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

INTERLOCUTORY APPEAL STATEMENT

Respondents Century Indemnity Company ("Century"), ACE Property and Casualty Insurance Company ("ACE P & C"), Pacific Employers Insurance Company ("PEIC"), and ACE American Reinsurance Company ("AARe") (collectively, the "ACE Companies") respectfully submit this Interlocutory Appeal Statement pursuant to New Hampshire Supreme Court Rule 8.

I. Statement of the Case

This interlocutory appeal is taken by the ACE Companies from the ruling issued on October 8, 2004 by the Merrimack County Superior Court (McGuire, J.) (the "Order on Remand") that potential payments to be made by Roger Sevigny, Insurance Commissioner for the State of New Hampshire, as Liquidator (the "Liquidator") of the Home Insurance Company ("Home") to certain insurers who had ceded insurance risk to the Home's UK branch office (the "AFIA Cedents") are administrative expenses authorized under RSA 402-C:1, III and IV; RSA 402-C:25, IV, VI and XXII; and RSA 402-C:44, I. (Order on Remand at 14.) The ACE Companies and Benjamin Moore & Company ("Benjamin Moore") had intervened, without objection, in the Home liquidation proceedings to challenge the proposed agreement between the Liquidator and the AFIA Cedents (the "Proposed Agreement"), pursuant to which the AFIA Cedents would be paid an "incentive" to file claims in Home's liquidation.

In its Order issued on April 29, 2004 (the "April 29 Order"), the Superior Court ruled that "[t]he agreement proposed by the Liquidator is authorized under the broad array of powers granted the Liquidator under RSA 402-C:25 and is consistent with the goals and purposes of the

statute to protect the interests of the insured and creditors." (April 29 Order at 2.) The New Hampshire Supreme Court accepted an appeal from the April 29 Order, but also issued an order remanding the case to the Superior Court "for the limited purpose of ruling on any motion to stay that may be filed by [the ACE Companies]." (Order dated May 12, 2004.) On remand, the Superior Court denied the ACE Companies' motion to stay and issued a separate order stating that a "further evidentiary hearing into whether the Liquidator has reasonably exercised his authority in endorsing the agreement would not be helpful." (*See* Addendum to April 29 Order, dated June 1, 2004.)

After briefing and oral argument, the New Hampshire Supreme Court, in an Order dated September 13, 2004 (the "September 13 Order"), vacated the April 29 Order approving the Proposed Agreement with the AFIA Cedents, and again remanded the case to the Superior Court. It specifically directed the Superior Court to consider five issues upon remand:

(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 Superior Court has an independent obligation to assess the fairness of the Proposed Agreement with the AFIA Cedents;

(3) Whether the intervenors have standing to contest the Proposed Agreement;

(4) Whether the "Necessity of Payment Doctrine" or some other equitable doctrine authorizes the Liquidator or the Superior Court to vary the mandatory priorities set forth in RSA 402-C:44; and

(5) Whether the proposed payments to the AFIA Cedents qualify as administrative expenses under RSA 402-C:44, I.

(September 13 Order at 2.) The Supreme Court also stated that the Superior Court "shall support its determinations on these issues with factual findings, as appropriate." (*Id.*)

Following conferences with counsel and the submission of papers regarding a draft order, the Superior Court issued the Order on Remand and ruled, *inter alia*, that (1) the ACE Companies have standing to contest the Proposed Agreement; (2) consideration of a stay of the New Hampshire proceedings is not appropriate; (3) equitable doctrines such as the Necessity of Payment doctrine do not authorize the Liquidator to deviate from the statutory distribution scheme set forth in RSA 402-C:44; and (4) an evidentiary hearing on whether the Proposed Agreement with the AFIA Cedents is necessary, fair and reasonable will be deferred until after a further ruling by the Supreme Court on the administrative expense issue. (*See* Order on Remand at 4-6, 10-13.)

In response to the Supreme Court's specific inquiry whether the proposed payments to the AFIA Cedents qualify as administrative expenses under RSA 402-C:44, I, the Superior Court ruled that such payments would be administrative expenses authorized under RSA 402-C:1, III and IV; 402-C:25, IV, VI, and XXII; and RSA 402-C:44, I. (*See* Order on Remand at 6-10.) The Superior Court granted the ACE Companies and Benjamin Moore leave to appeal the legal issue of whether the proposed payments to the AFIA Cedents qualify as administrative expenses. (*Id.* at 14.)

II. Statement of Facts

Century, ACE P&C, PEIC, and AARe are members of the ACE Companies. (Durkin Aff., Jt. App. at 77, ¶ 4.)[1] All of the ACE Companies are incorporated in Pennsylvania with their principal place of business in Philadelphia. (*Id.*)

[1] Reference to the Joint Appendix ("Jt. App.") is to the Joint Appendix of the ACE Companies and Benjamin Moore submitted to the New Hampshire Supreme Court in connection with the original appeal. The "Motion" referred to below is the Liquidator's motion for approval of the Proposed Agreement, which was filed on February 11, 2004.

Prior to its insolvency, Home was a reinsurer of the ACE Companies pursuant to various separate and independent reinsurance agreements. (*Id.*, at 77, ¶ 5.) As creditors of Home, the ACE Companies stand to suffer financial damage as a result of Home's inability to fulfill its contractual obligations due to its insolvency. (*Id.*) The ACE Companies have filed proofs of claim against Home in the amount of $153,423,300.74. (Proofs of Claims, Jt. App. at 300-349.)[2] The ACE Companies understand that their claims in Home's liquidation will be treated as Class V claims pursuant to RSA 402-C:44.

A. Background of AFIA

The Proposed Agreement at issue in this appeal concerns obligations assumed by Home as part of its participation in an insurance "pool" previously known as the American Foreign Insurance Association and later as AFIA. (Durkin Aff., Jt. App. at 77-78, ¶ 6; Motion, Jt. App. at 40, ¶ 2.) AFIA was an unincorporated entity formed in 1918 through which its members — U.S. insurance companies — carried on business outside of the U.S. (Durkin Aff., Jt. App. at 77-78, ¶ 6.) The structure of the pool was that various AFIA member companies obtained licenses or authorizations to operate branches in foreign countries and carry on the business of insurance through such branches in their own names. (*Id.*) Regardless of which company issued a policy or contract of reinsurance, through a series of reinsurance agreements every risk ultimately was shared by each member of AFIA in a fixed percentage equal to its number of "units of participation" in AFIA. (*Id.*) The AFIA members also arranged for common reinsurance that protected all members in excess of certain claim levels. (*Id.*)

In connection with its participation in AFIA, Home opened a branch office in London, England through which it issued policies of insurance and reinsurance. (*Id.*, at 78, ¶ 7; Motion,

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[2] Each of the ACE Companies has filed proofs of claim against Home, in the following amounts: Century, $139,291,554.56; ACE P&C, $13,992,050.79; AARe, $121,799; and PEIC, $17,896.39. (Proofs of Claim, Jt. App. at 300-349.)

Jt. App. at 40, ¶ 2.) Home's London office was not a separate English company or subsidiary; the results of the London office's activities were included in Home's accounts. (Durkin Aff., Jt. App. at 78, ¶ 7.) Notably, Home issued reinsurance agreements to AFIA Cedents that were not located solely in the U.K. (*Id.*, at 80, ¶ 14.) To the contrary, numerous AFIA Cedents were domiciled in the U.S., Canada, Bermuda, and indeed throughout the world. (*Id.*)

B. Century's Assumption of Home's AFIA Liabilities

The merger between Insurance Company of North America ("INA") and Connecticut General Insurance Company that created the CIGNA Corporation in 1982 set in motion a series of transactions that resulted in the sale of the rights and interests in the AFIA business to CIGNA in 1984. (Durkin Affidavit, Jt. App. at 78, ¶ 8.) As part of the transfer of the AFIA business to CIGNA, Home (and other AFIA companies) entered into an Insurance and Reinsurance Assumption Agreement (the "Assumption Agreement") with INA (a CIGNA company) dated January 31, 1984, pursuant to which INA reinsured 100% of Home's liabilities under the insurance and reinsurance contracts Home had issued. (*Id.*, at 78-79, ¶ 9.) Century became the successor to INA with respect to the Assumption Agreement by virtue of a corporate restructuring under Pennsylvania law. (*Id.*, at 79, ¶ 10.) Century thereafter was acquired by the ACE Group when ACE purchased the CIGNA Property and Casualty Companies in 1999. (*Id.*) Thus, Century is now Home's counterparty with respect to the Assumption Agreement. (*Id.*)

