

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' WRITTEN RESPONSE
TO PROPOSED ORDER ON REMAND**

Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company, and ACE American Reinsurance Company (collectively, the "ACE Companies") by their attorneys, Orr & Reno, PA, submit the following written response to the Court's proposed order on remand:

(1) The ACE Companies believe that in order to be consistent with and give due respect and deference to the issues remanded by the Supreme Court one particular aspect of the Court's draft order on remand needs to be recast - that relating to the fifth issue remanded by the New Hampshire Supreme Court. The Supreme Court specifically requested that this Court consider: "(5) whether the payment to the AFIA Cedents qualifies as an administrative expense under RSA 402-C:44."

(2) At the status conference, the parties agreed that question (5) is a matter of law and could be resolved without further evidence. However, the Draft Order re-characterizes the question in a much broader way; in essence, it re-frames the question as a matter of the Liquidator's authority to enter the agreement. It is, was and remains the ACE Companies' position that that issue is not an issue remanded to this Court. Indeed, the issue of the Liquidator's authority under RSA 402-C to enter into the agreement was not discussed at the status conference on October 4, 2004. It is not conceded by the ACE Companies here, nor was it

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conceded by the ACE Companies at the status conference, that the issue of the Liquidator's authority to enter into the agreement with the AFIA Cedents could be determined without further evidence. The ACE Companies believe that the issue of the Liquidator's authority to enter into the agreement with the AFIA Cedents is inextricably linked with the "fairness" question, and requires discovery and an evidentiary hearing.

(3) Accordingly, the ACE Companies respectfully request that the first full paragraph under section (5) on page 6 of the draft order read "agreed that the Court's determination as to whether the payment to AFIA Cedents qualifies as an administrative expense is a matter of law," rather than "agreed that the Court's determination as to whether *the Liquidator has the authority to enter into the agreement and compromise* is a matter of law." (emphasis supplied).

(4) The same issue arises on page 12 of the draft Order. The ACE Companies believe that the last sentence of the first full paragraph should address the issue on remand "administrative expenses", and not authority to enter an agreement. Accordingly, the Order should read "For this reason, the 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". (emphasis added) The next paragraph should read: "At this point, the Court and the parties request that the Supreme Court decide the legal issue, *whether the payment under the agreement is an administrative expense*, before the Court conducts the reasonableness/fairness issues. If the *payment is not an administrative expense*, the issue is resolved." (emphasis added).

(5) The proposed Conclusion again suggests an answer to a question the Supreme Court did not ask. Accordingly, the ACE Companies respectfully suggest that the conclusion read:

"1. The parties agree that the record is adequate to determine the legal issue of whether the payment to AFIA Cedents is an administrative expense;" and

2. For the reasons stated above, the Court rules that the payments are administrative expenses and authorized under RSA 402-C:25, VI and XXII."

(6) The ACE Companies believe that an Order by this Court which suggests a different question to be decided by the Supreme Court is inconsistent with the order from the Supreme Court, raises an issue that was not addressed by any party at the status conference, and proposes a "procedural direction" not agreed to by the ACE Companies at the status conference

(7) The ACE Companies also respectfully suggest that the second full paragraph on page 9 beginning with the word "Contrary" should read "... The Court now determines that the Liquidator could properly classify ...". The ACE Companies suggest this change because the original Order appealed did not refer to "administrative expenses" but rather discretion to enter the agreement. To suggest otherwise now would be unfair to the appealing parties originally (who appealed focusing on discretion) and now.

(8) The draft Order should also reflect that the ACE Companies and Benjamin Moore argued that the payments to the AFIA Cedents would violate RSA 402-C:44 and 402-C:25 (xxi). See p. 7 of proposed Order (emphasis supplied)

(8) Finally, on page 1 of the draft Order, the ACE Companies contest that the primary purpose of the UK proceedings are to "protect and preserve assets". There is no evidence whatsoever that there are any assets in the UK to protect, as ACE's counsel has repeatedly argued. To the contrary the reinsurance at issue is not a UK asset at all. Accordingly, the purpose articulated is a "purported one" and no more.

Respectfully submitted,



Ronald L. Snow
ORR & RENO, P.A.
One Eagle Square
P.O. Box 3550
Concord, New Hampshire 03302-3550
Telephone (603) 224-2381
Facsimile (603) 224-2318

-and-

Gary S. Lee,
Eric A. Haab
Gail M. Goering
LOVELLS
900 Third Avenue, 16th Floor
New York, New York 10022
Telephone (212) 909-0600
Facsimile (212) 909-0666

Attorneys for Respondents Century
Indemnity Company, ACE Property and
Casualty Insurance Company, Pacific
Employers Insurance Company, and ACE
American Reinsurance Company