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THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

NH SUPERIOR COURT
MERRIMACK COUNTY SUPERIOR COURT
CONCORD, NH

In the Matter of the)
Liquidation of the Home) Docket No: 03-E-0106
Insurance Company)

STATUS CONFERENCE

Before: Honorable Kathleen A. McGuire
Presiding Justice, held at
Concord, New Hampshire, on
Friday, April 9, 2004

* * *

APPEARANCES:

For the Liquidator: Peter Roth
Attorney at Law

For the Respondents: Ron Snow
(ACE Companies) Attorney at Law

Pieter Van Tol
Gary Lee
Attorneys at Law

(Benjamin Moore) Andre D. Bouffard
Attorney at Law

Court Reporter: Michelle A. H. McGirr
CSR/RPR
Official Court Reporter

* * *

1 Friday

2 April 9, 2004

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5 P R O C E E D I N G S

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9 THE COURT: Good morning.

10 As I understand it, we're here on a
11 status conference on the liquidator's motion for
12 approval of the agreement and compromise with
13 the AFIA Cedents. I know some of you, but I
14 don't know most of you, and I know you've
15 already given your name to the court reporter,
16 but if you'd repeat them for me now, I'd
17 appreciate it.

18 MR. BOUFFARD: Your Honor, my name's
19 Andre Bouffard. I'm with Downs, Rachlin &
20 Martin in Burlington, Vermont, and I represent
21 Benjamin Moore.

22 THE COURT: Yes.

23 MR. SNOW: Ron Snow, Orr & Reno,

1 representing ACE Companies. With me is Gary Lee
2 of the New York office of Lovells. Next to him
3 is his colleague, Pieter Van Tol, of the same
4 office, Your Honor. All of us are representing
5 the ACE Companies.

6 THE COURT: Okay.

7 MR. ROTH: Your Honor, Peter Roth for
8 the liquidator from the Attorney General's
9 Office.

10 THE COURT: Okay. Now, I understand
11 today we're just here for a status conference,
12 kind of a scheduling-type conference; and I
13 guess for the purposes of today, the most
14 important thing we have to determine is are we
15 having an evidentiary hearing on this matter,
16 right? Is that the number one thing we need to
17 determine?

18 MR. SNOW: Seems to me, Your Honor,
19 there are two issues. One, as you've just
20 announced, the second is the need for discovery,
21 limited discovery.

22 THE COURT: Okay. Does that matter --
23 does the discovery request or the resolution of

1 that involve whether it's going to be an
2 evidentiary hearing or not or is it the other
3 way around, the discovery will determine whether
4 there's a need for an evidentiary hearing?

5 MR. SNOW: I think it's little bit of
6 both. Clearly our clients believe there's a
7 need for an evidentiary hearing on something
8 this significant. It doesn't have to be a week
9 long hearing, but a day or two. They clearly
10 believe that they need discovery.

11 I have one housekeeping matter I have
12 to take up with the court which is my motion for
13 pro hac vice admission of these two gentlemen,
14 which was not contested but --

15 THE COURT: I think I've signed those.

16 MR. SNOW: I hadn't gotten it yet. I
17 wanted to make sure it was okay for the Court
18 for them to speak if necessary.

19 THE COURT: Yes. I'm pretty sure I
20 granted those, but maybe not.

21 MR. SNOW: Mr. Van Tol is going to be
22 the spokesman.

23 MR. VAN TOL: Good morning, Your

1 Honor.

2 THE COURT: Good morning.

3 Mr. Roth, do you agree that we're here
4 on those two issues, the discovery and the need
5 for an evidentiary rehearing and how they
6 interplay?

7 MR. ROTH: Yes, I agree with that. My
8 concern obviously is that the interest of these
9 parties and their desire to have that I think is
10 seriously tainted and I think that to engage in
11 those proceedings is a waste of the Court's
12 time, a waste of the liquidator's time and a
13 waste of --

14 THE COURT: Before we get to the
15 merits, before we get to argument on it, I want
16 to know if you agree those are the issues.

17 MR. ROTH: Yes, those are the issues.
18 If we need an evidentiary hearing of what scope
19 and when -- and if we do need an evidentiary
20 hearing, then what scope of discovery if any is
21 appropriate.

