THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2005-0740

IN THE MATTER OF THE LIQUIDATION OF THE HOME INSURANCE COMPANY

Appeal Pursuant to Rule 7 From
The Merrimack County Superior Court

BRIEF FOR THE COMMISSIONER OF INSURANCE AS LIQUIDATOR OF THE HOME INSURANCE COMPANY

ROGER A. SEVIGNY, COMMISSIONER
NEW HAMPSHIRE INSURANCE DEPARTMENT, AS LIQUIDATOR OF THE HOME INSURANCE COMPANY

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QUESTIONS PRESENTED

1. Whether payments necessary to collect assets of an insolvent insurer to benefit creditors generally constitute administration costs under RSA 402-C:44, I, if made to persons who are also creditors of the insurer at a priority that will receive no distribution from the estate.

2. Whether the evidentiary hearing record supports the Superior Court's factual findings that (a) the contingent payments under the Liquidator's agreement with AFIA Cedents are a necessary cost of collecting a multimillion dollar asset of Home; and (b) the terms of that agreement are fair and reasonable.

STATUTES INVOLVED

This appeal involves sections of the Insurers Rehabilitation and Liquidation Act, RSA 402-C ("Act"), including RSA 402-C:1, 25, and 44. See the Statutory Addendum to this brief.

STATEMENT OF THE CASE AND FACTS

1. **Introduction**. This is an appeal from an order of the Superior Court (McGuire, J.) granting the motion of the Commissioner of Insurance ("Commissioner"), as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), for approval of an agreement ("Agreement") with certain entities reinsured by Home ("AFIA Cedents" or "Cedents"). The Superior Court found that the Agreement was necessary for the collection of very significant assets (reinsurance) from members of the ACE group of companies ("ACE"), for the benefit of policyholders and other creditors of Home.

ACE reinsures all Home's obligations to the AFIA Cedents, which ACE estimated prior to Home's liquidation to be $231 million. For many years before the liquidation, ACE dealt directly with the Cedents in handling and paying their claims on Home's behalf. Upon Home's liquidation, however, ACE's payment obligations became dependent on the filing, prosecution and allowance of the Cedents' valid claims in the New Hampshire liquidation proceeding. If

AFIA Cedents choose not to prosecute their claims, ACE is not obligated to make payment and gains a windfall. AFIA Cedents would not prosecute their claims except to the extent they could be used to offset Home's own claims against the Cedent because, as Class V creditors, they are expected to receive nothing. ACE and Benjamin Moore & Co. ("BMC"), an affiliate of ACE's own reinsurer for this obligation, recognize these facts and oppose the Agreement even though it will cause ACE to pay no more than if Home had not become insolvent.

The Agreement increases the available assets for the benefit of Home's policyholders and other Class II creditors by providing AFIA Cedents with reason to prosecute valid claims above offset and barring them from making deals directly with ACE and excluding Home. The Agreement was heavily negotiated, and its terms reflect the Cedents' significant leverage. As the Superior Court held, consistent with the Act, the Agreement is necessary to collect a very substantial asset; the payments are Class I administrative costs of collecting assets; and the terms of the Agreement are fair and reasonable.

2. **Procedural History**. The Liquidator sought the Superior Court's approval of the Agreement by motion dated February 10, 2004 (Joint Appendix ("J.A.") 60). Four affiliated companies ("ACE Companies") that are part of ACE and BMC objected to the motion and moved to intervene. The Superior Court allowed intervention and, after argument, approved the Agreement on April 29, 2004 (J.A. 318). BMC filed a mandatory appeal in which the ACE Companies participated (No. 2004-0319).

On September 13, 2004, this Court issued an order vacating the April 29, 2004 order and remanding the matter for consideration of five issues (the "Remand Order," J.A. 335).

The Superior Court held a conference to address the Remand Order on October 4, 2004. After receiving comments from the ACE Companies, BMC, and the Liquidator, the Superior

Court issued an Order on Remand on October 8, 2004 (J.A. 11). As pertinent here, the Superior Court held that the payments to AFIA Cedents qualify as an administrative expense under RSA 402-C:44, I, and that the Court has an independent obligation to assess the fairness of the Agreement. J.A. 16-23.[1] The Superior Court authorized appeal of its ruling on the administrative expense issue and discovery regarding the "necessity, fairness, and reasonableness" of the Agreement. J.A. 24. The ACE Companies applied to this Court for interlocutory appeal of the administrative expense issue on October 28, 2004 (No. 2004-0729). The Court declined that application on December 27, 2004.

After extensive discovery, the Superior Court held a five day evidentiary hearing on the necessity, fairness and reasonableness of the Agreement on July 25-29, 2005. The Liquidator, the ACE Companies and BMC then submitted proposed findings and conclusions of law. On September 22, 2005, the Superior Court issued its Order granting the Liquidator's motion for approval of the Agreement (the "Approval Order," J.A. 25). The ACE Companies and BMC filed notices of mandatory appeal with this Court on October 20 and 21, 2005, respectively.

In light of the Approval Order, the Joint Provisional Liquidators appointed in England applied to the High Court of Justice in London ("English Court") for sanction of the scheme of arrangement ("Scheme") and issuance of the global liquidation order that were conditions to the Agreement. On November 10, 2005, over ACE's objection, the English Court issued a Judgment sanctioning the Scheme (Liquidator's Appendix ("L.A.") 580). It issued the global liquidation order on December 19, 2005 (L.A. 591). The Joint Provisional Liquidators filed the Judgment

[1] The Superior Court also held that the ACE Companies and BMC have standing to challenge the Agreement; the New Hampshire liquidation should not be delayed pending proceedings in the United Kingdom; and equitable doctrines do not authorize varying the priorities of RSA 402-C:44. J.A. 14-16, 20-21.

with the Registrar of Companies on December 20, 2005 (L.A. 594), at which time the Scheme became effective and bound all AFIA Cedents as a matter of English law. See J.A. 34-35.[2]

3. **The Facts Found by the Superior Court.**[3] The Superior Court found that the Agreement's purpose "is to create a dynamic which will secure the Liquidator's recovery of AFIA related reinsurances from ACE." J.A. 34. It found that the Agreement is necessary to collect these otherwise unavailable assets (estimated at $87.5 million to over $150 million) for the benefit of Home's creditors, J.A. 52-54, and that the Agreement is fair and reasonable given the benefit to creditors and negotiating positions of the Liquidator and the Cedents. J.A. 55-57.

a. Background. Home wrote insurance and reinsurance in the United Kingdom ("UK") as a member of the American Foreign Insurance Association ("AFIA"), entering contracts with policyholders and cedents (reinsureds) and reinsuring that business with AFIA. As pertinent here, Home entered reinsurance treaties ("AFIA Treaties") with the AFIA Cedents. Home did business in the UK through its unincorporated UK branch ("Home UK Branch"), which was regulated by the Financial Services Authority ("FSA"). J.A. 29; L.A. 3 (L.F. ¶¶ 6, 9).

In 1983, CIGNA Corporation purchased AFIA, and a CIGNA subsidiary, Insurance Company of North America ("INA"), entered an Insurance and Reinsurance Assumption Agreement dated January 31, 1984 ("Assumption Agreement") (L.A. 158) with Home and the

[2] After this Court denied their motion to waive initial filing in the Superior Court, the ACE Companies filed a motion to stay with the Superior Court on November 3, 2005. On December 9, 2005, the Superior Court issued an order declining to stay the Approval Order but specifying that no distributions were to be made under the Scheme pending this Court's decision on appeal (L.A. 577). The ACE Companies then moved for a stay from this Court, which denied the motion on January 11, 2006.

