

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**

**LIQUIDATOR'S OPPOSITION TO THE ACE COMPANIES'
MOTION FOR RECONSIDERATION OF ORDER ON REMAND**

Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby opposes the ACE Companies' Motion for Reconsideration of Order on Remand ("Motion"). The Motion is untimely, raises matters that are not relevant to the legal question decided in the Order on Remand, and mischaracterizes the proceedings before a Senate Committee and NAIC working group on which it relies. As further reasons, the Liquidator states:

A. The Motion Is Late And Should Be Denied As Untimely.

1. The Motion was filed more than four months after the Order on Remand, far past the ten day period for filing motions for reconsideration. The Court issued the Order on Remand on October 8, 2004, and the Clerk's Notice concerning the Order on Remand issued on October 13, 2004. See Exhibit A. The ACE Companies filed the Motion on February 28, 2005. Motions for reconsideration "shall be filed within ten (10) days of the date on the Clerk's written notice of the order or decision." Superior Court Rule 59-A(1). The Motion accordingly should be denied as untimely.

2. The ACE Companies contend that the Court may reconsider its ruling at this late date based on a change in circumstances. Motion at 10. But the only claimed change they point to in support of this argument is the withdrawal on February 3, 2005 of a potentially clarifying

amendment included in one section of a Department of Insurance technical bill then pending before a Senate Committee (the “Proposed Amendment”). Id. This is simply irrelevant, as noted in paragraph 6 below. The statutes relied on in the Order on Remand have not changed at all. In the absence of any change in the controlling law, there is no reason for an untimely motion for reconsideration. In any event, it is unreasonable for the ACE Companies to wait more than three weeks from the alleged changed in circumstances to file the Motion.

B. The ACE Companies Mischaracterize Proceedings Before The Senate Committee That In Any Event Are Irrelevant To The Interpretation Of The Statutes Addressed In The Order On Remand.

3. The ACE Companies’ principal argument is that the Department of Insurance’s withdrawal of part of section 5 of a technical bill, 2005 Senate Bill 74, then pending before a Senate Committee, somehow changes the meaning of the existing statutes addressed in the Order on Remand. The ACE Companies incorrectly characterize the withdrawal, which is, in any event legally irrelevant.

4. The ACE Companies misportray the activity before the Committee in two ways. First, while they acknowledge that the Department of Insurance¹ withdrew the Proposed Amendment before a vote by the Senate Committee, Motion at 2, 7, the ACE Companies erroneously describe the withdrawal as a “rejection” by the Committee. Motion at 2. Indeed, they even characterize it as a rejection by “the New Hampshire Legislature.” Motion at 11. The Committee, and certainly the Legislature as a whole, never took any action that expressed a position on the proposed amendment.

5. Second, the Motion rests on the implicit but erroneous assertion that the Committee members disagreed with the proposed amendment on the merits. Even though they

¹ The ACE Companies incorrectly refer to the Liquidator even though the Department requested the bill, which dealt with a number of technical matters other than the proposed amendment described in the Motion. ACE Ex. 1 at 1.

have no significance in the context of this litigation,² the concerns expressed by individual legislators focused principally on (a) reluctance to get involved in an issue in litigation pending before the courts, and (b) concern that the Proposed Amendment would have no retroactive effect. The Department accordingly withdrew the Proposed Amendment. In light of legislators' desire to avoid involvement in litigated matters (which was a principal thrust of the ACE Companies lobbying efforts, see ACE Ex. 3 at 1-2, 4-5,), it is ironic that the ACE Companies have chosen to bring the legislative proceedings into this action by filing the Motion.

6. Most importantly, even if the Legislature had taken some action that properly could be characterized as a rejection of the merits of the Proposed Amendment (which it did not), it would be irrelevant to the issues decided in the Order on Remand. The Supreme Court has specifically disapproved the notion that a subsequent legislature's rejection of a proposed amendment – especially a clarifying amendment – affects the interpretation of the existing law:

[T]he legislative history of a proposed amendment rejected by a subsequent legislature does not alter our interpretation of the statute, particularly since the proposed amendment purported to clarify, not change, existing law.

State v. Warren, 147 N.H. 567, 572 (2002). The ACE Companies concede that the proposed amendment here was presented as a clarification. Motion at 1, 2, 11; see also ACE Ex. 6. The withdrawal of the Proposed Amendment is thus, as a matter of law, wholly irrelevant to the Court's interpretation of RSA 402-C:44 and related statutes in the Order on Remand.

