

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' OBJECTION TO
MOTION TO RECONSIDER COURT'S DENIAL OF
NATIONWIDE'S MOTION TO INTERVENE and
MOTION TO PERMIT ATTORNEY MICHAEL COHEN
TO APPEAR PRO HAC VICE**

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 P.A., respectfully object to Nationwide General Insurance Company's ("Nationwide") motions for reconsideration filed on Day Four of the trial in this matter because:

- (1) Nationwide's failure to request oral argument as required by Super. Ct. R. 58 in its original motion to intervene disposes of its purported deprivation of due process rights under the United States and New Hampshire Constitution;
- (2) Nationwide has not pointed to facts or law presented to the Court in the Motion to Intervene which the Court overlooked or misapprehended. Accordingly, the Motion for Reconsideration should be denied pursuant to Super. Ct. R. 59-A(1);
- (3) Even on its merits, Nationwide's request for intervention was untimely when filed on Friday and remains untimely today.
- (4) Nationwide's emphatic insistence that it was a **nonparty** to this proceeding, and resulting refusal to answer the discovery propounded by ACE Companies in January 2005 to prepare for this proceeding, should estop it from asserting that it is or must be a party in the current proceeding, see Exhibit A;
- (5) Nationwide fails to otherwise meet the New Hampshire standard for intervention; and
- (6) The motion pro hac vice should be denied where local counsel has not appeared in the underlying case in addition to the reasons previously set forth in the objection to the motion to intervene.

Accordingly, the Court should deny the Motions for Reconsideration, or take this matter up at some future date that will not distract from completing trial today, and award costs to ACE Companies for having to address the arguments raised the Motion for Reconsideration. ACE Companies would also request reimbursement of its cost for having to carry this hearing over until Monday if addressing this Motion prevents ACE Companies from finishing its case today. ACE Companies further state:

1. Counsel for ACE Companies learned upon returning to the office of undersigned counsel at approximately 4:20 pm, Thursday July 28, 2005, that Nationwide had filed a motion to reconsider the denial of its motions to intervene and related motion for pro hac vice. Attorney Cohen, who has been monitoring the trial all week, benefiting from ACE Companies' request for daily transcript by ordering a copy for Nationwide, apparently chose not to mention during the course of the trial day that his client was seeking this relief.

Had Nationwide Abided by the Superior Court Rules, It Would Have Learned of ACE Companies' Objection to Its Motions Prior to Filing Them.

2. In its motion for reconsideration, Nationwide expresses surprise that a party would object to its motion to intervene in the first place, and complains that it did not learn of ACE Companies objection to the attempted intervention until after the motion was addressed by this Court on the first day of trial. Had Nationwide's counsel sought concurrence on the motions, as required by Super. Ct. R. 57-A, they would have learned prior to filing them that ACE Companies objected.

3. Furthermore, ACE Companies had no obligation to file a written objection prior to the commencement of the pending merits hearing as Superior Court Rules allow it 10 days to object to a motion. It was by sheer fortuity that ACE Companies' local counsel learned of the motion to intervene upon returning to the office at approximately 3:15 pm last Friday (July 22, 2005), alerted other counsel in this proceeding to the filing of the motion, and was able to put together a hurried

objection. Therefore, Nationwide should have anticipated that it would not learn the parties' response to its motion to intervene until Monday morning.

Nationwide's Failure to Request Oral Argument Disposes of Its Constitutional Argument.

4. Nationwide asserts that the Court denied its due process rights under the United States and New Hampshire Constitutions because it was not given an opportunity to expand at oral argument on the cursory motion for intervention it filed. Nationwide, however, never requested oral argument as required by Superior Court Rule 58.

5. Accordingly, the Court was completely within its rights to deny the motion based on the papers before it. *Id.*

6. The Motion to Intervene did not set forth facts from which the Court could determine that Nationwide had a right involved in this trial and a direct and apparent interest therein. *Brzica v. Trustees of Dartmouth College*, 147 N.H. 443, 446 (2002). Moreover, when offered an opportunity to provide oral argument, Nationwide's counsel, Mr. Cohen, only really stated that his client "asked me to come and participate in these proceedings primarily as an observer but to speak, if necessary." Trial Transcript 1A at 10 lines 21-23. Where Nationwide failed to provide this Court with any basis for granting intervention, it should not be heard to complain later when its request is denied.

7. Thus, the constitutional challenge advanced by Nationwide should be disregarded.

While Nationwide attempts to Buttress its Meager Motion for Intervention with Unverified Facts and Legal Arguments in its Motions for Reconsideration, It Fails to Assert What the Court Overlooked or Misapprehended About the **Motion for Intervention**.

8. Under Super. Ct. R. 59-A, a party filing a motion for reconsideration has the burden of establishing the points of law or fact the Court overlooked or misapprehended in ruling on the original motion.

