**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**

**MOTION FOR RECONSIDERATION OF ORDER ON REMAND**

Recent events in the New Hampshire Legislature have made it clear that the payments to the AFIA Cedents under the Proposed Agreement do not qualify as administrative expenses pursuant to RSA 402-C:44, I. At the end of January 2005, Roger A. Sevigny, the Insurance Commissioner for the State of New Hampshire and liquidator (the "Liquidator") of Home Insurance Company ("Home"), introduced — without any advance notice to the interested parties — an amendment to RSA 402-C:44 (the "Proposed Amendment" or "Amendment") that purported to "clarify" the Legislature's intent regarding the permissibility of elevating claim payments to lower priority creditors (like the AFIA Cedents) to Class I administrative expense priority. The Proposed Amendment was withdrawn a few days later for lack of support. In light of this development, respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company, and ACE American Reinsurance Company (the "ACE Companies"), by and through their counsel Orr & Reno P.A., respectfully request that the Court reconsider the Order on Remand dated October 8, 2004, and reverse its prior holding regarding the treatment of the proposed payments to the AFIA Cedents as administrative expenses. In support of their motion, the ACE Companies state as follows:

## Introduction

1. This motion arises out of the Liquidator's introduction of Senate Bill 74 ("S.B. 74"), which — in its original version — contained the Proposed Amendment. The Proposed Amendment would have added the following language to RSA 402-C:44: "This section shall not be construed to prohibit any payments, as administrative expenses, made to claimants in lower priority classes where those payments assist or result in the collection or recovery of assets or property, including debts, moneys due or claims belonging to an insurer for the benefit of claimants in higher priority classes." (Ex. 1 annexed hereto at 3.) The Liquidator withdrew the Proposed Amendment just days after submitting it to the Senate Banks and Insurance Committee (the "Committee"), when it became evident that the Committee was going to remove the above-quoted language from S.B. 74 before sending the legislation to the full Senate.

2. The Liquidator sought to justify the Proposed Amendment by arguing that it would "clarify" the intent of the Legislature. The Committee's rejection of the Proposed Amendment even before it was considered by the full Senate, proves that the Liquidator's interpretation of the administrative expense provision in RSA 402-C:44 is wrong and contrary to the Legislature's intent. If the Proposed Amendment were in fact a clarification of legislative intent, as the Liquidator argued in the proceedings before the Committee, the Committee would have included it in S.B. 74.

3. The Liquidator's failed effort in the Legislature followed on the heels of a similar, unsuccessful attempt by Home to amend the Insurers Rehabilitation and Liquidation Model Act ("Model Act") on which RSA 402-C:44 is based. A working group of the National Association of Insurance Commissioners ("NAIC") considering changes to the Model Act rejected Home's proposal to adopt the same language that Home subsequently included in the Proposed Amendment. The NAIC's rejection provides further support for the ACE Companies' argument

that elevating the proposed payments to the AFIA Cedents to administrative expense priority violates the mandatory order of priority set forth in RSA 402-C:44.

4. The Liquidator's and Home's actions also betray a lack of confidence in the viability of their position and the Court's expansive ruling that the proposed payments to the AFIA Cedents may be given administrative expense priority. As discussed below, the New Hampshire Supreme Court was not receptive to the Liquidator's argument on an earlier appeal that the proposed payments to the AFIA Cedents could be characterized as administrative expenses. Faced with the prospect of a reversal by the New Hampshire Supreme Court on the administrative expense issue and the refusal of the NAIC to amend the Model Act, the Liquidator turned to the New Hampshire Legislature. However, the Liquidator's failure to persuade the Committee (let alone the full Senate or Legislature) to accept the Proposed Amendment speaks volumes about the deficiencies in his administrative expense argument.

5. Given the recent activity in the Legislature, the ACE Companies respectfully submit that the Court should reconsider and reverse its holding regarding the elevation of the proposed payments to the AFIA Cedents to administrative expense priority.

## Background

### I. Prior Proceedings

6. In the Order on Remand, the Court accepted the Liquidator's position that the payments to the AFIA Cedents under the Proposed Agreement may be given administrative expense priority under RSA 402-C:44, I, and that this elevation of the AFIA Cedents' claims from Class V general creditor priority to Class I administrative expense priority would be consistent with the overall intent of RSA 402-C:1 *et seq.* (*See* Order on Remand at 6-10.) The parties requested that the New Hampshire Supreme Court review this Court's holding on the

administrative expense issue on an interlocutory basis. The Supreme Court, however, denied the request on December 27, 2004, thereby indicating that it will consider the administrative expense issue after this Court conducts a hearing and issues a final ruling on the motion for approval of the Proposed Agreement (the "Liquidator's Motion").

