

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0319, In the Matter of the Liquidation of The Home Insurance Company, the court on September 13, 2004 issued the following order:

Having considered the briefs and oral arguments of the parties and the record on appeal, the court concludes that a formal written opinion is not necessary for the disposition of this appeal. We vacate and remand.

The intervenors appeal the order of the Superior Court (McGuire, J.) granting the motion filed by the Liquidator of The Home Insurance Company (Home) for approval of an agreement between Home and certain of its reinsureds, the AFIA Cedents. The agreement gives the AFIA Cedents a financial incentive to file claims against Home in the liquidation proceedings. According to the Liquidator's allegations, the agreement permits the AFIA Cedents to receive approximately \$72.5 million of an estimated \$231 million that the Liquidator will receive from the ACE Companies when the AFIA Cedents' claims against Home are filed and prosecuted.

The trial court ruled that the agreement complied with RSA chapter 402-C, which governs rehabilitation and liquidation of insurers. The court found the agreement "consistent with the goals and purposes of [RSA chapter 402-C] to protect the interests of the insureds and creditors." The trial court reached its conclusion without conducting an evidentiary hearing, however. On appeal, the parties raise arguments that they raised below, but upon which the trial court did not rule. We decline to rule upon these arguments in the first instance, absent a sufficient evidentiary record.

Moreover, although the trial court, in its June 1, 2004 order, acknowledged "[t]he agreement will be the subject of further proceedings and applications for approval in both regulatory and judicial settings in the United Kingdom," the court did not consider whether it had an independent obligation to assess the agreement's fairness through fact-finding proceedings. Cf. Matter of Boston & Providence R. Corp., 673 F.2d 11, 13 (1st Cir. 1982) (in reorganization proceeding, bankruptcy court must "act independently, out of its own initiative, for the benefit of all creditors" when assessing fairness of compromise with

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creditors); In re Estate of Indian Motorcycle Mfg., Inc., 299 B.R. 8, 20 (D. Mass. 2003) (listing factors for bankruptcy court in Chapter 7 proceeding to consider when assessing whether compromise is fair).

Nor did the court consider whether comity concerns require that the New Hampshire liquidation proceedings be stayed pending completion of the proceedings in the United Kingdom. See Allstate Ins. Co. v. Hughes, 174 B.R. 884, 890 (S.D.N.Y. 1994) (discussing whether court may take action that calls into question validity of scheme of arrangement approved by court in United Kingdom).

For all of the above reasons, we vacate the trial court's order approving the agreement and remand for further proceedings consistent with this order. On remand, the trial court shall consider: (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 the 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.

On remand, the trial court may resolve these issues through offers of proof, unless it determines that a full evidentiary hearing is necessary.

The trial court shall support its determinations on these issues with factual findings, as appropriate. For instance, if, on remand, the trial court determines that the agreement is lawful under New Hampshire law in part because Class II recipients will benefit from it and because it does not impair the rights of Class V recipients, the court shall set forth the factual basis for this conclusion. Similarly, if, on remand, the trial court determines that the agreement is lawful under New Hampshire law in part because it does not create subclasses within Class V, the court shall set forth the factual basis for this determination as well.

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The court does not intend this order to impede in any way the regulatory and judicial proceedings in the United Kingdom.

Vacated and remanded.

BRODERICK, C.J., and NADEAU, DALIANIS, DUGGAN and GALWAY, JJ.,
concurred.

**Eileen Fox,
Clerk**

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