The Assumption Agreement contains the following terms that are relevant to the matters raised in this case:

- Century assumed all obligations of Home (*id.*, at 82, ¶ 2);
- Century assumed the obligation to administer the business, including the investigation and settlement of claims, and was given full power of attorney to act on Home's behalf for that purpose (*id.*, at 82-83, ¶ 3);
- In the event of Home's insolvency, Century's reinsurance obligations are payable to Home or its liquidator; in turn, Century has the right to receive

notice of any claim, and investigate and interpose defenses to such claims in the liquidation proceedings (*id.*, at 84-86, ¶ 6); and

- The Assumption Agreement is governed by New York law (*id.*, at 90, ¶ 10), with disputes to be resolved in arbitration to take place in New York (*id.*, at 86-87, ¶ 7).[3]

Since 1984, Century (and its predecessor and affiliates) have complied fully with the financial and administrative obligations under the Assumption Agreement to handle and adjust claims by Home's AFIA Cedents. (*Id.*, at 90, ¶ 11.) In so doing, Century has handled claims without any day-to-day involvement of Home, even after Home became financially troubled in the mid-1990s and was placed into rehabilitation proceedings. (*Id.*, at 90-91, ¶ 12; Motion, Jt. App. at 40-41, ¶ 4.)[4]

C. Events Leading Up to the Motion and Proposed Agreement

Without the knowledge of Century or any of the other ACE Companies, the Commissioner, as Home's Rehabilitator, began negotiations with certain AFIA Cedents at some point during the spring of 2003 that ultimately led to the Proposed Agreement. (April 23, 2004 Transcript, Jt. App. at 219:16-19, 222:13-15.) On May 8, 2003, the Commissioner filed a petition with the Superior Court to liquidate Home on grounds of insolvency. (Motion, Jt. App. at 41, ¶ 5.) That same day, Home was placed into provisional liquidation by the High Court of Justice in London, England, and Joint Provisional Liquidators were appointed for it. (*Id.*) On

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[3] In the Motion, the Liquidator referred to the "repatriation" of "U.K. Assets" of Home. (Motion, Jt. App. at 39-40, 42-44, 46 ¶¶ 1, 7, 11). Although the Liquidator did not define those U.K. assets, it is the ACE Companies' position that the only assets alluded to in the Motion are reinsurance recoveries against Century pursuant to the Assumption Agreement. (*Id.* at 47, ¶ 13). Given that those recoveries would be from a Pennsylvania company pursuant to a contract governed by New York law with New York arbitration provisions, it is also the ACE Companies' position that Century's obligations under the Assumption Agreement cannot be characterized as "U.K. Assets" of Home.

[4] Since the Superior Court placed Home into Liquidation, Century has continued to investigate and administer the claims of Home's AFIA Cedents pursuant to the Assumption Agreement, in close cooperation with Home's Liquidator, but Century has not made any binding determinations. (Durkin Aff., Jt. App. at 79, ¶ 12). The Liquidator has taken the position that Century's obligation to investigate and adjust the claims by cedents of Home's U.K. branch continues despite the insolvency of Home. (*Id.*). The parties have agreed to a protocol for Century's handling of such claims, the Liquidator's motion for approval of the claims protocol is *sub judice*.

June 13, 2003, the Superior Court declared Home insolvent and appointed the Commissioner as Home's Liquidator. (*Id.*)

Thereafter, the Joint Provisional Liquidators, supported by the Liquidator (but again without the knowledge of any of the ACE Companies), continued to negotiate with the AFIA Cedents to develop an English law "scheme of arrangement" for Home. (April 23, 2004 Transcript, Jt. App. at 219:16-19, 222:13-15, 226:5-8.) The purpose of the scheme was to enable the Liquidator to collect reinsurance, principally from "the ACE Group," by paying a portion of the proceeds recovered directly to the AFIA Cedents. (*See* Proposed Agreement, Jt. App. at 53-55, 57, ¶¶ 1, 1.3, 1.3.4, 1.3.5, 1.4, 1.5.1, 1.9.3, 1.9.4, 1.9.5, 1.9.7.) Ultimately, the negotiating parties reached the Proposed Agreement, which contained the following relevant terms:

- The Liquidator would seek the Superior Court's approval for the implementation of a scheme of arrangement between Home and the AFIA Cedents (Proposed Agreement, Jt. App. at 53, ¶ 1.1.2.);
- Once the Superior Court's approval was obtained, the Joint Provisional Liquidators would seek the High Court's approval for the scheme of arrangement, as well as the approval of the requisite majority of creditors (*id.*, at 54, ¶ 1.1.3.);
- The AFIA Cedents would file claims against Home, thus enabling Home to seek reimbursement for those claims from "the ACE Group or any 'Third Party Reinsurer'" as defined therein (*id.*, at 54, ¶ 1.3.); and
- 50% of the "proceeds received by Home from the ACE Group or any Third Party Reinsurer" as a result of the AFIA Cedents' claims, less certain deductions specified in the Proposed Agreement, would be distributed *pari passu* to the AFIA Cedents according to the value of their claims (*id.*, at 54, 56-57, ¶¶ 1.3, 1.9.1.).

Notwithstanding Century's contractual entitlement to adjust and administer claims by the AFIA Cedents, the Liquidator did not inform, involve or consult with Century or any other ACE Company about the Proposed Agreement. (Durkin Aff., Jt. App. at 79, ¶ 13.) Indeed, the ACE Companies knew nothing of the Proposed Agreement until it had already been executed. (*Id.*)

III. Question of Law

The following controlling question of law is transferred in accordance with Supreme Court Rule 8 and RSA 491:17:

> Whether, as a matter of law, the payments to the AFIA Cedents under the Proposed Agreement qualify as administrative expenses under RSA 402-C:44, I.

IV. Statement of Reasons for Interlocutory Transfer

Rule 8 of the Supreme Court Rules requires "a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an interlocutory appeal may materially advance the termination or clarify further proceedings of the litigation, protect a party from substantial and irreparable injury, or present the opportunity to decide, modify or clarify an issue of general importance in the administration of justice." N.H. Sup. Ct. R. 8(1)(d) (emphasis added). The requirements of Rule 8 are met here.

A. A Substantial Basis Exists for a Difference of Opinion on Whether the Proposed Payments to the AFIA Cedents Qualify as Administrative Expenses

Before the Superior Court and in the appeal to the Supreme Court, the Liquidator sought to characterize the proposed payments to the AFIA Cedents as administrative expenses within the scope of RSA 402-C:44, I, which defines the "costs and expenses of administration" to include "the actual and necessary costs of preserving or recovering the assets of the insured." The ACE Companies have vigorously disputed the Liquidator's attempt to recast the proposed payments as administrative expenses. (*See* Order on Remand at 7, 9-10.) It is the ACE Companies' position that such a reclassification of the payments is not supported by the language of the statute, the applicable case law or public policy, and that it is directly contrary to the Liquidator's own characterization of the payments as "distributions" and "settlements." The ACE Companies further believe that the Liquidator has not established that the payments would be necessary or that the proposed amounts are reasonable.

It is also the ACE Companies' position that in relying on RSA 402-C:25, IV and VI, and RSA 402-C:1, III and IV in the Order on Remand the Superior Court simply restated its original (and now overruled) finding that the Proposed Agreement is "authorized under the broad array of powers granted the Liquidator under 402-C:25, and is consistent with the goals and purposes of the statute to protect the interests of the insureds and creditors."

Accordingly, a substantial basis exists for a difference of opinion on the controlling question of law identified above. The questions posed by the Supreme Court at the July 15, 2004 oral argument on the prior appeal further indicate that a difference of opinion exists.

B. Resolution of the Issue of Whether the Proposed Payments to the AFIA Cedents Qualify as Administrative Expenses Will Materially Advance the Termination of, or Clarify Further Proceedings in, the Subsequent Litigation

The Superior Court noted that a decision by the Supreme Court that the proposed payments to the AFIA Cedents do not qualify as administrative expenses would resolve this key issue. (Order on Remand at 13.) It is likely that even a determination that the proposed payments are administrative expenses would help frame the issues, thus clarifying further proceedings and streamlining the litigation before the Superior Court.