7. When the administrative expense question was before the Supreme Court on a prior appeal of this Court's April 29, 2004 Order, the ACE Companies and Benjamin Moore & Co. ("Benjamin Moore") demonstrated that the treatment of the proposed payments to AFIA Cedents as administrative expenses would violate the plain meaning of RSA 402-C:44 and case law on similar statutes. Benjamin Moore also noted that the Liquidator's broad interpretation of administrative expense priority is contrary to a large body of federal bankruptcy law upon which the relevant language of the New Hampshire statute was based.

8. The parties further pointed out that a similar attempt to manipulate the administrative expense classification had been rejected in a case directly on point, *Oxendine v. Commissioner of Ins. of N.C.*, 494 S.E.2d 545 (Ct. App. Ga. 1997). In *Oxendine*, creditors who had settled claims against the estate prior to the company's rehabilitation argued that the settlements should be considered administrative expenses under the Georgia code (which contains the same language as the current RSA 402-C:44). The *Oxendine* court stated that: "No reasonable definition of 'costs' or 'expenses' can include the claims which appellees assert. These claims are for money which appellees claim from [the] estate and not administrative costs or expenses incurred." *Id.* at 548. The *Oxendine* court also found that the effect of allowing pre-liquidation claims to be classified as administrative expenses "would be to render meaningless the priority of claims established [by the Georgia statute]." *Id.* The ACE Companies and Benjamin Moore noted that allowing the Liquidator to elevate the proposed payments to the

AFIA Cedents to administrative expense priority would similarly rewrite the order of distribution, render RSA 402-C:44 meaningless, and give insurance liquidators broad discretion to depart from the mandatory order of priority whenever they deem it advisable to do so.

9. At oral argument in July 2004, the Supreme Court expressed a great deal of skepticism about the Liquidator's argument that the proposed payments to AFIA Cedents in settlement of their Class V claims could be treated as an "administrative expense" of the estate:

THE COURT:

Let me see if I understand. If this is not an administrative expense, but a payment of a claim to a Class 5 creditor, is that being paid before all of the claimants in Class 2, 3 or 4 are paid?

PETER ROTH:

That is correct.

THE COURT:

That violates the statute.

PETER ROTH:

We are sort of going around in circles, I understand. But it is an administrative expense because it is not in satisfaction of their Class 5 claim.

...

THE COURT:

Why is it an expense? It doesn't look or sound like an expense.

PETER ROTH:

Well, the statute was written very broadly and the statute — excuse me a minute. § 44(1) doesn't speak of how you can parse it out and say well, it's too big or it's to the wrong people. All it says is "including, but not limited to, the actual necessary [sic] costs of preserving or recovering the assets of an insurer" and the courts around the country that have interpreted administrative expenses have looked at that language in similar circumstances in bankruptcy contexts because it is very similar to what is the treatment in bankruptcy courts that finders fee, a percentage of the action, or a contingent fee for a lawyer also can be an administrative claim.

Sometimes these claims can be very large — so the size and nature of the payee doesn't determine whether it is an administrative expense or not.

THE COURT:

**Well, it looks to me like you are paying and distributing an asset to a claimant that doesn't look and sound like an expense of collecting assets.**

(Hearing transcript at 14-15, annexed hereto as Ex. 2; bold added.)[1]

## II. Liquidator's Submission And Rapid Withdrawal Of The Proposed Amendment

10. Although the Liquidator did not notify the ACE Companies or their counsel, in late January 2005 the ACE Companies learned that the Liquidator would be introducing S.B. 74 for consideration by the Committee. The Analysis section of S.B. 74 states that the legislation would only make "technical changes" to the insurance laws and was being submitted at the request of the Insurance Department. (Ex. 1 at 1.) The Proposed Amendment, however, went well beyond a mere "technical" change and was an attempt to alter the substantive priority provisions in RSA 402-C:44 by providing specifically that payments such as those proposed by the Liquidator to the AFIA Cedents may be given Class I administrative expense priority.

11. The ACE Companies, along with Reinsurance Association of America ("RAA") and the American Insurance Association ("AIA"), presented oral and written testimony in opposition to the Proposed Amendment at a hearing before the Committee on February 1, 2005. (*See, e.g.*, statements of ACE Companies, RAA and AIA, annexed hereto as Exs. 3, 4 and 5, respectively.) Benjamin Moore also testified in opposition to the Proposed Amendment. Representatives of the Liquidator testified at the February 1 hearing and, shortly thereafter,

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[1] Counsel for the Liquidator referred to finders' fees and contingent payments in a bankruptcy matter, but those examples only serve to prove the ACE Companies' point. Those types of payments are to creditors whose claims arise post-petition when they perform services for the debtor; the administrative expense provisions in the Bankruptcy Code do not apply to pre-petition creditor claims. *See, e.g., In re Kmart Corp.*, 359 F.3d 866, 872 (7th Cir. 2004).

submitted a written statement regarding the Proposed Amendment. (*See* Ex. 6 annexed hereto.) The Liquidator's written statement echoed the testimony at the February 1 hearing, which is that the Legislature should pass the Proposed Amendment in order to clarify the legislative intent: "The amendment is appropriate at this time because the issue is one of legislative intent that may be further contested before the New Hampshire Supreme Court. The Legislature could resolve the question of its intent through the clarifying amendment." (*Id.*; emphasis added.)

