THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

LIQUIDATOR'S MOTION FOR APPROVAL OF AGREEMENT AND COMPROMISE WITH AFIA CEDENTS

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire ("Commissioner"), as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), by his attorneys, the Office of the Attorney General, hereby moves that the Court enter an order in the form submitted herewith approving the Liquidator's endorsement of a compromise, reflected in an agreement (the "Agreement") between the Joint Provisional Liquidators appointed in the English provisional liquidation proceeding for Home's United Kingdom Branch ("Home UK Branch") and members of the Informal Creditors' Committee established in that proceeding. The Agreement circumscribes the implementation of an English "scheme of arrangement" ancillary to these proceedings. The Agreement will facilitate the collection of a multimillion dollar asset of the Home estate and has been entered into in an effort to avoid costly, uncertain and protracted multi-jurisdictional litigation. In support hereof, the Liquidator respectfully represents as follows:

I. INTRODUCTION

1. The Agreement is a critical first step toward resolving a complex set of relationships between or among Home, a number of insurers that ceded insurance risk to Home, through the Home UK Branch, and Home's reinsurer and/or indemnitor with

respect to certain of the Home UK Branch business. It is expected that the Agreement will result in the repatriation of significant assets related to the Home UK Branch for the benefit of Home's priority claimants. Affidavit of Peter A. Bengelsdorf, Special Deputy Liquidator, in Support of Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents ("Bengelsdorf Aff.") ¶ 2.

II. BACKGROUND

2. As briefly discussed at the November 24, 2003, status conference, Home had an unincorporated branch operation in the United Kingdom. The Home UK Branch wrote insurance and reinsurance business in the United Kingdom as a participating member of the American Foreign Insurance Association, an unincorporated association of American insurers ("AFIA"), through certain reinsurance treaties (the "AFIA Treaties"), and then reinsured that business with AFIA as well as a number of other third party reinsurers. Under the AFIA Treaties, a number of insurers ceded insurance risk to Home through the Home UK Branch (the "AFIA Cedents"). Bengelsdorf Aff. ¶ 3.

3. In 1984, CIGNA and certain of its subsidiaries purchased AFIA. As part of that transaction, one of the CIGNA subsidiaries, Insurance Company of North America ("INA"), agreed in an Insurance and Reinsurance Assumption Agreement dated January 31, 1984 (the "INA Agreement"), among other things, to assume the insurance and reinsurance liabilities with respect to the Home UK Branch business, administer such business, and bear the costs and expenses related thereto. Bengelsdorf Aff. ¶ 4.

4. As contemplated by the INA Agreement, the Home UK Branch's AFIA related general direct and marine and aviation business was formally transferred to a CIGNA subsidiary under English law in 1986. This effected a novation such that the

transferred business became a direct obligation of the relevant CIGNA subsidiary, and Home no longer had any involvement with that business. However, the AFIA Treaties were not formally transferred under English law and accordingly remained an obligation of Home, through the Home UK Branch, subject to the indemnities afforded by INA under the INA Agreement as well as additional reinsurance protection. Since 1984, claims submitted by the AFIA Cedents under the AFIA Treaties have been handled and paid on Home's behalf by INA or, when INA became part of the ACE Group organization, by ACE Group at their own expense pursuant to the INA Agreement. Bengelsdorf Aff. ¶ 5.

5. The Commissioner filed a petition to liquidate Home on grounds of insolvency with this Court on May 8, 2003. That same day, the High Court of Justice in London (the "English Court") appointed Joint Provisional Liquidators in respect to the Home under English law. This Court declared Home insolvent and appointed the Commissioner as its Liquidator under New Hampshire law in an Order of Liquidation entered June 13, 2003. Bengelsdorf Aff. ¶ 6.

6. The insolvency and liquidation of Home has several significant effects on Home's business, including the AFIA Treaties, under New Hampshire law:

- Claims against Home must be filed with the Liquidator. See RSA 402-C:37; RSA 402-C:57. Accordingly, the AFIA Cedents' claims under the AFIA Treaties must be filed with the Liquidator and not simply submitted to ACE Group for direct payment to the AFIA Cedents.
- Home's assets must be paid or turned over to the Liquidator, who is vested with title to and charged with collecting the insolvent insurer's assets. See

RSA 402-C:21, I; RSA 402-C:25, VI. ACE Group must thus make payments under the INA Agreement to the Liquidator, and not to the AFIA Cedents. The INA Agreement contains an insolvency clause specifically requiring that "[i]n the event of the insolvency of [Home], this reinsurance shall be payable directly to [Home], or to its liquidator, . . . on the basis of the liability of [Home] without diminution because of the insolvency of [Home] or because the liquidator . . . has failed to pay all or a portion of any claim." INA Agreement § 6. Cf. RSA 402-C:36 and RSA 405:49.

