THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

In the Matter of the Liquidation of
The Home Insurance Company

Docket No. 03-E-0106

ORDER

Before the Court is the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents. The Court has previously determined that the Liquidator has statutory authority under RSA Chapter 402-C, New Hampshire's Insurer Rehabilitation and Liquidation Act, to enter into the proposed agreement and compromise with the AFIA Cedents. The Court found that the Liquidator endorsed the agreement to maximize asset recovery and his endorsement is consistent with the broad purposes and goals of RSA Chapter 402-C to protect the interests of the insureds and creditors. In its approval the Court considered the liberal construction of the Chapter under RSA 402-C, II and III, and the specific provisions within RSA 402-C:25 which govern the powers of the Liquidator.

Under RSA 402-C:25, VI the Liquidator is empowered to "[c]ollect all debts and monies due in claims belonging to the insurer" and "do such other acts as are necessary or expedient to collect, conserve or protect...assets or property." Further, under RSA

402- C:25, IV the Liquidator may "defray all expenses of taking possession of, conserving... property of the insurer." Finally, under RSA 402 C:25, XXII, the Liquidator may, beyond the enumerated powers, do "such acts...as are necessary or expedient for...the purpose of liquidation". Having found that the Liquidator has the authority under Chapter 402-C to endorse the proposed agreement and compromise, the Court determined that the expenses associated with the agreement and compromise are properly categorized as they are "actual and necessary costs of preserving or recovering the assets of the insurer" under RSA 402-C:44, I. After determining that the agreement and compromise is lawful, the Court held an evidentiary hearing from July 25 – 29, 2005, to determine whether the agreement is necessary to preserve and recover assets of the estate and whether the terms of the agreement are fair and reasonable.

1. PROCEDURAL HISTORY

The Liquidator first filed the Motion for Approval of Agreement and Compromise with AFIA Cedents in February 2004. Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company, and ACE American Reinsurance Company ("ACE") and Benjamin Moore & Co. ("BMC") promptly filed motions to intervene for the purpose of objecting to the proposed agreement. The motions to intervene were granted and a hearing in the matter was held on April 23, 2004.[1]

At the hearing, the Liquidator argued that: (1) the agreement is necessary to secure access to a substantial asset of the liquidating insurer; (2) the agreement would be of significant benefit to Class II claimants; (3) the terms of the agreement are reasonable

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[1] An additional Motion to Intervene, filed by Nationwide Mutual Insurance Company on the fourth day of the hearing, was denied without prejudice. That motion has been recently renewed and is pending over the objection of both ACE and the Liquidator.

under the circumstances of this particular liquidation; (4) the agreement posed no greater liability to ACE than already exists; and (5) ACE will receive a significant windfall if the agreement is not approved.

ACE and BMC challenged the agreement, arguing that: (1) the payments to AFIA Cedents could not be properly classified as administrative under RSA 402-C:44, I; (2) the agreement ignores the order of distribution required by RSA 402-C: 44; and (3) the agreement creates an impermissible subclass of Class V claimants. While focusing upon those legal arguments, both also argued that the specific terms of the agreement should be reviewed for fairness.

The Court issued an order approving the agreement and compromise on April 29, 2004 and an addendum to that order on June 1, 2004. On May 7, 2004, BMC filed a Rule 7 Mandatory Appeal with the New Hampshire Supreme Court. ACE joined BMC on that appeal. After briefing[2] and oral argument, the Supreme Court issued an order vacating the trial court's orders and remanding the matter for further consideration.

The Supreme Court's September 13, 2004 remand order directed the trial court to address a number of specific issues. They included: (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 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; and

[2] Amicus Curiae briefs were submitted by the National Association of Insurance Commissioners (NAIC) and the National Council of Insurance Guaranty Funds (NCGIF) in support of the Liquidator's position and by the Reinsurance Association of America (RAA)in opposition to the Liquidator's position.

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

Upon remand, the trial court scheduled a status conference to narrow the issues and explore procedures to efficiently resolve disputed matters. At the scheduling conference on September 24, 2004, the parties agreed that the record was sufficiently developed to enable the Supreme Court to determine, as a matter of law, whether the Liquidator was authorized to enter into the agreement with AFIA Cedents under RSA 402-C, and whether the payment to AFIA Cedents qualifies as an administrative expense under RSA 402-C:44, I. It was noted that an answer in the negative to either question would obviate the need for a hearing into whether the agreement was necessary, fair and reasonable.

This Court issued its Order On Remand on October 8, 2004. The order addressed all issues raised by the Supreme Court. The parties filed an agreed upon interlocutory appeal on November 8, 2005, asking the Supreme Court to determine the legal issues of whether, as a matter of law: (1) the Liquidator is authorized to enter into the agreement with AFIA Cedents under RSA 402-C: 25 IV, VI and XXII; and (2) the payment to AFIA Cedents qualifies as an administrative expense under RSA 402-C: 44, I. The Supreme Court declined to accept the interlocutory appeal on December 27, 2004. This Court's prior rulings on the legal issues remained in effect and an evidentiary hearing was scheduled to determine the necessity, fairness and reasonableness of the Liquidator's agreement and compromise with the AFIA Cedents.

The five (5) day hearing addressing the circumstances and terms of the agreement and compromise with AFIA Cedents concluded on July 29, 2005. At the

hearing the testimony of eleven (11) witnesses, including two (2) experts, was presented and over ninety (90) exhibits were admitted into evidence.

2. UNDISPUTED FACTUAL BACKGROUND

Home Insurance Company / Home UK Branch

The Home Insurance Company ("Home") is a New Hampshire domiciled insurance company licensed and regulated by the New Hampshire Insurance Department. Home and its predecessor insurance companies have been writing insurance since 1853. Home and its subsidiaries wrote property and casualty insurance and reinsurance in the United States and in certain other countries, including the United Kingdom ("UK").

Home did business in the UK as a member of the American Foreign Insurance Association ("AFIA"), an unincorporated association of American insurers, which wrote insurance and reinsurance business and used the Home stamp. As a participating member of AFIA, Home entered insurance and reinsurance contracts with policyholders and cedents in the UK, and Home reinsured that business with AFIA. AFIA entered into certain reinsurance treaties ("AFIA Treaties") with parties who purchased insurance through AFIA ("AFIA Cedents"). While Home was regulated in the UK by the Financial Services Authority ("FSA") [3] and its predecessor regulators in the UK, and Home considered the business it did in the UK as the Home's "UK Branch", no separate entity was ever established.

Successors to UK Branch Liabilities / AFIA Reinsurances

Home was reinsured with respect to its liabilities under the AFIA Treaties under reinsurance contracts with BAFCO Reinsurance Company of Bermuda Limited,

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[3] The Financial Services Authority is an independent body and the single statutory regulator authorizing and regulating the financial services industry in the UK.