C. Opportunity to Decide Issue of Importance

An interlocutory transfer would provide an opportunity for the New Hampshire Supreme Court to decide an issue that is of obvious interest to that Court, but was not decided on the previous appeal. The administrative expense provision is a core provision in the statute, and the issue of whether the proposed payments to the AFIA Cedents qualify as administrative expenses is of critical importance in this liquidation and future liquidations in New Hampshire. Also, since virtually every state liquidation statute refers to administrative expenses, a decision by the Supreme Court could have far-reaching consequences throughout the United States.

V. Counsel

The name, address and telephone number of the lawyers involved in this appeal and the names of their respective clients are as follows:

Liquidator:	Suzanne M. Gorman, Esquire Civil Bureau NH Department of Justice 33 Capitol Street Concord, NH 03301-6397
	J. David Leslie, Esquire Eric A. Smith, Esquire Rackermann, Sawyer & Brewster One Financial Center Boston, MA 02111
Benjamin Moore & Co.:	Andre Bouffard, Esquire Eric D. Jones, Esquire Downs, Rachlin, Martin PLLC 199 Main Street P.O. Box 190 Burlington, VT 05402
ACE Companies:	Ronald L. Snow, Esquire Orr & Reno, P.A. One Eagle Square P.O. Box 3550 Concord, NH 03302-3550
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One IBM Plaza
330 North Wabash Avenue
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Chicago, IL 60601

VI. Record

Copies of the applicable statutes, pleading, affidavits and transcripts are contained in the Joint Appendix previously submitted to the New Hampshire Supreme Court. In addition, the following exhibits are annexed hereto:

Exhibit 1: Order on Remand.

Exhibit 2: Transcription of the oral argument before the Supreme Court on July 15, 2004.

Transfer Ordered:

Honorable Kathleen A. McGuire

376073_1.DOC 10/27/04

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

TABLE OF CONTENTS OF EXHIBITS
TO INTERLOCUTORY APPEAL STATEMENT
FILED ON OCTOBER 21, 2004

1. Merrimack County Superior Court Order on Remand, dated October 8, 2004

2. Transcription of the oral argument before the New Hampshire Supreme Court on July 8, 2004

THE STATE OF NEW HAMPSHIRE
Merrimack County Superior Court

163 N. Main Street
P. O. Box 2880
Concord, NH 03301 2880
603 225-5501

EXHIBIT 1

NOTICE OF DECISION

RONALD L SNOW ESQ
ORR & RENO PA
PO BOX 3550
CONCORD NH 03301-3550

03-E-0106 In the Matter of Rehabilitation of TheHome Insurance Company

Enclosed please find a copy of the Court's Order dated 10/08/2004 relative to:

Court Order

10/13/2004

William McGraw
Clerk of Court

cc: Roger A. Sevigny, Commissioner of Ins.
Suzanne M. Gorman, Esq.
Peter Bengelsdorf
Peter C.L. Roth, Esq.
J. David Leslie, Esq.
Paula T. Rogers, Esq.
Eric Jones, Esq.
Andre Bouffard, Esq.
Pieter Van Tol, Esq.
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Eric A. Haab, Esq.

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

ORDER ON REMAND

This matter is before the Court on remand from the Supreme Court. The remand order vacated this Court's order of April 29, 2004 and the June 1, 2004 addendum thereto. A status conference was held on October 4, 2004 to discuss the Supreme Court's remand order and to provide an opportunity for the Liquidator and the intervening parties to narrow the issues and agree on an efficient procedural direction going forward.

BACKGROUND:

The Home Insurance Company, a New Hampshire domestic insurer with a substantial, historic business presence in the United Kingdom, through an unincorporated branch office, was ordered into liquidation by the Merrimack County Superior Court on June 9, 2003. While Joint Provisional Liquidators have been appointed by the High Court of England and Wales with respect to the branch office business liabilities generated by the Home's presence in the United Kingdom, the provisional liquidation proceeding in the United Kingdom is ancillary to the proceedings in this Court. This Court understands that the primary purpose of the proceeding in the United Kingdom is to protect and preserve assets as efforts are made by the Liquidator to achieve an efficient and fair distribution of those assets to claimants in the liquidation estate. Regardless of the domicile of the claimant, or where the coverage was written, all claims will be filed in the proceeding overseen by this Court and consistent with procedures approved by it.

In February 2004, the Liquidator endorsed a compromise reached in the United Kingdom between the Joint Provisional Liquidators and an Informal Creditors' Committee of certain reinsureds of the Home, known collectively as the AFIA Cedents. The agreement and compromise provided that the Liquidator would first "seek approval of the supervising New Hampshire Court" for purposes of securing a "New Hampshire Order"; the Joint Provisional Liquidators would then "seek sanction of the English Court in respect of the Scheme" and; finally, the Joint Provisional Liquidators would seek an order from the English court for remission of the assets to the New Hampshire Liquidator for administration and distribution. See Letter of Agreement dated January 22, 2004 at paragraph 1.1.2. In accord with the sequence of events as anticipated by the parties to the agreement and compromise, the Liquidator filed a motion with attachments and supporting documents on February 22, 2004 seeking review and approval of the agreement in Merrimack County Superior Court.

The ACE Companies and Benjamin Moore & Co. sought to intervene, with the former filing an Assented-To Petition to Intervene and the latter, a Motion to Intervene. No objections were filed and this Court granted both parties' requests on April 5, 2004. Both ACE Companies and Benjamin Moore & Co. filed pleadings and memoranda objecting to the agreement and compromise with the AFIA Cedents. In response, the Court scheduled a status conference on April 9, 2004.

At the conference, the parties agreed that the issues to be determined were: whether an evidentiary hearing was necessary to determine whether the Court should grant or deny the Liquidator's motion for approval of the agreement; what the scope of any evidentiary hearing should be; and what discovery the parties needed to complete prior to any further hearing. See April 9, 2004 hearing transcript at pages 3-5. The parties agreed with the Court's assessment

that whether or not the Liquidator had the statutory authority under RSA chapter 402-C to enter such an agreement with the AFIA Cedents was a matter of law which could be decided without conducting further discovery. See April 9, 2004 transcript at pages 7-10 and pages 19-20. The parties also agreed that whether the Liquidator had abused his discretion in endorsing the agreement, i.e., whether the agreement was reasonable, would be determined only if the first question was decided in favor of the Liquidator. (Id.)

After the April 23, 2004 hearing, the Court issued an order finding that "under the circumstances of this liquidation as explained below, the agreement proposed by the Liquidator is authorized under the broad array of powers granted the Liquidator under RSA 402-C:25 and is consistent with the goals and purposes of the statute to protect the interests of the insureds and creditors." See Order of April 29, 2004. ACE Companies and Benjamin Moore & Co. appealed this ruling.

In its Order of September 13, 2004, the Supreme Court enumerated the following questions upon which it requested specific discussion and findings:

(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 the 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 court to vary the mandatory priorities set forth in RSA 402-C:44 (Supp.2003); and

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

DISCUSSION:

The questions from the Supreme Court will be addressed out of sequence, with the threshold questions of standing and comity addressed at the outset because of their potential for limiting parties or delaying the liquidation in deference to another jurisdiction.

(3) Whether the intervenors have standing to contest the agreement

Benjamin Moore & Co. asserts a right to intervene based upon its status as a Class II, policyholder claimant "with numerous open liability claims". See Response and Objection of Benjamin Moore & Co. to Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents, 3/18/04. The ACE Companies assert an interest in approximately 13 million dollars worth of Class V claims to be filed in the liquidation. See Objection and Response of ACE Companies to the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents, 3/19/04. The initial pleading of ACE Companies also makes clear that Century Indemnity Insurance Company has a substantial business interest in the liquidation in its role as run off manager and indemnitor of the AFIA Cedent liabilities. The Court granted the motions to intervene on April 5, 2004 without objection, finding the interests of each of the intervenors were potentially at stake based on the foregoing facts. See Snyder v. NH Savings Bank, 134 NH 32 (1991); *NH Practice Civil Practice and Procedure*, §6.26 136-7 1997.

Though the Liquidator addressed the issue of ACE Companies' standing at the April 9, 2004 hearing, he did not object to it, stating that " as far as a legal standing issue, we have not really suggested that as a legal constitutional issue they (ACE Companies) lack standing, but we

I (sic) think we have fairly raised an equitable argument about what they are really about here. They're here about protecting their own interests and I think that's a fair argument and we'll continue to raise it." See April 9, 2004 transcript at p. 26. The Liquidator made no observation as to the standing of Benjamin Moore & Co. The Liquidator's posture with regard to the standing of ACE Companies, at least as presented in Superior Court, was really an argument as to fairness, that is, whether it is fair to allow the ACE Companies to contest the agreement which, if abrogated, would result in a windfall to those companies and render the liquidation estate unable to fully collect a substantial reinsurance asset.