- The availability and amounts of any payments on allowed claims against Home will depend on the available assets of the Home estate and the statutory priorities, which require that all claims in each successive priority class be paid in full (or adequate funds retained for payment) before any distribution to the next class. RSA 404-C:44. It is the position of the Liquidator that claims of the AFIA Cedents fall in the residual priority class, Class V. See RSA 402-C:44, V. While the ultimate assets of the Home estate and the total allowed claims in each class are not yet known, it appears unlikely that there will be sufficient assets for Home to make a significant distribution to this class. Thus, the AFIA Cedents are unlikely to receive any significant payment on their claims through distributions from the liquidation.

Bengelsdorf Aff. ¶ 7.

7. These changes to the pre-liquidation arrangements have created disputes and uncertainty over the filing, handling and payment of AFIA Cedents' claims and payment of amounts under the INA Agreement, including the following:

- AFIA Cedents have so far declined to file substantial claims in Home's liquidation on the basis that, since as Class V claimants they may well receive only a small (if any) distribution from the Home estate, there is little purpose in their doing so. Their ability to receive payments directly from ACE should be precluded by virtue of the factors described in paragraph 6 above. However, certain of the AFIA Cedents have been exploring alternative means of realizing recovery with respect to the business protected by the AFIA Treaties, including possible circumvention of Home by entering into side arrangements with ACE Group. The Liquidator and the Joint Provisional Liquidators have advised ACE Group and certain of the AFIA Cedents that any such side arrangements will not be countenanced, will be subject to legal challenge, and could lead to potential duplicative liability on the part of ACE Group. If the AFIA Cedents and ACE Group elect that course, however, it could have a material adverse impact on policyholder level claimants because Home's legal challenge might not be fully effective in preserving access to recoveries to which Home would otherwise be entitled under the INA Agreement and in preventing a possible windfall for ACE Group. This is because ACE Group could at least partially avoid obligations it would have incurred if Home were not in liquidation.
- Certain AFIA Cedents have also questioned the application of the New Hampshire claims and distribution procedures to claims and assets located in the United Kingdom, thereby raising the potential for complex international conflict of laws questions. In particular, certain AFIA Cedents have

> previously suggested that UK assets arguably should be "walled off" from United States creditors and distributed only to Home UK Branch creditors. The Liquidator and Joint Provisional Liquidators do not believe that there is any legal merit to that suggestion and have provided presentations and further documentation to AFIA Cedents to support their view. While AFIA Cedents have not further argued in favor of "walling off" of UK assets—principally due to the fact that they have been in discussions concerning the Agreement—the potential re-emergence of this issue does raise the prospect of costly and time-consuming litigation over whether there should be separate US and UK liquidations or a global New Hampshire proceeding. Furthermore, if the "walling off" approach were to be upheld, significant assets would be kept from the Liquidator for exclusive distribution to the AFIA Cedents.

Bengelsdorf Aff. ¶ 8.

8. Resolution of these and other issues could require complex, protracted and costly litigation in both the United States and England. In these circumstances, the Joint Provisional Liquidators, supported by the Liquidator, sought to negotiate a compromise settlement to avoid competing claims to proceeds under the INA Agreement and facilitate a global liquidation. Such a single proceeding would include the submission of claims and remission of assets to the Liquidator in New Hampshire. Because there are many AFIA Cedents, negotiations with each of them was not practical. The Joint Provisional Liquidators instead conducted discussions with the Informal Creditors' Committee ("Committee") established in connection with the English proceedings in respect of the Home. The Committee includes most of the principal AFIA Cedents. Under English

law, an arrangement approved by a sufficient number of creditors within a creditor class may be adopted as a "scheme of arrangement" for the entire creditor class. Bengelsdorf Aff. ¶ 9.

III. THE AGREEMENT

9. After extensive negotiations, the Joint Provisional Liquidators have reached the Agreement, endorsed by the Liquidator, with all but one of the members of the Committee. That member has not formally agreed but merely abstained at this time. The Agreement is reflected in identical letter agreements signed by a Joint Provisional Liquidator and individual Committee members. An example of the letters, with the signature pages from the other letters, is attached as Exhibit A. The Agreement, in essence, serves as a term sheet for the UK scheme of arrangement. Bengelsdorf Aff. ¶ 10.