("BAFCO"), a Bermudan company. These reinsurance contracts consisted of an Excess of Loss Reinsurance Agreement and a Second Excess of Loss Reinsurance Agreement both signed on December 23, 1982, and a First Supplemental Excess of Loss Reinsurance Agreement signed on February 1, 1985 (as amended, the "BAFCO Agreements"). The BAFCO Agreements provide that they are subject to English law and that disputes will be resolved by arbitration in England. They provide coverage to Home for net losses on the AFIA liabilities exceeding $95 million in the aggregate. Century International Reinsurance Company Limited ("CIRC"), a Bermudan company and a member of the ACE group of companies, is the successor in interest to BAFCO under the BAFCO Agreements.

In 1983, CIGNA Corporation ("CIGNA") and certain of its subsidiaries purchased AFIA from Home and six (6) other U.S. companies,[4] pursuant to certain agreements dated December 30, 1983, entitled Purchase Agreement No. 1 and Purchase Agreement No. 2. As part of the transaction, one of the CIGNA subsidiaries, Insurance Company of North America ("INA"), entered an Insurance and Reinsurance Assumption Agreement dated January 31, 1984 (the "Assumption Agreement") with Home and other companies. Under the Assumption Agreement, INA agreed to reinsure the insurance and reinsurance liabilities of the Home UK Branch business, administer that business, and bear the related costs and expenses. INA's obligations included responsibility to adjust claims and indemnify Home through payment of Home's losses under the AFIA Treaties. Finally, in connection with the sale, sellers agreed to provide reinsurance to INA that triggers the sellers' liability when the aggregate AFIA liabilities exceed $335 million.

[4] One of the sellers, St. Paul Fire and Marine Insurance Company, is the parent company of AFIA Cedent, Unionamerica.

In 1986, Home's interest in AFIA insurance and reinsurance business written in the UK, consisting of general direct and marine and aviation business, was formally transferred to a CIGNA subsidiary under English law. While that transferred business became a direct obligation of the CIGNA subsidiary, the AFIA Treaties were not formally transferred under English law, and accordingly remained an obligation of Home, subject to the Assumption Agreement.

In 1996, INA was part of a corporate restructuring pursuant to which Century Indemnity Company ("Century") became successor to INA and to INA's rights and obligations under the Assumption Agreement with respect to the AFIA Treaties. On July 2, 1999, CIGNA sold INA Corporation and its subsidiaries, including Century, to ACE INA Holdings, Inc., a subsidiary of ACE Limited. Under that transaction, Century became part of the ACE group of companies. The ACE group of companies also includes ACE-INA Services U.K. Limited ("ACE INA Services") which provided claim administration services and, through certain of its designated personnel, served as the UK representative for the Home with respect to the AFIA Treaties during the periods when Century was a party to the Assumption Agreement.

The Home Insurance Company Rehabilitation / Liquidation

On March 5, 2003, this Court entered an Order of Rehabilitation for Home that appointed the Commissioner as Home's Rehabilitator. On June 13, 2003, an Order of Liquidation issued which declared that Home was insolvent and appointed the Commissioner as liquidator of Home. On May 8, 2003, in conjunction with an application for an order of liquidation in New Hampshire, the Commissioner, as

Rehabilitator of Home, petitioned the High Court of Justice in London ("English Court") to appoint joint provisional liquidators for Home under English law. On that same date, the English Court appointed Gareth Hughes and Margaret Mills, licensed insolvency practitioners and partners of Ernst & Young, LLP ("E& Y"), as joint provisional liquidators ("Joint Provisional Liquidators") in a provisional liquidation proceeding for Home. While there is a provisional liquidation proceeding in the UK, the liquidation of Home is a unitary proceeding under the primary jurisdiction of this Court.

Under the Order of Liquidation the Liquidator is vested with title to and charged with administering and collecting Home's assets for distribution to Home's creditors under RSA 402-C:21, I and RSA 402-C:25, VI. Home's assets, including reinsurance recoverables, are required to be paid or turned over to the Liquidator. The rights of the Home under the Assumption Agreement (and/or the BAFCO Agreements) are an asset of the Home liquidation estate. The Assumption Agreement contains an insolvency clause requiring INA to pay obligations under the Assumption Agreement directly to Home or Home's liquidator in the event of Home's insolvency. Subject to other relevant terms of the Assumption Agreement, the claims are to be paid based on Home's liability on the claims, without diminution because of Home's insolvency or because Home's liquidator has failed to pay all or part of a claim.

The AFIA Cedents who assert claims against Home under the AFIA Treaties, and all other parties asserting claims against Home, must file proofs of claims in the New Hampshire liquidation proceeding. Such claims are subject to review and approval by the Liquidator and the Court. The Order of Liquidation enjoins other means of asserting claims against Home or its property. Under RSA 402-C:41 and RSA 402-C:45, the

Liquidator must investigate and determine claims, issue notices of determination subject to objection by the claimant and review by a referee or the Court, and make recommendations to the Court with respect to the allowance of claims.

3. AFIA CLAIMS PROCEDURES

From 1993 to the commencement of Home's liquidation, claims submitted by the AFIA Cedents under the AFIA Treaties have been handled on Home's behalf by INA and its successor, Century, and their respective agents, including ACE INA Services, at INA's and Century's own expense pursuant to the Assumption Agreement. ACE INA Services dealt with AFIA Cedents on behalf of Home and also prepared financial statements for the UK Branch of the Home which were audited, signed and filed with the FSA. Since that time, claims submitted by AFIA Cedents under the AFIA Treaties have been paid by a combination of the receipt of reinsurance proceeds (including commutation receipts from third party reinsurers), proceeds of receipts from AFIA sellers under a quota share agreement, and payments from CIRC for and on behalf of Century.

In conjunction with the liquidation, the Court entered an Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company In Liquidation ("Claims Procedures Order") on December 19, 2003. The Claims Procedures Order was amended on June 9, 2004, and restated and revised on January 19, 2005. As amended, the Claims Procedures Order, governs the practice and procedures for presentation of claims against Home for determination by the Liquidator, or any Court-appointed referee, or the Court.

The involvement of Century in the claims determination process regarding AFIA Cedent claims has also been formalized through a negotiated claims protocol with Century approved by the Court on November 12, 2004. As a result of Home's liquidation,

and application of the Claims Procedures Order and the claims protocol, Century must make any payments due on determined claims under the AFIA Treaties directly to the Liquidator, and not to the AFIA Cedents.

The Liquidator's collection of payments under the Assumption Agreement and/or the BAFCO Agreements depends upon, among other things, the timely filing and proving of valid claims in Home's liquidation by AFIA Cedents. The actual "allowance" of an insured's claim establishes the basis upon which a claim can be submitted to the reinsurer. Without allowed claims by the AFIA Cedents, the Liquidator is not able to recover from Century under the Assumption Agreement.