² The courts do not rely on post-enactment statements by individual legislators. See Bradley Real Estate Trust v. Taylor, 128 N.H. 441, 446 (“[W]e hold that personal recollections of the draftsman of a bill should not be considered for statutory interpretation purposes.”); State v. Mullen, 119 N.H. 703, 709 (1979) (the court “cannot rely on any statements made by legislators after passage of the bill regarding the ‘motives of members . . . in enacting the law.’”).

C. The ACE Companies Misportray The NAIC Working Group Proceedings And The Position Of The NAIC, Which Supports The Liquidator.

7. The ACE Companies also mischaracterize the matters they present concerning the National Association of Insurance Commissioners (“NAIC”). First, the working group to which they refer (Motion at 2) does not establish policy for the NAIC. It is merely an advisory committee that is preparing recommendations concerning a revised insurer receivership model act. Ultimately, its recommendations will be presented to certain NAIC committees and finally to the NAIC (the commissioners themselves) for action. See Affidavit of Douglas A. Hartz, Senior Counsel – Financial and Insolvency Regulation for the NAIC (“Hartz Aff.”) ¶ 1, attached as Exhibit B.³ Thus, any action taken by the working group as it works to draft its recommendations is not relevant because it does not concern the New Hampshire statutes or represent the position of the NAIC. The NAIC expressed its position concerning the AFIA settlement - administrative expense priority question in the amicus brief the NAIC filed in support of the Liquidator’s position (after vote of its Executive Committee) with the Supreme Court. See Hartz Aff. ¶ 3; Hartz Aff. Ex. (the NAIC amicus brief) at 1.⁴

8. Second, the ACE Companies again erroneously imply that the working group’s non-adoption of the proposed change to its draft represented a rejection of the proposed change on its merits. Motion at 2, 7-8. In fact, the sense of the working group was that the proposed change was unnecessary since it merely reiterated the proper application of present law (and the draft itself). See Hartz Aff. ¶ 4. It is, accordingly, incorrect to assert that the working group

³ As noted on the NAIC website, “[r]eports and recommendations are initiated at the working group or task force level, with further review by parent committees or subcommittees and final approval by the Executive Committee and the plenary.” http://www.naic.org/about/background/national_meetings.htm (last visited March 2, 2005). “If a model is adopted by the plenary, it becomes a formal NAIC recommendation of regulatory policy to each member.” Id.

⁴ The National Association of Insurance Guaranty Funds, the entities expected collectively to be the principal creditor of the Home estate, also filed an amicus brief supporting the Liquidator.

“rejected” the proposed amendment or to imply that its members disagreed with the amendment on the merits. *Id.* The working group’s inaction, if relevant, thus does not undermine the Liquidator’s position at all.

D. The Other Matters Raised By The ACE Companies Do Not Warrant Reconsideration.

9. In the Motion, the ACE Companies resuscitate arguments that were fully briefed last Spring, quote a small portion of the July 15, 2004 Supreme Court argument, and mysteriously contend that the absence of the administrative expense issues from certain documents produced in discovery somehow undercuts the Liquidator’s position and the Court’s analysis in the Order on Remand. Motion at 4-6, 8-9. These do not rise to the level of “points of law or fact that the Court has overlooked or misapprehended” as required by Superior Court Rule 59-A(1). Mere reargument, an excerpt of a colloquy with one Justice (probing at argument of no predictive value), and the assertion that discovery should but did not reveal written (and non-privileged) analysis do not warrant reconsideration of the legal question decided in the Order on Remand (and the Court’s earlier orders of April 29 and June 1, 2004).⁵

⁵ The Liquidator disagrees with other characterizations in the Motion, such as the ACE Companies’ description of the Order on Remand as “elevating” creditors claims, or the alleged “lack of confidence” in the Liquidator’s position (Motion at 3, 11), but does not address them because they are inconsequential. The Liquidator will address discovery issues at the scheduling conference, where they belong.

CONCLUSION


For the reasons stated, the Court should summarily deny the ACE Companies' untimely Motion.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE
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March 2, 2005

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Docket No. 03-E-0106

In the Matter of the Liquidation of
US International Reinsurance Company
Docket No. 03-E-0112

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2005, a copy of the Liquidator's Opposition to the ACE Companies' Motion for Reconsideration of Order on Remand, was served upon the persons named on the attached Service List, by first class mail, postage prepaid, and also by e-mail on lead counsel for the ACE Companies.

Dated: March 2, 2005



Eric A. Smith

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