[3] This statement is based on the facts found by the Superior Court in the Approval Order and in its rulings granting proposed findings of fact and conclusions of law. See J.A. 58. The ACE Companies omitted the Liquidator's proposed findings ("L.F.") and conclusions of law ("L.C.") from the Joint Appendix. They are submitted in the Liquidator's Appendix (marked as required by Supreme Court Rule 6(5)), together with the exhibits referred to in the Liquidator's proposed findings. The Liquidator cites only to proposed findings granted by the Court, which contain citations to the supporting testimony and exhibits. The ACE Companies' proposed findings in the Joint Appendix do not reflect the Superior Court's rulings, and a copy marked in accordance with Rule 6(5) is also included. The Superior Court declined to rule on BMC's proposed findings "as the paragraphs, with multiple assertions and/or argumentative elements, prevent efficient disposition." J.A. 58.

other sellers. By the agreement, INA agreed to assume as its direct obligation the insurance and reinsurance liabilities of the Home UK Branch business, pay those liabilities on behalf of Home, administer that business and bear the related costs and expenses. The Assumption Agreement contains an "insolvency clause" (L.A. 162) which requires INA to pay obligations directly to Home or Home's liquidator in the event of Home's insolvency. The claims are to be paid on the basis of Home's liability, "without diminution" because of Home's insolvency or because Home's liquidator has failed to pay all or part of a claim. J.A. 30; L.A. 4 (L.F. ¶¶ 10, 11, 13).[4]

Century Indemnity Company ("Century") succeeded to INA's rights and obligations under the Assumption Agreement in 1996 and thus reinsures Home for 100% of Home's obligations to AFIA Cedents. In 1999, Century became part of ACE, which also includes ACE INA Services U.K. Limited ("ACE INA Services"). J.A. 31; L.A. 2 (L.F. ¶¶ 3, 14, 15).[5]

Prior to Home's liquidation, and since at least 1993, claims submitted by AFIA Cedents under the AFIA Treaties were handled on Home's behalf by INA and Century and their agents, including ACE INA Services, at INA's and Century's own expense pursuant to the Assumption Agreement. AFIA Cedents submitted claims under the AFIA Treaties directly to ACE INA Services or its predecessors. ACE INA Services also prepared financial statements for the Home UK Branch for filing with the FSA. J.A. 33; L.A. 6 (L.F. ¶¶ 16, 17).

On June 13, 2003, the Superior Court issued an Order of Liquidation (J.A. 721) declaring Home insolvent and appointing the Commissioner as Liquidator. The English Court appointed

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[4] Home's interest in certain AFIA-related business (general direct and marine and aviation business) was formally transferred under English law in 1986. However, the AFIA Treaties were not transferred and accordingly remained an obligation of Home, subject to the Assumption Agreement. J.A. 31; L.A. 5 (L.F. ¶ 12).

[5] Home is also reinsured with respect to its liabilities under the AFIA Treaties exceeding $95 million in the aggregate under three reinsurance contracts dating from 1982 and 1985 with BAFCO Reinsurance Company of Bermuda Limited ("BAFCO"), a Bermudan company (the "BAFCO Agreements"). Century International Reinsurance Company Limited ("CIRC"), a Bermudan company and a member of ACE, is the successor to BAFCO under the BAFCO Agreements. The Assumption Agreement and BAFCO Agreements operate independently. The Assumption Agreement places INA (and now Century) directly behind Home, and the BAFCO Agreements provide additional reinsurance protection to Home. J.A. 29-30; L.A. 6 (L.F. ¶¶ 18-21).

the Joint Provisional Liquidators in an ancillary English provisional liquidation, which protects UK assets from creditor claims through a stay. J.A. 31-32; L.A. 3 (L.F. ¶¶ 7-8).

Under the Order of Liquidation, the Liquidator is vested with title to and is charged with administering and collecting Home's assets for distribution to Home's creditors. See RSA 402-C:21, I and RSA 402-C:25, VI. The rights of Home under the Assumption Agreement (and/or the BAFCO Agreements) are an asset of the Home estate, and due to Home's insolvency payments under those agreements must be made to Home or its Liquidator, not the AFIA Cedents. J.A. 32; L.A. 5 (L.F. ¶¶ 13, 25, 52).

The AFIA Cedents asserting claims under the AFIA Treaties (and all other persons asserting claims against Home) must file proofs of claim in the New Hampshire liquidation. The Order of Liquidation enjoined other means of asserting claims and set the last day for filing of claims as one year from the order (June 13, 2004). See RSA 402-C:37, I. The Liquidator is to determine claims and make recommendations to the Superior Court regarding allowance of claims. J.A. 32-33; L.A. 3 (L.F. ¶¶ 7, 24). See RSA 402-C:41 and RSA 402-C:45. ACE will be involved under an approved claims protocol (L.A. 350). J.A. 33-34; L.A. 5 (L.F. ¶¶ 13, 24, 115).

ACE's AFIA reinsurances are the largest single asset of Home's liquidation estate. J.A. 40, 51; L.F. ¶ 52. The Liquidator's ability to collect under the Assumption Agreement (and/or the BAFCO Agreements) depends upon the timely filing and proving of claims in Home's liquidation, as the actual "allowance" of a claim establishes the basis upon which a claim can be submitted to the reinsurer. J.A. 34; L.A. 14 (L.F. ¶ 52). The AFIA Cedents are Class V claimants under RSA 402-C:44, and no distributions from the Home estate are expected to be made to creditors below Class II. L.A. 8 (L.F. ¶¶ 26, 27).

b. Interests of ACE and BMC. One of the ACE Companies, Century, reinsures 100% of Home's obligations to AFIA Cedents. L.A. 2 (L.F. ¶ 3). As the Superior Court found, "the financial fortunes of ACE are best served if the Liquidator's agreement is not upheld": ACE would "reap a sizable windfall" because Home would not be able to collect reinsurance on AFIA Cedents' claims. J.A. 55; L.A. 31 (L.F. ¶ 115). The Agreement, however, does not increase ACE's obligations over what they would have been if Home had not been liquidated. Id. BMC is a member of the Berkshire Hathaway group of companies, another member of which reinsures over $1 billion of Century's obligations, including those for the Home-AFIA program. J.A. 56 & n.14; L.A. 2 (L.F. ¶ 4). BMC does not speak for other creditors. Id.

c. Circumstances leading to the Agreement. The Agreement was negotiated because events after Home's liquidation showed that (i) AFIA Cedents would not pursue claims except to preserve offset rights, preventing the Liquidator from collecting a significant portion of a substantial reinsurance asset from ACE, and (ii) there was risk that AFIA Cedents with large claims would deal directly with ACE. J.A. 51, 54; L.A. 19 (L.F. ¶¶ 70, 78-79).

i. AFIA Cedents would not prosecute claims above offset. This conclusion arose from several months' dealings with AFIA Cedents, culminating in a meeting with the largest Cedents on October 21, 2003. During meetings with a representative of the Joint Provisional Liquidators (Sarah Ellis) during the late spring and summer of 2003, four Cedents (Excess, Equitas, KWELM, and English and American) indicated that they had no economic incentive to file claims. AFIA Cedents were also unwilling to provide Ms. Ellis with information regarding the value of their claims. J.A. 40-41, 46; L.A. 9 (L.F. ¶¶ 30, 34). In late July 2003, Ms. Ellis sent a letter to sixteen AFIA Cedents with the highest expected claims requesting projected claims amounts, as well as whether each Cedent intended to file claims.

Only four Cedents responded, and only three indicated they would be filing claims. The fourth, Unionamerica, stated it was withdrawing pending requests for claims payments and assessing its position. J.A. 17; L.A. 9 (L.F. ¶¶ 31-33, 85), 244-46.

During a meeting in September 2003 with Mr. Williams and Ms. Amos of Equitas (the largest Cedent), Mr. Williams told Jonathan Rosen (the Chief Operating Officer of the Home liquidation) that he saw no reason why Cedents could be expected to file and fully prosecute claims, given that distributions to reinsureds were unlikely. J.A. 42; L.A. 11 (L.F. ¶ 39). Mr. Williams consistently advised that Equitas would not file and prosecute claims beyond offset without additional consideration. He believed that without an agreement Equitas would not have prosecuted claims except to protect offset rights. L.A. 22 (L.F. ¶¶ 83).

During a September 12 meeting with Mr. Rosen, Gareth Hughes (the lead Joint Provisional Liquidator) and Ms. Ellis, Gernot Warmuth, counsel for Agrippina, another large AFIA Cedent, "aggressively" advanced alternatives to filing claims, asserting that without an economic "incentive" to do so Agrippina's interests were better served by other options. He also threatened to terminate Treaty R,[6] which would block the flow of substantial reinsurance to the Home estate. J.A. 42; L.A. 11 (L.F. ¶¶ 38, 84). Mr. Warmuth believed that without an agreement, Agrippina would have terminated Treaty R and pursued the common account reinsurances instead of pursuing claims against Home. L.A. 23 (L.F. ¶ 84).