4. THE TERMS OF THE PROPOSED AGREEMENT AND COMPROMISE WITH AFIA CEDENTS

The agreement provides for a compromise to be implemented by a "scheme of arrangement" between Home and all AFIA Cedents under § 425 of the English Companies Act of 1985. The agreement's purpose is to create a dynamic which will secure the Liquidator's recovery of AFIA related reinsurances from ACE, the total value of which is variously estimated to be somewhat less than $200 million (ACE's view), to perhaps more than $400 million (Liquidator's view). The agreement provides that a portion of the proceeds received from ACE with respect to the AFIA Cedents' claims, or received from any reinsurer of Home's AFIA business other than an ACE, will be allocated to the scheme for distribution to the AFIA Cedents. The remainder vests with the Liquidator.

The scheme is subject to the approval of both a majority in number and seventy-five (75) percent in value of the AFIA Cedents and sanction by the English Court. If approved by the creditors and sanctioned by the English Court, and an office copy of the

English Court's order sanctioning the scheme is filed with the English Registrar of Companies, the agreement will be binding on all creditors covered (including AFIA Cedents) as a matter of English law.

Pursuant to the agreement, the amount to be allocated to the scheme for distribution to the AFIA Cedents is determined by taking the reinsurance amounts actually received from ACE with respect to the AFIA Treaties, less offsets on account of ACE's claims against Home, and deducting from that number: (1) the costs of the UK provisional liquidation; (2) collection costs; (3) costs of obtaining approvals from the New Hampshire and English Courts; (4) amounts received by Home on account of Home's AFIA liabilities, which will be settled with the AFIA Cedents by way of offset ; and (5) amounts received by Home on account of any costs orders entered against it in disputed claims proceedings. Pursuant to the agreement, fifty percent of these net proceeds, plus the previously deducted amounts received on costs orders, will be paid to AFIA Cedents as net recoveries, and the remaining fifty (50) percent will be retained by Home. The Cedents' share of net recoveries is be paid proportionately to all AFIA Cedents according to the value of their allowed claims against Home under the AFIA Treaties as determined in the New Hampshire liquidation, except that amounts from any cost orders will be paid to the Cedents involved.

The agreement is subject to the approval of the New Hampshire Court, as well as those approvals required for a scheme of arrangement under English law. Finally, the Agreement provides for a standstill period during which signatory AFIA Cedents will not seek cut-through agreements with ACE. This period originally ran until the earlier of the date on which a required approval is not obtained, or June 1, 2004. It has since been

extended to September 30, 2005.

5. ISSUES TO BE DETERMINED / BURDEN OF PROOF

In the October 8, 2004 Order on Remand and within various directives to the parties relating to the focus of discovery, this Court articulated that the issue to be addressed at the evidentiary hearing is whether the agreement is "necessary, fair and reasonable". None of the parties objected to this articulation of the issue to be determined. At the start of the evidentiary hearing, ACE objected to the Court making a finding regarding the necessity of the agreement and argued that the Court need only address whether the agreement is fair and reasonable. The Court is at a loss as to why ACE argues that necessity of the agreement is not one of the criteria that the Liquidator must prove since its inclusion would seem advantageous to ACE. Nor was ACE able to explain its rationale, at least to the satisfaction of the Court, for taking this position. Nevertheless, the Court finds that it is obligated under the provisions of the liquidation statute, specifically paragraphs IV, VI and XXII, to determine whether or not the agreement is necessary to collect assets under RSA 402-C:25.

During the evidentiary hearing, ACE also objected at several points to the admission of certain evidence arguing that the subjective beliefs of the Liquidator are not relevant to the Court's determination as to whether the agreement is necessary, fair, and reasonable, because the Court must apply an objective test. The Court agrees that the test it must employ is an objective one: whether a reasonable Liquidator under the circumstances known to him, would have thought that the agreement was necessary, fair and reasonable. Testimony and other evidence demonstrating what the Liquidator knew is relevant to this objective determination.

Finally, the parties agree that the Liquidator has the burden of proving that the

agreement is necessary, fair and reasonable. In determining whether the Liquidator has met his burden, the Court gives due deference to the Liquidator's expertise and discretion. *In re Liquidation of American Mut. Liab. Ins. Co.,* 632 NE 2nd 1209, 1217(Mass 1994) ([The Liquidator's]regulatory function as commissioner requires some acknowledgment of [his] expertise and discretion.); ([The Court] may give such weight as he or she may consider appropriate to the receiver's expertise as commissioner.); *In re Indian Motorcycle, Inc.,* 289 B.R. 269, 283 (1st Cir. BAP 2003). (The Court may give substantial deference to the business judgment of a bankruptcy trustee when deciding whether to approve a settlement.)

6. POSITIONS OF THE PARTIES

The Liquidator argues that the agreement with the AFIA Cedents is necessary to recover a very large asset of the estate primarily for the following reasons: (1) the AFIA Cedents had little or no incentive to prosecute their claims with the Home estate beyond setoff opportunities, because as reinsurers and Class V claimants, they could expect no distribution from the estate; (2) if the AFIA Cedents did not prosecute their claims, ACE would not be obligated to pay its substantial AFIA related reinsurances into the estate; (3) ACE and the AFIA Cedents would likely negotiate directly to reach a mutually beneficial arrangement whereby ACE would pay the Cedents some amount of money, and the Cedents would not prosecute their claims with the Home, thus preventing the Liquidator from marshaling the AFIA related reinsurances. The Liquidator also argues that the agreement is fair and reasonable from the perspective of Home's policyholders and other creditors, and that the agreement was the result of extended arms-length negotiations.

ACE denies these claims. Through cross examination and its own witnesses,

ACE challenged the Liquidator's fundamental assertion that common sense market dynamics would likely limit claims filing and prosecutions in liquidations like Home's to an amount directly related to cedent setoff opportunities. ACE focused upon establishing that cedents, unsure of the ultimate value of their setoff positions until well into the future, routinely file claims to the fullest extent possible. Additionally, ACE pointed out that expenses associated with prosecution of claims may be limited because when brokers are used in the London market, claims will be presented at no additional cost, and in multiple settings, as other reinsurers likely have liability for a portion of the same claim.

ACE also attempted to refute each of the other bases that the Liquidator advanced for entering the agreement. ACE witnesses testified that they made no post-liquidation overtures to AFIA Cedents for the purpose of circumventing the orderly filing of cedent claims, and that they received no overtures from AFIA Cedents of that nature. For each of the threats to the reinsurance asset articulated by the Liquidator, ACE offered contrary evidence. In minimizing the level of threat to the collection of reinsurances on the AFIA liabilities, ACE took issue with the Liquidator's failure to balance the legal costs attending a defense of the AFIA reinsurance asset from any threats that might materialize, against the procedural "costs" of negotiating and submitting the "scheme of arrangement" for necessary approvals, and the contemplated payments to the AFIA Cedents within it.

