

MERRIMACK, SS.

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

ORDER ON REMAND

This matter is before the Court on remand from the Supreme Court. The remand order vacated this Court's order of April 29, 2004 and the June 1, 2004 addendum thereto. A status conference was held on October 4, 2004 to discuss the Supreme Court's remand order and to provide an opportunity for the Liquidator and the intervening parties to narrow the issues and agree on an efficient procedural direction going forward.

BACKGROUND:

The Home Insurance Company, a New Hampshire domestic insurer with a substantial, historic business presence in the United Kingdom, through an unincorporated branch office, was ordered into liquidation by the Merrimack County Superior Court on June 9, 2003. While Joint Provisional Liquidators have been appointed by the High Court of England and Wales with respect to the branch office business liabilities generated by the Home's presence in the United Kingdom, the provisional liquidation proceeding in the United Kingdom is ancillary to the proceedings in this Court. This Court understands that the primary purpose of the proceeding in the United Kingdom is to protect and preserve assets as efforts are made by the Liquidator to achieve an efficient and fair distribution of those assets to claimants in the liquidation estate. Regardless of the domicile of the claimant, or where the coverage was written, all claims will be filed in the proceeding overseen by this Court and consistent with procedures approved by it.

In February 2004, the Liquidator endorsed a compromise reached in the United Kingdom between the Joint Provisional Liquidators and an Informal Creditors' Committee of certain reinsureds of the Home, known collectively as the AFIA Cedents. The agreement and compromise provided that the Liquidator would first "seek approval of the supervising New Hampshire Court" for purposes of securing a "New Hampshire Order"; the Joint Provisional Liquidators would then "seek sanction of the English Court in respect of the Scheme" and; finally, the Joint Provisional Liquidators would seek an order from the English court for remission of the assets to the New Hampshire Liquidator for administration and distribution. See Letter of Agreement dated January 22, 2004 at paragraph 1.1.2. In accord with the sequence of events as anticipated by the parties to the agreement and compromise, the Liquidator filed a motion with attachments and supporting documents on February 22, 2004 seeking review and approval of the agreement in Merrimack County Superior Court.

The ACE Companies and Benjamin Moore & Co. sought to intervene, with the former filing an Assented-To Petition to Intervene and the latter, a Motion to Intervene. No objections were filed and this Court granted both parties' requests on April 5, 2004. Both ACE Companies and Benjamin Moore & Co. filed pleadings and memoranda objecting to the agreement and compromise with the AFIA Cedents. In response, the Court scheduled a status conference on April 9, 2004.

At the conference, the parties agreed that the issues to be determined were: whether an evidentiary hearing was necessary to determine whether the Court should grant or deny the Liquidator's motion for approval of the agreement; what the scope of any evidentiary hearing should be; and what discovery the parties needed to complete prior to any further hearing. See April 9, 2004 hearing transcript at pages 3-5. The parties agreed with the Court's assessment

that whether or not the Liquidator had the statutory authority under RSA chapter 402-C to enter such an agreement with the AFIA Cedents was a matter of law which could be decided without conducting further discovery. See April 9, 2004 transcript at pages 7-10 and pages 19-20. The parties also agreed that whether the Liquidator had abused his discretion in endorsing the agreement, i.e., whether the agreement was reasonable, would be determined only if the first question was decided in favor of the Liquidator. (Id.)

After the April 23, 2004 hearing, the Court issued an order finding that "under the circumstances of this liquidation as explained below, 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." See Order of April 29, 2004. ACE Companies and Benjamin Moore & Co. appealed this ruling.

In its Order of September 13, 2004, the Supreme Court enumerated the following questions upon which it requested specific discussion and findings:

- (1) Whether the New Hampshire liquidation proceedings should be stayed pending the completion of the regulatory and judicial proceedings in the United Kingdom;
- (2) Whether the New Hampshire court has an independent obligation to assess the fairness of the agreement with the AFIA Cedents;
- (3) Whether the intervenors have standing to contest the agreement;
- (4) Whether the "Necessity of Payment Doctrine" or some other equitable doctrine authorizes the Liquidator or court to vary the mandatory priorities set forth in RSA 402-C:44 (Supp.2003); and

(5) Whether the payment to the AFIA Cedents qualifies as an administrative expense under RSA 402-C:44, I.