9. Here, Nationwide is attempting to enhance its original filing with unverified facts and legal arguments, but sidesteps the issue of addressing why the Court was not justified in

denying the motion originally presented. As already pointed out, the cursory motion for intervention filed by Nationwide did not support the granting of intervention as no clear right, or direct and apparent interest in the trial, was articulated. Nationwide's "primary" goal of having its counsel observe the trial can be, and has been, fulfilled without the need for intervention.

10. Accordingly, the motion for reconsideration should be denied.

The Facts Asserted By Nationwide in its Motion for Reconsideration Further Support Why Its Attempt to Intervene is Untimely

11. Nationwide's decision to sleep on its rights in this equity action should be barred under the doctrine of laches. See Nordic Inn Condominium Owners' Assoc. v. Ventullo, ___ N.H. ___, slip op. at 3 (December 29, 2004); Appeal of City of Laconia, 150 N.H. 91, 93 (2003). The test set forth by the New Hampshire Supreme Court looks at the amount of time the moving party as let slip by before asserting its purported rights, as well as "(1) the knowledge of the [moving party]; (2) 'the conduct of the [responding party]'; (3) 'the interests to be vindicated'; and (4) 'the resulting prejudice.'" Id. This is a fact driving inquiry. Id.

12. Even if the Court chooses to consider the newly asserted, unverified facts and legal arguments in the motion for reconsideration, Nationwide makes the case itself for why its motion to intervene is untimely, and subject to bar under the doctrine of laches. It admits that it has been regularly monitoring the progress of this matter, including review of the electronic docket, and that it has attended Court proceedings to date deemed necessary to protect its rights. In the year and a half this matter has been pending, Nationwide apparently has been able to protect its rights without ever previously filing for intervention and having counsel appear in the case.

13. Despite admitting that it has been well aware of this proceeding, Nationwide chose to wait until the eve of trial to seek intervention; a time calculated to be most disruptive to the parties, including ACE Companies in particular. Nationwide has chosen to wait until ACE

Companies presents its case in chief before renewing its efforts to insert itself into this trial. It cannot assert any rationale for why it has waited to intervene until this point.

14. Nationwide claims that its sudden need to intervene will not delay the proceedings, affect the witness schedule or extend the examinations. That assertion does not seem credible given that any attempt to question a witness necessarily has to extend the trial and jeopardizes the Respondents' ability to complete their case by the end of the day today as planned. To the extent that Nationwide's counsel has no intention of asking questions, then he has no need to participate in the trial. Nationwide leaves the issue of whether it will "speak" at trial ambiguous making its real interest in the case unclear. Instead, in the home stretch of this proceeding, Nationwide asserts a need to intervene so it can gain unfettered access to the court record and trial testimony so it can independently determine whether the Agreement is necessary, fair and reasonable. Motion for Reconsideration at ¶¶1 and 35. Leaving aside that Nationwide is not the factfinder in this trial, the record in this case is publicly available on the electronic docket. Nationwide concedes that it monitors this docket regularly, having "reviewed all the pleadings, orders and submissions posted on this Court's website." *Id.* at ¶6. Nationwide's counsel has monitored the entire trial, and is receiving daily transcripts. Thus, its purported need for information is being fully satisfied without formal intervention in the case. Thus, Nationwide cannot establish that it is clearly prejudiced by the denial of its motion.

15. As additional support of its need to participate in the hearing, Nationwide asserts that the Liquidator failed to stipulate last winter to a statement made during the course of a hearing in February about an agreement between Agrippina and the Liquidator. No good reason is advanced for the Court's consideration of why Nationwide did not address this asserted infringement of its rights last winter or spring, or how it impacts a right being addressed at trial, or how this creates a direct and apparent interest in the trial. Thus, Nationwide has not addressed any manner in which it is being prejudiced by being excluded from directly participating in the trial.

16. For their part, the ACE Companies essentially invited Nationwide to participate in this proceeding by serving it with discovery in January 2005. See Exhibit A. Nationwide rebuked this invitation asserting it was a nonparty. See id. Thus, ACE Companies have not caused Nationwide to delay intervention.

17. Balancing against Nationwide's asserted interests is that fact that ACE Companies' ability to complete this trial in the time proscribed will be jeopardized, and it will be substantially prejudiced in its abilities to defend against Nationwide's intervention without discovery on Nationwide's role in this case; discovery which Nationwide refused to answer.

18. The prejudice to the ACE Companies should intervention be allowed at this point in the proceedings substantially outweighs any inconvenience advanced by Nationwide. ACE Companies were rebuffed in their efforts to obtain discovery from Nationwide, and Nationwide's refusal to enter the fray prior to trial prevents its orderly inclusion in the trial at this point.