22 THE COURT: Now, does this issue have
23 to be resolved before -- is it June 31 when the

1 claims must be filed?

2 MR. ROTH: The claims date is June
3 13th. There is a deadline in the agreement
4 letter by which the agreement dies if it's not
5 approved by the Court and it's sometime in early
6 June. It could be the bar date, I'm not
7 certain. Our concern is that if this gets
8 brought forward through to June or late in May
9 or really much beyond today or next week, if
10 we're going to have to take this up on simply
11 oral argument and offers of proof --

12 THE COURT: But wait. Regardless, I
13 have to make an order --

14 MR. ROTH: Right.

15 THE COURT: -- and it's not exactly a
16 simple issue, at least --

17 MR. ROTH: Of course, but if there's
18 to be discovery --

19 THE COURT: But the question is again
20 does this issue have to be resolved by June
21 13th?

22 MR. ROTH: Absolutely and as early
23 before June 13th the better because if we send a

1 signal to the English AFIA Cedents, this is
2 going to drag on with evidentiary and a
3 discovery process, the deal could fall apart.

4 MR. VAN TOL: Your Honor, a simple yes
5 or no would suffice in our papers to move back
6 the bar date or any agreed upon dated for the
7 AFIA Cedents. On their date it's --

8 THE COURT: A different claims date
9 than for the rest?

10 MR. VAN TOL: Exactly, Your Honor. I
11 think that's very simple and cost effective and
12 we would propose that.

13 MR. ROTH: We're concerned that is not
14 going to make the AFIA Cedents comfortable. If
15 they see this is going to be a long, drawn out
16 process, if we lose one AFIA Cedent from the
17 deal, we have seven or eight or nine of them
18 lined up. If we lose one, they're going to
19 start running for the sky is falling kind of
20 thing and we're going to lose the deal.

21 THE COURT: Why don't we start then
22 with whether there's a need for an evidentiary
23 hearing. It seems to me just looking at the

1 issue that it seems to be a matter of law
2 whether or not under the statute setting forth
3 such an agreement is something that the
4 liquidators can approve of and the Court can
5 order.

6 MR. VAN TOL: We agree, Your Honor,
7 that it's a matter of law and if the Court is
8 inclined to go that way -- to find in favor of
9 the ACE Companies and find the liquidator cannot
10 do so, but if there's any question in the
11 Court's mind about whether the liquidator has
12 such discretion, there are fact issues which
13 form this case that must be fully fleshed out
14 and can't be handled on affidavits alone. These
15 affidavits are from people who have an interest
16 in the outcome of the matter. I'm not impugning
17 their motive, but I believe it's incumbent to
18 have those witnesses in front of Your Honor so
19 Your Honor can listen to their testimony, make a
20 credibility determination, how much weight is
21 the Court going to give this evidence. This is
22 an extraordinary, complex matter that can't be
23 handled on papers alone.

1 THE COURT: Well, isn't the issue, I
2 mean, whether the Court has the authority to
3 order such an agreement?

4 MR. VAN TOL: It is, Your Honor, in
5 the first instance. All we are saying as a back
6 up, if the Court is at all inclined to say that
7 the liquidator does have such a power, it is his
8 responsibility to show why that exercise of
9 discretion --

10 THE COURT: Okay.

11 MR. VAN TOL: -- is at all rational.

12 THE COURT: So there are two different
13 issues. One is whether such an agreement can be
14 ordered, but the second one is whether it's an
15 abuse of discretion, I guess, to order it.

16 MR. VAN TOL: Precisely, Your Honor.
17 We don't believe the liquidator has such
18 discretion, but to the extent he does, it has to
19 have a rational basis. It's that basis on which
20 there's a wealth of complex facts.

21 THE COURT: I guess then I would
22 rather do it in two parts then, the matter of
23 whether or not as a matter of law it's something

1 that can be ordered and then whether or not the
2 Court should exercise -- say that it is
3 something the Court can do -- whether the -- and
4 get to the later issue if -- and I don't even
5 know if that would be an issue, I'm not saying
6 that, but if it is an issue, then take it up at
7 that point --

8 MR. VAN TOL: Certainly.

9 THE COURT: -- and do it in two steps.

10 MR. VAN TOL: Would you anticipate
11 accepting further briefing? If there's late
12 issues raised in the Court's reply, we would
13 like to bring it to Court's attention.