DISCUSSION:

The questions from the Supreme Court will be addressed out of sequence, with the threshold questions of standing and comity addressed at the outset because of their potential for limiting parties or delaying the liquidation in deference to another jurisdiction.

(3) Whether the intervenors have standing to contest the agreement

Benjamin Moore & Co. asserts a right to intervene based upon its status as a Class II, policyholder claimant "with numerous open liability claims". See Response and Objection of Benjamin Moore & Co. to Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents, 3/18/04. The ACE Companies assert an interest in approximately 13 million dollars worth of Class V claims to be filed in the liquidation. See Objection and Response of ACE Companies to the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents, 3/19/04. The initial pleading of ACE Companies also makes clear that Century Indemnity Insurance Company has a substantial business interest in the liquidation in its role as run off manager and indemnitor of the AFIA Cedent liabilities. The Court granted the motions to intervene on April 5, 2004 without objection, finding the interests of each of the intervenors were potentially at stake based on the foregoing facts. See Snyder v. NH Savings Bank, 134 NH 32 (1991); *NH Practice Civil Practice and Procedure*, §6.26 136-7 1997.

Though the Liquidator addressed the issue of ACE Companies' standing at the April 9, 2004 hearing, he did not object to it, stating that "as far as a legal standing issue, we have not really suggested that as a legal constitutional issue they (ACE Companies) lack standing, but we

I (sic) think we have fairly raised an equitable argument about what they are really about here. They're here about protecting their own interests and I think that's a fair argument and we'll continue to raise it." See April 9, 2004 transcript at p. 26. The Liquidator made no observation as to the standing of Benjamin Moore & Co. The Liquidator's posture with regard to the standing of ACE Companies, at least as presented in Superior Court, was really an argument as to fairness, that is, whether it is fair to allow the ACE Companies to contest the agreement which, if abrogated, would result in a windfall to those companies and render the liquidation estate unable to fully collect a substantial reinsurance asset.

At the status conference on October 4, 2004, the Liquidator represented that he agreed that the ACE Companies and Benjamin Moore & Co. have standing to intervene for the purpose of contesting the agreement at issue. The Liquidator reserved the right to argue that ACE Companies and Benjamin Moore & Co. do not have appellate standing to contest the agreement. This would be an issue appropriately raised on appeal.

The Court finds that the direct interests of ACE Companies and Benjamin Moore & Co. are interests that would be prejudiced absent an opportunity to respond and demonstrate the potential harm that might be posed by the Liquidator's endorsement of the agreement at issue, about which they have raised various questions. Asmussen v. Comm. Dept. of Safety, 145 NH 578 (2000). Accordingly, ACE Companies and Benjamin Moore & Co. have standing to challenge the agreement.

- (1) Whether the New Hampshire liquidation proceedings should be stayed pending completion of the regulatory and judicial proceedings in the United Kingdom

At the status conference on October 4, 2004, the Liquidator, ACE Companies, and Benjamin Moore & Co. agreed that the New Hampshire liquidation proceedings should not be delayed pending the completion of the regulatory and judicial proceedings in the U.K.

Nonetheless, with regard to comity, the Supreme Court has directed this Court's attention to Allstate Ins. Co. v. Hughes, 174 B.R. 884, 890 (S.D.N.Y. 1994) as it may relate to staying the New Hampshire proceedings pending any regulatory and judicial proceedings that may occur in the United Kingdom. Allstate involves the insolvency of five affiliated companies collectively known as the KWELM companies. As UK companies, they were subject to the provisions of the UK Insolvency Act of 1986, and the action in the U.S. Bankruptcy Court would have been filed defensively as an ancillary proceeding to enjoin U.S. actions that might have been, or had been, filed against them. The circumstances of Allstate are the opposite of those in this case, as this Court serves, as explained above at Page 1, as the plenary Court with regard to the insolvency of the Home Insurance Company, a New Hampshire domestic company.

(5) Whether the payment to AFIA Cedents qualifies as an administrative expense under RSA 402-C:44, I

At the status conference on October 4, 2004, the Liquidator, ACE Companies and Benjamin Moore & Co. agreed that the Court's determination as to whether the payment to AFIA Cedents qualifies as an administrative expense under RSA 402-C:44, I is a matter of law. The parties again agreed that the issue could be determined without submission of further evidence or briefing.