A. Approval of the Agreement

10. Approval procedures. The Agreement provides for a compromise that is to be implemented through a scheme of arrangement between Home and all AFIA Cedents under section 425 of the English Companies Act 1985 (the "Scheme"). Under English law, the Scheme is subject to the approval of a majority in number representing 75% in value of the AFIA Cedents, as well as the English Court. The members of the Committee who have signed the Agreement are believed to represent sufficient creditors to approve the Scheme. (The signatory AFIA Cedents are submitting additional information to the Joint Provisional Liquidators to allow a more definitive determination on this point. See Agreement § 2.) The compromise reflected in the Agreement is subject to the approval of this Court. Agreement § 1.1.2. Bengelsdorf Aff. ¶ 11.

11. Once the compromise reflected in the Agreement is approved by this Court, the Joint Provisional Liquidators will apply to the English Court for permission to call a meeting of AFIA Cedents to approve a completed and fully negotiated Scheme. Once the AFIA Cedents' approval is obtained, the Joint Provisional Liquidators will seek the sanction of the English Court for the Scheme. Agreement § 1.1.3. To confirm that the Liquidator will receive Home's UK assets as envisaged in the Agreement, in addition to this Court's approval of the Agreement, the operation of the Scheme will depend upon (a) entry of an order by the English Court approving the remission of Home's assets in England and Wales (other than those subject to distribution under the Scheme) to the Liquidator to be administered as part of this New Hampshire proceeding (the "Global Liquidation Order"), and (b) the approval or non-objection of the UK regulator, the Financial Services Authority, to the Scheme and the Global Liquidation Order (the "FSA Approval"). By its terms, the Scheme will not become effective until after entry of the Global Liquidation Order and granting of the FSA Approval. Agreement §§ 1.1.2, 1.1.3. Bengelsdorf Aff. ¶ 12.

B. The Scheme of Arrangement

12. Principal elements of the Scheme. Section 1.9 of the Agreement sets forth the main features of the Scheme, including: (a) the allocation of a portion of the net proceeds received from ACE Group or any reinsurer other than an ACE Group company that reinsured Home for AFIA business ("Third Party Reinsurer") in respect of the AFIA Cedents' claims for distribution to the AFIA Cedents, with the remainder to vest with the Liquidator; (b) establishment of a Creditors' Committee in the English proceedings; and

(c) agreement with respect to costs claims in disputed claims proceedings. These provisions are further described below. Bengelsdorf Aff. ¶ 13.

13. In recognition of the AFIA Cedents' ability to prevent collection under the indemnity and reinsurance arrangements protecting the AFIA Treaties by not filing or perfecting claims and in compromise of the AFIA Cedents' asserted right of direct access to proceeds otherwise payable to Home under the INA Agreement, the Scheme will provide for the distribution of a portion of the proceeds to AFIA Cedents. Under the Scheme, the proceeds actually received (i.e., after application of offsets) by Home from ACE Group or any Third Party Reinsurer with respect to the AFIA Treaties will be reduced by deduction of: (i) the costs of the UK provisional liquidation; (ii) the costs of collecting the proceeds; (iii) the costs of obtaining approvals from this Court and the English Court; (iv) amounts received by Home on account of Home AFIA liabilities which will be settled with the AFIA Cedent by way of offset (i.e., amounts for which the AFIA Cedent will receive a credit against its obligations to Home); and (v) amounts received by Home on account of any costs orders entered against it in disputed claims proceedings (which otherwise will not be paid by Home). Agreement § 1.3. (The costs will be deducted from proceeds on an incurred basis. Agreement § 1.9.6.) Bengelsdorf Aff. ¶ 14.

14. Under the Scheme, 50% of these net "Proceeds," plus the amounts received by Home from ACE on account of costs orders entered against it, if any, will be distributed to AFIA Cedents as "Net Recoveries," and the remaining 50% will be retained by Home. Agreement § 1.2. The amount of the proceeds involved is very uncertain. However, using the latest available reserves for the AFIA Treaties from the

ACE Group and assuming that past claim and payment practices continue into the future, the Net Recoveries payable to the AFIA Cedents and the net amounts paid to Home are each estimated to be in excess of $50 million. Bengelsdorf Aff. ¶ 15.

