

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of Rehabilitation of The Home Insurance Company

03-E-0106

**MOTION FOR RECONSIDERATION OF COURT'S DENIAL OF  
NATIONWIDE'S MOTION TO INTERVENE AND MOTION TO PERMIT  
ATTORNEY COHEN TO APPEAR PRO HAC VICE**

NOW COMES Nationwide General Insurance Company and Nationwide Mutual Insurance Company (collectively, "Nationwide"), by its attorneys, Wiggin & Nourie, P. A. and counsel Michael Cohen, Esquire, of Cohen & Buckley, and respectfully files this motion for reconsideration of the Nationwide Motion to Intervene and it's Motion to Permit Attorney Cohen to Appear Pro Hac Vice. In support thereof, the Petitioner states as follows:

1. As an initial matter, Nationwide is not adverse in principle to a compromise by and between the liquidator and the AFIA cedents, however, because it was not a party to the negotiations, a member of the informal creditors committee nor the settlement agreement at issue before the Court, Nationwide has inadequate information to assess the settlement. It is however, one of the largest AFIA cedents with a claim in excess of fifty million dollars, and is probably the fourth largest creditor in the estate. Accordingly it cannot determine the necessity, fairness and reasonableness of the agreement and compromise at issue herein without having access to the complete record and the testimony presented to this Court in the ongoing Home Insurance liquidation proceedings, including the evidentiary proceedings commencing on July 25, 2005 and continuing.

2. Nationwide seeks to intervene not solely for the purpose of participating in the evidentiary hearing currently before the Court. Nationwide has demonstrated, as a major AFIA cedent, a significant interest in all issues pertaining to ACE's reinsurance of the AFIA book of

DENIED w/o prejudice.  
K. R. R. 7/29/05

business. It seeks to intervene in order to be heard at appropriate times on matters concerning that asset of the Home estate.

3. As the fourth largest AFIA creditor, Nationwide has a right to determine independently whether any agreement between the Liquidator and the AFIA cedents would have an adverse impact on its rights and responsibilities as a member of the Ruddy Pool. See RSA 402-C (1998). Furthermore, Nationwide has a right to protect its interest in these proceedings.

4. Notwithstanding the concerns expressed by the ACE Companies in its objection filed July 25, 2005, Nationwide does not intend to extend the examination, delay the process, or otherwise interfere with the witness schedule. ACE Companies has also objected to Attorney Michael Cohen's participation in these evidentiary proceedings because it claims he may be called as a witness. Attorney Cohen he did not participate in the negotiations or the settlement agreement, therefore, he has nothing to add as a witness. During the course of testimony to date there has been nothing to suggest Nationwide participated in the development of the United Kingdom (U.K.) scheme of settlement. Accordingly, the objection is unfounded.

5. Nationwide has an interest as a creditor, along with other similarly situated AFIA cedents, that any distributions relating to the Home Insurance are made equitably. Any interested creditor has a right to be treated equitably and fairly; this is a statutory right. See RSA 402-C: 46, Distribution of Assets. NH RSA 402-C is intended to protect the interest of the insureds and creditors. Nationwide has the right to access to the complete record and the testimony presented in these ongoing Home Insurance liquidation proceedings, including the evidentiary proceedings commencing on July 25, 2005 and continuing. Nationwide has a right to appear and participate in these proceedings as a creditor of record.

6. ACE objects to Nationwide's Intervention as untimely. Nationwide, as a major AFIA cedent and creditor, is not a newcomer in the Matter of the Liquidation of the Home Insurance Company. Nationwide has monitored these proceedings and reviewed all the pleadings, orders and

submissions posted on this Court's website, as is customary in liquidation proceedings. Nationwide has attended all Court proceedings deemed necessary to protect its interest as a major creditor.

7. During its ongoing monitoring of the liquidation proceedings, it became obvious to Nationwide that it was not seeing everything relevant to protect its interest in outcome of the case. Additionally, Nationwide was unable to secure information it deemed necessary to evaluate the recommendations of the Liquidator regarding the AFIA cedents.

8. By Court Notice dated February 14, 2005, this Court scheduled a February 17, 2005 hearing to address the Liquidator's Motion for Approval of Agreement with Agrippina, a similarly situated AFIA cedent. Nationwide attended the February 17, 2005 hearing and requested a non-redacted copy of the Liquidator's proposed agreement with Agrippina in order to assess the impact on its rights and responsibilities as a member of the Ruddy Pool.