Substantial pleadings, memoranda, and affidavits were submitted to the Court regarding the Liquidator's Motion for Approval of the Agreement and Compromise with AFIA Cedents. At the hearing on April 23, 2004, a significant portion of counsels' arguments on this matter were focused upon the statutory distribution scheme reflected in RSA 402-C:44 and other provisions within RSA chapter 402-C that provide authority to the Liquidator.

The Liquidator stated that the agreement and compromise would provide financial incentive to AFIA Cedents sufficient to promote filing and prosecution of claims, enabling the

liquidation to appropriately tap the ACE Companies on the resulting liabilities. The Liquidator argued that, absent the dynamic created by the agreement, his collection of a substantial asset was at risk because AFIA Cedents would not be inclined to pursue claims with the liquidation estate, except to the extent that those AFIA Cedents had a setoff opportunity as provided for under RSA 402-C:34. The Liquidator further stated that the ultimate purpose of the compromise and agreement was to financially enhance the Class II claimant distributions without impairing the prospects of the Class V claimants.

ACE Companies and Benjamin Moore & Co. argued that the Liquidator's endorsement ignored the mandatory nature of RSA 402-C: 44 and created an impermissible subclass of Class V claimants, AFIA Cedents, who would receive a distribution, while other claimants within Class V would receive no distribution at all. Additionally, the ACE Companies and Benjamin Moore & Co. argued that the payments to AFIA Cedents could only be characterized as claims payments, as the process used to determine their value would be, in essence, a claims determination process. As such, they argued that those payments would be made to a subset of Class V claimants in violation of RSA 402-C: 44 and RSA 402-C:25, XXI. Finally, both ACE Companies and Benjamin Moore & Co. argued that the sheer size of the aggregate payment defeated the Liquidator's efforts to characterize it as administrative.

The Liquidator asserted that the New Hampshire insurance liquidation provisions were to be broadly construed under RSA 402-C:1, III, and IV. He also cited RSA 402:25, IV, VI, and XXII, as specific provisions which he argued provided the necessary authority for the agreement at issue. The Liquidator argued that any monies received by AFIA Cedents under the agreement were administrative expenses, necessary to enhance the distributions to Class II policyholder claimants and preserve to the fullest, a substantial asset of the estate. In the alternative to

classifying the payments as administrative expenses, the Liquidator requested that the Court consider the application of various equitable doctrines, such as the Necessity of Payment Doctrine, to support departure from the statutory distribution/classification scheme.

Consistent with the understanding of the parties reached at the April 9, 2004 status conference, the Court first considered and determined whether, as a matter of law, RSA chapter 402-C authorizes the Liquidator to enter into an agreement such as the one at issue. In its analysis the Court considered that the provisions of RSA chapter 402-C are to be liberally construed and that the purpose of the statute is to protect insureds, creditors and the general public. RSA 402-C:1, III and IV. The Court also considered the nature and complexity of The Home Insurance Company's insurance and reinsurance business, and that its substantial involvement in the London market posed significant challenges to the Liquidator. As the periodic reports of the Liquidator have been filed, and various matters have been presented to the Court for review, it has been made clear that the largest single asset of the Home, apparently not an uncommon situation for companies in its category, is the reinsurance asset.

The Court also recognized the circumstances which put collection of the asset at risk, particularly the fact that AFIA Cedents would have little reason to file and prosecute claims if neither setoff nor actual distribution were likely. The Court's concern in this regard was supported by affidavits submitted by the Liquidator: See affidavits of: Gareth Howard Hughes, Joint Provisional Liquidator, at Paragraphs 12-15; Rhydian Williams, Head of Pools, Security, and Insolvency at Equitas, at Paragraphs 7-10 and 12-13; and Gernot Warmuth, Counsel for Zurich Versicherung, at Paragraphs 6-10. Additionally, the Court gave weight to the Liquidator's representation that the AFIA Cedents "presented a problem that nobody else could

present” (See April 23, 2004 transcript at page 17) and that the structure of the agreement was necessary to preserve and recover assets. RSA 402-C:44, I.

In ruling in favor of the legality of the agreement, the Court found that the Liquidator’s endorsement of the agreement sought to maximize asset recovery and was consistent with the broad purposes and goals of the statute to protect the interests of insureds and creditors. RSA 402-C: 1, III and IV. The Court also considered the various and more specific provisions upon which the Liquidator relied in endorsing the agreement. RSA 402-C:25, IV, VI, XXII. The Court found that “the agreement proposed by the Liquidator was authorized under the broad array of powers granted the Liquidator under RSA 402-C:25” and that with the agreement the Liquidator would be able “to marshal substantial assets to be distributed to creditors which would otherwise be unavailable.” See Order dated April 29, 2004.

