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

ACE COMPANIES' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO LIQUIDATOR'S MOTION FOR APPROVAL OF PROPOSED AGREEMENT AND COMPROMISE WTH AFIA CEDENTS

Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, the "ACE Companies") hereby submit this supplemental memorandum in connection with the April 23, 2004 hearing on the Liquidator's Motion for Approval of Proposed Agreement and Compromise with AFIA Cedents.[1]

INTRODUCTION

The Court has granted the ACE Companies leave to file an additional brief on whether the proposed Agreement is authorized under the New Hampshire Insurers Rehabilitation and Liquidation Act, N.H. Rev. Stat. Ann. § 402-C:1 *et seq.* (*See* April 9, 2004 Order.) As demonstrated in the ACE Companies' opening brief, the answer is "no." 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 for their claims against Home before claimants with higher statutory priority are paid in full, and before claimants with equal statutory priority are paid in kind. In the cases cited by the ACE Companies — which the Liquidator has failed to

[1] Undefined and capitalized terms in this memorandum will have the same meaning as in the ACE Companies' earlier memorandum in support of their objections to the Motion.

distinguish in any meaningful way — all courts considering the issue uniformly have rejected attempts to deviate from the statutory order of distribution in insurance company liquidations. Indeed, the Liquidator has been unable to cite a single relevant case in support of the proposed Agreement.

The Liquidator seeks to overcome the plain language of the Act by making several strained arguments, all of which lack merit. First, the Liquidator contends that he may enter into the Agreement based on language in the preamble to the Act (§ 402-C:1) stating that the purpose of the Act is to protect "the interests of insureds, creditors, and the public generally." Contrary to the most fundamental principles of statutory construction, the Liquidator argues that this preamble language "subsumes" all other specific and express contrary provisions within the Act. (Reply at 1.) Such an interpretation of the Act effectively would render every section of the Act other than the preamble meaningless and superfluous. This could not have been the intent of the New Hampshire legislature when it thrice included the word "shall" in § 402-C:44.

The Liquidator also seeks to avoid the express requirements of § 402-C:44 by arguing that he possesses a general "equitable" power to enter into the Agreement. Nothing in the Act nor in any case rendered in an insurance company liquidation allows the Liquidator to disregard specific statutory mandates in favor of general equitable doctrines.

Finally, the Liquidator makes the remarkable claim that the proposed payments to the AFIA Cedents are not "distributions" for Class V creditor "claims," but rather are "costs" of preserving assets for Home's estate and thus Class I administrative expenses under § 402-C:44(I). It is difficult to see how payments to the AFIA Cedents under the Agreement could be anything other than payments of those creditors' claims. Indeed, payments are to be

made to the AFIA Cedents only after their claims against Home are determined in the liquidation (Agreement ¶ 1.9.1), and are to be calculated based on a fixed percentage of the reinsurance proceeds attributable to those claims (Agreement ¶¶ 1.2, 1.3). Moreover, other courts have soundly rejected attempts to avoid statutory priorities by recasting claim payments as administrative expenses. Therefore, the Liquidator's Motion should be denied.

ARGUMENT

I. The Proposed Agreement Violates the Mandatory Order of Distribution under New Hampshire Law

The ACE Companies demonstrated in their memorandum in support of their objections to the Motion that the language in § 402-C:44 is mandatory. (*See* Opening Brief at 8.) The plain language of § 402-C:44 provides: "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 before the members of the next class receive any payment." N.H. Rev. Stat. Ann. § 402-C:44. The statute further states that "[n]o subclasses shall be established within any class." *Id.* Section 402-C:44 is unqualified. It does not provide that the order of distribution and prohibition against subclasses "may" be changed where it is "equitable," where it is "necessary and expedient," or where to do so would protect "the interests of insureds, creditors, and the public generally." It does not say "except as ordered by the Court."