9. Nationwide was not able to assess the agreement because the public copy contained significant redaction making it impossible for interested parties to confirm to what extent the settlement might impact their rights and responsibilities. In chambers, on February 17, 2005 this Court expressed similar concerns as those expressed by Nationwide Counsel, Attorney Doreen F. Connor.

10. During Chambers discussion, Attorney Eric A. Smith, on behalf of the Liquidator, represented to this Court in unequivocal terms that the pending agreement would have no adverse impact upon Nationwide or any other Ruddy Pool member. Upon hearing said assurances, the Court indicated its intent to approve the settlement.

11. Following this Court's Order approving the agreement, Nationwide requested that the Liquidator execute a simple Stipulation confirming the representations made by Attorney Smith, upon which the Court considered in issuing its Order.

12. Attorney Smith refused to execute the foregoing Stipulation as “unwarranted.” See Letter of March 9, 2005 from Attorney Smith to Attorney Connor dated March 9, 2005 attached as Exhibit 1.

13. Attorney Smith refused to execute the forgoing Stipulation despite the fact that the Stipulation was merely a recitation of the express representations made to this Court; representations which were made to this Court in response to the Court’s concern about approving the redacted Agreement if there was any possibility that the settlement might have an adverse impact on Ruddy Pool members such as Nationwide.

14. Unsuccessful in obtaining necessary information to determine the equity of the agreement at issue, or, in the alternative, assurances that its interest would not be adversely impacted, and because the outcome of the current proceeding will have a material impact on its claim, Nationwide filed its Motion to Intervene and to Admit Out of State Counsel Pro Hac Vice, as had other interveners. See GRA Intervener and Motion to admit Pro Hac Vice, granted 6/11/03; REM Intervener and Motion to admit Pro Hac Vice, granted 10/29/03; Benjamin Moore’s Intervener and Motion to admit Pro Hac Vice, granted 4/5/04; Equitas Intervener and Motion to admit Pro Hac Vice, granted 4/14/05, Petitioner’s Motion to admit Pro Hac Vice, granted 7/13/2005.

15. Nationwide, as a creditor, initially reviewed the Procedures Regarding Claims Filed with the Home Insurance Company in Liquidation (“Procedures”), which govern the practice and procedures in all proceedings before the Liquidator and the Liquidation Court with respect to claims against the Home, pursuant to NH RSA 402-C:1- 402-C:61.

16. The purpose of the procedures is to provide procedure and uniformity for the presentation, processing, determination and classification of claims and to assist all Claimants worldwide in the orderly presentation of their claims against the Home. Id. at ¶ 3, a. (emphasis added). These procedures provide a mechanism for the dispute of a claim; to request evidentiary hearings respecting a disputed claim; and for case management with respect to a disputed claim.

These procedures do not provide clear procedure for intervention in the absence of a disputed claim, as is the case here. Additionally, there is no express requirement for intervention by creditor, such as Nationwide, to intervene in a liquidation proceeding that is undisputed.

17. "Intervention" is the proceeding by which one not originally a party to an action is permitted, on his own application, to appear therein "for the protection of some right or interest alleged by him to be affected by such proceeding". See 59 Am Jur 2d PARTIES § 160-161.

Nationwide is of the opinion, however, that intervention is not required because it is a Participant of the liquidation as AFIA cedent, creditor and Claimant.

18. Nationwide, by virtue of its status as a creditor is considered a Participant within the meaning of these procedures. See Procedures, Definitions, ¶ 2, b. and n. Nationwide filed its intervener as precautionary measure believing it had a right to participate as a creditor in any evidentiary hearing and have full access to the evidentiary record and all discovery in connection with that proceeding including deposition transcripts and document production.

19. Neither the liquidation procedures nor the Court rules suggest that a motion to intervene was necessary. See N.H. R.S.A. 402-C; Procedures Regarding Claims Filed with the Home Insurance Company in Liquidation. Furthermore there are no Scheduling Orders, or other Court issued Orders, imposing deadlines for intervention.

20. The Court is charged with oversight of any payments in a manner that will assure the proper recognition of priorities and a reasonable balance between the expeditious completion of the liquidation and the protection of unliquidated and undetermined claims, including third party claims. See RSA 402-C:46 (1998), Distribution of Assets. This Court will be better served to allow Nationwide to participate in the evidentiary hearings.

21. Limited participation by Attorney, Mr. Cohen, Counsel for Nationwide, in the evidentiary hearing must be permitted because Nationwide is a creditor and Participant.

Participation by Mr. Cohen will facilitate equitable application of the liquidation statute; a goal common to both Nationwide and this Court.