12. At the February 1 hearing, however, several Committee members indicated that they were reluctant to include the Proposed Amendment in S.B. 74. The Committee scheduled a further hearing and a vote on S.B. 74 for February 3, 2005. Shortly before the second hearing, the Liquidator withdrew the Proposed Amendment and submitted a revised version of S.B. 74 (*See* Ex. 7 annexed hereto.) By withdrawing the Proposed Amendment even before the follow-up hearing and vote, the Liquidator has effectively conceded that the Amendment lacked sufficient support in the Committee.

## III. NAIC's Earlier Rejection Of Similar Language

13. In December 2004, prior to the submission of S.B. 74, Home put almost the exactly the same language before the NAIC Model Act Revision Group, which has been considering revisions to the Model Act on which the New Hampshire statute is based. (*See* Ex. 8 annexed hereto; Ex. 4 at 3.)[2] Home's proposal stated: "This Section shall not be construed to prohibit any payments, as Class 1 administrative costs, to claimants in lower priority classes where those payments assist or result in the collection or recovery of assets or property, including debts, monies due or claims belonging to the insurer for the benefit of claimants in

[2] The ACE Companies did not learn about Home's proposal to the NAIC Model Act Revision Group until after the Proposed Amendment was submitted to the Senate in late January 2005.

higher priority classes." (Ex. 8.) Home's proposed amendment to the Model Act was not accepted. (*See* Ex. 4 at 3; Ex. 5.)

## IV. The Documents Produced Thus Far Further Underscore The Weakness Of The Liquidator's Administrative Expense Argument

14. The above chronology of events shows that the Liquidator resorted to the legislative route — through attempted revisions to the Model Act and then the New Hampshire statute — only after the New Hampshire Supreme Court expressed reservations regarding the elevation of the proposed payments to the AFIA Cedents to administrative expense priority.[3] By the same token, the Liquidator did not focus on the administrative expense issue until after the Liquidator's Motion was filed and his other arguments failed.

15. On October 4, 2004, the ACE Companies served document requests on the Liquidator asking for all documents relating to the Proposed Agreement and the request for Court approval. The documents produced by the Liquidator that pre-date the filing of the Liquidator's Motion on February 11, 2004 are marked by an absence of any discussion that the proposed payments to the AFIA Cedents would be payable as administrative expenses under RSA 402-C:44, I.[4]

16. For example, at the October 21, 2003 meeting of the Informal Creditors Committee in Home's U.K. scheme of arrangement ("Creditors Committee"), counsel for the Liquidator stated that "US case law strongly backs up" the classification of the AFIA Cedents as

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[3] At the July 2004 oral argument before the Supreme Court, one of the Justices also noted that "[i]f it is not an administrative expense, you lose." (Ex. 2 at 12.) This Court agreed in the Order on Remand by rejecting the equitable doctrines cited by the Liquidator.

[4] The Liquidator did not begin to produce documents until two and a half months after the ACE Companies' requests were served and has produced only one box. Moreover, the ACE Companies believe that the Liquidator has withheld documents based on unsupportable privilege grounds. The ACE Companies have also served document requests on the AFIA Cedents, but, to date, only Agrippina has

Class V creditors and that "no Insurance Commissioner in the US would say that reinsurance creditors rank in class 2." (Ex. 9 annexed hereto at H01825.) In a detailed memorandum dated November 10, 2003, the Liquidator's counsel further advised the Creditors Committee that "**the claims of Home's cedants [sic] are general unsecured claims entitled to residual status only**." (Ex. 10 annexed hereto at H00376; bold added.) He pointed out that "[t]he priority statute represents the legislative determination of how loss should be allocated." (*Id.* at H00379.) Counsel for the Liquidator did not anywhere state or imply that the contemplated payments to the AFIA Cedents would be recoverable as administrative expenses.[5]

17. The Liquidator's Motion alludes to administrative expenses, but only in passing. (*See* Ex. 12 annexed hereto at ¶ 21.) For the most part, the Liquidator described the proposed payments as "distribution[s]" resulting from the "compromise" or "settlement" with the AFIA Cedents. (*See, e.g., id.* at 1, ¶¶ 8, 10-13, 15, 20-21.) In the earlier proceedings before the Court, the Liquidator sought to justify the proposed payments to the AFIA Cedents primarily by relying on his discretion under the statute and various equitable doctrines.