The legislature's choice of the word "shall" in § 402-C:44 cannot be ignored. "Pursuant to general rules of statutory construction, the word 'shall' is a command, which requires mandatory enforcement." *Fastrack Crushing Services v. Abatement Int'l/Advatex Assocs.*, 149 N.H. 661, 664-65 (N.H. 2003) (citation omitted). Moreover, "[w]hen examining the words in a statute, [courts] ascribe to them their plain and ordinary meanings." *Sanborn Reg'l Sch. Dist. v.*

Budget Comm., 150 N.H. 241, 242 (N.H. 2003) (citation omitted). Further, "[w]hen the language of a statute is plain and unambiguous, [courts] do not look beyond it for further indications of legislative intent." *Id.*; *see also Estate of Ireland v. Worcester Ins. Co.*, 149 N.H. 656, 661 (N.H. 2003); *Marceau v. Concord Heritage Life Ins. Co.*, 149 N.H. 216, 218 (N.H. 2003). "The legislature is presumed to choose the words of a statute advisedly." *Appeal of Public Serv. Co.*, 141 N.H. 13, 17 (N.H. 1996) (citation omitted). "Courts can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include." *Id.* "The legislative intent is to be found not in what the legislature might have said, but rather in the meaning of what it did say." *Id., see also Appeal of Ann Miles Builder (N.H. Comp. Appeals Bd.)*, 150 N.H. 315, 318 (N.H. 2003) ("We will not consider what the legislature might have said or add words that the legislature did not include") (citation omitted).

Courts construing virtually identical insurance insolvency statutes have emphasized that the statutory order of distribution may not be altered in an insurance company liquidation. In discussing § 205(1) of the Illinois Insurance Code, which is analogous to § 402-C:44, the Illinois Supreme Court stated that:

> Section 205(1) establishes a rule of absolute priority. Under the provision, no succeeding class of claimants may share in the distribution of assets until the allowed claims of all senior interests have been satisfied in full. . . . Section 205(1) of the Insurance Code . . . provides a comprehensive scheme for the distribution of assets of an insurance company undergoing liquidation. Nothing in the Code suggests that relief other than that specified in section 205 would be available to claimants in liquidation proceedings.

In re Liquidation of Security Casualty Co., 537 N.E.2d 775, 780 (Ill. 1989) (emphasis added). *Security Casualty* and other courts expressly refused to vary the order of distribution for reasons of "equity."[2] *See id.* at 781 ("Because the legislature has provided a comprehensive statutory

[2] Similarly, courts uniformly have rejected efforts by reinsured creditors to recast themselves as

scheme governing the distribution of assets from the liquidated insurer's estate, equitable relief different from that provided by statute was not available to the shareholders"); *Illinois ex rel. Boozell v. Coronet Ins. Co. (In re Liquidation of Coronet Ins. Co.)*, 698 N.E.2d 598, 603 (Ill. App. 1998) ("In a liquidation action, a circuit court is vested with only as much authority as is provided by the Insurance Code; equitable remedies in contradiction to those plainly set forth within the Insurance Code are therefore precluded"); *Northwestern Nat'l Ins. Co. v. Kezer (In re Liquidation of Aspen Indem. Co.)*, 812 P.2d 688, 690 (Colo. App. 1990) ("The statute classifying claims for preference purposes is both specific and comprehensive. It leaves no room for the judiciary to add to the type of claims to be preferred or to establish a method of preference not created by the statute"). Therefore, the Agreement is contrary not only to the plain language of the Act but also to the decisions of every court that has considered similar issues.

II. The Liquidator's Efforts to Harmonize the Agreement with the Act Are Unavailing

A. Neither the Act Nor Any Applicable Case Law Gives the Liquidator Discretion To Ignore § 402-C:44 Where To Do So Allegedly Would Be in the Best Interests of the Estate

The Liquidator does not seriously dispute that the proposed Agreement would violate § 402-C:44. Instead, he asserts that the Agreement nonetheless should be approved because it would serve the general purpose of the Act to protect "the interests of insureds, creditors, and the public generally. . . ." § 402-C:1(IV). According to the Liquidator, this purpose "subsumes other matters" (Reply at 7), apparently including § 402-C:44.