14 THE COURT: Sure. Okay.

15 So is that okay, Mr. Roth?

16 MR. ROTH: Yeah, I think that would
17 work for us. Again, we're on -- time is of the
18 essence, Your Honor -- a very short time frame
19 so if they have additional briefing, I would say
20 let's see it by the middle of next week. I
21 mean, we've got -- I keep coming back to this
22 point. Why are they here and I think the
23 pleading they filed yesterday really says it

1 all. When put to defining and describing why
2 they're here, why they objected to this, the
3 best they could come up with is they have a
4 right to ensure that any action concerning the
5 reinsurance proceeds in which they have an
6 undisputed property interest comports with New
7 Hampshire statutory scheme and principles of due
8 process and fairness. Well, their interest in
9 it is in not paying the estate. That's their
10 undisputed property interest, in keeping their
11 money from us. And so they're here today and
12 this whole program is designed to keep their
13 money from us. They have a very small creditor
14 interest, but this appearance today alone
15 probably cost more than the creditor interest
16 they've already -- that they're claiming against
17 us. So I just -- it's -- to me it's frightening
18 that this kind of an array can be made for this
19 kind of a motive against what we're trying to
20 do, which is reasonable and lawful; and I think
21 that on the submissions that we have already
22 made, we can come up with a determination -- I
23 think the Court can determine that not only what

1 the liquidator is doing is lawful, but the
2 affidavits that we've presented and just the
3 overall nature of the scheme suggests that it is
4 also reasonable. What they're trying to do is
5 prevent paying a debt to the state -- to the
6 estate. They're trying to reap a windfall for
7 themselves for one of their own or two of their
8 own from this estate. And I just -- I implore
9 the Court to not allow that to happen because if
10 this deal falls apart, we're going to have these
11 guys and five other lawyers just like them in
12 courts all around the country and in England
13 fighting each one of these AFIA Cedent claims
14 and it's not going to be pretty and not produce
15 any benefit to the estate.

16 MR. BOUFFARD: Your Honor, may I
17 speak to that point?

18 THE COURT: Yes.

19 MR. BOUFFARD: I just want to make
20 sure it's clear that the ACE Companies don't
21 speak for my client. My client is entirely
22 separate and distinct. My client is a policy
23 holder claimant in these proceedings --

1 THE COURT: But are you still
2 objecting to the agreement?

3 MR. BOUFFARD: Yes. We have filed our
4 objection to the agreement.

5 THE COURT: All right. And you're
6 just concerned that there won't be enough money
7 in the class II pot --

8 MR. BOUFFARD: Well, no.

9 THE COURT: -- if the agreement goes
10 through, is that your position?

11 MR. BOUFFARD: No. Our view, Your
12 Honor, is that we cannot understand why the
13 liquidator has come to the conclusion that it is
14 a reasonable judgment to pay 50 million dollars
15 to the AFIA Cedents to incite them to file
16 claims in these proceedings; and despite the
17 liquidator's attempts in his papers to
18 articulate a rationale for that decision, it
19 isn't in there. There's no rationale, there's
20 no explanation for that for that position.

21 THE COURT: Okay. Am I wrong that if
22 this agreement doesn't go through, there's not
23 really a way for the liquidator to recoup the

1 money and get any of it into the class II pot?

2 MR. BOUFFARD: Yeah. I think that is
3 wrong, Your Honor. There are -- it seems to me
4 that there are any number of ways that the
5 liquidator might go about getting the money into
6 the pot, to use the Court's words.

7 THE COURT: Okay. How would the
8 liquidator do that?

9 MR. BOUFFARD: Well, one possibility I
10 suppose would be for the liquidator to go to the
11 ACE Companies and ask the ACE Companies whether
12 or not they want to commute their reinsurance
13 agreements, for example. That would be a very
14 simple way to do it. It doesn't -- I haven't
15 seen in the papers any suggestion that the
16 liquidator has done that. That's just one
17 possibility that I am suggesting here that would
18 be lawful under the liquidation statute. It
19 would be quick, easy and expeditious, but I
20 don't know from looking at the papers whether or
21 not the liquidator has ever had such a
22 conversation with the Ace group.