On October 21, 2003, the Liquidator, lead Joint Provisional Liquidator, Peter Bengelsdorf (the Special Deputy Liquidator) and other members of the US and UK liquidation teams met with representatives of nine of the largest AFIA Cedents, who formed an "informal creditors

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[6] Under this reinsurance contract, Home retrospectively reinsured 100% of Agrippina's Rutty Pool liabilities. These liabilities were covered by the Assumption Agreement and are thus part of Century's obligations. Agrippina asserted that, upon Home's insolvency, it was entitled to terminate Treaty R, which would permit it to recapture "common account" reinsurances to which ACE is presently entitled. J.A. 42 n.8; L.A. 10 (L.F. ¶¶ 36-38).

committee" ("ICC") in the UK provisional liquidation.[7] Mr. Bengelsdorf made a presentation and sought to obtain more detailed claims information and assurances from the Cedents that they would file and fully prosecute claims in the Home estate. Neither goal was achieved, as he met "a very hostile audience." The Cedents made clear they "saw no good reason for them to file proofs of claim beyond their offset entitlements, because the filing and prosecution of claims would, in their view, be an extremely expensive and time-consuming exercise for what they perceived to be a zero sum gain." J.A. 46 (quoting Tr. I 153); L.A. 20 (L.F. ¶¶ 72, 74-77). Mr. Williams, *de facto* ICC chair, summed up with this point. J.A. 47, 778; L.A. 21 (L.F. ¶¶ 77-78).

The Superior Court found that while there was no dispute that Cedents would prosecute claims to take advantage of any offset opportunities, "beyond that, there was a very high degree of uncertainty." J.A. 54. The Court found that Mr. Hughes' observations from attendance at the October 21 ICC meeting, reflecting his familiarity with the Cedent attendees, "were persuasive." Id. Mr. Hughes "testified that he 'believed it was inconceivable that Equitas would prosecute its claims . . . over many years going forward without receiving economic return.'" Id.; see L.A. 21 L.F. ¶¶ 77-78, 83; Tr. II 178-81 (evaluating each ICC member).[8] By contrast, the Court did not credit ACE's proffered expert, Robert Craig, who provided "no credible testimony concerning what AFIA Cedents would do with respect to claims beyond offset." L.A. 23 (L.F. ¶ 86).

ii. AFIA Cedents credibly threatened direct dealings with ACE. The uncertainty over Cedents dealing directly with ACE and depriving Home of reinsurance arose from correspondence and discussions with three large Cedents (L.F. ¶ 50) and with ACE itself.

[7] Unknown to the Liquidator, representatives of ICC members had met the previous week at Equitas' invitation to discuss the Home-AFIA situation. The ICC members present reached a consensus that they would not file and prosecute claims, except to preserve offset, unless they could receive some additional benefit. L.A. 20 (L.F. ¶ 73).

[8] Mr. Hughes is a corporate restructuring partner at Ernst & Young LLP in the UK and an experienced licensed insolvency practitioner who has been appointed provisional liquidator for nine insurance companies. Tr. II 142-44.

Equitas raised the possibility of direct dealing in an August 5, 2003 email from its Ms. Amos to Mr. Rosen (L.A. 243). The email set forth various scenarios for "a potential way forward on AFIA" including seeking to cut through and deal directly with ACE over Equitas' AFIA-related claims above offset amounts. Although Mr. Rosen objected to any direct dealing, Ms. Amos raised the topic again later. J.A. 41; L.A. 10 (L.F. ¶¶ 35).

During the September 2003 meeting, Mr. Williams disagreed with Mr. Rosen that cut throughs were impermissible and said that, based on the course of dealings between ACE and Equitas and the Assumption Agreement, the obligations should be direct obligations of ACE and that Equitas was entitled to deal directly with ACE. Equitas was "keeping all options open." Mr. Rosen "was left with no uncertain impression that [ACE and Equitas] were in direct communication" on AFIA matters. J.A. 42 (quoting Tr. II 9, IV 92); L.A. 11 (L.F. ¶ 39).

Indeed, the evidence at the hearing showed that ACE and Equitas had begun discussions over a potential global commutation prior to the September 2003 meeting and were in the process of exchanging information that included information with respect to Home's AFIA-related liabilities. ACE did not notify Home of those discussions. L.A. 12 (L.F. ¶ 41), L.A. 617 (Ex. 56). During the fall of 2003, Equitas also sought advice of counsel in both the UK and the US concerning the permissibility of cut throughs under UK and US law. Counsel in <u>both</u> the UK and the US advised Equitas that it was permissible. L.A. 12 (L.F. ¶ 42), 486; J.A. 702. Indeed, when he brought the Agreement to his superior in January 2004, Mr. Williams was not sure whether Equitas would sign it due to discussions going on with ACE. L.A. 12 (L.F. ¶ 42).

Agrippina also threatened direct dealings with ACE. During the September 12 meeting, Mr. Warmuth, counsel for Agrippina, asserted that without an economic incentive, Agrippina's interests were better served by other options, including a direct approach to ACE under a theory

of constructive novation. J.A. 42; L.A. 11 (L.F. ¶ 38); Tr. I 114, II 26, 155-156. On September 17, Mr. Warmuth again advised Mr. Rosen that without consideration from Home, Agrippina would exercise other options and seek consideration from ACE. J.A. 43; L.A. 14 (L.F. ¶ 48).

Unionamerica's conduct and comments by an ACE staff person also indicated it might be considering direct dealing. On September 17, Mr. Rosen and Ms. Ellis met with Unionamerica seeking an explanation over its withdrawal of its request for claim payments. L.A. 13 (L.F.¶ 46). Other than statements that Unionamerica was "reserving [its] rights," no explanation was forthcoming. Barbara Nowak of ACE INA Services later suggested privately that Unionamerica might be intending to do a side deal with ACE. J.A. 43; L.A. 13 (L.F. ¶¶ 45-47).

Nationwide, another AFIA Cedent, had previously pursued cut through litigation. The Sixth Circuit had issued a decision in that case (L.A. 208)[9] denying cut through under the then-existing facts but deferring the issue in the context of Home's insolvency as not ripe. A decision in the Legion liquidation (L.A. 247)[10] permitting policyholders to cut through on the facts there presented caused additional concern. L.A. 12 (L.F. ¶ 43).

ACE's conduct, in particular its refusal to give assurances, also concerned the Liquidator. On September 16, Mr. Rosen met with Michael Durkin and Michael Smith of ACE to discuss his meeting with Agrippina. Mr. Rosen raised his concerns over potential cut throughs or direct dealing between ACE and AFIA Cedents and stated that Home would not tolerate an attempt to by-pass Home. Mr. Durkin was noncommittal and would not address the issue. That same day, ACE's counsel sent a letter (L.A. 289) to the Liquidator suggesting that Mr. Rosen might be "interfering" with an arbitration between ACE and Agrippina. J.A. 43; L.A. 13 (L.F. ¶¶ 44, 51).

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[9] Nationwide Mut. Ins. Co. v. Home Ins. Co., 150 F.3d 545 (6th Cir. 1998), cert. denied, 525 U.S. 1140 (1999).

[10] Koken v. Legion Ins. Co., 831 A.2d 1196 (Pa. Commw. 2003), aff'd. on opinion below, 878 A.2d 51 (Pa. 2005).

At this point, Mr. Bengelsdorf directed Mr. Rosen to schedule a meeting with ACE and requested that the Liquidator and Joint Provisional Liquidator issue a joint letter to ACE seeking assurances. On September 26, 2003, the Liquidator and Joint Provisional Liquidators sent a joint letter (L.A. 293) that expressed concern that attempts might be made to deal directly with AFIA Cedents; advised ACE that the Liquidator and Joint Provisional Liquidators viewed such efforts as unlawful; and requested assurances that ACE would not "participate in" or "otherwise facilitate" efforts to circumvent the liquidation and advise if ACE were "presently aware of any such efforts." ACE never provided a written reply. J.A. 43-44; L.A. 14 (L.F. ¶¶ 49, 53-55, 57).

On September 30, 2003, Mr. Bengelsdorf, Mr. Hughes, Mr. Rosen and Ms. Ellis met with ACE attorneys Thomas Wamser and Howard Denbin. Home raised the joint letter and its concerns regarding attempts by ACE to bypass Home and deal directly with AFIA Cedents. However, the ACE representatives did not provide the requested assurances. Instead, Mr. Denbin responded by stating that cut throughs or direct agreements between ACE and AFIA Cedents were permissible under English law, citing the NEMGIA decision (L.A. 305).[11] He said that Lovells thought there was a strong case for cut through, and that ACE was seeking an opinion on the issue under US law from US counsel. J.A. 45; L.A. 16 (L.F. ¶¶ 58, 61-62).