"policyholders" or "insureds" of the insolvent insurer to achieve a payment that would be higher than if they were classified as general creditors (as would be the effect of the proposed Agreement). *See e.g., American Re-Ins. v. Washburn (In re Liquidation of Reserve Ins. Co.)*, 524 N.E.2d 538, 539, 542 (Ill. 1988) (holding that claims of reinsured creditors were "claims of general creditors," and not claims of "policyholders, beneficiaries [or] insureds"). *Accord Covington v. Ohio Gen'l Ins. Co.*, 789 N.E.2d 213, 217 (Ohio 2003); *Neff v. Cherokee Ins. Co.*, 704 S.W.2d 1, 4-7 (Tenn. 1986); *Foremost Life Ins. Co. v. Department of Ins.*, 409 N.E.2d 1092, 1097 (Ind. 1980); *In re Liquidation of Sussex Mut. Ins. Co.*, 694 A.2d 312, 315 (N.J. Super. App. Div. 1997); *State ex rel. Long v. Beacon Ins. Co.*, 359 N.E.2d 508, 511-12 (N.C. App. 1987).

The Liquidator's reliance on the general purpose expressed in § 402-C:1 to trump the specific mandates of § 402-C:44 is misplaced. It is a well-established maxim of statutory construction that general language expressing the intent of a statute cannot override specific provisions in the same statute. *See, e.g., Bissette v. Colonial Mortgage Corp.*, 477 F.2d 1245, 1246 n.2 (D.C. Cir. 1973) (noting that general section of statute setting forth its purpose cannot prevail over statute's specific provisions); *People v. Woodhead,* 239 Cal. Rptr. 656, 660-661 (Cal. 1987) ("[t]he preamble to [the statutory proposition] provides no persuasive evidence of the intended meaning of the specific language of [a specific] section"); *Eller Media Co. v. Community Redevelopment Agency,* 133 Cal. Rptr. 2d 324, 333 (Cal. App. 2003 ("[t]he enumeration of specific items or factors will be controlling over general statements placed before or after the list of specific items or factors"). If the Liquidator's interpretation of the Act were correct, he could justify *any* action simply by claiming that he was acting in "the interests of insureds, creditors, and the public generally." Nothing in the Act or elsewhere reveals that the legislature intended to grant liquidators such unfettered discretion.

Implicitly recognizing the lack of support for his position in the Act or in any New Hampshire case, the Liquidator relies on a single California case, *In re Rehabilitation of Executive Life Ins. Co.*, 38 Cal. Rptr. 2d 453 (Cal. App. 1995), for the proposition that the "best interests of the estate" is the standard by which the Court should assess the proposed Agreement. *Executive Life*, however, involved the approval of a *rehabilitation* plan and, as the ACE Companies noted in their opening brief, rehabilitators have greater discretion than liquidators in managing a financially troubled insurer's affairs. (*See* Opening Brief at 12.) Moreover, the issue considered in *Executive Life* was materially different than the issue here, where the proposed

Agreement would result in a subclass of creditors receiving payment before claimants with higher priorities had been paid in full and before other class members had received similar payment. By contrast, the *Executive Life* court only considered whether holders of guaranteed investment contracts should be classified as *either* policyholders (class 5) *or* general creditors (class 6). There was no suggestion that the class 6 creditors (or a sub-class of the class 6 creditors) would receive a distribution before the class 5 creditors (as would be the case here).

The Liquidator attempts to distinguish the cases cited by the ACE Companies by claiming that "[t]he rationale for these cases is that the proposed remedies would harm preferred creditors by preventing the distribution of assets to them." (Reply at 16 n.8.) Contrary to the Liquidator's assertion, the courts based their holdings on the fact that the relief requested violated the statutory order of distribution. Nothing in the cases suggests that a deviation from statutory priorities in an insurance company liquidation is lawful so long as it arguably benefits the estate. Thus, the Liquidator's claim that the proposed Agreement may be justified because it purportedly is in the "interests of insureds, creditors, and the public generally" does not withstand scrutiny.

B. The Equitable Doctrines Relied On By The Liquidator Do Not Override the Express Language of the Act

The Liquidator asserts that the "Agreement is also bolstered by equitable doctrines authorizing a receiver to make payments of the estate's property out of the ordinary course when doing so is in the best interest of creditors of the estate." (*See* Reply at 17). There is no such authority granted by § 402-C:44. In fact, as the ACE Companies demonstrated in the memorandum in support of their objections to the Motion, courts have consistently rejected arguments relying on equity when construing state order of distribution statutes like § 402-C:44. (*See* Opening Brief at 11-13, 17-18). They did not use their equitable powers to add to the types

of claims to be preferred or to establish a method of preference not specified when the priority of distribution statute, by its plain terms, did not so authorize.