In making the determination, Court again considered the situation which the Liquidator sought to address through the endorsement of the agreement and compromise; the fact that payments to the AFIA Cedents would result in substantial economic benefit to Class II claimants; and the undisputed fact that Class V claimants would “receive nothing with or without the agreement”. See Order dated April 29, 2004 and April 23, 2004 transcript at 54. Finally, the Court considered that under the agreement and compromise no greater liability was imposed on the Ace Companies than existed prior to this dispute.

In addressing the dispute over the characterization of the payments to be made to AFIA Cedents, the Court considered ACE Companies’ and Benjamin Moore & Co.’s arguments that the aggregate payments were simply too substantial and too closely tied to claims procedures for evaluation purposes to qualify as administrative expenses. The parties may have disagreed as to the exact value of ACE Companies’ indemnification of Home liabilities, however it was carried

on the ACE Company books as a liability in excess of \$ 200 million. See April 9, 2004 transcript at page 50. The Liquidator estimated that approximately one-third of the amounts collected on the AFIA liabilities would be distributed to the AFIA Cedents, with the remainder to be recovered by the liquidation estate.

The Court's order of April 29, 2004 did not specifically state that payments to the AFIA Cedents under the agreement were administrative expenses under RSA 402-C:44, I. This was an oversight as the Court attempted to explain why the Liquidator had the authority to incur such an administrative expense without plainly stating that the payments to the AFIA Cedents were an administrative expense under RSA 402-C:44, I. The Court hereby clarifies that in previously ruling that "under the circumstances of this liquidation as explained below, 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", the Court necessarily found that the payments to the AFIA Cedents are administrative expenses. They are "actual and necessary costs of preserving or recovering the assets of the insurer" under RSA 402-C:44, I.

- (4) Whether the necessity of payment doctrine or some other equitable doctrine authorizes the Liquidator or the court to vary the mandatory priorities set forth in RSA 402-C:44 (Supp. 2003)

In its order of April 29, 2004, the Court did not specifically address equitable doctrines such as the "Doctrine of Necessity" raised by the Liquidator because the Court determined that the statute allowed such an agreement. However, in answer to the Supreme Court's question, the Court agrees with the position of ACE Companies and Benjamin Moore & Co. that specific equitable doctrines may not override a statute enacted upon a particular topic. See Wormwood v. Association, 87 NH 136, 138 (1934) (rejecting trial court's assumption that a "court in equity

has power to override the statute law of the state and enjoin the ejection of a tenant by his landlord whenever it finds the purposes and motives of the landlord to be reprehensible.”)

In finding that RSA chapter 402-C authorizes the contract at issue, the Court did find that the statute affords equitable consideration and flexibility in a number of provisions. See e.g. RSA 402-C:1, III (statute “shall be liberally construed to effect (its) purpose.”); RSA 402-C: 1, IV (“The purpose of this chapter is the protection of the interests of the insureds, creditors, and the public generally...); RSA 402-C:2⁵~~§~~, ^{II}XXX (enumeration... is not a limitation nor does it exclude his right to do such other acts not herein specifically enumerated or otherwise provided for as are necessary or expedient for the accomplishment of or in aid of the purposes of the liquidation.”). More specifically, the Court concluded that the Liquidator properly took action to “collect all debts and monies due and claims belonging to the insurer” and was “doing such other acts as may be necessary or expedient to collect, conserve or protect” assets or property. RSA 402-C:25, VI.

(2) Whether the New Hampshire Court has an independent obligation to assess the fairness of the agreement with the AFIA Cedents

The Court recognizes an independent obligation to assess the fairness of the agreement with AFIA Cedents. After the April 23, 2004 hearing, the Court issued a supplemental order on June 1, 2004 which clarified that a further hearing was not necessary to determine this issue.

The Court Order of April 29, 2004 granted the Liquidator’s Motion for Approval of Agreement and Compromise with AFIA Cedents. The Order did not expressly address the alternative request by ACE Companies and Benjamin Moore & Co. for further evidentiary hearing to determine whether the Liquidator exercised his authority reasonably by endorsing the agreement. The matter is clarified below.