At the status conference on October 4, 2004, the Liquidator represented that he agreed that the ACE Companies and Benjamin Moore & Co. have standing to intervene for the purpose of contesting the agreement at issue. The Liquidator reserved the right to argue that ACE Companies and Benjamin Moore & Co. do not have appellate standing to contest the agreement. This would be an issue appropriately raised on appeal.

The Court finds that the direct interests of ACE Companies and Benjamin Moore & Co. are interests that would be prejudiced absent an opportunity to respond and demonstrate the potential harm that might be posed by the Liquidator's endorsement of the agreement at issue, about which they have raised various questions. Asmussen v. Comm. Dept. of Safety, 145 NH 578 (2000). Accordingly, ACE Companies and Benjamin Moore & Co. have standing to challenge the agreement.

(1) Whether the New Hampshire liquidation proceedings should be stayed pending completion of the regulatory and judicial proceedings in the United Kingdom

At the status conference on October 4, 2004, the Liquidator, ACE Companies, and Benjamin Moore & Co. agreed that the New Hampshire liquidation proceedings should not be delayed pending the completion of the regulatory and judicial proceedings in the U.K.

Nonetheless, with regard to comity, the Supreme Court has directed this Court's attention to Allstate Ins. Co. v. Hughes, 174 B.R. 884, 890 (S.D.N.Y. 1994) as it may relate to staying the New Hampshire proceedings pending any regulatory and judicial proceedings that may occur in the United Kingdom. Allstate involves the insolvency of five affiliated companies collectively known as the KWELM companies. As UK companies, they were subject to the provisions of the UK Insolvency Act of 1986, and the action in the U.S. Bankruptcy Court would have been filed defensively as an ancillary proceeding to enjoin U.S. actions that might have been, or had been, filed against them. The circumstances of Allstate are the opposite of those in this case, as this Court serves, as explained above at Page 1, as the plenary Court with regard to the insolvency of the Home Insurance Company, a New Hampshire domestic company.

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

At the status conference on October 4, 2004, the Liquidator, ACE Companies and Benjamin Moore & Co. agreed that the Court's determination as to whether the payment to AFIA Cedents qualifies as an administrative expense under RSA 402-C:44, I is a matter of law. The parties again agreed that the issue could be determined without submission of further evidence or briefing.

Substantial pleadings, memoranda, and affidavits were submitted to the Court regarding the Liquidator's Motion for Approval of the Agreement and Compromise with AFIA Cedents. At the hearing on April 23, 2004, a significant portion of counsels' arguments on this matter were focused upon the statutory distribution scheme reflected in RSA 402-C:44 and other provisions within RSA chapter 402-C that provide authority to the Liquidator.

The Liquidator stated that the agreement and compromise would provide financial incentive to AFIA Cedents sufficient to promote filing and prosecution of claims, enabling the

liquidation to appropriately tap the ACE Companies on the resulting liabilities. The Liquidator argued that, absent the dynamic created by the agreement, his collection of a substantial asset was at risk because AFIA Cedents would not be inclined to pursue claims with the liquidation estate, except to the extent that those AFIA Cedents had a setoff opportunity as provided for under RSA 402-C:34. The Liquidator further stated that the ultimate purpose of the compromise and agreement was to financially enhance the Class II claimant distributions without impairing the prospects of the Class V claimants.

ACE Companies and Benjamin Moore & Co. argued that the Liquidator's endorsement ignored the mandatory nature of RSA 402-C: 44 and created an impermissible subclass of Class V claimants, AFIA Cedents, who would receive a distribution, while other claimants within Class V would receive no distribution at all. Additionally, the ACE Companies and Benjamin Moore & Co. argued that the payments to AFIA Cedents could only be characterized as claims payments, as the process used to determine their value would be, in essence, a claims determination process. As such, they argued that those payments would be made to a subset of Class V claimants in violation of RSA 402-C: 44 and RSA 402-C:25, XXI. Finally, both ACE Companies and Benjamin Moore & Co. argued that the sheer size of the aggregate payment defeated the Liquidator's efforts to characterize it as administrative.

The Liquidator asserted that the New Hampshire insurance liquidation provisions were to be broadly construed under RSA 402-C:1, III, and IV. He also cited RSA 402:25, IV, VI, and XXII, as specific provisions which he argued provided the necessary authority for the agreement at issue. The Liquidator argued that any monies received by AFIA Cedents under the agreement were administrative expenses, necessary to enhance the distributions to Class II policyholder claimants and preserve to the fullest, a substantial asset of the estate. In the alternative to

classifying the payments as administrative expenses, the Liquidator requested that the Court consider the application of various equitable doctrines, such as the Necessity of Payment Doctrine, to support departure from the statutory distribution/classification scheme.

Consistent with the understanding of the parties reached at the April 9, 2004 status conference, the Court first considered and determined whether, as a matter of law, RSA chapter 402-C authorizes the Liquidator to enter into an agreement such as the one at issue. In its analysis the Court considered that the provisions of RSA chapter 402-C are to be liberally construed and that the purpose of the statute is to protect insureds, creditors and the general public. RSA 402-C:1, III and IV. The Court also considered the nature and complexity of The Home Insurance Company's insurance and reinsurance business, and that its substantial involvement in the London market posed significant challenges to the Liquidator. As the periodic reports of the Liquidator have been filed, and various matters have been presented to the Court for review, it has been made clear that the largest single asset of the Home, apparently not an uncommon situation for companies in its category, is the reinsurance asset.

The Court also recognized the circumstances which put collection of the asset at risk, particularly the fact that AFIA Cedents would have little reason to file and prosecute claims if neither setoff nor actual distribution were likely. The Court's concern in this regard was supported by affidavits submitted by the Liquidator: See affidavits of: Gareth Howard Hughes, Joint Provisional Liquidator, at Paragraphs 12-15; Rhydian Williams, Head of Pools, Security, and Insolvency at Equitas, at Paragraphs 7-10 and 12-13; and Gernot Warmuth, Counsel for Zurich Versicherung, at Paragraphs 6-10. Additionally, the Court gave weight to the Liquidator's representation that the AFIA Cedents "presented a problem that nobody else could

present" (See April 23, 2004 transcript at page 17) and that the structure of the agreement was necessary to preserve and recover assets. RSA 402-C:44, I.

In ruling in favor of the legality of the agreement, the Court found that the Liquidator's endorsement of the agreement sought to maximize asset recovery and was consistent with the broad purposes and goals of the statute to protect the interests of insureds and creditors. RSA 402-C: 1, III and IV. The Court also considered the various and more specific provisions upon which the Liquidator relied in endorsing the agreement. RSA 402-C:25, IV, VI, XXII. The Court found that "the agreement proposed by the Liquidator was authorized under the broad array of powers granted the Liquidator under RSA 402-C:25" and that with the agreement the Liquidator would be able "to marshal substantial assets to be distributed to creditors which would otherwise be unavailable." See Order dated April 29, 2004.

In making the determination, Court again considered the situation which the Liquidator sought to address through the endorsement of the agreement and compromise; the fact that payments to the AFIA Cedents would result in substantial economic benefit to Class II claimants; and the undisputed fact that Class V claimants would "receive nothing with or without the agreement". See Order dated April 29, 2004 and April 23, 2004 transcript at 54. Finally, the Court considered that under the agreement and compromise no greater liability was imposed on the Ace Companies than existed prior to this dispute.

In addressing the dispute over the characterization of the payments to be made to AFIA Cedents, the Court considered ACE Companies' and Benjamin Moore & Co.'s arguments that the aggregate payments were simply too substantial and too closely tied to claims procedures for evaluation purposes to qualify as administrative expenses. The parties may have disagreed as to the exact value of ACE Companies' indemnification of Home liabilities, however it was carried

on the ACE Company books as a liability in excess of $ 200 million. See April 9, 2004 transcript at page 50. The Liquidator estimated that approximately one-third of the amounts collected on the AFIA liabilities would be distributed to the AFIA Cedents, with the remainder to be recovered by the liquidation estate.

