing of negotiations, and (d) the ACE Companies’ awareness of the Agreement. Since these “facts” are not necessary to the Interlocutory Appeal Statement, they should be deleted. The Liquidator has deleted the unnecessary language in the alternative Interlocutory Appeal Statement attached as Exhibit B.

11. Question of Law/Reasons for Transfer. In the alternative Interlocutory Appeal Statement, the Liquidator has slightly changed the question of law to more accurately track the Court’s phrasing of the question in the Order on Remand. The Liquidator also made minor changes to the Statement of Reasons for Interlocutory Transfer. While that section may properly be argumentative, it should not mischaracterize the Supreme Court’s September 13 Order (which did not “overrule” the Superior Court’s earlier finding but vacated it). Nor should it refer to the Liquidator as “recasting” or “reclassifying” the proposed payments as administrative expenses.

12. Record on Interlocutory Appeal. The ACE Interlocutory Appeal Statement incorporates a portion of the record in the previous appeal to the New Hampshire Supreme Court. However, this is not the full record that the parties agreed was adequate to determine the legal issue whether the payments to AFIA Cedents are an administrative expense. See Order on Remand at 14. The “Joint Appendix” to which the ACE Companies refer (ACE Interlocutory Appeal Statement at 11) was submitted only by the ACE Companies and Benjamin Moore. It did not include a number of items that the Liquidator had requested be included, and the Liquidator submitted a separate Appendix to Brief for the Commissioner of Insurance as Liquidator of The Home Insurance Company (“Liquidator’s Appendix”). The Liquidator’s Appendix should also be part of the record on interlocutory appeal, and it has been added in the alternative Interlocutory Appeal Statement attached as Exhibit B.

13. The ACE Companies propose to include in the record a “transcription” of the oral argument before the Supreme Court on July 15, 2004. This “transcription” is not an official transcript but a version of the oral argument created by counsel for the ACE Companies. Counsel for the Liquidator has compared the “transcription” to the recorded oral argument available online at the New Hampshire Supreme Court’s website, and it contains numerous inaccuracies and omissions as shown on the marked up version attached as Exhibit C. The ACE Companies have not offered any reason for inclusion of the “transcription” in the record, and in view of its unofficial nature and many inaccuracies the Liquidator objects to including it. If the Court were inclined to include the “transcription” in the record, then Exhibit C should be substituted.


CONCLUSION

For the reasons stated, the Court should grant the Liquidator's motion for reconsideration, vacate the October 27, 2004 order approving interlocutory appeal statement, and enter an order approving the Interlocutory Appeal Statement attached as Exhibit B hereto.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER OF
THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT, IN HIS OFFICIAL
CAPACITY AS INSURANCE COMMISSIONER
AND LIQUIDATOR OF THE HOME
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By his attorneys,

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Date: October 29, 2004

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Motion for Reconsideration of Order Approving Interlocutory Appeal Statement was sent this 29th day of October, 2004, first class mail to all counsel on the attached service list.



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