22. Nationwide filed an intervener because the procedures established by the Court were uncertain. Generally, a person desiring to intervene in a pending action, where no statute prescribes the procedure, should file a Petition to Intervene setting forth facts sufficient to show the nature of his interest in the subject matter of the suit, that the interest is direct and will either suffer or be sacrificed if he is not allowed to intervene, the issues he proposes to raise, and the parties against whom he wishes to raise them. See Richard V. Wiebusch, 4 New Hampshire Practice, Civil Practice and Procedure § 6.29 (1997).

23. New Hampshire has a liberal policy regarding intervention. The right of a party to intervene in pending litigation in this state has been rather freely allowed as a matter of practice without the aid of statute permitting it. Scamman v. Sondheim, 97 N.H. 280, 282 (1952). A trial court should grant a motion to intervene if the party seeking to intervene has a right involved in the trial and a direct and apparent interest therein. Brzica v. Trs. of Dartmouth College, 147 N.H. 443, 447 (2002); Snyder v. New Hampshire Sav. Bank, 134 N.H. 32, 34 (1991). Nationwide has a direct interest in the outcome of settlements involving AFIA cedents, the Home Liquidation proceedings generally, and seeks to intervene in order to be heard at appropriate times on matters concerning that asset of the Home estate. The intervener filed on July 22, 2005 should not have been denied. Nationwide is an AFIA cedent, and a creditor in the Home liquidation proceedings. This Court has consistently granted Intervener and Motions Pro Hac Vice and should similarly grant Nationwide's Motion, particularly given its interest as an AFIA cedent, interested creditor, and ongoing participant in the Home liquidation.

24. Any person asserting an interest in the proceedings may seek to intervene as a party thereto upon petition to intervene briefly setting forth that person's relation to the subject matter of the case. See N.H. Superior Court Rule 188. Nationwide filed a Motion to Intervene pursuant to

Superior Court Rules; its decision to do so was primarily as a precautionary measure. As a major creditor and Claimant, Nationwide anticipated its intervener would be granted.

25. Nationwide appeared before this Court at 10:00 A.M. on July 25, 2005 believing its Motions to be unopposed. Accordingly Nationwide was certain this Court would exercise its discretion to grant the pending motions.

26. Absent Objection, the Court shall generally grant intervention by an interested party. See Richard V. Wiebusch, 4 New Hampshire Practice, Civil Practice and Procedure § 6.29 (1997). The court will grant the Petition without hearing if no objection is made. Id. The right of a party to intervene in pending litigation in this state has been rather freely allowed as a matter of practice. Scamman at 281.

27. ACE served its objection upon Nationwide at approximately 9:30 A.M. on July 25, 2005 via hand delivery at the offices of Wiggin & Nourie, P.A. Counsel was already present at the Court in anticipation of the 10:00 A.M. proceedings. Upon commencement of proceedings, at 10 A.M. on July 25, 2005, Nationwide had no knowledge whatsoever that ACE had filed an Objection to its Motions.

28. The record will reflect that upon commencement of proceedings this Court announced that it would consider the motions filed by Nationwide. There was neither acknowledgement nor discussion with respect to pending objections. The undersigned, having no knowledge of pending objection, exchanged pleasantries with the Court and introduced Mr. Cohen, and awaited inquiry by the Court. None was forthcoming. Therein, this Court denied the Nationwide Motion to Intervene for lack of timeliness.

29. Generally, where a party objects the court will hold a hearing and will require that the petitioner show that actual prejudice to his legal or equitable rights will occur if he is not allowed to intervene. See Richard V. Wiebusch, 4 New Hampshire Practice, Civil Practice and Procedure § 6.29 (1997) (emphasis added). In the instant matter, Nationwide was not afforded notice of an

Objection; Nationwide was not allowed an opportunity to address the Court as to the points raised in the Objection by ACE.

30. Undersigned Counsel, upon return to his office, read the ACE Objection for the first time. ACE objected because it claimed Attorney Cohen might be called as a witness, because of potential delay, and for reasons of timeliness. While a trial Court is afforded broad discretion regarding intervention, whether a denial of a motion to intervene is sustainable under the present circumstance is questionable. Nationwide, as the moving party has a clear interest in the proceedings, had neither notice of an Objection nor the basis therein. Furthermore, Nationwide was neither permitted an opportunity to address the merits of the Objection nor demonstrate likely resulting prejudice to its legal or equitable rights should intervention be denied.