The Court's order of April 29, 2004 did not specifically state that payments to the AFIA Cedents under the agreement were administrative expenses under RSA 402-C:44, I. This was an oversight as the Court attempted to explain why the Liquidator had the authority to incur such an administrative expense without plainly stating that the payments to the AFIA Cedents were an administrative expense under RSA 402-C:44, I. The Court hereby clarifies that in previously ruling that "under the circumstances of this liquidation as explained below, the agreement proposed by the Liquidator is authorized under the broad array of powers granted the Liquidator under RSA 402-C:25 and is consistent with the goals and purposes of the statute to protect the interests of the insureds and creditors", the Court necessarily found that the payments to the AFIA Cedents are administrative expenses. They are "actual and necessary costs of preserving or recovering the assets of the insurer" under RSA 402-C:44, I.

(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 (Supp. 2003)

In its order of April 29, 2004, the Court did not specifically address equitable doctrines such as the "Doctrine of Necessity" raised by the Liquidator because the Court determined that the statute allowed such an agreement. However, in answer to the Supreme Court's question, the Court agrees with the position of ACE Companies and Benjamin Moore & Co. that specific equitable doctrines may not override a statute enacted upon a particular topic. See Wormwood v. Association, 87 NH 136, 138 (1934) (rejecting trial court's assumption that a "court in equity

has power to override the statute law of the state and enjoin the ejection of a tenant by his landlord whenever it finds the purposes and motives of the landlord to be reprehensible.")

In finding that RSA chapter 402-C authorizes the contract at issue, the Court did find that the statute affords equitable consideration and flexibility in a number of provisions. See e.g. RSA 402-C:1, III (statute "shall be liberally construed to effect (its) purpose."); RSA 402-C: 1, IV ("The purpose of this chapter is the protection of the interests of the insureds, creditors, and the public generally..:); RSA 402-C:2~~6~~, XXX (enumeration... is not a limitation nor does it exclude his right to do such other acts not herein specifically enumerated or otherwise provided for as are necessary or expedient for the accomplishment of or in aid of the purposes of the liquidation."). More specifically, the Court concluded that the Liquidator properly took action to "collect all debts and monies due and claims belonging to the insurer" and was "doing such other acts as may be necessary or expedient to collect, conserve or protect" assets or property. RSA 402-C:25, VI.

(2) Whether the New Hampshire Court has an independent obligation to assess the fairness of the agreement with the AFIA Cedents

The Court recognizes an independent obligation to assess the fairness of the agreement with AFIA Cedents. After the April 23, 2004 hearing, the Court issued a supplemental order on June 1, 2004 which clarified that a further hearing was not necessary to determine this issue.

> The Court Order of April 29, 2004 granted the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents. The Order did not expressly address the alternative request by ACE Companies and Benjamin Moore & Co. for further evidentiary hearing to determine whether the Liquidator exercised his authority reasonably by endorsing the agreement. The matter is clarified below.
>
> The agreement at issue was pursued in conjunction with the Provisional Liquidation in the United Kingdom. The Joint Provisional Liquidators appointed by the High Court and the

> Informal Creditors Committee established under English law negotiated the terms. In endorsing the agreement, the Liquidator moved to marshal assets and secure access to an estimated $231 million of ACE Companies reinsurance and indemnification obligations. The ACE Companies' interest is directly contrary to the liquidation's interest which is to maximize opportunity to access this asset.
>
> In the absence of the agreement, AFIA Cedents whose filing and prosecution of claims triggers the reinsurance and indemnification obligations of ACE Companies, have little incentive to file claims. Under the specific financial realities of this liquidation, Class V claimants would bear the expense of filing and prosecuting claims without realistic prospect of any distribution. Under the agreement and in conjunction with their filing and prosecution of claims, AFIA Cedents in the aggregate will retain approximately $50 million for distribution to approximately 200 member companies under a formula governed by the terms negotiated. The remainder will be largely available for distribution to policyholder claimants with approximately $10 (million) to be retained for administrative expenses in the United Kingdom Provisions Liquidation.
>
> As noted above, the terms of the agreement were negotiated in conjunction with the Provisions Liquidation in the United Kingdom. The agreement will be the subject of further proceedings and applications for approval in both regulatory and judicial settings in the United Kingdom. Further, as noted in the April 29, 2004 Order, neither the Financial Services Authority, the regulator in the United Kingdom, nor the National Conference of Insurance Guaranty Funds Reinsurance Commutation Subcommittee of the Home Insurance Company in Liquidation, both of which have reviewed the agreement, have objections to it.
>
> The Court hereby clarifies that, under these circumstances, a further evidentiary hearing into whether the Liquidator has reasonably exercised his authority in endorsing the agreement would not be helpful.

Given these circumstances, the Court was satisfied that the agreement was fair and reasonable.

Since the remand order, ACE Companies and Benjamin Moore & Co. have requested an evidentiary hearing to afford them an opportunity to inquire into whether the agreement and compromise are necessary, and if so, whether the terms of the agreement were reasonable and

fair. The Court is unsure whether the Supreme Court remand order finds that there are inadequate bases to find that the agreement is fair and reasonable. For this reason, the Court asks the parties to request clarification on this point when this case returns to the Supreme Court. This Court will hold a further hearing on the matter if its ruling that the payment to AFIA Cedents qualifies as an administrative expense is upheld by the Supreme Court and the Supreme Court finds that a further hearing is necessary to determine the fairness and reasonableness of the agreement.

In sum, at this point the Court requests that the Supreme Court decide the legal issue, whether the payment to AFIA-Cedents qualifies as an administrative expense, before the Court conducts any reasonableness/fairness hearing. If the payment is not an administrative expense, the issue is resolved. If it is, this Court will schedule a further hearing to determine the necessity, fairness and reasonableness of the agreement if so directed by the Supreme Court. The nature of the hearing, i.e., by offer of proof or by taking evidence, will be determined at a future scheduling conference. In the meantime the parties may conduct discovery limited to the necessity, reasonableness, and fairness of the agreement.

Because the Supreme Court has not maintained jurisdiction of this matter, parties wishing to appeal aspects of the Court's Order on Remand will be required to renew the appeal process and pursue whatever opportunities may exist for an expedited disposition.

CONCLUSION:

1. ACE Companies and Benjamin Moore & Co. have standing to contest the agreement and compromise;

2. Consideration of a stay of the New Hampshire proceedings is not appropriate to the circumstances of this matter;

3. Specific equitable doctrines such as the "Necessity of Payment Doctrine" may not override a statue enacted upon a particular topic;

4. The parties agree that the record is adequate to determine the legal issue of whether the payments to AFIA Cedents are an administrative expense;

5. For the reasons stated above, the Court rules that the payments are an administrative expense authorized under RSA 402-C:1, III and IV; RSA 402-C:25, IV, VI and XXII; and RSA 402-C:44, I;

6. ACE Companies and Benjamin Moore & Co. may appeal the Court's finding that payments to AFIA Cedents are administrative expenses.

7. The parties may conduct discovery limited to the necessity, fairness, and reasonableness of the compromise and agreement.

8. The Liquidator will request that the Supreme Court clarify whether further evidence is necessary to determine the fairness and reasonableness of the agreement.

SO ORDERED:

DATED: 10/8/04

Kathleen A. McGuire
Associate Justice

EXHIBIT 2

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In the Matter of the Liquidation of
The Home Insurance Company

No. 2004-0319

TRANSCRIPT OF JULY 15, 2004 ORAL ARGUMENT

The first case this morning is 2004-319, *In the Matter of the Liquidation of Home Insurance Company.*

GAIL GOERING:

May it please the Court. My name is Gail Goering and I represent the Ace Companies. We are one of the appellants in this matter.

The proposed Agreement that is at issue in this appeal was entered into because §44 of the New Hampshire Insurers Rehabilitation and Liquidation Act provides a disincentive to certain creditors that the Liquidator doesn't like. He therefore seeks to make an end-run around §44 of that Act to pay a subclass of creditors that are not entitled to receive a distribution of assets for their claims before the claims of higher priority creditors are paid in full. The assets that the Liquidator seeks to distribute to this subclass of classified creditors are assets that they intend to collect from companies that are members of the Ace Group, my client. To get around §44, the Liquidator has made various arguments why his payments either don't violate §44 or even if they do, nonetheless should be approved. The original justification was that the Agreement was a compromise of a dispute and that therefore it should be approved on that basis. Later the argument was, well, these are an administrative expense and can be justified therefore to be paid as a Class 1 expense of the estate before any creditor claim is paid. That seems to be the lead argument that is being made on this appeal. Finally, and also the basis adopted by the

Superior Court in its order, the payments were, the Liquidator said, justified even if they contravened §44 of the statute because the Liquidator has a broad power to collect assets of the estate, the Agreement would enable them to do that, and that the collecting of the assets was consistent with the general purposes of the Rehabilitation and Liquidation Act, regardless whether the distributions were in violation of §44 of that same Act.

