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March 11, 2005

**BY EMAIL & OVERNIGHT COURIER**

Andre Bouffard, Esq.  
Downs Rachlin Martin PLLC  
199 Main Street  
P.O. Box 190  
Burlington, Vermont 05402-0190

Re: In the Matter of the Liquidation of The Home Insurance Company  
Docket No. 03-E-0106

Dear Andre:

This letter will respond to your letter of March 2, 2005, raising for the first time issues with respect to the Liquidator's November 24, 2004 responses to interrogatories and document requests propounded by Benjamin Moore & Co. ("BMC").

**A. Interrogatories**

1. The Liquidator responded to BMC interrogatory 3 by identifying the five principal persons involved in the consideration of matters referred to in the answers to interrogatories 1 and 2. This is an appropriate response. These persons (the Special Deputy Liquidator, Home's Chief Operating Officer, the Liquidator, the active Joint Provisional Liquidator at Ernst & Young, and an Assistant Director at Ernst & Young) were the decisionmakers and chief assistants responsible for determining how to proceed. While the interrogatory seeks the identity of "all persons," a listing of their subordinates and counsel would serve no purpose. (I note that people involved with the Agreement in various ways are listed on the legend to the privilege log.)

2. Interrogatory 4 asked about "estimates of reinsurance recoverable" by Home absent the Agreement. The Liquidator responded by incorporating his response to interrogatory 2, which also addressed this interrogatory, and clarified that information from ACE-INA about ultimate gross liabilities beyond the \$231 million figure existed but (as it assumed AFIA Cedents would pursue claims as they had prior to Home's liquidation) was not an estimate of reinsurance

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recoverable. BMC now asks for this information, but it is neither responsive to interrogatory 4 nor relevant to the necessity, reasonableness and fairness of the agreement. Other than establishing that the potential asset of the estate is substantial (as demonstrated by the \$231 million ACE-INA estimate as of December 31, 2002) information concerning ACE-INA's projections of AFIA Cedents' claims collections is irrelevant and thus unduly burdensome. The fundamental point is that absent the Agreement there would be no potential recovery except to the extent of AFIA Cedents' claims necessary to protect their offset rights.

3. As the Liquidator's response to interrogatory 4 incorporated the response to interrogatory 2, it was appropriate to respond to interrogatory 5 (seeking persons involved with the matter of interrogatory 4) by incorporating the response to interrogatory 3 (seeking persons involved with the matters of interrogatories 1 and 2). As explained in item 1 above, the Liquidator appropriately responded to BMC interrogatory 3 by identifying the five principal persons involved. A listing of their subordinates and counsel would serve no purpose. (The number of people who have been involved in issues concerning the Agreement is quite large as demonstrated by the legend to the privilege log.)

4. BMC asserts that Interrogatory 6 (seeking the amount of professional fees and costs incurred in connection with the negotiation, approval, and litigation concerning the Agreement) is relevant. The Liquidator disagrees. These costs have no bearing on the necessity, reasonableness or fairness of the Agreement. In particular, the costs imposed on the Home estate by the opposition of the ACE Companies and BMC cannot reasonably be used as a bootstrap excuse for their opposition.

5. The Liquidator objected to interrogatory 7 because a listing (by insurer and "face amount of coverage") of all reinsurance contracts involved in commutation agreements by the Liquidator is not relevant and would be unduly burdensome to produce. BMC now contends that other commutations would somehow shed light on whether reinsurance for the AFIA Cedents' claims could be commuted. This ignores the voluntary nature of commutations. That various reinsurers have been willing to commute with the Liquidator says nothing about whether Century Indemnity Company would commute the Assumption Agreement, and the Liquidator's discussions with Century on that topic have not progressed. Furthermore, BMC's theory of relevance assumes that these commutations are analogous to the AFIA situation, and inquiry into the facts and circumstances underlying the various commutations would go far beyond reasonable bounds for discovery.