The courts' unwillingness to depart from statutory mandates is not surprising. As the Seventh Circuit Court of Appeals noted in *In re Kmart Corp.*:

> The fact that a [bankruptcy] proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be.
>
> A 'doctrine of necessity' is just a fancy name for a power to depart from the Code. Although courts in the days before bankruptcy law was codified wielded power to reorder priorities and pay particular creditors in the name of 'necessity,' today it is the Code . . . that must prevail. . . . Answers to contemporary issues must be found within the Code (or legislative halls). Older doctrines may survive as glosses on ambiguous language . . . but not as freestanding entitlements to trump the text.[3]

359 F.3d 866, 871 (7th Cir. 2004) (citations omitted) (holding in a Chapter 11 reorganization proceeding that § 105(a) of the Bankruptcy Code allowing a bankruptcy court to take steps "necessary or appropriate to carry out [Code] provisions" did not "create discretion to set aside the Code's rules about priority and distribution").

The New Hampshire legislature has enacted a clear and comprehensive statutory scheme for the distribution of an insolvent insurer's assets. No equitable "gloss" is necessary to interpret § 402-C:44. In such circumstances, the Liquidator's attempt to override the specific requirements of § 402-C:44 by relying on general equitable doctrines must be rejected.

C. The Payments to the AFIA Cedents Cannot Legitimately Be Characterized as Administrative Expenses of the Home Estate

According to the Liquidator, "the Agreement was not entered as a compromise of the

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[3] Moreover, unlike the debtor in *Kmart*, Home is in liquidation, not rehabilitation. The Liquidator is not seeking to make unusual payments in an attempt to preserve ongoing business operations or to obtain additional financing. No "critical vendor" or "new value" is involved here.

AFIA Cedents' claims against the estate but as a necessary and expedient step to collect an asset of the estate." (*Id.* at 3-4.) The Liquidator thus asserts that the payments contemplated in the proposed Agreement are "collection costs" and may be paid as administrative expenses of the Home estate pursuant to § 402-C:44(I). (*See* Reply at 3-4, 14.) Indeed, the Liquidator makes the remarkable contention that "[t]he objectors' arguments to the contrary are based on an erroneous assumption that the payments are distributions on the AFIA Cedents' class V claims."[4] (*Id.* at 14.)

The Liquidator's assertion that the payments under the proposed Agreement are not claim payments but rather are administrative expenses defies common sense. The Liquidator concedes in the Motion that the proposed Agreement is a compromise of the AFIA Cedents' "claims" and that the resulting payments would constitute "distributions." (Motion ¶¶ 12, 13, 18.) Indeed, the payments contemplated are based *solely* on the AFIA Cedents' claims against Home as determined in Home's New Hampshire liquidation proceedings, and on Home's recovery from reinsurers based on those claims. (Agreement ¶¶ 1.9.1, 1.2, 1.3.) The Motion plainly states that the proposed Agreement "will provide for the distribution of a portion of the proceeds to the AFIA Cedents." (Motion ¶ 13.) The proposed Agreement likewise specifies that "the distributions to AFIA Cedents under the Scheme will be taken into account in determining appropriate New Hampshire distributions."[5] (Agreement ¶ 1.5.2.) Thus, it cannot seriously be

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[4] For this reason, the Liquidator contends that "[t]he payments are not a compromise of the AFIA Cedents' class V claims against Home so there is no creation of a sub-class of class V claimants." (*Id.* at 15.)

[5] Paragraph 1.5.2 of the Agreement states that "in determining [an AFIA Cedent's] entitlement (if any) to receive any distribution payable [to the AFIA Cedent] as a creditor in Home's New Hampshire liquidation [the AFIA Cedent] will bring into account, and give credit for, any payments received . . . pursuant to the arrangements described" in the Agreement. It cannot seriously be contended that the payments are not for a portion of the AFIA Cedents' claims against Home if they are required to deduct those payments from any other payments they might receive for their claims from the Home estate.

disputed that the recoveries under the proposed Agreement are *distributions* directly related to the AFIA's Cedents' *claims* against Home.