All of these justifications, the Ace Companies submit, are wrong. First of all, §44 is mandatory, not permissive. The word "shall" is used no less than three times in this section that was drafted and enacted by the New Hampshire Legislature. No payment *shall* be made until every other creditor in the class before lower creditor classes are paid. No subclasses *shall* be created. The decisions of this Court make clear that the judgment of the legislature should not be substituted. The legislature's own judgment should control. And the *Blackthorne* decision of this Court recently made that clear.

JUSTICE (?)

[totally inaudible, Judge is too far away from microphone.]

GAIL GOERING:

If the Agreement would be approved, the argument is that the monies that are collected would then enable a greater distribution to be made to Class 2 creditors. That is assuming that those claims are valid and collectible against the Ace Companies as reinsurance. The Ace Companies have indicated in their brief that they believe that this type of a solicitation of a claim against Home is a claim that has been a collusive claim in violation of obligations that the Home owes to Ace as its reinsurer and, therefore, it is questionable whether those claims are recoverable under the reinsurance contract.

JUSTICE (?):

As a matter of fact, does the [inaudible] support a finding?

GAIL GOERING:

Does the record support the finding that?

JUSTICE (?):

[inaudible]

GAIL GOERING:

If you assume . . . I'm sorry, I would submit that it is not because of the questionability of the recovery of those assets from the Ace Companies.

JUSTICE (?):

How are Class 2, 3, and 4 creditors harmed by this arrangement?

GAIL GOERING:

Class 2, 3 and 4 creditors are harmed by this arrangement because assets that might otherwise have been recovered, had the claims been validly filed against the estate, not collusively obtained. Assets recovered on those claims could be jeopardized and, therefore, assets will not be available to be made to Class 2, 3, and 4 claimants.

JUSTICE (?):

I'm not sure I follow that. In this case, there is going to be about $72 million made available.

GAIL GOERING:

If you assume that that amount is properly recoverable from the Ace Companies under the Reinsurance contract some monies would be paid to the estate, that is true, half of which under the Agreement would be distributed to the AFIA Cedents and half would be made

available to the remainder of the estate to pay administrative expenses and then the next level classes of creditors until the assets are exhausted.

JUSTICE (?):

So without this Agreement, would Class 2, 3, and 4 creditors receive less money?

GAIL GOERING:

It is the Ace Companies' position that they will, because it jeopardizes the reinsurance recovery to collude to try to collect it.

I have just one minute remaining because I'm splitting my time with Mr. Bouffard but I would like to point out that the consequence of the Superior Court's Order is that it makes every claim that is backed by an asset, whether held by a Class 5 creditor or even a Class 2 creditor, the subject of negotiation with the Liquidator.

JUSTICE (?):

Why aren't these expenses? Why isn't the $72 million properly characterized as an expense, an administrative expense, associated with marshalling assets? What's wrong with that argument?

GAIL GOERING:

Well, first of all, administrative expenses historically in all insolvency proceedings and not insurance ones, are things like attorneys' fees, rent, investigative expenses, and so forth. This is not in that form or character. And it's very difficult to call this an administrative expense when what it is, is actually, it's based on a claim that has to be made against the estate. It's based on a recovery that has to be made on those claims from a reinsurer, and 50% of the amount of a claim that gets filed in the estate gets paid to the class creditor. That doesn't look like an administrative expense, it looks like a distribution of assets and in fact, I submit it is.

JUSTICE DALIANIS:

One question, counsel. Your red light is on, but I'm curious about why you think you have standing.

GAIL GOERING:

There are a number of reasons why. First of all, the standing issue was not raised by the Liquidator, the trial court. I will leave that to one side and concentrate on the person aggrieved aspect.

First of all, the Ace Companies are otherwise Class 5 creditors of the Home. They only become debtors, and even only some of them become debtors, on a contingent basis. If the Agreement is approved, then some of the companies become debtors. But even that set to one side, if you look at the Agreement itself that is proposed to be approved, the Ace Group Companies are the actual target of that Agreement. They are mentioned in the Agreement no less than 10 times. For them to not be able to come in and challenge the validity of the Agreement of which they are a target is wrong, and they are aggrieved by that Agreement. The Agreement involves, the Ace Companies submit, collusive claims that would not have occurred in the ordinary course. No insurer would go out and collude with a policyholder to have a claim made against it. But that is what's happening here, and that's in violation of Home's duty of utmost good faith to the Ace Companies to minimize the claims against its reinsurer. On that basis, it's also aggrieved.

And finally, we've seen the claims now. Some of them have been filed. We've looked at the proofs, and they involve claims that have previously been denied or are time-barred and there are other aspects of them so they're claims that the Ace Companies would have to handle and

analyze and deal with that they would not otherwise have to, and that also makes them a person aggrieved in this situation.

JUSTICE DALIANIS:

Thank you.

ANDRE BOUFFARD:

May it please the Court. My name is Andre Bouffard. I represent Benjamin Moore, a Class 2 creditor in this case. The core issue before the Court, Benjamin & Moore thinks, is whether or not the Legislature will establish the order of priority of distribution in insurance insolvencies or whether a liquidator will determine the order of priority in insurance insolvencies. That is the core issue before the Court. The reason that issue is presented in this appeal is because this Liquidator has entered into an Agreement that turns the priority scheme on its head.

JUSTICE ?:

If you win, don't you lose. I thought Benjamin & Moore was making out fine.

ANDRE BOUFFARD:

Well, that's what it looks like on the surface, Your Honor, and it is sort of like that saying "when it is too good to be true, maybe it is". I don't know as a Class 2 creditor whether or not Benjamin Moore would have been better off. There is a very big premise that underlies all of the Liquidator's arguments here and that is that these claims would not have been filed by the AFIA Cedents. That is an assumption, that is a huge assumption and the only basis for that in the record in this case is affidavits submitted by self-interested AFIA Cedents. These are insurance companies that have ceded risk to the Home and who have every incentive to try to come up with

a scheme that will enable them to make some recovery when in the ordinary course, based upon estimates that have been made in this case, there would be no recovery.

JUSTICE ?:

If the scheme, so-called, goes through, doesn't that still leave a lot of money for Class 2 creditors like Benjamin & Moore?

ANDRE BOUFFARD:

Well, assuming that the reinsurance hasn't been voided by this collusive scheme, I suppose it would, but you also have to consider, Your Honor, had the scheme not been entered into these claims may very well have been filed. I am not an expert in insurance insolvency but my understanding is that it is ordinarily the practice of insurance companies to file claims in these cases. It takes ten minutes to file a claim in one of these cases. It is not a big, costly exercise. You file a claim and you see what happens. We don't know whether that would have happened in this case because the scheme was concocted to incite these creditors to file claims. You have to keep in mind that in insolvency proceedings the norm is that trustees and liquidators wish to minimize claims against the estate. That is why there is an entire statutory construct here enabling the liquidator to object to claims that are not valid. The liquidator's duty is to examine claims and keep claims down for the benefit of those who have valid claims. Here, the liquidator is doing the opposite. The liquidator has entered into an Agreement that is intended to cause people to file claims.

JUSTICE DALIANIS:

Is there any statutory provision, counsel, that you know of or can point to, that would trump 402:C-44? In other words, does the Liquidator have a statutory leg to stand on here?

ANDRE BOUFFARD:

He does not, your Honor. §44 is the heart and soul of this statute. The order of distribution provision is the heart and soul of any insolvency statute. It is the heart and soul of the Federal Bankruptcy Code, as well. That is where the rubber meets the road. That is the centerpiece of the statutory scheme and because it is so important, it is a carefully crafted scheme that the legislature enacted. If you look at the Wisconsin statute and the history of the Wisconsin statute that is the basis for the New Hampshire statute, you will see that there is commentary to the effect that this is part of the statute that was perhaps the most carefully crafted because it is so important, and it is specific, it is mandatory, and there is not a single authority that the Liquidator has cited for the proposition that you can get around it and all that the Liquidator has to stand on here is general statutory powers which really, under this Court's decisions, cannot trump the specifics of §44.

JUSTICE ?:

Why is it that the National.....

JUSTICE ? (totally inaudible)

ANDRE BOUFFARD:

Well, this Liquidator is not collecting debts, Your Honor.