23 What do you say as to that, Mr. Roth?

1 MR. ROTH: We have had conversations
2 with the Ace group about commuting their
3 obligations to the estate and we'd be happy to
4 continue to do that, but what the end result is
5 going to be that we have to have AFIA Cedents
6 file claims here in order to make the Ace group
7 liable on their obligations to us and if the
8 AFIA Cedents don't file claims here, then we
9 have got very little weight to bring to the
10 table in a commutation. The Ace group I'm sure
11 would love for us to have the claims bar date
12 come and go and then count the claims and decide
13 what's a fair commutation; and we're going to
14 see that without the deal in place, we're going
15 to have not very many claims because the AFIA
16 Cedents, who are class V, are not inclined --
17 and I think our documents establish that -- that
18 we've heard from the AFIA Cedents that they
19 don't want to file claims because it's not worth
20 it.

21 I mean, in response to Benjamin
22 Moore's pleading, I just would say that they
23 seem to have an information issue, they want to

1 know more, and I think that with our affidavits
2 that we filed last Friday, we've answered almost
3 all of their questions. To the extent they're
4 saying, we still don't get it, I don't know what
5 else we can tell them. It's all spelled out
6 there pretty clearly what it is that motivates
7 the liquidator to do what he's doing. We have
8 issues about the cut through threats, we have
9 the issue about the ring fencing threat and we
10 have the issues about the claims filing. Now we
11 can debate and we can try to prove as a matter
12 of fact whether it is possible to ring fence in
13 England or possible to cut through and whether
14 that's legal and lawful in England; but the fact
15 remains we acted upon the threats of those
16 things and rather than simply sit back and
17 realize those things and go through possibly
18 years of foreign litigation -- the BCCI cases
19 that were cited by ACE and in their papers were
20 I think instructional. You have a case that was
21 filed in 1990. The issue comes up immediately,
22 they have a decision over eight days of hearing
23 in 1992 or '93, then you get a decision and

1 appeals and everything and it lasted until,
2 like, 1997 to decide whether ring fencing was
3 appropriate. And we just can't -- it's not
4 worth it to the estate to go through that
5 effort. The value of the asset is lost if we
6 have to do that.

7 The other issue that Benjamin Moore
8 brings up is purely legal. They say it's not
9 lawful to do what we're doing and I think we've
10 fairly briefed that and it's fairly presented in
11 front of you.

12 But as coming back to the commutation,
13 we'd be happy to do a commutation if it's
14 advantageous to us and worthwhile, but if we
15 wait until the claims bar date to decide to do
16 that commutation, without the deal, we're in
17 trouble. If we --

18 THE COURT: You can't do such an
19 agreement unless AFIA files the claims here --

20 MR. ROTH: We cannot have a
21 commutation without claims being made.

22 THE COURT: Okay. And I guess your
23 position is you can't make AFIA file claims.

1 MR. ROTH: We cannot make the AFIA
2 Cedents file claims. What I would suggest is
3 it's really no skin off of ACE's neck if we do
4 this deal or we don't do this deal. If we do
5 the deal, we commute with ACE, we put the money
6 into the English agreement and the English
7 stream and it gets distributed the way we've
8 agreed with the AFIA Cedents. It doesn't affect
9 ACE in any way. It just has no impact on ACE at
10 all. All we're trying to do with this is make
11 sure that the agreements in place prior to the
12 liquidation with ACE, which included the
13 assumption agreement which has in it an
14 insolvency clause which says that if Home goes
15 insolvent, ACE continues to perform
16 notwithstanding the insolvency. We're trying to
17 make sure things work the same after the
18 insolvency as they did before the insolvency.
19 Ace's obligations to Home will not be any
20 different or any greater after the insolvency as
21 they were before and again, it goes to our sort
22 of mystery about -- it's no mystery they're
23 trying to protect themselves from having to pay

1 their debt to the estate.