Mr. Bengelsdorf and Mr. Rosen made an October 16 follow up call to Mr. Wamser. ACE did not unequivocally agree to refrain from pursuing side deals with AFIA Cedents. The NEMGIA case was debated, and ACE said it stood by the NEMGIA analysis that circumvention is legal in <u>both</u> the UK and US. J.A. 45-46; L.A. 18 (L.F. ¶¶ 66-67). During the September 30 and October 16 discussions, ACE sought to obtain bargaining leverage by lowering its valuation

[11] <u>National Employers' Mut. Gen. Ins. Ass'n Ltd. v AGF Holding (UK) Ltd.</u>, [1997] 2 BCLC 191.

of Cedents' claims, not clearly giving the requested assurances, and maintaining a right to deal directly with Cedents based on NEMGIA. L.A. 19 (L.F.¶¶ 68-69).

ACE's expert on English law, Richard Hacker, testified that the legality of cut throughs (including circumvention agreements) is an "unresolved" issue of English law, and that the NEMGIA decision is the only decision that addresses the issue. There is no notice requirement for such agreements; they could be structured among parents or affiliates; and a company could choose to enter them as a matter of commercial judgment. L.A. 23 (L.F. ¶ 87).

The Superior Court concluded that "reasonable lawyers and/or business executives may disagree on the meaning" of the cases cited and it "certainly cannot say that the Liquidator was unreasonable in determining there was significant legal uncertainty about whether the Cedent or ACE could successfully litigate various theories, or negotiate side deals to gain economic advantage." Noting the "autonomous manner in which ACE had administered the AFIA matters and paid claims since 1999," it added that Cedent pursuit of action based on a theory of constructive novation "could not be lightly dismissed." J.A. 54; L.F. ¶¶ 70; Tr. II 179.[12]

iii. The decision to pursue the Agreement. The Liquidator considered resolving the situation by agreement with ACE. At the September 30, 2003 meeting with ACE, Mr. Bengelsdorf suggested the possibility of a three-corner commercial resolution between Home, ACE, and the AFIA Cedents. The ACE representatives stated they did not have authority to commit ACE to enter commutation discussions. The parties also discussed the difference between ACE's projections of AFIA liabilities (£143 million – $231 million – on the 2002 FSA return prepared by ACE INA Services, L.A. 216) and the amount Home believed suggested by

[12] The Superior Court denied ACE's proposed findings that there was no credible threat of cut through or direct dealing. See J.A. 59 (denying ACE F. ¶¶ 106, 111, 122, 128; ACE R. ¶¶ O, T, X, CC).

high level information from AFIA Cedents ($400 million or more). ACE lowered its 2002 figure by as much as 20 percent. J.A. 44-45 (see Tr. V 37-38); L.A. 6 (L.F. ¶¶ 17, 58-59).

This growing discrepancy prevented any detailed discussion. The Special Deputy Liquidator and the lead Joint Provisional Liquidator recognized that Home did not have the claims information needed for effective commutation discussions and that such information needed to be collected from AFIA Cedents. J.A. 44-45; L.A. 17 (L.F. ¶ 60). Home and ACE agreed to investigate the differing views of Cedents and ACE by attempting to reconcile the positions of three Cedents. This project was overseen by Ms. Ellis. However, she encountered difficulties with ACE and due to ACE's very slow pace the reconciliation of the second Cedent "never really started." J.A. 41 n.5; 44-45 (Tr. II 94-98); see L.A. 17 (L.F. ¶¶ 63-65).[13]

During the October 16 call, ACE rejected any agreement that would include Cedents but indicated it was interested in discussing a commutation between ACE and Home. However, ACE also said it would not commute at the amount set forth in the 2002 FSA return, and that its valuation of Cedents' claims had dropped. The Court specifically found that the September 30 and October 16 discussions were only preliminary. J.A. 45-46; L.A. 17 (L.F. ¶¶ 60, 66-68).

At the October 21 ICC meeting, Mr. Bengelsdorf concluded that he would lose an asset of the estate if he did not take decisive action. He had three options: he could do nothing, which he determined was unacceptable; he could "do a commercial resolution with ACE"; or he could "work out some sort of arrangement with AFIA Cedents." J.A. 47. Although Mr. Bengelsdorf preferred to negotiate a deal with ACE, the withholding of information by Cedents blocked that avenue. Id.; L.A. 17 (L.F. ¶¶ 60, 76); see Tr. III 197-98. He thus directed his efforts toward

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[13] E&Y, which did not have claims information, was to facilitate meetings between ACE and KWELM to compare claims and amounts on ledgers and then review files where there was a discrepancy. The ledger comparison was completed in December 2003 and identified 190 claims as appearing on KWELM's but not ACE's ledgers. ACE wanted to review the 190 files, but it would only review ten per week. J.A. 41 n.5; L.A. 18 (L.F. ¶¶ 64-65).

reaching an agreement with AFIA Cedents and did not pursue a commercial resolution with ACE. Nor did ACE follow up with Home. Between October 16 and the time of the Agreement, ACE did not make a proposal or initiate any discussions. J.A. 47; L.A. 19 (L.F. ¶¶ 71, 78-80).

iv. Negotiations. After the October 21 meeting, the Liquidator, the lead Joint Provisional Liquidator, the Special Deputy Liquidator and counsel discussed the development of a scheme of arrangement to facilitate reaching an agreement with AFIA Cedents. Under English law, a scheme would bind all Cedents, not just ICC members.[14] The subsequent multiparty negotiations with the Cedents were conducted under the direction of Mr. Hughes and counsel, in consultation with the US liquidation team. J.A. 47-48; L.A. 22 (L.F. ¶¶ 81, 88-89, 108).

The negotiations extended through mid-January 2004. The amount that the Cedents were to receive based on the net asset recovery was the "major sticking point." The negotiations moved through the Liquidator's November 10, 2003 proposal of 25% (viewed as "completely inadequate" by Mr. Williams, Tr. IV 97[15]), a subsequent lock-step proposal of graduated percentages from 25% to 50%, and a counterproposal from seven of nine Cedents of 50% with an "uplift" (in case of commutation with ACE) and veto power over any commutation with ACE, to 50% without any uplift or veto. Only when an eighth Cedent, Unionamerica, supported the proposal in January 2004 was the 75%-by-value threshold reached. See n. 14. The Agreement was circulated for signature on January 23, 2004, some ten weeks after the initial proposal. The FSA supported the Liquidator's efforts. J.A. 48-50; L.A. 24 (L.F. ¶¶ 89-103).

v. The Agreement. The Agreement (L.A. 346) provides for the Scheme, under which a portion of the net proceeds received from ACE with respect to the AFIA Cedents'

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[14] A scheme of arrangement must be approved by a majority of creditors in number representing 75% in value of the claims, and then be sanctioned by the English Court. J.A. 34; L.A. 29 (L.F. ¶ 108).

[15] Mr. Williams of Equitas (the largest Cedent) was used to gauge Cedent response. He was very familiar with the London reinsurance market having served on over a dozen informal creditors' committees. J.A. 48; Tr. II 154, 185-86, IV 100.

claims will be allocated to the Scheme for the Cedents. The net proceeds are determined under a formula by which amounts actually received from ACE (after any offset) are reduced by deductions for (1) the costs of the UK provisional liquidation, (2) the costs of collecting the amounts from ACE, (3) the costs of obtaining approvals in New Hampshire and England, (4) amounts reflecting AFIA Cedents' claims used as offsets against Home, and (5) amounts received by Home on cost orders. Fifty percent of these net proceeds (plus the previously deducted amounts on cost orders) will be paid to AFIA Cedents, and the other 50% will be retained by Home. J.A. 11; L.A. 28 (L.F. ¶ 105).[16]

This formula provides AFIA Cedents with reason to prosecute claims, but only if the Cedent believes they are valid (otherwise the time and expense of pursuing the claim will be lost). It makes the payments contingent upon success in collecting from ACE. If the Liquidator is unable to collect, then no payments to AFIA Cedents will be made. It also provides that asset collections the Liquidator could expect to make without the Agreement do not give rise to payment to AFIA Cedents. The deduction for amounts collected on AFIA Cedents' claims that are settled with Home by way of offset means that amounts received on claims that would have been filed and prosecuted without the Agreement do not result in payment. Also, the deductions for costs of obtaining the necessary approvals and of the provisional liquidation means that those costs are covered before any payment to AFIA Cedents are made. L.A. 30 (L.F. ¶¶ 111-112).