JUSTICE ? (totally inaudible)

ANDRE BOUFFARD:

Well, granted it is a pretty broad grant of authority. I would suggest that it is pretty general and nonspecific because it is intended to deal with a myriad of possible circumstances that may come up.

JUSTICE ?:

What about §25?

ANDRE BOUFFARD:

Well, no. I say that §25 is not specific enough to provide a basis for an exception to §44.

JUSTICE ?:

You can't give the liquidator broad powers that will allow the Liquidator, for instance, to create subclasses.

ANDRE BOUFFARD:

§44 specifically says that, Your Honor.

JUSTICE ?:

Nationally, Insurance Commissioners Association, in state, has filed an *amicus* in this case in support of the Liquidator. Is that correct?

ANDRE BOUFFARD:

That is correct, Your Honor.

JUSTICE ?:

Is there a fallacy in their argument?

ANDRE BOUFFARD:

The Association of Insurance Commissioners?

JUSTICE ?:

Yup.

ANDRE BOUFFARD:

Well, as I read their brief, they are relying almost exclusively on the administrative expense aspect of §44 and the fallacy in that argument is that the administrative expense aspect

of that statute is intended to be a narrow window within which certain expenses can be paid that are necessary for the operation of the estate. If you look at the commentary on the Wisconsin statute, the commentary on the Wisconsin statute . . .

JUSTICE ?:

What I am looking for is, I read the definition of administrative expenses in the statute but what I am trying to find out from you is, they have taken the position that they are in favor of the Liquidator's position. Is this a problem dealing with the statute? Is this a problem dealing with the theory of marshalling assets to the estate? What position have they taken that is wrong?

ANDRE BOUFFARD:

Well, I think what is motivating their position is that insurance commissioners have difficulty accessing reinsurance in some instances because claimants with low priority have less than a significant incentive to file claims and this is a way for them – they are attempting to stretch the administrative expense part out of the statute as a way to address that problem which is a statutory problem that should be debated in the legislature, not this Court.

JUSTICE ?:

Thank you.

ANDRE BOUFFARD:

Thank you.

PETER ROTH:

May it please the Court, I am Peter Roth from the Office of the Attorney General, counsel to Roger Sevigny, Commissioner of Insurance, and the Liquidator in this case of the Home Insurance Company. We are here today on the dispute or interpretation of a remedial statute which by its terms is to be liberally construed. It is a dispute about whether a Liquidator of an

insurance company can use the statute consistently with the purpose of protecting the interests of policyholders by collecting a debt from the ACE Appellants for the benefit of policy- holders like the Appellant, Benjamin & Moore. The Liquidator has the support of the liquidation's largest body of creditors, the guarantee funds that filed a *amicus* brief here, the National Conference of Insurance Guarantee Funds who best represent the interests of the Class 2 policyholder/creditors. They are something like 90% of the overall policy holder debt in this case, and the National Association of Insurance Commissioners whose Act it is we're operating under and whose Order we interpret here today

JUSTICE DALIANIS:

Well, the fact that everybody likes it doesn't necessarily mean that it is legal. I wish you would sort of go right to the heart of the situation and tell me how you get around the mandatory language of §44.

PETER ROTH:

The mandatory language of §44 prohibits the Liquidator from making a distribution on a claim that would be in violation of the waterfall of money that flows down. The payment that is being made to the AFIA Cedents in this case is not on account of their claim as a Class 5 creditor. It is a contingent payment that is made to induce them to file and prove their claims in the liquidation. Their Class 5 remains in line with other Class 5 creditors to be satisfied at a later date if there is ever any money to get them.

JUSTICE ?:

Is that the $72 million, is that what they are going to get?

PETER ROTH:

That is correct.

JUSTICE ?:

Is that an administrative expense, or what is that?

PETER ROTH:

We are treating that as an administrative expense.

JUSTICE ?:

It is **not** an administrative expense. Your move.

PETER ROTH:

I submit that if it is not an administrative expense there remains the equitable doctrines that were discussed in the brief, the new value corollary to the absolute priority rule, as well as the necessity doctrine.

JUSTICE ?:

How do you apply general equitable principles that violate the statute? In other words, the statute says, for instance, for Class 5 creditors, there will be no subclasses. If it is not an administrative expense bumped it into Class 1, then you have created a subclass, haven't you? What am I missing?

PETER ROTH:

It really has to be an administrative expense.

JUSTICE ?:

It is not, if you create a subclass in violation of the statute.

PETER ROTH:

The equitable doctrines that we cite in the brief have been treated by bankruptcy courts and receivership courts since really the later part of the 19th century. They have operated under similar statutory setups such as this, where there was an absolute priority of distribution

(including the current bankruptcy code), and yet the bankruptcy courts -- including the bankruptcy court in New Hampshire as recently as 1997 -- have followed this doctrine because they recognize the practical necessity to bring in an asset and the way you bring in an asset, sometimes the best people to bring in an asset are people who have low-lying junior claims and those doctrines are still alive and well today.

JUSTICE ?:

This is my problem. But can you bring in an asset that will violate the distribution formula of the statute? It appears pretty mandatory on its face and with respect to Class 5 creditors it says "thou shall not create subclasses", so if this is not an administrative expense and bumped up to Class 1, then it seems to me that you have created a subclass in violation of the statute.

PETER ROTH:

Well, we submit the argument that it is not an administrative expense and that this can't be done essentially turns the entire statute inside out and says that we are no longer going to operate the statute for the benefit of policyholders, we are going to operate the statute to punish people on the bottom of the waterfall. As Justice Duggan pointed out in a decision in a defense, he said "the object of a remedial statute is to protect the people that are targeted, not to punish those who are their antagonists".

JUSTICE ?:

If it is not an administrative expense, it is a distribution to a Class 5 creditor before a distribution to a Class, 2, 3 or 4 creditor?

PETER ROTH:

We submit that there is just not a distribution to Class 5 creditors in respect of their Class 5 claims. It just doesn't happen and the Agreement is not set up to work that way.

JUSTICE ?:

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

PETER ROTH:

That is correct.

JUSTICE ?:

That violates the statute.

PETER ROTH:

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

JUSTICE ?:

Understood. Go back to my original question. If it is not an administrative expense, you loose.

PETER ROTH:

I disagree because the equitable doctrines that we spoke of, the doctrine of necessity and the doctrine of the new value corollary to the absolute priority rule which is really this situation.

JUSTICE?

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

PETER ROTH:

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

JUSTICE ?:

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

PETER ROTH:

Well, we have a situation, and I think it is undisputed in the Superior Court, that without the claims being made by the AFIA Cedents, there would be no assets. There would be nothing to distribute to the Class 2 creditors or anybody else.

JUSTICE ?:

That doesn't necessarily make it an expense.

PETER ROTH:

Oh, absolutely. It does. In order to induce, and this was again not disputed in the Superior Court, to induce the claimants to file their proofs of claim and I think it was also undisputed that they were unwilling to file their claims. And because they were unwilling to file

their claims they needed to be induced and this inducement is what was negotiated by the Liquidator to get them to do it. Those issues were really not disputed below and I can point to sections in the record where it is evident that those were not disputed. So we have a situation ---I am sorry……

JUSTICE ? (inaudible)

PETER ROTH:

No. I don't believe there was any factual dispute. What in the record supports that? I would call the Court's attention to the discovery materials that were filed by the Ace Group at the Liquidiator's Appendix, pages 46-66; Ace's Memorandum of Law and Discovery Issues which is the Liquidator's Appendix, at 88; and then the transcript of April 23rd; the Joint Appendix at 267 where counsel to Ace discussed the disincentive problem as a given and all of the papers that were filed here discussed the disincentive problem as a given. I don't think there is any serious dispute that the AFIA Cedents were not incentivized to file and that the Agreement was an inducement to them.

JUSTICE ? (totally inaudible)

PETER ROTH:

I don't have that handy. I am sorry. But I don't think again there was really any dispute about that. The dispute that was raised by the Ace counsel this morning suggests that there is no benefit to Class 2 because they are going to fight it tooth and nail all the way to the end of the earth and that they are going to make sure that we never get any money out of it, but I think the assumption – we have to go under the assumption – that this is going to succeed and that it is going to benefit Class 2 creditors because that is the way it is supposed to work.

JUSTICE ?:

Will you tell me how this becomes an expense? How do you say this is an expense?