15. The Scheme will provide for Net Recoveries to be distributed *pari passu* (as far as reasonably practicable) to all AFIA Cedents according to the value of their claims against Home under the AFIA Treaties as determined in the New Hampshire liquidation. Agreement § 1.9.1. The portion of Net Recoveries representing recoveries on any adverse costs awards will be distributed in full to the AFIA Cedent that obtained the award. Id.; see § 1.9.7. Pending distribution, the Net Recoveries and all interest thereon will be held on a segregated basis by the Joint Provisional Liquidators, who will serve as Scheme Administrators, for application under the Scheme. Agreement § 1.9.2. Bengelsdorf Aff. ¶ 16.

16. As is typically the case in connection with schemes of arrangement in UK proceedings, a Creditors' Committee will be established under the Scheme. The Creditors' Committee will have the right to be consulted by the Scheme Administrators on any transaction or litigation between Home and any ACE Group company which is likely to have a material impact upon Net Recoveries. Agreement § 1.9.3. The Creditors' Committee will also have the right to relevant documentation and to be consulted before Home enters any commutation with any ACE Group company or any Third Party Reinsurer relating to that company's obligations to Home under the AFIA Treaties. In addition, Home will provide notice to the Creditors' Committee before applying to this Court for approval of any such potential commutation, in accordance with the provisions of the Order Establishing Procedures for Review of Reinsurance

Commutation Agreements entered July 23, 2003, as it may be amended by the Court. Agreement § 1.9.4. Bengelsdorf Aff. ¶ 17.

17. The Scheme will also provide that, in the event a claim is denied and a disputed claim proceeding ensues, the Scheme does not preclude an AFIA Cedent from seeking a cost order against Home pursuant to RSA 402-C:6. However, under the Scheme, an AFIA Cedent that obtains such an award will not be permitted to enforce payment by Home of the award but will only be entitled to reimbursement to the extent of any cash recovery with respect to the award from ACE Group or a Third Party Reinsurer. As described above, any such recovery will be credited to Net Recoveries and payable in full to the AFIA Cedent concerned, and it will be distributed before distribution of Net Recoveries to other AFIA Cedents. Agreement § 1.9.7. Bengelsdorf Aff. ¶ 18.

C. Other Terms of the Agreement

18. Other provisions of the Agreement. The Agreement provides that this Court's approval and the Scheme itself will be conditioned upon entry of the Global Liquidation Order by the English Court and approval by the Financial Services Authority. Agreement §§ 1.1.2, 1.1.3. Further, in the event that AFIA Cedents may be entitled to a distribution as a creditor of Home in the New Hampshire proceeding, the distributions to AFIA Cedents under the Scheme will be taken into account in determining appropriate New Hampshire distributions. Agreement § 1.5.2. Bengelsdorf Aff. ¶ 19.

19. To alleviate concerns expressed by the AFIA Cedents that claim procedures established by the Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company entered December 19, 2003, may provide for broader discovery than is otherwise available under the AFIA Treaties, the Liquidator has

agreed to recommend to this Court in a future pleading that where the reinsurance contract contemplates arbitration or other dispute resolution procedures with more limited discovery than permitted by the claim procedures, discovery will be limited to that available under the contractually contemplated procedures. Agreement § 1.1.4. Bengelsdorf Aff. ¶ 20.

20. In light of the complex approval process and the compromise of disputes reflected in the Agreement, the Agreement provides for a Standstill Period running until the earlier of the date on which a required approval is not obtained or June 1, 2004. See Agreement §§ 1.6, 1.7. Bengelsdorf Aff. ¶ 21.

IV. CONCLUSION

21. The Liquidator submits that the compromise reflected in the Agreement is fair and reasonable and in the best interests of the liquidation and the policyholders and other creditors of The Home. It is a settlement of disputed positions concerning the AFIA Cedents' claimed right to direct access to proceeds otherwise payable to Home under the INA Agreement and under other reinsurances protecting the AFIA Treaties and the suggestion that those proceeds otherwise should only be collected and distributed in the UK proceedings. It also addresses the AFIA Cedents' undoubted ability to refuse to file and prosecute claims from which they likely would receive nothing in the liquidation. Unless the AFIA Cedents file claims which are then properly adjusted, the Liquidator will be unable to collect from ACE Group or Third Party Reinsurers, whether under the INA Agreement or under other reinsurance protecting the AFIA Treaties. Those indemnitors/reinsurers would receive a windfall, because absent Home's liquidation they would be making payments under their respective reinsurance/indemnity agreements, and

the policyholders and other creditors who are in priority classes that would receive a distribution from those proceeds under RSA 402-C:44 would not benefit from those reinsurance/indemnity agreements. In these circumstances, it is appropriate to agree that the AFIA Cedents may receive a portion of the net proceeds received on their claims because it facilitates the collection of assets for the general benefit of Home's creditors. That portion is in essence a cost of obtaining and collecting an asset of the Home estate for the benefit of the policyholders and other creditors of Home whose distribution will otherwise be lower. See Bengelsdorf Aff. ¶ 22.