The Scheme binds all AFIA Cedents and bars them from entering cut through or other agreements with ACE. J.A. 11; L.A. 29 (L.F. ¶¶ 107-108).

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[16] Because of the deductions, the actual portion of any amounts received from ACE allocated to the Cedents is likely to be less than 50%: using the $231 million value from the 2002 FSA return and other assumptions, approximately one-third of amounts received will be paid to AFIA Cedents. J.A. 57 & n.15; L.A. 29 (L.F. ¶ 106). See J.A. 217.

d. The Superior Court's decision. After five days of testimony from eleven witnesses and consideration of over 90 exhibits, the Superior Court held that payments to AFIA Cedents under the Agreement are "properly categorized [as administrative expenses] as they are 'actual and necessary costs of preserving or recovering the assets of the insurer' under RSA 402-C:44, I." J.A. 26, 50; see id. at 16-20; L.A. 30 (L.F. ¶¶ 110, 116; L.C. ¶¶ 4-5). It credited the Special Deputy Liquidator's conclusion that "absent creation of a more attractive alternative, Cedents would not file and fully prosecute claims, and . . . they would move in more commercially favorable directions to the disadvantage of the estate," while negotiation with ACE was "seriously compromised by the absence of adequate information from the Cedents." J.A. 53; L.F. ¶¶ 60, 76-79. The Court found "the Liquidator has met his burden of proving that a reasonable liquidator under the circumstances would have concluded that the agreement was necessary to preserve access to and marshal the AFIA reinsurances." J.A. 54. It also specifically found the Agreement was necessary to collect assets. L.A. 30 (L.F. ¶¶ 110, 116).

The Superior Court further found that the Agreement, reviewed with the "paramount interest of creditors" in mind, is "fair and reasonable." J.A. 55, 57; L.A. 30 (L.F. ¶¶ 111, 116; L.C. ¶ 8). Under the Agreement "the Liquidator stands to collect a portion of reinsurances otherwise at risk [estimated at $87.5 million to well in excess of $150 million], for purposes of providing a direct and substantial benefit to Class II claimants." J.A. 56; L.A. 30 (L.F. ¶¶ 111-114). The Court found that the Agreement had been significantly negotiated over a two month period, and that the Cedents had a "strong commercial position" in negotiations. J.A. 57 (quoting Tr. II 223); L.A. 21 (L.F. ¶¶ 78, 100, 103).

SUMMARY OF ARGUMENT

The Agreement is fully consistent with the Act. As the Superior Court found, the contingent payments to AFIA Cedents contemplated by the Agreement are necessary to collect the reinsurance asset from ACE. The Act specifically provides the "actual and necessary costs" of preserving or recovering assets of an insolvent insurer with Class I administration cost priority. RSA 402-C:44, I. Payments of such Class I administration costs do not constitute distributions and do not conflict with the priorities or create subclasses among lower priority creditors. The contingent payments are made pursuant to a post-liquidation agreement and serve the legislative purpose of the Act of protecting policyholders and other creditors by increasing the assets in the estate. The appellants' position frustrates that purpose, and the cases they cited involved attempts by creditors to assert priority based on pre-liquidation agreements that would reduce the assets available to other creditors.

The Superior Court's findings on necessity and fairness and reasonableness are amply supported by the record, and ACE and BMC do not provide grounds to disregard the Court's evaluation of credibility and the weight to be given evidence. In finding that the Agreement was necessary to collect reinsurance, the Superior Court reasonably credited the testimony of experienced professionals – the Special Deputy Liquidator, lead Joint Provisional Liquidator and the Chief Operating Officer of the Home liquidation – for the common-sense conclusion that AFIA Cedents would not file and prosecute claims in excess of offset for no economic return, while finding the testimony of ACE's witness on the point "not credible." The Superior Court also considered the threats and conduct of AFIA Cedents and ACE and reasonably found that the risk of direct dealing by AFIA Cedents and ACE created additional uncertainty. In finding that the Agreement was fair and reasonable, the Court properly considered the multimillion dollar benefit to the estate, the protracted negotiations, and the significant leverage of the Cedents.

ARGUMENT

I. THE APPLICABLE STANDARDS OF REVIEW

The Liquidator's motion for approval of the Agreement is addressed to the supervising court's discretion. See RSA 402-C:25, introductory par. (liquidator's authority is "[s]ubject to the court's control"); Rand v. Merrimack River Sav. Bank, 86 N.H. 351, 354 (1933) (supervising court may "in the exercise of discretion" authorize bank receiver to borrow). The Approval Order is accordingly reviewed for error of law or unsustainable exercise of discretion. See Brito v. Ryan, 151 N.H. 635, 637 (2005) (reviewing denial of motion to vacate default).[17] Within this context, factual findings will not be disturbed "unless they lack evidentiary support or are erroneous as a matter of law;" legal conclusions and application of law to fact are reviewed for plain error; and questions of law are renewed de novo. Sherryland, Inc. v. Snuffer, 150 N.H. 262, 265 (2003). The Court examines the evidence in the light most favorable to the person prevailing below, Bezanson v. Hampshire Meadows Dev. Corp., 144 N.H. 298, 305 (1999), and defers to the trial court's resolution of conflicting testimony, evaluation of credibility, and determination of the weight to be given evidence. Cook v. Sullivan, 149 N.H. 774, 780 (2003)

II. THE AGREEMENT FULLY ACCORDS WITH THE STATUTORY PRIORITIES BECAUSE THE ACT AUTHORIZES PAYMENT OF NECESSARY COSTS OF RECOVERING ASSETS AS CLASS I ADMINISTRATION COSTS.

ACE and BMC first contend that the payments to AFIA Cedents contemplated by the Agreement violate the priority provision of the Act. However, the Act expressly provides the "actual and necessary costs" of preserving or recovering the assets of the insurer with Class I administration cost priority. RSA 402-C:44, I. The Superior Court found that the payments to

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[17] Cf. In re Servisense.com, Inc., 382 F.3d 68, 71 (1st Cir. 2004) (bankruptcy settlement approvals are upheld "absent a clear showing that the bankruptcy judge abused [her] discretion"), quoting Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995); In re Executive Life Ins. Co., 38 Cal. Rptr. 2d 453, 460 (Cal. Ct. App. 1995) (rehabilitation plan and related settlements reviewed for abuse of discretion).

AFIA Cedents were administration costs necessary to collect on ACE's obligations. J.A. 20, 26, 50. This finding resolves the arguments based on the priority statute. As Class I administration costs, the payments do not constitute Class V distributions and therefore neither conflict with the priorities nor create a subclass of Class V creditors. J.A. 58 (granting L.C. 6, L.A. 33).

A. The Act Provides Broad Authority To Collect Assets And Gives "Actual And Necessary" Collection Costs Class I Priority So That Payment Of Those Costs Is Consistent With The Priority Provision.

One of the principal responsibilities of a liquidator is to marshal the assets of the insolvent insurer. The Act reflects this by providing the Liquidator with broad authority to collect assets in RSA 402-C:25 and granting the necessary costs of collection Class I priority in RSA 402-C:44. The Act authorizes the Liquidator to "[c]ollect all debts and monies due and claims belonging to the insurer" and to "do such other acts as are necessary or expedient to collect, conserve or protect its assets or property." RSA 402-C:25, VI. It also authorizes the Liquidator to "[d]efray all expenses of taking possession of, conserving . . . property of the insurer." RSA 402-C:25, IV. Beyond these enumerated powers, it authorizes the Liquidator to do "such other acts . . . as are necessary or expedient for the accomplishment of or in aid of the purpose of liquidation." RSA 402-C:25, XXII. Consistent with these powers, the Act provides that the necessary costs of collecting assets are a first priority charge. The priority statute gives Class I priority to "Administration Costs," defined as "[t]he costs and expenses of administration, including but not limited to the following: the actual and necessary costs of preserving or recovering the assets of the insurer . . . ." RSA 402-C:44, I (emphasis added).