19. In balancing all the factors set forth in the laches standard, including but not limited to the fact that Nationwide was not a signatory to, nor participated in negotiating, the Agreement under consideration in this case, that it had full knowledge of the scheduling of the trial, refused to engage in discovery claiming it was a non-party to the proceeding, its counsel is monitoring the trial and receiving daily transcript, and the substantial prejudice to ACE Companies if Nationwide is allowed to intervene on the last day of trial, the Court should determine that Nationwide's failure to assert its rights earlier now precludes its ability to assert itself into the case at this point in the proceeding. See Nordic Inn Condominium Owners' Assoc., slip op. at 3; Appeal of City of Laconia, 150 N.H. at 93.

Nationwide's Previous Assertion that it is Not a Party in this Case Should Estop It From Now Asserting that It Is, or Should be, a Party

20. Moreover, as ACE Companies previously noted, by serving Nationwide with discovery requests during the discovery period sanctioned by this Court, Nationwide was being

given an opportunity to participate in this proceeding. See Exhibit A. Nationwide emphatically refused to answer the discovery claiming that it was a **nonparty**.¹ ACE Companies, in reliance on Nationwide's assertion that it was a non-party, did not seek to compel discovery from it.

21. Nationwide cannot have it both ways. Asserting it is a nonparty when it does not want to comply with discovery requests, but then asserting it should be allowed to intervene as a party (or simply that it is a party by virtue of the fact that it is an AFIA Cedent) at trial when ACE Companies have been denied its opportunity to discover Nationwide's role in this case.

22. Accordingly, it should be estopped from now claiming that it is, or should be allowed to become, a party in this stage of the case.

The Court, In Its Discretion, Should Deny the Attempted Intervention For Failure to Meet the Intervention Standard

23. As already set forth above, a party cannot intervene unless it has a right involved in this trial and a direct and apparent interest therein. Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 446 (2002)². While intervention is usually granted liberally, the Court nonetheless has discretion to prohibit intervention when, as here, it is inappropriate to do so. Id.

24. Here, Nationwide vaguely asserts in its motion to intervene that this matter may involve its interests. Motion to Intervene at ¶1. Its newly purported reason for intervention is to gain “unfettered access to the complete record and the testimony presented to this Court in the ongoing Home Insurance liquidation proceedings, including the evidentiary proceedings commencing on July 25, 2005 and continuing.” Objection at ¶35. It of course does not want other parties to have unfettered access to its own records. See Exhibit A. It admits that it is a stranger to

¹ In the same communication addressed to Ronald Snow, Esq. in which it refuses to answer discovery, Mr. Cohen also asserts on behalf of Nationwide that it may seek to conflict the Lovells firm out of the case if it becomes involved as a party. Exhibit A. To the extent that Nationwide has an ulterior motive of intervening during trial so as to attempt to conflict the Lovells firm out of the case, its pretextual attempt to intervene should be denied given the extreme prejudice ACE Companies would suffer if its chosen national counsel were successfully conflicted out of the case at this point in time.

² It is unclear why Nationwide resorts to federal bankruptcy law to determine whether it has a right to intervene in a New Hampshire state court equity proceeding when New Hampshire law clearly sets forth the intervention standard.

the Agreement at issue in this trial; it was not a signatory and did not participate in its negotiation. This record simply does not set forth how Nationwide has a right at issue in the litigation, or a direct and apparent interest therein.

25. Accordingly, the Court should continue to exercise its discretion by denying the motion to reconsider its order denying the motion to intervene.

The Motion Pro Hac Vice Fails Because the Motion to Intervene Fails

26. Finally, Nationwide asserts that its pro hac vice motion should be allowed because such motions are typically allowed at any stage of a proceeding. Nationwide conveniently overlooks the fact that such motions are not permitted if local counsel has not him or herself filed an appearance in the case.

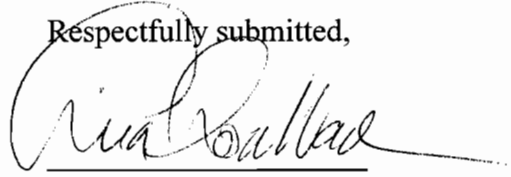
27. Thus, for the reasons already set forth in ACE Companies' objection to the motion to intervene and motion pro hac vice, and for the additional reasons set forth in this objection, the motion to reconsider denial of the motion to intervene and motion pro hac vice admission of Mr. Cohen should be denied.

WHEREFORE, the ACE Companies respectfully request that the Court:

- A. Deny the Motions for Reconsideration filed by Nationwide;
- B. Grant ACE Companies' costs for having to respond to these motions for reconsideration; and
- C. Grant such further relief as the Court deems just

Dated: July 29, 2005

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Lisa Snow Wade", written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing pleading has been served on Roger A. Seigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail and email on July 29, 2005. Counsel to Nationwide was provided a copy by hand-delivery on this date:

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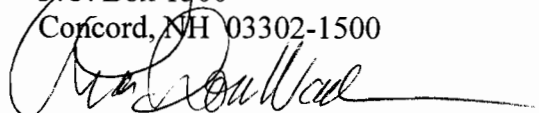
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