

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 OPPOSITION TO MOTION TO TRANSFER
QUESTION OF LAW FOR INTERLOCUTORY APPEAL**

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator of The Home Insurance Company, by his attorneys, the Office of the Attorney General, hereby opposes the Motion to Transfer Question of Law for Interlocutory Appeal filed by the ACE Companies (the "ACE Motion") in response to the Court's April 29, 2004 Order (the "Order") granting the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents.¹ The Liquidator disagrees that the standards for interlocutory appeal in Rule 8 of the New Hampshire Supreme Court Rules ("Supreme Court Rules") are met. More importantly, the ACE Motion should be denied because the Order is final and appealable as of right.

**A. The Motion Is Unnecessary Because The Order
Is Final and Appealable As Of Right.**

The underlying premise of the ACE Motion is that the Court's April 29, 2004 Order is interlocutory and therefore not subject to the usual appeal process, although they expressly "reserve their right to argue that the [Order] is final and may be appealed as a matter of right." ACE Companies' Interlocutory Appeal Statement

¹ The Liquidator uses the terms defined in the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents.

(“ACE Appeal Statement”) at 1 n. 1. The Order, however, is final and appealable, and treating it as interlocutory would create uncertainty in the administration of the liquidation.

The Order finally resolved the question whether the Court would approve the proposed Agreement with the AFIA Cedents. 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. RSA 40[2]-C:1, IV.” Order at 2. Indeed, the ACE Companies acknowledge that the Court “granted the motion in its entirety.” ACE Appeal Statement at 4. In light of the Order, the Liquidator will proceed to implement that Agreement, and there will be no further proceedings in this Court on the merits of the Agreement.² Accordingly, the Order is a final “decision on the merits” within Supreme Court Rule 3, and it is properly subject to appeal under Supreme Court Rule 7.

The ACE Companies contend that without an interlocutory transfer “they would not be able to appeal the Order until the conclusion of the liquidation.” ACE Appeal Statement at 7. This is wrong because the Liquidator’s motion for approval of the AFIA compromise addressed a discrete matter separate from the overall liquidation of Home. As the Liquidator would have responded if consulted under Superior Court Rule 57-A, rulings on the Liquidator’s applications for approval of

² The hearing scheduled for June 4, 2004 is to discuss the status of negotiations between the ACE Companies and the Liquidator, not the AFIA compromise, as that matter “has been decided favorably to the Liquidator.” Order at 3.

agreements and other transactions are final and subject to appeal. A contrary position would mean that the Court's decisions could be subject to challenge years later, after the transactions at issue have been fully implemented. The need for the Liquidator and other parties to the agreements to be able to act on the Court's approvals and their reliance interests when they have so acted require that the Court's decisions be final and subject to appeal only within the thirty day period allowed by Supreme Court Rule 7.

“Final” orders in receiverships and bankruptcy proceedings are not limited to the order entered at the end of the proceeding. See, e.g., Tringali v. Hathaway Machinery Co., Inc., 796 F.2d 553, 558 (1st Cir. 1986) (citing cases). Insolvency proceedings involve many applications and individual controversies which need to be finally resolved long before the proceeding itself ends. In this context, “an order which disposes of a ‘discrete dispute within a larger case’ will be considered final and appealable.” Id. (quoting In re American Colonial Broadcasting Corp., 758 F.2d 794, 801 (1st Cir. 1985)). The ACE Motion should be denied as unnecessary because they may appeal as of right from the April 29, 2004 Order.

B. The ACE Companies' Proposed Interlocutory Appeal Statement Is Flawed.

As the motion is unnecessary, and to provide an expedited response, the Liquidator does not address all of his many disagreements with the ACE Appeal Statement. Should the Court choose to consider the merits of the motion to transfer, however, the Liquidator notes three points:

1. The ACE Companies' proposed statement of the question inaccurately assumes facts and answers to the very legal issues to be decided. See ACE Appeal Statement at 5. The question presented assumes that the Agreement provides for a distribution to a subclass of Class V creditors as such and ignores the fact that the Agreement facilitates the collection of a significant asset that otherwise would be lost. If the Court were to endorse a statement of the issue, it should do so in a manner consistent with the Order, for instance:

Does the New Hampshire Insurer Rehabilitation and Liquidation Act, RSA 402-C:1, et seq., authorize the liquidator of an insolvent insurer to enter an agreement which enables the liquidator to marshall otherwise unavailable assets for distribution to creditors by providing for payments to certain creditors at no detriment to other creditors in the same class?

2. The "substantial basis for a difference of opinion" over the issue presented that is required by Supreme Court Rule 8(1) is lacking in this case. For the reasons set forth in the Liquidator's prior submissions, the Liquidator has clear statutory power to take necessary and expedient steps to collect debts and maximize the estate, including entry of the Agreement. See, e.g., RSA 402-C:25, VI, XXII. Further, the arrangement provided for in the Agreement is consistent with RSA 402-C:44 because the payments contemplated are administration costs within RSA 402-C:44, I.

3. Finally, the Liquidator has established that the Agreement benefits the liquidation and furthers the purposes of the statutes as described in the Order at pages 2-3. There is no substance to the ACE Companies' claims concerning discovery or an evidentiary hearing, and their assertion that the Court stated that it would permit them to conduct discovery and present evidence (ACE Appeal Statement at 3) is false. See

Transcript of April 9, 2004 Hearing at 19-20; April 9, 2004 Order (“If [the authority] issue is answered affirmatively, the Court will consider the agreement and whether further hearing on its approval is necessary.”)

CONCLUSION

The Court should deny the ACE Companies’ motion.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE
COMMISSIONER OF THE STATE OF NEW
HAMPSHIRE, SOLELY IN HIS CAPACITY AS
LIQUIDATOR OF THE HOME INSURANCE
COMPANY,

By his attorneys

PETER W. HEED, ATTORNEY GENERAL

/s/ Peter C.L. Roth
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
Eric A. Smith
Rackemann, Sawyer & Brewster
One Financial Center
Boston, MA 02111
(617) 542-2300

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