ACE also contended that the Liquidator had been disingenuous in dealing with ACE about a commercial resolution. ACE asserted that the Liquidator had not acted in "good faith" when deciding to negotiate with the AFIA Cedents shortly after initial

discussions over a commercial resolution with ACE. Finally, through expert testimony, ACE pointed out that the agreement before the Court is without precedent, principally from two standpoints: the cash incentive within the agreement which encourages cedents to file claims, and the Liquidator's contention that the substantial payments to AFIA Cedents are administrative in nature

BMC offered no witnesses at the hearing, relying instead upon examination of ACE witnesses and cross-examination of the Liquidator's witnesses for purposes of establishing that the agreement was unprecedented, contrary to law, and unnecessary. As a Class II claimant, BMC focused heavily upon the costs associated with the Liquidator's endorsement of the agreement and what BMC considered was an unnecessary prolongation of the provisional liquidation.

In rejecting the Liquidator's rationale, BMC highlighted its concern that costs of the agreement's negotiation and presentation to the Court are borne by Class II claimants even if the agreement fails; and if it survives, those costs are enhanced by the actual payments to AFIA Cedents. Finally, BMC suggested that the Liquidator had "put at risk" the reinsurance asset covering the AFIA liabilities by engaging in actions which were in breach of the duty of "utmost good faith", customarily honored between insurers and reinsurers, and first alluded to by ACE during the initial April 2004 hearing on this matter.

7. FINDINGS OF FACT RELATIVE TO NECESSITY, FAIRNESS AND REASONABLENESS OF THE AGREEMENT

Based upon the exhibits and testimony presented at the hearing held from July 25-29, 2005, and the Court's evaluation of the credibility of the testimony of the various witnesses, the Court finds the following facts.

Gareth Howard Hughes and Margaret Mills, insolvency practitioners and partners in E & Y, were appointed as Joint Provisional Liquidators by the High Court of Justice in the UK on May 8, 2003. The provisional liquidation in the UK encompasses AFIA reinsurances, the largest single asset of Home's liquidation estate. Prior to the liquidation of Home, ACE dealt directly with the AFIA Cedents with minimal involvement of Home.

Mr. Hughes, the lead Joint Provisional Liquidator, determined that AFIA presented unique challenges to the Home's liquidation. He delegated responsibility for overall management of the day-to-day administration of the provisional liquidation of Home to Sarah Ellis, Assistant Director in the Financial Services Department of the Corporate Restructuring Group of E & Y. As part of her responsibilities, Ms. Ellis met and communicated often with the AFIA Cedents in the late spring and summer of 2003. Excess Insurance Company, Equitas, KWELM, and English & American all indicated to Ms. Ellis that they had no economic incentive to file claims with the Home estate. Ms. Ellis became concerned that Cedents were exploring alternatives to filing claims in the liquidation, and also that if Cedents were to file claims, they would do so only to the extent of offsets.

Additionally, Ms. Ellis encountered obstacles in obtaining information from individual Cedents on the value of their claims against the Home. What high level information she did receive, led her to believe that the AFIA liabilities were well in excess of what had been reported by ACE. Representatives of KWELM and English & American indicated to Ms. Ellis that they had difficulty dealing with ACE. KWELM reported specific difficulty trying to reach a reconciliation with ACE on KWELM's claims against the AFIA pool. English & American reported that ACE would be difficult

"about recovering money".[5] (Tr 2-A, p.84) Ms. Ellis reported these difficulties and her concerns regularly to Mr. Hughes.

To address the growing uncertainty, Ms. Ellis sent a letter in late July 2003 to the sixteen (16) AFIA Cedents with the highest expected claims potential, requesting information on projected claims amounts, as well as whether each Cedent intended to file claims. Only four (4) Cedents responded, and of those, only three (3) indicated that they would be filing claims. Additionally, an August 29, 2003 letter from Unionamerica stated that the company was withdrawing pending requests for claims payments and assessing its position with regard to AFIA matters.

Jonathan Rosen, Chief Operating Officer of The Home Insurance Company in Liquidation, and a reinsurance specialist, regularly communicated with Ms. Ellis. Mr. Rosen became concerned regarding AFIA matters in August 2003. His concern was in part precipitated by an August 5 e-mail to him from Karen Amos, Counterparty Manager of Equitas. The e-mail's attachment laid out various scenarios for "a potential way forward on AFIA" and posed as one such way, an Equitas cut through to ACE.[6] Mr. Rosen made it clear to Ms. Amos that any direct dealing by a Cedent with ACE was objectionable. Despite his admonition, she raised the same topic in a later conversation with Mr. Rosen. This concerned Mr. Rosen, as did the Unionamerica letter of August 29, 2003 and a request from Agrippina Versicherung ("Agrippina")[7] for a meeting with the JPL. Mr. Rosen traveled to London in September 2003 to address the mounting

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[5] Ms. Ellis was to encounter her own difficulties with ACE during her on-going work with reconciliation of AFIA Cedent claims with ACE. On the first Cedent selected for reconciliation, KWELM, ACE stated that it could review no more than 10 files a week of the 190 files selected, effectively pushing the KWELM reconciliation out at least four months. Because of ACE's very slow pace on the KWELM files, Ms. Ellis never really started with the Equitas reconciliation.

[6] Liquidator's Exhibit 12

[7] Agrippina Versicherung's successor in interest is Zurich Versicherung

uncertainty around claims filing of the AFIA Cedents, and to meet specifically with two of the largest cedents, Equitas and Agrippina.

Mr. Rosen met with Karen Amos and Rhydian Williams, head of Pools, Securities and Insolvencies for Equitas. Mr. Williams, representing the largest single Cedent, told Mr. Rosen that he saw no reason why Cedents could be expected to file and fully prosecute claims, given that distributions to reinsureds were unlikely. He stated his belief that Equitas was entitled to deal directly with ACE and indicated that Equitas was "keeping all options open". As a result of his discussions with Mr. Williams, Mr. Rosen "was left with no uncertain impression that [ACE and Equitas] were in direct communication on AFIA matters." (Tr.2-A, p.9)

On September 12, Mr. Rosen, Mr. Hughes and Ms. Ellis met with Gernot Warmuth, an attorney representing Agrippina's interests. Mr. Warmuth made it clear that Agrippina's objective was to obtain payment from some source to cover its AFIA related liabilities. He aggressively advanced alternatives to filing claims, asserting that without an economic "incentive" to do so, Agrippina's interests were better served by other initiatives or options, including a direct approach to ACE under a theory of "constructive novation". Further, Mr. Warmuth threatened to terminate Treaty R.[8] This would have significant material impact on Home's assets because termination of Treaty R would block the flow of substantial reinsurances to the estate. Mr. Rosen's discussions with Agrippina were complicated by the fact that Agrippina and ACE Companies were involved in a difficult and protracted arbitration over the contract of reinsurance

[8] The reinsurance contract (Treaty R) comes up within the context of the Rutty Pool liabilities, part of the Home's AFIA liabilities originally assumed by Cigna and now an obligation of Century. Under Treaty R Home had retrospectively reinsured (100%) Agrippina's Rutty Pool liabilities; however, under the contract, upon Home's insolvency, Agrippina was entitled to terminate the agreement and regain access to certain reinsurances to which ACE is currently entitled.

governing Home's obligation (now ACE's) for Agrippina's participation in the M.E. Rutty Underwriting Pool.