PETER ROTH:

We say that it is an expense because there is an asset worth some $231,000,000. That asset will not come into the estate unless the money is spent to induce the filing of the claims to parties who have made it clear that they wouldn't file claims otherwise. It is like a finder's fee or a contingent payment to the AFIA Cedents to induce them to file the claims without which there would be no asset brought in. So it is priming the pump. You've got to prime the pump to bring in this asset and that is what the AFIA Cedent payments are intended to do.

JUSTICE ?:

Without this Agreement, what would you do without this Agreement, in all probability?

PETER ROTH:

Without this Agreement we would have some of the AFIA Cedents who would file claims to cover their setoff position so they wouldn't be liable and exposed to the liquidation.

JUSTICE ?:

Would they recover any money?

PETER ROTH:

They would not recover any money. I think it is uncontested that Class 5, either way, gets nothing. The other Class 5 creditors, like the Ace Companies, they get nothing out of this whether there is an Agreement or whether there is not an Agreement and despite what was said earlier and in the briefs the Ace Companies conceded at the hearing at the Superior Court that the Agreement doesn't harm them; that if you assume

JUSTICE ?:

Oh, but it does. It does harm them substantially if the Court puts the assets into a pot . . .

PETER ROTH:

That is a harm that they were paid for 20 some years ago.

JUSTICE ?:

But, I know, you are inducing the harm, is what you are saying. You are incentivising the harm, is what you said before.

PETER ROTH:

We are incentivising the claim-holders to file their claims so that the Ace Companies can be made to perform on the Agreements that they were compensated for and that the policyholders relied on implicitly when they did business with the Home Insurance Company over the past 20 years. The safety of the insurance was based in part on the reinsurance and indemnities that the Home had and in addition in the Agreement, is the insolvency clause which says the Ace Companies will pay to the Liquidator notwithstanding the insolvency. So what they are trying to do now is say well that doesn't really matter. We don't care about the insolvency clause. We want to get out of this and we have a right to get out of it, and I think the Superior Court hit it right on the head -- this is a windfall to them. They are going to get out of this Agreement that they were already paid for and without having to respond to the policyholders' needs.

JUSTICE ? (totally inaudible)

PETER ROTH:

What will happen from here is that there will be a scheme approved in England and the operation of the scheme will then provide for the payments to the AFIA Cedents and for the repatriation of the rest of the money which is $145,000,000 to the estate.

JUSTICE ?:

What happens after that?

PETER ROTH:

What happens after that? The process of that happening is that the AFIA Cedents' claim will be looked at by the Liquidator and by the Ace Companies who will be invited to the claims dispute process and that it will be determined as I put it "under the jaundice eye and the scowling mean" of the referee, the Superior Court, and the Ace Companies, who obviously are not going to sit still for inflated or bogus claims. Once the AFIA Cedents claim is allowed, it will sit and it will wait for any Class 5 distribution, but at the same time the scheme will be activated to provide them, if after deductions for setoffs, and the deduction for the expenses of the fight and then you fight with Ace over recoveries. If after all those things, there is anything left to give to the AFIA Cedents, they will get their 50%. And it is not a given that there is going to be money in it for the AFIA Cedents because obviously Ace has made it clear that they are going to engage us in protracted and costly litigation every step of the way.

JUSTICE ? (inaudible)

PETER ROTH:

Yeah, well the Class 2 creditors is really where all the business is here and the Class 2 claimants will await distributions from the liquidation.

JUSTICE ? (inaudible)

PETER ROTH:

Yes, we will.

JUSTICE ?:

Is it likely that Class 3 or Class 4 creditors will see any money?

PETER ROTH:

That we really don't know at this point. It is too soon to tell. It is a long process and we don't know how successful Class 2 creditors will be in proving their claims and we have an enormous amount of asset recovery to do, including this one. This is a very large asset for the Home estate.

JUSTICE ?:

There is an issue here of standing. Why do you say they don't have standing

PETER ROTH:

Well, the insolvency courts and bankruptcy courts, in particular the First Circuit, and then this Court in dealing with the Cedents' estates have applied the person aggrieved standard. I think it is fairly clear that the Ace Companies are not aggrieved. They have stated on the record below that the Order approving the Agreement – the Agreement doesn't harm them. If they are not harmed, they are hardly a party aggrieved.

JUSTICE ?:

The parties below? The don't have standing?

PETER ROTH:

The parties below – they are parties in interest and I think the courts have made clear, including this court a long time ago, that just because you have a reason to intervene or you are a party in interest in the proceedings below doesn't give you appellate party aggrieved – person

aggrieved standing. Bankruptcy courts run into this all the time. They have hundreds of people who show up for hearings. I have been to Delaware where you have a crowd of attorneys sitting there waiting to be heard, but not everyone is not going to be a person aggrieved with respect to any given issue on a given day.

JUSTICE ?:

This is not an administrative expense. Why can't the Ace Companies, the Ace Companies have said, we're a Class 5 creditor and we are being treated differently than other Class 5 creditors, so we are aggrieved.

PETER ROTH:

Because either way they get nothing. If they get nothing without the Agreement, they are not harmed; and if they get nothing with the Agreement, they are not harmed.

JUSTICE ?:

The statute doesn't say you can have subclasses when it doesn't really matter. It says you can't have subclasses "period".

PETER ROTH:

We submit that there is no subclass made here Your Honor. We have the authority under a liberal reinterpreted remedial statute to do the best we can to provide a payout to policy-holders. We submit that the asset is being brought in legitimately under the broad powers that are afforded to the Liquidator under the statute. The administrative expense statute is not so narrow and shouldn't be interpreted so narrowly as to prevent what is really good for policy-holders. I see that my light is on. We ask the Court to affirm.

JUSTICE ?:

Thank you very much.

GAIL GOERING:

Just a few quick points. May it please the Court. There has been a number of characterizations as to what or wasn't said by the Ace Companies below, rather than point by point dispute Mr. Roth's characterization. I would refer the Court to the transcript of the hearing of April 23 and also to the briefs which I believe will refute all of the points that Mr. Roth say have been conceded. Secondly, it is not known at this time whether or not there will be any recoveries by Class 5 creditors. The insolvency process is a lengthy one. This is the reason why most Class 5 creditors will go ahead and submit the paper for their claims on the chance that they will receive something so it will not be known for some time whether any recoveries will be made by them. As to the point that policyholders were relying on the reinusrance provided by the Ace Companies to the Home in this circumstance, we don't provide reinsurance on any policyholder claims, only on reinsured creditor claims, so only in the very broadest sense that they thought there was a pool of assets backing this company somewhere can it be stated that they have relied upon them. Finally, the Court asked about whether there was any indication in the statute that as to whether the general powers in §25 could trump the specific powers of §44. I submit that subpart 21 of §25 provides that that cannot happen. It refers to the Liquidator exercising discretionary powers only if they are not inconsistent with the provisions of this statute, meaning the Act.

JUSTICE ?:

What section?

GAIL GOERING:

Subpart 21 of §25. There is also another subpart of that which refers to a transfer to be able to be affected only if it doesn't contravene the priorities established in §44. I think that I have probably gone to two minutes now and I will let Mr. Bouffard make his rebuttal remarks. Thank you.

ANDRE BOUFFARD:

May it please the Court. Just very briefly, to get to the point that Justice Duggan raised a number of times, the answer to the question whether my client benefits from this is we don't know. There was no record created below that would enable any fact finder to make any determination whether or not Class 2 policyholder creditors are better with this deal or with what would have happened if this deal had not been done. We asked the Trial Court for the opportunity to create a factual record. We were denied that opportunity. With respect to administrative expenses, in terms of interpreting the language of §44, the most useful authority is federal bankruptcy authority. The reason that authority is germane is because the Wisconsin statutory language, which is in the New Hampshire statute, was taken from the Federal Bankruptcy Act. The Federal Bankruptcy Act has now been superceded by the Federal Bankruptcy Code, but the legislative history of the Code makes it very clear that the Code incorporated the language from the Act, so the language that is in the New Hampshire statute was derived from the language that is now in the Federal Bankruptcy Code and there is a wealth of authority in the federal bankruptcy arena that says that in order for something to be an administrative expense . . .

JUSTICE ?:

You can cut it short because the red light is on.

ANDRE BOUFFARD:

Okay. I've got 30 seconds, Your Honor. You have to have two things. You have to have an expense that arises following the insolvency and the claimant has to be able to demonstrate the reasonable value of what was given to the estate. Neither of those elements can be shown here. Thank you.

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