6. With respect to interrogatory 8, BMC requests the number and a list with name and amounts of all proofs of claim filed by "reinsureds of Home that have been or should be classified as Class V" excluding claims of AFIA Cedents and claims (if any) that state they are filed for offset purposes only. The process of determining the approximately 18,000 proofs of claim filed with the liquidation is still in its early stages, and BMC's request would require

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reviewing over 500 non-AFIA proofs of claim that may potentially involve assumed business. Even if that were done, such proofs would not be relevant to the necessity, reasonableness and fairness of the Agreement. BMC's theory appears to be that the filing of a proof of claim is evidence that the claimant intends to prosecute its claims, when the filing is merely the first step and may be just a placeholder. Inquiry into the facts and progress of each such proof of claim to assess the claimant's intent to prosecute the claim to conclusion would be a distracting sideshow that is beyond the scope of reasonable discovery contemplated by the Order on Remand.

7. As stated in General Objection 2(d), the Liquidator's interrogatory answers are based on information from the Special Deputy Liquidator and liquidation staff involved in the subject matters of the interrogatories (Home's Chief Operating Officer and Home's Chief Actuary) and the Liquidator and pertinent staff at the New Hampshire Insurance Department (the Deputy Commissioner). Counsel obviously were also involved in the preparation of the interrogatory responses. With respect to the Joint Provisional Liquidators in the ancillary UK proceeding, the Liquidator notes that they are independent professionals appointed by the High Court of Justice in London and responsible to that Court in accordance with the terms of their appointment order. Thus, while they have a common interest and have worked with the Liquidator in this matter, they are not acting as his agents. Further, as non-parties, they have no obligation to respond to interrogatories. However, and as stated in General Objection 2(d), the Liquidator responded not only based on information from the persons noted above but also based on "information received from the Joint Provisional Liquidators". The Liquidator's responses are based on appropriate inquiry.

## **B. Document Requests**

1. The Liquidator has produced documents responsive to the ACE Companies' and BMC's document requests as a single set as they were maintained in the ordinary course of business. Both the ACE Companies and BMC agreed to this approach as shown on the attached emails dated December 9 and December 13, 2004, and I am surprised that you now want us to identify the specific documents responsive to BMC document request 1. The documents are not so voluminous that BMC cannot review them. However, I note that the responsive documents include those concerning discussions with the ACE Companies (for example, Nos. H00499, H00511, H00630, H00650, H00650 and privilege log entries 10, 31, 149, 171).

2. The Liquidator's response to request 2 is not internally inconsistent. As stated in the response by reference to interrogatory 4, the Liquidator construed the request to seek estimates of indemnity or reinsurance recoverable by the Liquidator or Joint Provisional Liquidators with respect to claims under AFIA Treaties in the absence of the Agreement. As indicated in the response to interrogatory 2, the estimate was that the wait and see approach would only result in a recovery of a fraction of the value of the Assumption Agreement and/or BAFCO Agreements (as AFIA Cedents would only file and prosecute claims to protect offset

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rights which were estimated to be only a relatively small percentage of the AFIA Cedents' claims) and that ACE-INA had prior to Home's liquidation estimated the gross ultimate value of AFIA Cedents' claims and thus the ACE Group's obligations as \$231 million. Any non-privileged documents within the time period of the response that concern this estimate have been produced. However, a specific number was not estimated, and you should not expect to find documents showing one. Your reference to documents concerning "the Liquidator's review and evaluation of information concerning reinsurance recoverable by Home" is a mistaken interpretation of the response. The information concerned ACE-INA's view of potential ultimate gross liabilities under the AFIA Treaties, not amounts that would be recoverable absent the Agreement.

3. The Liquidator continues to object to request 3, seeking all reinsureds' proofs of claim that have been preliminarily classified as Class V (other than AFIA Cedents and proofs stating they are filed for offset purposes only), for the reasons set forth above concerning interrogatory 8.

4. With respect to privilege, I provided you with copies of my correspondence with Gary Lee responding to his inquiries before the March 4, 2005 status conference.

Very truly yours,



Eric A. Smith

cc: Gary S. Lee, Esq.