The plain language of RSA 402-C:44, I, provides Class I priority to any "actual and necessary costs" of collecting assets. Where payments fall in this category (as the Superior Court found here), they are Class I administration costs. Payments of Class I expenses, by definition, do not constitute a distribution to a lower priority class and do not create a subclass of

lower priority creditors. The arguments of ACE and BMC to the contrary amount to an assertion that the priority statute prohibits administration cost payments to a person who is also a lower priority creditor. However, the priority statute contains no bar on payment of administration costs to lower priority creditors in order to collect an asset. The classifications in the priority statute turn on the nature of the claim (e.g., for administration costs, for recovery under a policy), not the identity of the recipient. See RSA 402-C:44.

The National Association of Insurance Commissioners ("NAIC") has specifically recognized that administrative cost payments to creditors to assist in the collection of assets for the benefit of the broad body of creditors are consistent with the priorities of distribution. The NAIC recently adopted the Insurer Receivership Model Act ("IRMA"), a revision of the Insurer Rehabilitation and Liquidation Model Act. 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 32 (4th Quarter 2005) (forthcoming). In the drafting note to the administrative expense priority section, the NAIC stated:

> Implicit in the powers conferred on the liquidator under this Act, and explicitly in Section 504A(3),[[18]] is the right, subject to approval by the receivership court, to pay Class 1 administrative costs to persons in any priority class where those Class 1 administrative cost payments assist or result in the collection or recovery of property of the insurer for the benefit of creditors of the estate. Payments of administrative costs in these circumstances do not constitute distributions so as to circumvent priority classes or establish subclasses within a class.

Insurer Receivership Model Act, drafting note to § 801 (emphasis added) (L.A. 601).[19]

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[18] Section 504A(3)(b) of IRMA grants a liquidator the power "[t]o pay Class I administration costs of the estate, at the liquidator's sole discretion and upon approval of the receivership court, where the payments assist or result in the collection or recovery of property of the insurer that provides a net benefit to the creditors of the estate." L.A. 597.

[19] The Court may properly consider this interpretation by the national body of insurance regulators. See Benson v. N.H. Ins. Guar. Ass'n, 151 N.H. 590, 595-599 (2004) (looking to NAIC comments to model guaranty association act). Indeed, ACE's expert, Mr. Craig, attempted to rely on initial IRMA NAIC drafting group discussions, although his testimony on the point was "completely undermined" by the drafting note (then an intermediate level working group note), which he acknowledged only on cross-examination. J.A. 52, Tr. V 112-114. By contrast, as the Superior Court held (L.A. 550-51), the withdrawal of a clarifying amendment (see J.A. 434) from a Senate Committee is not relevant. The Legislature speaks by enacting legislation, and "the legislative history of a proposed amendment rejected by a subsequent legislature does not alter [the] interpretation of the statute, particularly since

B. ACE's And BMC's Position Is Not Supported By The Language Of RSA 402-C:44, I, And Frustrates The Purpose Of The Act.

ACE and BMC view the priority statute as mandating that lower priority creditors may not be paid anything, for any reason, unless higher priority creditors are paid in full. However, the statute was intended to protect the preferred creditors by reserving assets for them, not to prevent collection of additional assets by barring payment of necessary costs. The ACE/BMC reading frustrates the pervasive legislative purpose of maximizing assets for benefit of creditors.

In the Act, the Legislature sought to "protect[] the interests of insureds, creditors and the public generally" through, among other things, "[e]quitable apportionment of any unavoidable loss." RSA 402-C:1, IV. The broad authority to collect assets provided by RSA 402-C:25 serves to minimize "unavoidable loss" by maximizing the assets available for distribution. See Boedeker v. Rogers, 746 N.E.2d 625, 630 (Ohio App. 2000) (broad powers "enable liquidators to do what is 'necessary or appropriate' to vindicate the interests they are assigned by law to protect") (under Ohio Act). The Superior Court recognized that broad powers were essential to permit the Liquidator to deal on an equal footing in the "rough and tumble world of the reinsurance business" to marshal and maximize assets for the benefit of claimants. J.A. 50-51.

The statutory priorities reflect the related legislative intent to minimize the impact of the insolvency on policyholders and policy claimants by paying their claims before others. See RSA 402-C:44, II. "[T]he system of priority was chosen . . . 'to carry out sound public policy by minimizing the damage done to the insured community when an insurer fails.'" Hager v. Iowa Nat'l Mut. Ins. Co., 430 N.W.2d 420, 422-23 (Iowa 1988), quoting the official comment to the

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the proposed amendment purported to clarify, not change, existing law." State v. Warren, 147 N.H. 567, 572 (2002). In any event, ACE mischaracterizes what transpired, and the Committee's floor report makes clear that the Committee did not address the merits: "The committee also heard lots of testimony both in favor and against language which was contained in section 5 of the bill. The committee, without coming to a substantive determination on that language, felt because the matter was before the courts, it was best not to pass a measure that impacted the litigation in any way whatsoever." Senate Banks and Insurance Committee, floor report to the Senate on 2005 SB 74, Senator Foster for the Committee (February 10, 2005) (L.A. 546) (emphasis added).

Wisconsin Act, Wis. Stat. § 645.68 (J.A. 943). The priorities and other provisions of the Act are thus intended to protect the legislatively preferred creditors. See Minor v. Stephens, 898 S.W.2d 71, 78 (Ky. 1995) ("The plainly stated intent of the statutes is to protect policyholders to the fullest possible extent.") (under Kentucky Act). The Act should be "liberally construed" to effectuate this purpose. RSA 402-C:1, III. See State v. Whittey, 149 N.H. 463, 467 (2003).

An administrative expense payment necessary to collect assets and increase distributions for higher priority creditors furthers these purposes, regardless of the identity of the recipient. Nothing in the statute compels the absurd result that administration costs cannot be paid to a lower priority creditor in order to collect assets to benefit higher priority creditors. See Appeal of Estate of Van Lunen, 145 N.H. 82, 86 (2000) (courts construe all parts of a statute together "to effectuate its overall purpose and to avoid an absurd or unjust result"). This would deprive the creditors of amounts ACE would have paid but for Home's insolvency and give ACE an unjust windfall, contrary to the legislative purpose of obtaining full payment from reinsurers despite an insurer's insolvency. See RSA 402-C:36; RSA 405:49, I (requiring insolvency clause for reinsurance credit); First Am. Ins. Co. v. Commonwealth Gen. Ins. Co., 954 S.W.2d 460, 465 (Mo. App. 1997). This Court has recognized the injustice of permitting reinsurers to escape obligations because of their reinsured's insolvency. Hunt v. New Hampshire Fire Underwriters' Ass'n, 68 N.H. 305, 306 (1895).

The insurer liquidation cases cited by ACE and BMC only underscore this point. None involved payments of administration costs to collect assets. Instead, they addressed unilateral attempts by lower priority creditors to seize existing assets through equitable remedies, which would reduce amounts available to policyholder level creditors. See In re Liquidation of Security Cas. Co., 537 N.E.2d 775, 781 (Ill. 1989) (rejecting constructive trust because "[s]uch a

recovery by shareholders diminishes the pool of assets available for distribution to other claimants."); In re Liquidation of Coronet Ins. Co., 698 N.E.2d 598, 603 (Ill. App. 1998) (rejecting attorneys' retaining lien and equitable orders that would reduce assets for distribution to other claimants); Northwestern Nat'l Ins. Co. v. Kezer, 812 P.2d 688, 690, 692 (Colo. App. 1990) (rejecting equitable lien that would reduce payments to preferred creditors). Liquidators opposed these efforts to take assets from other creditors, and the courts rejected them.

III. THE CONTINGENT PAYMENTS TO AFIA CEDENTS ARE "ADMINISTRATION COSTS" WITHIN RSA 402-C:44, I.

The Superior Court found that the payments to AFIA Cedents are contingent payments necessary to collect an otherwise unavailable asset and are thus administration costs. Under the Agreement, the payments depend upon actual collection from ACE of amounts in excess of AFIA Cedents' claims settled with Home by way of offset (as well as other deductions). Contrary to BMC's suggestions, amounts received on claims that would have been prosecuted without the Agreement do not result in any payment. L.A. 28 (L.F. ¶¶ 105, 111-112).