2 MR. VAN TOL: Your Honor, just
3 briefly.

4 Mr. Roth's comments show exactly why
5 we need discovery. I'm assuming now that we go
6 past the initial briefing stage and Your Honor
7 finds there is some discretion by the
8 liquidator, Mr. Roth would have us accept
9 everything he says as true. That the AFIA
10 Cedents will not file the claims, that there is
11 a substantial threat of ring fencing, that there
12 is a substantial threat of side agreements that
13 would cut out the liquidator. Those are the
14 very facts that cannot be accepted simply on
15 self-interested affidavits. Those are the ones
16 that we would request an evidentiary hearing
17 on. And in order to make the evidentiary
18 hearing meaningful for the Court, short and
19 concise, we would also submit we should have a
20 chance to depose those people and make it an
21 efficient process.

22 THE COURT: I don't want to move to
23 that issue until we decide as a matter of law.

1 MR. VAN TOL: I understand, Your
2 Honor.

3 THE COURT: And I take it everybody
4 agrees that at least as to whether as a matter
5 of law the Court can approve such an agreement
6 or such an agreement's valid, that no further
7 discovery is necessary for that issue.

8 MR. VAN TOL: We would be willing to
9 submit further briefing and be heard by the
10 Court on that issue, yes, Your Honor.

11 THE COURT: Okay.

12 MR. VAN TOL: And quickly, the last
13 point Mr. Roth is talking about, what the world
14 should look like post liquidation. The statute
15 tells the Court exactly what the world is
16 supposed to look like. We are not trying to do
17 anything other than enforce the statute, Your
18 Honor.

19 THE COURT: All right. Why don't --
20 any further pleadings then be due next
21 Wednesday, the 14th. Can you make that date?

22 MR. VAN TOL: I'm afraid I can't. I'm
23 going to be out of town on other business. If

1 we could have more time, I would appreciate it.

2 THE COURT: How much?

3 MR. VAN TOL: Another week beyond
4 that.

5 MR. ROTH: Your Honor, they've got
6 five pro hac Lovells' lawyers, I don't know how
7 many Lovells has worldwide. We've got Mr.
8 Snow. I can't believe that they're giving us
9 this, we need more time because there aren't
10 enough of us.

11 MR. BOUFFARD: Your Honor, I'm not in
12 a multi-national law firm and --

13 THE COURT: Yeah. Well, this has got
14 to go on track soon.

15 MR. BOUFFARD: I understand, but I
16 just want to make sure --

17 THE COURT: If you want anymore
18 pleadings, they'll be due by the 16th, okay?
19 The hearing two weeks from today, Friday
20 morning, okay?

21 MR. SNOW: What's the date?

22 THE COURT: That's the 23rd.

23 MR. VAN TOL: Your Honor, I'm sorry, I

1 missed the time.

2 THE COURT: Well, how long will the
3 hearing take?

4 MR. ROTH: Two hours --

5 THE COURT: Two hours.

6 MR. ROTH: -- maximum.

7 THE COURT: Let's say 10 o'clock then,
8 okay?

9 MR. VAN TOL: Thank you, Your Honor.

10 THE COURT: I'll get an order out on
11 that.

12 Are there any other issues we should
13 take up today?

14 MR. ROTH: Your Honor --

15 THE COURT: Oh, you know what would be
16 helpful, what I would like -- it might not be
17 necessary for this, but I would like it by then,
18 it's unclear as to what actual amounts are
19 involved, how much would go into the class II
20 pot and so forth from all of this and how much
21 ACE is actually -- what the claims were and so
22 forth. Do you think that you could clarify that
23 before --

1 MR. ROTH: We'll do our best. I'm not
2 sure that it's easily quantifiable because it's
3 -- part of it is AFIA Cedents have to file
4 claims and we don't know how much those claims
5 will be exactly and once they file claims. Then
6 they have to prosecute them and defend them
7 against objections because this isn't just,
8 let's have AFIA Cedents file the biggest claim
9 that they can and we'll stick it to ACE, that's
10 not what this is about. ACE is going to be part
11 of the program to adjudicate all the claims and
12 determine what they're really worth in the
13 claims process we've set up here. So at this
14 point we don't know precisely what it's going to
15 be. We will endeavor to produce a statement of
16 what we think -- what our best guess is as to
17 their worth.