31. Because of the lack of guiding precedent in New Hampshire with respect to liquidation cases, Bankruptcy law may offer the Court guidance. Federal Bankruptcy Law has a long tradition of allowing creditors the right to be heard. Construing former Section 206 of Title 11, Judge Learned Hand declared, “All creditors have an absolute right to be heard on all matters ....” Dudley v. Mealey, 147 F.2d 268, 270 (2d Cir. 1945). More recently, a majority of Federal circuits have found Section 1109(b) to confer an unconditional right upon creditors to be heard and to intervene both in bankruptcy cases themselves and adversary proceedings. See, e.g., In re Caldor Corp., 303 F.3d 161, 162-63 (2d Cir. 2002); In re Marin Motor Oil, Inc., 689 F.2d 445, (3d Cir. 1982).

32. Section 1109(b) states, “A party in interest, including ... a creditor ..., may raise and may appear and be heard on any issue in a case under this chapter.” Both cases noted the prior rule, in place for approximately 40 years, and the legislative history of section 1109(b) which, “shows no dissatisfaction with it.” In re Caldor, 303 F.3d at 175. The Second Circuit affirmed the soundness of In re Marin by concluding in pertinent part:

After living with the *Marin* decision for over a decade, the Third Circuit continued to find that policy concerns favored an unconditional right to intervene...In short, interests of efficiency and fair play underlie § 1109(b), and the driving force behind the *Marin* decision



was the belief that allowing intervention into adversary proceedings would best serve those interests.

Id. at 175-76 (quoting Phar-Mor, Inc. v. Coopers & Lybrand, 22 F.3d 1228, 1240 (3d Cir. 1994)).

This Court should follow the precedent of the Federal Bankruptcy Courts and allow Nationwide to be heard.

33. Nationwide has a legally protected property interest in these proceedings, and is entitled to appropriate procedural safeguards respecting due process. Appeal of Catholic Medical Ctr., 128 N.H. 410, 416 (1986). The Court's denial of Nationwide's participation in the proceeding; denial of its motions; and denial of its opportunity to address the Objection of ACE violated its constitutional right to procedural due process. See U.S. Const. amend. XIV, § 1; N.H. Const. pt. I, art. 15. Under the circumstances of this case, Nationwide respectfully requests this Court reconsider its denial of the Motion to Intervene and its denial of the Motion to Permit Attorney Michael Cohen to Appear Pro Hac Vice.

34. A Motion to Appear Pro Hac Vice may be filed at any time during a proceeding and are virtually always granted. An attorney who is licensed in another state or country may move the trial court for permission to participate in a particular trial, and that motion will usually be granted if a member of the New Hampshire Bar joins the attorney in the motion and appears with the attorney throughout the course of the trial. See N.H. Super. Ct. R. 19; N.H. Dist. and Mun. Ct. R. 1.3(C); N.H. Prob. Ct. R. 19; See Richard V. Wiebusch, 4 New Hampshire Practice, Civil Practice and Procedure § 15.06 (1997).

35. Petitioner seeks to intervene in this matter, in the event that counsel for the Petitioner needs to elicit testimony or address the court in order to clarify the record and protect the interests of Nationwide Mutual Insurance Company. Petitioner intervenes for the purposes of obtaining unfettered access to the complete record and the testimony presented to this Court in the ongoing

Home Insurance liquidation proceedings, including the evidentiary proceedings commencing on July 25, 2005 and continuing.

WHEREFORE, Nationwide requests this Honorable Court to:

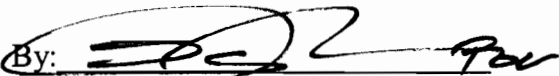
- A. Allow it to appear as an intervener in the above captioned case and grant its Motion to permit Attorney Michael Cohen to Appear Pro Hac Vice;
- B. Permit Attorney Cohen to question the witnesses; to otherwise participate in the discovery process, and to allow unfettered access to full and complete discovery;
- C. Or, in the alternative allow Nationwide access to full and complete discovery as an intervener; and
- D. Grant such other and further relief as may be just and equitable.

Respectfully submitted,

Nationwide General Insurance Co.  
By Its Attorneys,

WIGGIN & NOURIE, P.A.

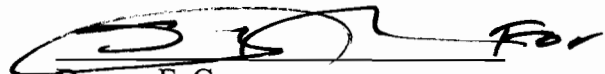
Dated: July 28, 2005

By: 

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#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was this day forwarded to all counsel of record.

  
Doreen F. Connor

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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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03-E-0106

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