On September 16, Mr. Rosen met with ACE representatives Michael Durkin and Michael Smith to discuss his meeting with Agrippina. Mr. Rosen took the opportunity to also discuss his concerns regarding cut throughs, circumvention and any attempt by ACE to bypass Home and deal directly with AFIA Cedents. He made it clear that Home would not tolerate any of these actions. On the same day, ACE's counsel sent a letter to the Liquidator objecting to Mr. Rosen's meeting with Agrippina without an ACE representative present. Further, the letter suggested that Mr. Rosen might be "interfering" with the arbitration that was underway.

On September 17, 2003, Mr. Rosen and Ms. Ellis met with representatives of Unionamerica seeking an explanation for Unionamerica's withdrawal of its request for claims payments. Other than indicating that "they were reserving their rights", no further explanation was forthcoming. (Tr.1-B, p.128) At the conclusion of the meeting, Barbara Nowak of ACE INA Services, who also attended the meeting, suggested privately to Mr. Rosen and Ms. Ellis that Unionamerica might be intending to do a side deal with ACE. Later that day, Mr. Rosen met for a second time with Mr. Warmuth. Again, Mr. Warmuth advised Mr. Rosen that without some consideration from Home, Agrippina would exercise other options and seek consideration from ACE.

During his September trip, Mr. Rosen made regular reports to the Special Deputy Liquidator, Peter Bengelsdorf. After his meetings with the AFIA Cedents and ACE, Mr. Rosen informed Mr Bengelsdorf that he believed that ACE and the AFIA Cedents were actively reviewing and considering alternatives to filing claims in the Home estate. Mr.

Bengelsdorf determined that there were "enough potential red flags going up" that a "face-to-face meeting" with ACE was necessary to "find out what was going on". (Tr.3-B, p.145-46) Mr. Bengelsdorf directed Mr. Rosen to schedule this meeting with ACE, and requested that the Liquidator and Joint Provisional Liquidator issue a joint written communication directly to ACE seeking assurances that ACE would not interfere with an orderly filing of AFIA Cedent claims. This joint liquidator letter was sent to ACE on September 26, 2003, objecting to ACE's characterization of Mr. Rosen's actions and requesting assurances that ACE would not "participate in" or "otherwise facilitate" efforts to circumvent the liquidation, and that ACE "advise if presently aware of any such efforts".[9] Neither the Liquidator, nor the lead Joint Provisional Liquidator received a written reply to the September 26 letter.

Mr. Rosen scheduled a meeting with ACE in New York on September 30, 2003. The meeting was attended by ACE attorneys, Thomas Wamser, Senior General Counsel and Howard Denbin, as well as Peter Bengelsdorf, Gareth Hughes, Jonathan Rosen and Sarah Ellis. At the meeting, Mr. Bengelsdorf made a presentation outlining the Liquidator's understanding of the relationships and obligations of the parties involved in the liquidation. The prospect of a commercial resolution between Home and ACE was discussed, including a three-cornered transaction which was to include the AFIA Cedents. Also discussed was the substantial discrepancy between the parties' projections of the size of the AFIA liabilities. Based upon the high level information received from several Cedents, the Liquidator believed that the liabilities could exceed $400 million. ACE-INA Services' last FSA filing in 2003 carried a liability of approximately $231 million, however, at the September 30 meeting, ACE backed away from that figure by as

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[9] Liquidator's Exhibit 19

much as twenty (20) percent. ACE's substantial reduction of its estimate of the AFIA liabilities raised further concerns for the Liquidator. The growing discrepancy prevented any detailed discussion and the parties agreed that work needed to be done on reconciliation if matters were to move forward. It was agreed that reconciliation work would continue with KWELM, a project overseen by Sarah Ellis that was underway independent of their discussions.

Within the context of the September 26 letter, Home again raised its concerns regarding cut through, circumvention and any other attempt by ACE to bypass the Home and deal directly with AFIA Cedents. However, ACE representatives remained noncommittal and avoided those assurances. To the contrary, representatives from ACE prompted a discussion of the NEMGIA decision[10] and asserted that that decision implied that circumvention would be tolerated under English law. ACE also indicated that its outside counsel, Lovells and Stroock & Stroock were looking at those legal matters from both a UK and US perspective.

There was further discussion of a possible commercial resolution with ACE in a follow up call on October 16. During that call, ACE rejected any agreement that would include AFIA Cedents, indicating that the relationships between ACE and the Cedents were difficult and that negotiating such a transaction would be unwieldy. The assurances requested in the September 26 letter were again discussed in conjunction with moving the parties beyond exploratory discussions on the prospect of a commercial resolution. Mr. Bengelsdorf recognized that he had inadequate information to negotiate with ACE and that he would need direct access to those in authority to move forward on a commutation.

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[10] Liquidator's Exhibit 21, *NEMGIA v AGF Holdings,* (1997) 2 BCLC 191, (1997)LRLR 159

Home and ACE agreed that if commutation negotiations were underway neither would disclose those discussions to the AFIA Cedents. Ace did not however, unequivocally agree to refrain from pursuing side deals with the AFIA Cedents, although there was an agreement to advise one another should either party negotiate "any other side deals". The NEMGIA case was again debated and ACE said it stood by the NEMGIA analysis that circumvention is legal in both the UK and US. The discussions between Home and ACE on September 30 and October 16 regarding a potential commercial resolution between them were preliminary in nature and did not constitute commutation negotiations.

During September and early October 2003, communications with and amongst the AFIA Cedents were being facilitated by the organization of an informal creditors committee (ICC).[11] The Liquidator's first formal meeting with AFIA Cedents in the ICC setting was held on October 21, 2003. At that meeting Mr. Bengelsdorf made an informational presentation to the members of the ICC, providing the members with the history of the Home and AFIA. Mr. Bengelsdorf also sought to prompt open discussion on the uncertainties pertaining to the fact that the Cedents ranked behind policyholders claimants in the order of distribution in Home's liquidation.

Mr. Bengelsdorf's goals for the first ICC meeting were to obtain more detailed claims information and assurances from the AFIA Cedents that they would file and fully prosecute claims in the Home estate. Neither goal was achieved. Rather, Mr. Bengelsdorf and Mr.Rosen met with "a very hostile audience". The Cedents made it clear that they "saw no good reason for them to file proofs of claim beyond their offset entitlements, because the filing and prosecution of proofs of claim would, in their view, be an

[11] An informal creditors' committee (ICC) may be formed by creditors in provisional liquidations in the UK. In this matter the ICC is composed of nine (9) AFIA Cedents with sufficient claims in the aggregate to constitute seventy-five (75) percent of the creditors by value.

extremely expensive and time-consuming exercise for what they perceived to be a zero sum gain". (Tr.1-B, p.153) Certain of the Cedents also clearly expressed their frustration in their prior dealings with ACE-INA Services on claims submissions.