22. The Liquidator has provided the Agreement to members of the National Conference of Insurance Guaranty Funds' Reinsurance Commutation Subcommittee on The Home Insurance Company in Liquidation ("NCIGF Subcommittee") who have entered confidentiality agreements. The NCIGF Subcommittee has advised that it has no objection to the proposed compromise with AFIA Cedents. Bengelsdorf Aff. ¶ 23.

WHEREFORE, the Liquidator prays that the Court enter an order in the form submitted herewith and grant such other and further relief as may be just.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, SOLELY IN HIS CAPACITY AS LIQUIDATOR OF THE HOME INSURANCE COMPANY,

By his attorneys

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/s/

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February 11, 2004

1.1 General Rules

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"PDF" means Portable Document Format. This includes both "Electronically Converted PDF Documents," which are created from a word processing system (MS Word, WordPerfect, etc.) using PDF creation software and are text searchable, and "Scanned PDF Documents," which are created from paper documents run through a scanner.

(§ (f) amended / /05)

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2.3 Format and Quality Control

(a) **PDF Format Required.** Documents electronically filed must be submitted in PDF format. Unless otherwise provided herein, main documents must be filed in an ~~Only documents~~ electronically converted ~~to~~ PDF text searchable format ~~from the word processing original~~. Attachments/Non-Trial Exhibits must also be filed in an electronically converted PDF text searchable format, ~~may be filed through ECF~~ unless the Filing User possesses only a paper copy of the document to be submitted, in which case a scanned PDF may be submitted.

(§§ (a) and (b) amended; § (h) added / /05)

Comments

These amendment are proposed to clarify the expectation that the searchable text function in attorney's PDF conversion software program is activated. The text searchable function is important to those judges and practitioners who are working with electronic documents.

It is also designed to specify that the main document should be a converted PDF in all instances (unless otherwise provided in the rule, e.g. return of service documents), and that attachments/exhibits should also be submitted in that format unless they only possess a paper copy, in which case it would be submitted in scanned PDF format.

2.1 Scope of Electronic Filing

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~~(e) **Attorneys Admitted Pro Hac Vice.** Unless an attorney admitted pro hac vice is a Filing User of this court's ECF system, all documents electronically filed in an ECF case must be submitted by local counsel.~~

Comments

This should have been stricken a year ago. This was in a draft of the rules that did not require pro hac vice counsel to register for ECF. As we ultimately decided they must register for ECF, this rule should have been omitted.

2.3 Format and Quality Control

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(b) PDF Documents Exceeding Three ~~Two~~ Megabytes. No document exceeding 3 ~~2~~ megabytes will be accepted in ECF. Any document exceeding 3 ~~2~~ megabytes must be submitted in separate segments of less than 3 ~~2~~ megabytes. Documents that exceed 10 megabytes shall not be electronically filed, but instead shall be submitted on a 3.5 floppy or compact disk. If a document exceeds 10 megabytes and is an attachment/non-trial exhibit, it shall be submitted consistent with AP 2.5(e). ~~If the court's ECF system indicates that a document submitted exceeds 2 megabytes, the Filing User must attempt to resubmit the document using reduced megabyte segments~~.

(§§ (a) and (b) amended; § (h) added / /05)

Comments

Large documents are a problem for both the bench and bar. They are difficult for attorneys to save in separate segments and, from both the court's and user's perspective, documents broken into numerous separate segments are very difficult to work with.

To address this problem, we are investigating the impact to the attorneys of increasing the megabyte limit to 3 megs. Additionally, if the document exceeds 10 megs (i.e. would have to be broken into 4 separate segments of less than 3 megs), the judges proposed they simply file the document on disc or CD rather than trying to submit it in ECF or on paper. In almost all cases documents exceeding 3 megs will be a scanned exhibit/attachment to a main document, so I added the language that such exhibits should be submitted consistent with AP 2.5(e)(i.e. file a Notice of Conventional Filing and get the disk/CD to us within 48 hours). The last sentence I propose striking because, in retrospect, it is both self evident and redundant to the second sentence in the paragraph.