A. Contingent Payments To Collect Otherwise Unavailable Assets Are Administration Costs.

Contingent payments that are necessary to collect otherwise unavailable assets fall within the plain language of the phrase "actual and necessary costs of preserving or recovering the assets of the insurer." RSA 402-C:44, I. This language makes clear the legislative intent to accord first priority status to the "actual and necessary" costs of collecting assets for the obvious purpose of maximizing the estate for the benefit of creditors.[20] Not surprisingly, courts applying similar provisions in the Bankruptcy Code have approved contingent fees to those who assist in

[20] Contrary to BMC's argument, the phrase "costs and expenses of administration" does not somehow limit the costs of collecting assets that may be included in Class I. The Legislature provided Class I priority for "costs and expenses of administration, including but not limited to the following" and then listed as the first category "the actual and necessary costs of preserving or recovering the assets of the insurer." RSA 402-C:44, I (emphasis added). The "actual and necessary costs of preserving or recovering the assets" language is specific language that modifies the more general phrase "costs and expenses of administration," not the other way around.

collecting assets or otherwise benefit the estate as administrative expenses. E.g., In re American Tissue, 331 B.R. 169, 176 (Bankr. D. Del. 2005) (contingency fee is an administrative expense); In re Barber, 223 B.R. 830, 833 (Bankr. N.D. Ga. 1998) (contingency fee is administrative expense); In re Foundation Group Sys., Inc., 141 B.R. 196, 200 (Bankr. E.D. Cal. 1992) (finder's fee is administrative expense); In re First Security Mortgage Co., Inc., 117 B.R. 1001, 1005, 1007 (Bankr. N.D. Okla. 1990) (contingent finder's fee is administrative expense).[21]

B. The Contingent Payments Arise From The Post-Liquidation Agreement And Actions Of The Cedents And Benefit Creditors Generally.

ACE and BMC contend that the payments "arise" from pre-liquidation claims and thus cannot be administration costs, but they disregard the payments' genesis in the Agreement and the reasoning of the bankruptcy cases they cite. Those cases ask whether "the right to payment arose from a post-petition transaction with the debtor estate" and the "consideration supporting the right to payment was beneficial to the estate." E.g, Woburn Assocs. v. Kahn (In re Hemingway Transport, Inc.), 954 F.2d 1, 5 (1st Cir. 1992), citing Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.), 536 F.2d 950, 954 (1st Cir. 1976); see Mass. Div. of Empl. and Training v. Boston Reg'l Med. Ctr. (In re Boston Reg'l Med. Ctr.), 291 F.3d 111, 124 (1st Cir. 2002); In re Food Barn Stores Inc., 175 B.R. 723, 728-30 (Bankr. W.D. Mo. 1994). None, however, involved a claimant who took post-petition action under a post-petition agreement that resulted in collection of assets to benefit creditors generally. The payments to AFIA Cedents here arise from a post-liquidation transaction (the Agreement) and are based on post-liquidation consideration (actual collections from ACE based on the Cedents' post-liquidation prosecution

[21] ACE contends that contingent payments to AFIA Cedents are not finders' fees, but the point is that the payments are analogous to finders' fees and thus administration costs. The "ordinary course of business" issue in In re Foundation Group, 141 B.R. at 199, has no bearing on administrative expense classification. It only arose because transactions entered by a debtor without the bankruptcy court's approval are avoidable under 11 U.S.C. § 549 if they are not in the ordinary course of business. See In re Dant & Russell, Inc., 853 F.2d 700, 703-04 (9th Cir. 1988). This Bankruptcy Code issue has no analogy under RSA 402-C, and the Agreement here was approved in any event.

of claims they otherwise would not pursue). "The test is, of course, essentially an effort to determine whether the underlying statutory purpose will be furthered by granting priority." Matter of Jartran, Inc., 732 F.2d 584, 587 (7th Cir. 1984). It is satisfied here because the payments arise from a post-liquidation agreement and actions that benefit the estate.[22]

The controlling factor in determining the classification of the payments is the actual operation of the Agreement. The Superior Court properly declined to find that the payments were "in fact on account of, and directly relate to" the pre-liquidation claims (J.A. 59, neither granting nor denying ACE F. 171). Neither the administration cost payment nor the related asset would exist without the intervening post-liquidation Agreement and the post-liquidation prosecution of claims and collection from ACE. The Scheme's provisions allocating the Cedents' portion among the Cedents based on the allowed amounts of their claims is merely a method of dividing up that share among the Cedents. It does not change the fact that any payment to the Cedents is based on the collection of assets made possible by the Agreement.[23]

ACE's and BMC's reliance on Oxendine v. Commissioner of Ins. of North Carolina, 494 S.E.2d 545 (Ga. App. 1997), is similarly misplaced. That case involved claimants who had agreed upon settlements of their claims with the rehabilitator of a troubled insurer. Before the settlements were paid in full, the insurer was found insolvent and placed in liquidation. The liquidator stopped payments, and the claimants then tried to enforce the pre-liquidation

[22] The bankruptcy cases that strictly construe administrative expenses are merely applying the more general principle that bankruptcy statutes should be construed to protect creditors. They reflect a concern for "keeping fees and administrative expenses at a minimum so as to preserve as much of the estate as possible to the creditors." Otte v. United States, 419 U.S. 43, 53 (1974) (emphasis added). E.g., Carpenter v. Fanaras (In re Fanaras), 263 B.R. 655, 667 (Bankr. D. Mass. 2001) ("section 503(b) is construed narrowly to maximize value for creditors"). That concern is not applicable where payments are necessary to increase available assets and maximize value.

[23] ACE's linguistic arguments avoid the substance of the Agreement and lack merit. The Liquidator most certainly did not "concede" that the Agreement is a "settlement" of pre-liquidation claims; it resolves the asset collection problem that AFIA Cedents would not prosecute claims beyond offset and the conflicting positions of certain Cedents (and ACE) and the Liquidator over the permissibility of direct dealing and circumvention. Use of the term "distribution" does not imply that the payments are not administration costs; as used in the motion, the term refers to payments from collected assets under the Scheme.

settlement as an administrative expense. Id. at 546-47. Unlike this case, there was no post-liquidation transaction, and the payments sought as administrative expenses would not assist in collecting assets or providing any other benefit to the creditors of the insolvent insurer.[24]

IV. THE SUPERIOR COURT'S FINDINGS THAT THE AGREEMENT IS NECESSARY AND FAIR AND REASONABLE SHOULD BE UPHELD.

The ACE Companies and BMC attack the Superior Court's findings, in many cases relying on "facts" and inferences that the Superior Court rejected. See ACE Br. 9-13 nn. 3, 5, 6, 8, 9. Their arguments disregard the applicable standards of review and fail to acknowledge that the Superior Court, as finder of fact, was in the best position to measure the persuasiveness and credibility of evidence, was not required to believe even uncontroverted evidence, and had discretion to evaluate witnesses' credibility and to reject their testimony in whole or in part. See DeLucca v. DeLucca, 152 N.H. 100, 102 (2005); In re Nyhan, 151 N.H. 739, 744 (2005). The Superior Court expressly found the testimony of the liquidation team of Peter Bengelsdorf, Jonathan Rosen, Gareth Hughes, and Sarah Ellis to be "highly credible," and it specifically credited the testimony of Mr. Hughes and Mr. Williams (of Equitas) as persons "very experienced in the financial realities and pertinent dynamics of the reinsurance market in the UK." J.A. 51.[25] In contrast, the Court found the testimony of ACE's witness on US insurer liquidation practices, Mr. Craig, not credible. J.A. 52; L.A. 23 (L.F. ¶ 86).

Two preliminary points are in order. First, the Superior Court did not improperly defer to the Liquidator's judgment. The Court is entitled to give some deference to the judgment of the Liquidator, who is also the Commissioner. J.A. 37. See Matter of the Liquidation of American

[24] ACE points out that the claimants in Oxendine asserted the settlements preserved assets of the estate, but the court did not credit the argument. 494 S.E.2d at 548. So far as appears, the claimants contended that the settlement of their claims for less than the amount asserted was a benefit. This plainly has nothing to do with the collection of additional assets to increase the estate.

[25] These findings rejected ACE's various challenges to the credibility of the witnesses based upon alleged changes in position over the lengthy history of this proceeding (see ACE Br. 10 n.5).