Mr. Hughes concluded that as a matter of "commercial logic" there had to be "an arrangement put in place where it made it economically beneficial for those creditors to prove and prosecute their claims" or else " the largest asset of the estate would be lost...". (Tr.2-B, p.178,182-83) Toward the close of the meeting, Rhydian Williams, *de facto* chair of the ICC, observed that because AFIA Cedents as Class V creditors were unlikely to get a distribution from the estate, they would not likely prosecute claims over and above setoff amounts. At that point, Mr. Rosen, in reaction to the Cedents' feedback, turned to Mr. Bengelsdorf and stated that "something had to be done". (Tr.1-B, p.154)

Mr. Bengelsdorf determined that he would lose an asset of the estate if he did not take decisive action. He concluded that he had three options: he could do nothing, which he determined was unacceptable; he could "do a commercial resolution with ACE"; or he could "work out some sort of arrangement with AFIA Cedents". (Tr.3-B, p.158-59) Although Mr. Bengelsdorf testified that he had preferred to negotiate a deal with ACE, the withholding of information by the Cedents blocked this avenue. He thus directed his efforts toward reaching an agreement with AFIA Cedents. The Liquidator made no further efforts to pursue a commercial resolution with ACE. Nor did ACE ever follow up with Home.

Directly after the October 21 ICC meeting the Liquidator, the lead Joint Provisional Liquidator, the Special Deputy Liquidator and counsel discussed the development of a scheme of arrangement to facilitate the goal of reaching an agreement

with the AFIA Cedents. Negotiations with the AFIA Cedents were to commence under the direction of Mr. Hughes and counsel, in consultation with the US liquidation team. In his capacity as lead Joint Provisional Liquidator, Mr. Hughes regularly advised the FSA on matters of significance, keeping them "briefed throughout" as the scheme was being negotiated and developed. (Tr.2-B, p.225)

The Liquidator and lead Joint Provisional Liquidator relied upon Rhydian Williams to gauge Cedent responses to various proposals. Mr. Williams was very familiar with the London reinsurance market and had served on more than a dozen informal creditors committees. From mid-October 2003 until mid-January 2004, the financial terms of the agreement were under significant discussion between the AFIA Cedents and the Liquidator. The share that the Cedents were to receive from the net proceeds as defined under the agreement became the major sticking point.

The initial proposal offered the Cedents a twenty-five (25) percent distribution from the net proceeds, realized after application of various expenses and offsets to the gross receipts from AFIA reinsurances, and also required that the ICC members provide information to the Liquidator on the details of their expected claims prior to Court approval of the agreement. The proposal was transmitted to Rhydian Williams on November 10, 2003. Mr. Williams advised Mr. Hughes that the proposal was inadequate for two reasons: the percentage of the net proceeds to be shared was too low; and the timing of the provision of claims information by the Cedents to the Liquidator was disadvantageous to the Cedents. Mr. Williams advised against circulating the offer to the ICC because it would be dismissed.

After consultation and discussion amongst the Liquidator, Joint Provisional

Liquidator and counsel, a second proposal was prepared with a "lock-step" component providing for a graduated percentage share of net proceeds to a maximum level of fifty (50) percent as the gross receipts from the AFIA Treaties grew. Also, the proposal postponed the timing on the provision of claims information until such time as the agreement was fully approved. Upon review, Mr. Williams indicated that the changes were in the right direction. He suggested that "it was worth sharing with some of the other cedents just to show that the Liquidators were coming up with ideas, but that ...[they] should be prepared to receive short shrift." (Tr.4-A, p.99)

At a meeting of the ICC on November 28, 2003, the lock-step proposal was discussed and Sarah Ellis made a PowerPoint presentation to illustrate how the proposal operated. While the ICC members at the presentation did not formally reject the lock-step approach, the tenor of the discussion and indications from Rhydian Williams to Gareth Hughes, conveyed to the Liquidator that the Cedents were likely to reject the proposal and hold to a 50/50 sharing of net proceeds.

On December 12, 2003, Gareth Hughes received a counter-proposal from the ICC, transmitted by Richard Leedham, who served as counsel to the ICC during the final negotiation phase. The proposal provided for a 50/50 sharing of proceeds; an "uplift" for the Cedents should Home commute with ACE; and a requirement that Home obtain AFIA Cedents' consent for any commutation with ACE. Seven (7) of nine (9) ICC members were lined up behind the proposal advanced by Richard Leedham. However, even with seven (7) Cedents in support, the agreement would not have had the necessary approval to move forward.

After significant discussion and sharing of drafts over the final weeks of

December 2003 and the early part of January 2004, the Liquidator agreed to a 50/50 sharing of net proceeds and the Cedents withdrew their proposal for veto power over a Home commutation with ACE. With the addition of Unionamerica's support in January, the threshold of approval by seventy-five (75) percent of the creditors (by value) had been achieved. The agreement signature sheets were circulated on January 23, 2004, some ten (10) weeks after the initial proposal was sent to Rhydian Williams. Prior to filing the Motion for Approval of Agreement and Compromise with AFIA Cedents, the Liquidator provided notice to ACE.

8. ANALYSIS

The July evidentiary hearing focused upon the reasonableness of the Liquidator's determination that an agreement with the AFIA Cedents was necessary and upon the fairness of the terms of the agreement. The Court's findings on these matters are intrinsically tied to the Court's prior rulings that the Liquidator has the authority under RSA Chapter 402-C to enter into this type of agreement under the circumstances, and that the payments to the AFIA Cedents are "actual and necessary costs of preserving and recovering the assets of the insurer" under RSA 402-C:44, I. The Court and parties had previously asked the Supreme Court to accept this case on interlocutory transfer to determine the legality of the agreement at issue under the statute. In doing so, the Court and parties agreed that the undisputed facts were sufficient to allow the Supreme Court to do so. The Supreme Court declined the case on an interlocutory basis and remanded for an evidentiary hearing on the necessity and fairness of the agreement

The evidentiary hearing has confirmed the Court's view that the agreement is permitted under RSA Chapter 402-C. The hearing provided a glimpse into the rough and

tumble world of the reinsurance business within the liquidation setting and explained, in part at least, why the liquidation statute provides that it is to be broadly construed to implement its purpose to protect insureds and creditors, and why the Liquidator is granted a broad array of powers under the statute to marshal and maximize assets for the benefit of claimants. ACE and the AFIA Cedents are motivated by the economic bottom line and what is in the best financial interests of their businesses. As Rhydian Williams testified, even after negotiating the agreement with Home, if ACE "had come forward with a better deal, then Equitas would not have signed that agreement". (Tr.4-B, p.139-140) As BMC noted in its argument at hearing, those involved in the matters before the Court are "highly sophisticated insurance professionals". The hearing made it clear that if the Liquidator were not able to negotiate with them on an equal footing to reach an agreement such as is at issue here, he would be, at the least, at a distinct business disadvantage in attempting to marshal assets that belong to the estate.