18 MR. BOUFFARD: Your Honor, in that
19 regard, one of the questions we raised in our
20 objection is whether or not and to what extent
21 AFIA Cedents have already filed claims. We
22 tried to get some of that information on our own
23 by just contacting the liquidator to get a

1 claims register, something along those lines,
2 and were told that the claims register was not a
3 public document, much to my surprise. So one
4 question that perhaps we could get answered
5 today is whether there have been claims filed
6 and how much.

7 MR. ROTH: There have been none. No
8 AFIA Cedent has filed a claim yet. They've been
9 very reluctant to do so because they don't want
10 to waive their rights to do the cut-throughs and
11 their ring fencing and whatever it is they've
12 been trying to do. If they file a claim --

13 THE COURT: Okay. So the answer is
14 no.

15 MR. ROTH: The answer is no.

16 MR. BOUFFARD: What about commutations
17 with AFIA Cedents? They're commuting AFIA
18 Cedents --

19 MR. ROTH: (Conferring off the
20 record). No.

21 MR. LEE: Your Honor, may I rise?

22 THE COURT: Yes.

23 MR. LEE: I just was checking the Home

1 docket not much more than a couple of weeks ago
2 and I saw that there was a commutation between
3 the Home and various Lloyd's syndicates that
4 represent or make up what is now known as
5 Equitas. I understand that they may have carved
6 out explicitly for the purpose of doing what
7 they said they wouldn't do, which is submit
8 claims against ACE, the AFIA related business.
9 So we know of at least one commutation involving
10 an AFIA Cedent. It may not have related to the
11 AFIA business, but it certainly has a bearing on
12 this particular hearing. We wouldn't know
13 whether there are other commutations in the
14 works with other AFIA Cedents. There are
15 hundreds, many of whom are in the United States,
16 some of whom are in Bermuda, very few in the
17 United Kingdom.

18 MR. ROTH: What he said about the
19 various syndicates is correct and it did not
20 involve any AFIA business. That's why I
21 answered the question, no, because it was --
22 Equitas is an AFIA Cedent in the larger sense,
23 but we did not commute AFIA business with

1 Equitas.

2 THE COURT: So any further pleadings?

3 MR. VAN TOL: Your Honor, I'm sorry,
4 one point of clarification. The liquidator has
5 raised issue of our standing and our ability to
6 be heard. We would like to, if possible, limit
7 these next filings to just the pure issues of
8 law, which is thumbs up/thumbs down. Can the
9 liquidator do what he wants to do because it's
10 clear we have a pecuniary interest. Your Honor
11 has granted our motion to intervene and we're
12 here today being heard. So we would like to
13 keep the papers to that and we're willing to
14 stipulate to that.

15 THE COURT: Yeah.

16 MR. ROTH: I guess as far as a legal
17 standing issue, we have not really suggested
18 that as a legal constitutional issue they lack
19 standing, but we I think we have fairly raised
20 an equitable argument about what are they really
21 here about. They're here about protecting their
22 own interests and I think that's a fair argument
23 and we'll continue to raise it.

1 THE COURT: Well, that might go to if
2 there is -- if we get to the issue about
3 discretion with the Court, I guess, but as far
4 as the legal issue, I don't see how it would be
5 relevant.

6 MR. VAN TOL: Our motivation, Your
7 Honor, is beside the point of the statutory
8 question. That's why we wanted it limited in
9 that fashion.

10 THE COURT: That's what we're going to
11 deal with first.

12 MR. ROTH: Your Honor, in terms of the
13 briefing, since we've sort of fired the last
14 round and their turn comes the 16th, could we
15 have a few days to make a reply?

16 THE COURT: No. I think you can --
17 all the pleadings in by the 16th.

18 MR. ROTH: Okay.

19 THE COURT: You can raise whatever --
20 you can reply orally that day if you want, all
21 right? So the hearing is two weeks from today,
22 the 23rd, 10 o'clock, okay?

23 MR. VAN TOL: Thank you, Your Honor.

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(Conclusion of proceedings at this time)