The Liquidator has not cited a single case where a court has allowed the payment of a creditor's claim as an administrative expense. Indeed, as noted in the ACE Companies' opening brief, the court in *Oxendine v. Commissioner of Ins. (In re Liquidation of Coastal States Life Ins. Co.)*, 494 S.E.2d 545 (Ga. App. 1997), rejected an attempt to bootstrap a claims settlement into an administrative expense.[6] In *Oxendine*:

> The central issue [was] whether parties who would otherwise be general creditors of an insurance company with Class 4 priority [*i.e.*, general creditor] claims can convert their claims to Class 1 priority [*i.e.*, administrative expense] claims by agreeing with the rehabilitator appointed . . . to compromise their claims against the insurance company during the rehabilitation process. Appellees argue that by reaching such agreements their claims become costs and expenses of administration during rehabilitation and liquidation because the Georgia Insurance Commissioner, by settling their claims, in effect, preserved the assets of the estate.

Id. at 547-48.

The *Oxendine* court rejected the creditors' argument on three grounds. First, it held that the creditors' argument was "not authorized by the plain terms" of the administrative expense provision: "Class 1 claims clearly concern 'costs and expenses of administration.' No reasonable definition of 'costs' or 'expenses' can include the claims which appellees assert. These claims are for money which appellees claim from Coastal States' estate and not administrative costs or expenses incurred." *Id.* at 548. Second, the court noted that the payment of the creditors' claims would violate the statutory order of distribution, which stated that distributions "shall be in accordance with the order as set forth in this Code section." *Id.*

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[6] The administrative expense provision in the Georgia liquidation statute that was in effect at the time *Oxendine* was decided is nearly identical to § 402-C:44(I). *See* GA. Code Ann. § 33-37-41(1).

(emphasis added). Third, the court attached no significance to the fact that the Georgia Insurance Commissioner had entered into the settlements with the creditors. If such settlements were given special treatment, the priority of claims established by the Georgia statute would be "render[ed] meaningless." *Id.*

Similarly, the Liquidator in this case is seeking to make payments for claims that the AFIA Cedents have against Home. The canons of statutory construction do not allow for a strained interpretation of "costs and expenses" that includes the settlement and payment of creditor claims.[7] The reclassification of payments for the AFIA Cedents' claims as administrative expenses would contravene § 402-C:44. Indeed, allowing the Liquidator to pass off the payments to AFIA Cedents as administrative expenses would render § 402-C:44 meaningless and would set the same kind of disturbing precedent that the *Oxendine* court feared. This case amply illustrates the type (and magnitude) of problems that such a broad interpretation of administrative expenses could cause. Under the guise of "administrative expenses," the Liquidator is asking the Court to approve payments for the AFIA Cedents' Class V claims that amount to half the total recovery from Home's reinsurers for those claims (which could amount to tens of millions of dollars or more). The Court should not sanction such an absurd result.

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[7] Bankruptcy cases on the payment of administrative expenses are instructive. Administrative expenses in federal bankruptcy proceedings include "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). A claim will not qualify as an administrative expense unless, among other things, "the right to payment arose from a post-petition transaction with the debtor estate, rather than from a prepetition transaction with the debtor." *In re Hemingway Transport,* 954 F.2d 1, 5 (1st Cir. 1992). In this case, it cannot be disputed that the AFIA Cedents' claims arise from contracts that were entered into before Home's liquidation. Therefore, payments for such claims should not be characterized as "administrative expenses."

CONCLUSION

For the foregoing reasons, the ACE Companies respectfully request that the Court deny the Motion.

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The undersigned certifies that he served a copy of the foregoing on the following counsel via First Class mail unless otherwise indicated on April 16, 2004.

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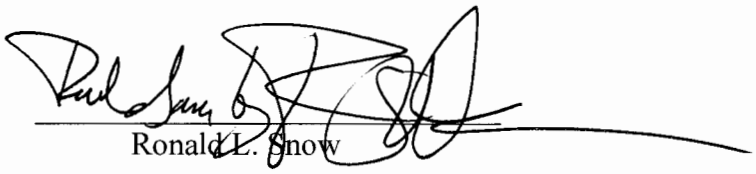

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