The Court found the testimony of the Liquidation team of Peter Bengelsdorf, Jonathan Rosen, Gareth Hughes and Sarah Ellis to be highly credible. The Court also gives due deference to the business judgment of Mr. Bengelsdorf, Mr. Rosen and Mr. Hughes that it was necessary to negotiate an agreement with the AFIA Cedents to assure that the largest single asset of the estate was not lost. See: *In Re Indian Motorcycle, Inc.* 289 B.R. 269, 283 (1st Cir. BAP 2003) ("Compromises are generally approved if they meet the business judgment of the trustee.") Further, the Court credits the testimony of Gareth Hughes and Rhydian Williams, both of whom are very experienced in the financial realities and pertinent dynamics of the reinsurance market in the UK.

ACE presented one of its experts for the purpose of casting doubt on the Court's prior determinations that: 1) the Liquidator has the requisite authority to enter into an agreement structured to provide payments to lower priority claimants for the purpose of enhancing distributions to higher priority claimants; and 2)that such payments are necessarily administrative expenses. Attorney Robert Craig took issue with the pending agreement, testifying that these very issues had been the subject of recent discussions within a drafting group at the NAIC[12] charged with updating the Model Receivership Act. He testified that "the proposal was put in a draft in December or early January of this year and rejected...finding its way back into the draft...at least three times...and rejected three times." (Tr.5-A, p.106) Only on cross-examination did Mr. Craig acknowledge that the current draft recently approved by the NAIC intermediate levels, included a drafting note indicating that, subject to court approval, it is implicit within the powers of a liquidator under the Model Act to make Class I administrative payments to claimants in lower priority, if doing so results in a return to the estate of assets benefiting claimants in higher priorities. Further, the drafting note indicates that such "payments do not constitute distribution so as to circumvent priority classes or establish subclasses within a class."(Tr.5-A, p.112) Ace's evidence on this point was thus completely undermined.

Necessity of the Agreement

The Court first determines whether the Liquidator's position that the agreement is necessary to marshal and maximize the assets of the estate is reasonable. The Court focuses upon the information the Liquidator developed up to and through the first formal ICC meeting in late October 2003, after which a decision was made to work toward an

[12] The National Association of Insurance Commissioners is comprised of the chief insurance regulators of the fifty(50)states.

agreement with the AFIA Cedents. The Court reviews the circumstances then known to the Liquidator to evaluate whether it was reasonable for him to conclude that an agreement with the AFIA Cedents was necessary to marshal and maximize the assets of the estate.

The Special Deputy Liquidator, Mr. Bengelsdorf, made an early determination that the AFIA reinsurances were the largest asset of the estate and that his ability to marshal that asset was fraught with uncertainty. The matters brought to Mr. Bengelsdorf's attention by Mr. Rosen regarding the September contacts with ACE and the Cedents; the information provided by Gareth Hughes in his capacity as lead JPL; Mr. Bengelsdorf's direct involvement in the face-to-face September meeting with ACE and the follow up October telephonic conference ; and the October 21 ICC meeting informed Mr. Bengelsdorf's decision to negotiate with the ICC. He firmly concluded that absent creation of a more attractive alternative, Cedents would not file and fully prosecute claims, and that they would move in more commercially favorable directions to the disadvantage of the estate. Mr. Bengelsdorf testified that he had preferred to negotiate a deal with ACE; however, he concluded that he was still dealing with ACE representatives without the authority to move matters along, and that his negotiating leverage with ACE was seriously compromised by the absence of adequate information from the Cedents. (Tr.3-B, p.197) Assessing the totality of the circumstances, Mr. Bengelsdorf moved forward to negotiate a compromise with the ICC.

At hearing, ACE and BMC challenged each of the factors the Liquidator considered in determining that the agreement was necessary. For example, much was made over various court decisions in both the US and the UK, and whether those cases

might serve to either motivate AFIA Cedents and ACE to actively pursue alternatives to the filing of claims, or discourage them from doing so. However, reasonable lawyers and/or business executives may disagree on the meaning of these cases. The Court certainly cannot say that the Liquidator was unreasonable in determining that there was significant legal uncertainty about whether the Cedents or ACE could successfully litigate various theories, or negotiate side deals to gain economic advantage. Both the Nationwide decision,[13] which left unanswered the question of whether a cut through would be permissible in the case of an insolvency, and the NEMGIA decision, are cases in point. Additionally, given the autonomous manner in which ACE had administered the AFIA matters and paid claims since 1999, Cedent pursuit of legal action based upon a theory of constructive novation could not be lightly dismissed.

Much was also made over whether, in the absence of any agreement, the Cedents would file and fully prosecute claims over the expected ten (10) and more years' span of the liquidation. While there was no dispute that Cedents would file and prosecute claims to take advantage of any offset opportunities, beyond that, there was a very high degree of uncertainty. Mr. Hughes' observations from his attendance at the October 21 ICC meeting were persuasive. He testified to his familiarity with the Cedent attendees, and focused upon the largest, Equitas. He testified that he "believed it was inconceivable that Equitas would prosecute its claims...over many years going forward without receiving economic return...". (Tr.2-B, p.179)

In sum, the Court finds that the Liquidator has met his burden of proving that a reasonable liquidator under the circumstances would have concluded that the agreement was necessary to preserve access to and marshal the AFIA reinsurances.

[13]Liquidator's Exhibit 9, Nationwide Mutual Ins. Co. v. Home Ins. Co, 150 F. 3d 545 (1998)

Fairness and Reasonableness of the Terms of the Agreement

The Court next reviews the terms of the agreement to determine whether they are fair and reasonable under the circumstances. ACE focuses upon the fairness of the agreement to ACE as a business enterprise. Broadly considered, the financial fortunes of ACE are best served if the Liquidator's agreement is not upheld. In that case, ACE stands to reap a sizable windfall. If the agreement is upheld, however, ACE cannot argue that its liabilities as a substantial net debtor to the estate, are any greater than those reflected under the terms of the contracts governing the 1999 transaction with Cigna. The crux of ACE's argument is that Home was neither fair nor reasonable in the way it initiated discussions with ACE over a commercial resolution; changed course to commence negotiations with the AFIA Cedents; and only informed ACE after finalizing an agreement with the Cedents. (Tr.5-A, p.179) As Mr. Wamser candidly testified, Ace felt that it had been "suckered" by the Liquidator.

ACE's argument is factually flawed. The Court has already found that commutation negotiations had not begun with ACE on October 16 because of Home's lack of adequate claims information and access to those with direct negotiating authority at ACE. However, even if ACE's assertions were true, it would not change the Court's conclusions, because what is relevant is the fairness of the agreement to ACE in its capacity as a claimant in the estate, and not as a business enterprise. In considering fairness, the Court reviews the agreement "with the paramount interest of creditors" in mind. See *In Re Estate of Indian Motorcycle MFG. Inc.* 299 B.R. 8, 20 (D. Mass. 2003). See also RSA 402-C:1, IV, "The purpose of this chapter is to protect the interests of insureds, creditors, and the public generally...". ACE's rights as a claimant and creditor

and its rights to setoff under RSA 402-C:34 are unimpaired by the pending agreement and thus the agreement is not unfair to ACE.