18. However, after the ACE Companies demonstrated that the Liquidator's powers may not be exercised in derogation of the priority statute and this Court held in the Order on Remand that equitable doctrines do not trump RSA 402-C:44, the Liquidator had no option but to attempt unsuccessfully to expand, through legislation, the administrative expense priority to

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produced any documents. Equitas has promised to make a limited production (but has not yet done so), while the other AFIA Cedents are refusing to produce any documents at all.

[5] Similarly, in a letter to Jonathan Rosen dated December 20, 2003, counsel for one of the AFIA Cedents described the proposed payments to the AFIA Cedents as "an amount in excess of the amount these creditors would normally receive if applicable statutory preferences were applied in order to have these creditors make claims in the liquidation." (Ex. 11 annexed hereto at H01284.) It does not appear that Mr. Rosen objected to this characterization of the proposed payments, nor did he advise the cedent, Nationwide, that they would be payable as administrative expenses.

encompass the proposed payments to the AFIA Cedents. The Liquidator's failed efforts show that the elevation of the proposed payments to the AFIA Cedents to administrative expense priority cannot be squared with the plain language and intent of RSA 402-C:44.

**Argument**

19. It is well established that New Hampshire trial courts may reconsider prior rulings based on newly discovered evidence or a change in circumstances. *E.g., Ashuleot Paper Co. v. Ryll*, 109 N.H. 573, 577, 259 A.2d 657, 659 (1969); *Cumberland Farms Northern, Inc. v. Pierce*, 104 N.H. 489, 502, 190 A.2d 403, 413 (1963); *Croteau v. Harvey & Landers*, 99 N.H. 264, 266-67, 109 A.2d 553, 554-55 (1954). *Cf. N.E. Redlon Co. v. Franklin Square Corp.*, 23 A.2d 370, 374 (1941) (court is not required to reconsider a decided issue unless there has been a change in circumstances). Here, the basis for reconsideration is the Liquidator's recent legislative gambit, which directly relates to the Court's ruling on the administrative expense issue and mandates a reversal.

20. The Liquidator, ignoring the plain language of the statute and the authorities cited by the ACE Companies and Benjamin Moore delineating the recognized contours of administrative expense priority, has argued that his interpretation of the administrative expense provision in RSA 402-C:44 is consistent with the Legislature's intent to provide broad powers to liquidators. In the Order on Remand, the Court similarly emphasized the alleged legislative intent to provide liquidators with powers broad enough to justify a variation from the mandatory order of priority and an elevation of the proposed payments to the AFIA Cedents to administrative expense priority. The Court stated that in ruling the Proposed Agreement is "consistent with the goals and purposes of the statute to protect the interests of the insureds and creditors," it "necessarily found that the payments to the AFIA Cedents are administrative

expenses." (Order on Remand at 10.) The Court did not address the plain meaning and other statutory interpretation arguments raised by the ACE Companies and Benjamin Moore, nor the authorities cited by them, nor the fact that the Liquidator failed to cite a single case supporting his novel interpretation of the statute. The Court also could not have been aware that the New Hampshire Legislature would soon reject the Liquidator's effort to amend the statute to validate, ex post facto, his overly broad interpretation of administrative expense priority.

21. In the Senate proceedings, the Liquidator described the Proposed Amendment as a clarification of legislative intent that would assist the Supreme Court in reviewing the administrative expense issue. The Committee's refusal to endorse the Proposed Amendment did indeed provide clarity, demonstrating that the Liquidator's expansive interpretation of administrative expense priority was not intended by the Legislature.

22. The ACE Companies, therefore, respectfully submit that the Court should reconsider the Order on Remand in light of the Legislature's clarification on legislative intent and should reverse its prior ruling that the Liquidator may elevate the proposed payment of the AFIA Cedents' Class V claims to Class I administrative expense priority.

**Conclusion**

In offering the Proposed Amendment, the Liquidator implicitly admitted that, as written, RSA 402-C:44 does not support his argument — and this Court's ruling —that the AFIA Cedents' Class V claims may be paid ahead of the claims of higher priority creditors and other Class V claimants. In rejecting the Proposed Amendment, the New Hampshire Legislature has clearly indicated that the Liquidator's interpretation of RSA 402-C:44 is not supportable under the existing law. Accordingly, the ACE Companies respectfully request that the Court reverse its conclusion in the Order on Remand and hold that the proposed payments to the AFIA Cedents in settlement of their Class V claims cannot be given administrative expense priority.

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CERTIFICATE OF SERVICE

The undersigned certifies that I served a copy of the foregoing on the following counsel via First Class mail on February 28, 2005

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