The agreement at issue was pursued in conjunction with the Provisional Liquidation in the United Kingdom. The Joint Provisional Liquidators appointed by the High Court and the

Informal Creditors Committee established under English law negotiated the terms. In endorsing the agreement, the Liquidator moved to marshal assets and secure access to an estimated \$231 million of ACE Companies reinsurance and indemnification obligations. The ACE Companies' interest is directly contrary to the liquidation's interest which is to maximize opportunity to access this asset.

In the absence of the agreement, AFIA Cedents whose filing and prosecution of claims triggers the reinsurance and indemnification obligations of ACE Companies, have little incentive to file claims. Under the specific financial realities of this liquidation, Class V claimants would bear the expense of filing and prosecuting claims without realistic prospect of any distribution. Under the agreement and in conjunction with their filing and prosecution of claims, AFIA Cedents in the aggregate will retain approximately \$50 million for distribution to approximately 200 member companies under a formula governed by the terms negotiated. The remainder will be largely available for distribution to policyholder claimants with approximately \$10 (million) to be retained for administrative expenses in the United Kingdom Provisions Liquidation.

As noted above, the terms of the agreement were negotiated in conjunction with the Provisions Liquidation in the United Kingdom. The agreement will be the subject of further proceedings and applications for approval in both regulatory and judicial settings in the United Kingdom. Further, as noted in the April 29, 2004 Order, neither the Financial Services Authority, the regulator in the United Kingdom, nor the National Conference of Insurance Guaranty Funds Reinsurance Commutation Subcommittee of the Home Insurance Company in Liquidation, both of which have reviewed the agreement, have objections to it.

The Court hereby clarifies that, under these circumstances, a further evidentiary hearing into whether the Liquidator has reasonably exercised his authority in endorsing the agreement would not be helpful.

Given these circumstances, the Court was satisfied that the agreement was fair and reasonable.

Since the remand order, ACE Companies and Benjamin Moore & Co. have requested an evidentiary hearing to afford them an opportunity to inquire into whether the agreement and compromise are necessary, and if so, whether the terms of the agreement were reasonable and

fair. The Court is unsure whether the Supreme Court remand order finds that there are inadequate bases to find that the agreement is fair and reasonable. For this reason, the Court asks the parties to request clarification on this point when this case returns to the Supreme Court. This 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 and the Supreme Court finds that a further hearing is necessary to determine the fairness and reasonableness of the agreement.

In sum, at this point the Court requests that the Supreme Court decide the legal issue, whether the payment to AFIA Cedents qualifies as an administrative expense, before the Court conducts any reasonableness/fairness hearing. If the payment is not an administrative expense, the issue is resolved. If it is, this Court will schedule a further hearing to determine the necessity, fairness and reasonableness of the agreement if so directed by the Supreme Court. The nature of the hearing, i.e., by offer of proof or by taking evidence, will be determined at a future scheduling conference. In the meantime the parties may conduct discovery limited to the necessity, reasonableness, and fairness of the agreement.

Because the Supreme Court has not maintained jurisdiction of this matter, parties wishing to appeal aspects of the Court's Order on Remand will be required to renew the appeal process and pursue whatever opportunities may exist for an expedited disposition.

CONCLUSION:

1. ACE Companies and Benjamin Moore & Co. have standing to contest the agreement and compromise;
2. Consideration of a stay of the New Hampshire proceedings is not appropriate to the circumstances of this matter;

3. Specific equitable doctrines such as the "Necessity of Payment Doctrine" may not override a statute enacted upon a particular topic;

4. The parties agree that the record is adequate to determine the legal issue of whether the payments to AFIA Cedents are an administrative expense;

5. For the reasons stated above, the Court rules that the payments are an administrative expense authorized under RSA 402-C:1, III and IV; RSA 402-C:25, IV, VI and XXII; and RSA 402-C:44, I;


6. ACE Companies and Benjamin Moore & Co. may appeal the Court's finding that payments to AFIA Cedents are administrative expenses.

7. The parties may conduct discovery limited to the necessity, fairness, and reasonableness of the compromise and agreement.

8. The Liquidator will request that the Supreme Court clarify whether further evidence is necessary to determine the fairness and reasonableness of the agreement.

SO ORDERED:

DATED: 10/8/04


Kathleen A. McGuire
Associate Justice