BMC has intervened as a Class II policyholder claimant.[14] No other policyholder claimant has intervened and BMC represents that it does not speak for any other Class II claimants. BMC raises the argument that the agreement may not represent the best bargain that could have been struck by the Liquidator for Class II claimants. BMC contends that if the Liquidator had pursued a commercial resolution with ACE , rather that one with the AFIA Cedents, the estate would have benefited more, in part because it would not have incurred the costs attendant to pursuing approval of the agreement. The Court has already concluded that the Special Deputy Liquidator's decision to negotiate a resolution with the AFIA Cedents on behalf of the Liquidator rather than with ACE was reasonable. The Court has no information to assess whether a superior deal could have been struck by the Liquidator with ACE and therefore can give no meaningful consideration to BMC's argument.

Under the agreement the Liquidator stands to collect a portion of reinsurances otherwise at risk, for purposes of providing a direct and substantial benefit to Class II claimants, which comprise ninety (90) percent of all claimants. The Special Deputy Liquidator estimated that Cedent claims exceed setoff positions by anywhere from $87 Million to an amount well in excess of $150 Million. (Tr.3-B, p.159) The Special Deputy Liquidator estimated that the potential gross proceeds from the AFIA reinsurances would total between $231 Million and $400 Million, or more. While there is necessary

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[14] BMC, an operating entity within Berkshire Hathaway Inc., intervened as a Class II claimant. The Court assumes that its intervention is in no way motivated by the interests of a companion operating entity within Berkshire Hathaway, Inc. which reinsures ACE's liabilities on the AFIA exposures.

uncertainty as to the gross proceeds to be received by the Liquidator under the agreement, the Liquidator established that the agreement returns nearly two-thirds of the gross reinsurance proceeds to the liquidation estate, with the remaining one third going to the Cedents through the scheme.[15]

Having taken the position that the Liquidator has struck an unnecessary bargain with AFIA Cedents, ACE and BMC necessarily take the position that the monies expended by the Liquidator under the agreement are unreasonable. Here, the Court considers the nature of the agreement and the context in which the negotiations were conducted. The agreement was formulated to promote a sustained prosecution of claims over a number of years. The terms of the pending agreement were the subject of significant negotiation over a two month period. As Mr. Hughes noted, the Cedents had a "considerable amount of commercial leverage" over the Home estate, and "a strong commercial position" during the negotiations. (Tr.2-B, p.217,223) The Liquidation team included members with broad experience in the insurance industry and the regulatory environment in the US and the UK, or both. The FSA was regularly advised by the Liquidator and the lead Joint Provisional Liquidator of progress on the negotiations and the terms of the agreement. No objection to either the concept or the terms was expressed at any time by the FSA.

For all of the above reasons the Court finds that the agreement is fair and reasonable.

[15] This projection was based upon the liabilities reflected in the 2003 FSA filing. If the gross reinsurances were to significantly exceed that figure, the spread in the proportional share would diminish.

FINDINGS AND RULINGS

The Court's rulings on the Findings of Fact and Rulings/Conclusions of Law submitted by the parties, and on ACE Companies' Objection to the Liquidator's Proposed Findings of Fact and Conclusions of Law and the Liquidator's Response to Ace Companies' Objection to Liquidator's Proposed Findings of Fact and Conclusions of Law follow:

Liquidator's Proposed Findings of Fact and Conclusions of Law After Evidentiary Hearing

Findings of Fact:

Granted: 1-17,18-20 (See Exhibit 1, paragraphs 36-38), 21, 23-39, and 41-116

Denied: 40

Neither granted nor denied: 22.

Conclusions of Law:

Granted: 1-11.

Benjamin Moore & Co.'s Requests for Findings of Fact and Conclusions of Law

The Court declines to rule with specificity on Benjamin Moore & Co.'s Requests for Findings of Fact and Conclusions of Law as the paragraphs, with multiple assertions and/or argumentative elements, prevent efficient disposition. Therefore, as to Benjamin Moore & Co.'s requests, all findings and rulings consistent with this Order are granted; otherwise, the requests for findings and rulings are denied.

ACE Companies' Request for Findings of Facts and Rulings of Law

Findings of Fact:

Granted: 1, 10-33, 36-39, 41-51, 52 (with the further finding that ACE was excluded by G. Warmuth), 53-54, 56 (to the extent that no Cedent expressly so advised), 58, 60 (as to directly informed, denied as to "suggested in any way"),61 (as to expressly stated reasons), 63, 65 (as to the chronology, but not to the implication that a commutation is fully synonymous with a settlement), 66-73, 74 (with the further finding that the commutation discussions never began), 75 (to the extent that no request was made to reduce to writing; remainder is neither granted, nor denied), 76-77 (as to authority to discuss rather than negotiate), 78 (as to the extent that reconciliation continued as an on-going process, but denied as to the implication that commutation discussions had begun), 79-80, 81 (as to the request of Agrippina, and

Home's response, otherwise denied), 82 (as to the assurance to the AFIA Cedents, otherwise denied), 83-84, 89, 91-93, 107, 109, 113-114, 116, 118, 119 (with the finding that there was also contrary information), 120, 123 (as to commitments made, but not to the implication that negotiations on commutation had begun),124-127, 129-130,133, 139, 140 (as to the first two assertions, otherwise denied), 141, 145, 148, 150, 153, 155, 158-164, 167, 169, 170, and 172.

Denied: 2-3, 4-9, 90, 94, 106, 110-112, 117, 121-122, 128, 131-132, 134-136, 138, 142-144, 147, 152, 156, 157, 166, and 168.

Neither granted nor denied: 34-35, 40, 55, 57, 59, 62, 64, 85-88, 95-105 (limited relevancy), 108, 115 137, 146, 149, 151, 154, 165, and 171.

Conclusions of Law:

Granted: A, B, C, D, F, G, P (as to an actual novation), V, AA, EE, and GG (except for the second assertion which is denied)

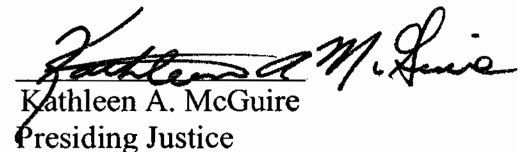
Denied: E, H, I, J, O, Q, R, S, T, U, W, X, Y, Z (as to an agreement with ACE), BB-DD, FF, HH, and II.

Neither granted nor denied: K,L,M and N (limited relevancy)

In sum, based upon the findings of fact within the narrative, and the additional findings of fact reflected in the Court's response to post-hearing submissions by the parties, the Court finds that the Liquidator has met his burden of proving that the agreement and compromise with the AFIA Cedents is necessary, fair and reasonable. Accordingly, the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents is GRANTED.

SO ORDERED

9/22/05
Date



Kathleen A. McGuire
Presiding Justice