Mut. Liab. Ins. Co., 632 N.E.2d 1209, 1216 (Mass. 1994) (the court "may give such weight as [it] considers appropriate to the receiver's expertise as commissioner"). It may also give "due deference" to the business judgment of the experienced individuals charged with overseeing the proceedings. J.A. 51 (see Tr. I 58-62, II 142-44, III 131-36). See RSA 402-C:25, I (authorizing appointment of special deputy liquidator). In the bankruptcy context, the judge "is not to substitute her judgment for that of the trustee, and the trustee's judgment is to be accorded some deference." Hicks, Muse & Co. v. Brandt (In re Healthco Int'l, Inc.), 136 F.3d 45, 50 n.5 (1st Cir. 1998), quoting Hill v. Burdick (In re Moorhead Corp.), 208 B.R. 87, 89 (1st Cir. BAP 1997). See In re Estate of Indian Motorcycle Mfg., Inc., 299 B.R. 8, 21 (D. Mass. 2003) (according "substantial deference" to trustee's business judgment). These factors, together with the judgments concerning the credibility and weight of the testimony of the liquidation team, fully support the Court's decision to accord some deference to the Liquidator's determination of the appropriate course of action in a complex situation.

Second, the Superior Court properly addressed the necessity of the Agreement. The finding of necessity is the factual underpinning of the Court's rulings on both administration costs and the Liquidator's authority. See J.A. 50; RSA 402-C:25, VI (authorizing "necessary or expedient" actions to marshal assets); RSA 402-C:44, I ("actual and necessary" collection costs are administration costs). The Superior Court considered the "necessity" of the Agreement with respect to these statutes and not, as ACE asserts, as part of an analysis of the equitable doctrine of necessity.

A. The Superior Court's Finding That The Payments Contemplated By The Agreement Are Necessary To Collect Assets Should Be Upheld.

The Superior Court found that the Agreement was necessary because, without it, the Liquidator would not be able to collect ACE's obligations for AFIA Cedents' claims in excess of

amounts they could offset, an amount estimated to range from $87.5 million to over $150 million. L.A. 30 (L.F. ¶¶ 110, 114; L.C. ¶ 5). The Superior Court's finding should be upheld.

1. The Superior Court Properly Found Necessity Under Both The Applicable "Reasonable Liquidator" Standard And ACE's Proposed "But For" Standard.

ACE mischaracterizes the Superior Court's decision in asserting that it applied the wrong standard. The Superior Court applied two standards in addressing necessity. It first considered the matter from the vantage of the reasonable liquidator ("whether a reasonable Liquidator under the circumstances known to him, would have thought the agreement was necessary, fair and reasonable," J.A. 36). As the Superior Court explained (J.A. 36; Tr. II 82), this is an objective standard. Cf. Allen v. Dover Co-Recreational Softball League, 148 N.H. 407, 417 (2002) (reasonable person in tort cases is an objective standard). The Superior Court properly viewed the "reasonable liquidator" standard as appropriate, but it also applied a "but for" test in granting the Liquidator's proposed findings. See L.A. 30, 32 (L.F. ¶¶ 110, 116; L.C. ¶ 5 ("the Liquidator could not have marshaled this asset absent the contingent payments")). The Court thus found necessity even if that standard applied.

2. The Superior Court's Necessity Finding Is Supported.

The Superior Court's finding of necessity rests on two grounds. First, and most importantly, the Court credited the evidence that AFIA Cedents would not file and prosecute claims in excess of offset without an incentive. See pages 7-9 above. The Court specifically credited the business judgment of the Special Deputy Liquidator and Mr. Rosen and the lead Joint Provisional Liquidator, a licensed insolvency practitioner familiar with the London reinsurance market and the AFIA Cedents, who testified that it was "inconceivable" that Equitas – and other Cedents – would prosecute claims for many years without an economic return. J.A. 51, 54; Tr. II 178-81. The Court also credited the testimony of Mr. Williams of Equitas, who

was familiar with the London reinsurance market, and who testified that he did not believe Equitas would prosecute claims with no reward. J.A. 51; L.A. 22 (L.F. ¶ 83). The AFIA Cedents presented a united front on this issue at the ICC meeting. L.A. 21 (L.F. ¶ 77).[26]

The Superior Court rejected ACE's proffered expert testimony in this area. The Court found that Mr. Craig had "very little personal experience" in dealing with reinsureds' claims against insolvent insurers, and that he "provided no credible testimony concerning what AFIA Cedents would do with respect to claims beyond offset." L.A. 23 (L.F. ¶ 86); see Tr. V 117-25. This is well within the Superior Court's discretion. E.g., DeLucca, 152 N.H. at 102.

ACE's and BMC's attacks on subsidiary points ignore the Court's determinations of credibility and rulings on proposed findings. They assert that large Cedents would file claims and point to three letters from Cedents stating they intended to file a proof of claim. However, the issue was not the filing of a general proof of claim but prosecuting the individual claims above offset. Further, the three Cedents represented only a small portion of the AFIA claims; one was a net debtor with an incentive to prosecute all claims to preserve offset; the statements were not binding; and the letters were written before the ICC meeting. L.A. 23 (L.F. ¶ 85).

ACE and BMC suggest that AFIA Cedents would prosecute claims in excess of offset because they would not know what the offset amounts were. The Superior Court properly declined to rule on ACE's proposed finding on this issue (ACE F. ¶ 165). Insurers routinely carry estimated liabilities on their books, see L.A. 6 (L.F. ¶ 17), and Cedents can project

[26] The Special Deputy Liquidator's best estimate in 2003 and 2005 is that there will be a substantial distribution to Class II creditors but no distribution to creditors below Class II. L.A. 8 (L.F. ¶ 27). ACE offers only speculation of a "possibility" of a return (ACE F. ¶164) in suggesting that Class V Cedents still have reason to pursue claims above offset. Its references to alleged tax reasons (ACE F. ¶¶ 162-63) are similarly speculations that the witnesses themselves did not give weight.

potential liabilities and prosecute claims up to those approximate amounts to preserve offsets. Tr. III 187; see L.A. 16 (L.F. ¶ 56) (Equitas commutation capping offset).[27]

ACE and BMC also suggest, based on fragmentary bits of testimony, that the Liquidator could subpoena claims information and the Joint Provisional Liquidators could require information from Cedents beyond the Court's jurisdiction. However, the Special Deputy Liquidator did not believe there were options to obtain information, Tr. III 198, and the lead Joint Provisional Liquidator noted such an approach would be "quite controversial." Tr. III 117. In any event, the potential existence of an untested power to compel production (all that is found in ACE F. ¶ 167) does not mean that the Liquidator can prosecute claims for an unwilling claimant. Unlike the Bankruptcy Code, see 11 U.S.C. § 501(c), the Act does not expressly authorize the Liquidator to file a claim on a claimant's behalf; it certainly does not provide clear authority to prosecute a claim over the claimant's objection using information wrested from it under compulsion. This invitation to additional litigation lacks any reasonable support.

Second, the Superior Court found there was uncertainty over potential direct dealing between ACE and AFIA Cedents to circumvent Home. J.A. 54. As ACE's English law expert acknowledged, such arrangements could benefit both ACE and the Cedent. The Cedent would obtain some consideration while ACE would pay less than if claims were prosecuted in the liquidation. L.A. 23 (L.F. ¶ 87); see also Tr. I 126. They could be limited to claims in excess of offset. Tr. II 10-11, V 85. There is no notice requirement, and agreements could be effected between the Cedent and ACE's affiliates and hidden from the Liquidator. L.A. 23 (L.F. ¶ 87).

[27] ACE also asserts that the burden of prosecuting claims is minimal, but the Superior Court did not find this credible and denied the proposed finding on the point (ACE F. ¶ 166). The Cedents advised of difficulties dealing with ACE (J.A. 40-41, 46-47; Tr. I 153), and Ms. Ellis had her own experience on this point. J.A. 41 n.5. In any event, the issue is not burden but whether Cedents would choose to prosecute claims where they would not benefit.

The Liquidator's position that direct dealing is unlawful does not mean that secret agreements might not be made or that others would not disagree.[28]

In fact, both AFIA Cedents and ACE took the position that direct dealing was lawful. Contrary to its present position, ACE contended to the Liquidator in 2003 that direct dealing was permissible under both UK and US law. L.A. 17 (L.F. ¶¶ 62, 67). It does not abjure that position even now, asserting only that it is "highly unlikely" AFIA Cedents and ACE would pursue such agreements. ACE Br. 31. Equitas also argued cut through was legal. L.A. 11 (L.F. ¶ 39). While ACE now disclaims NEMGIA, ACE's English law expert confirmed that the issue is unresolved under English law, L.A. 23 (L.F. ¶ 87), and the evidence showed that Equitas had received advice from UK and US counsel that cut through was permissible. L.A. 12 (L.F. ¶ 42), 486; J.A. 702; see Tr. IV 140, 142-43.[29] The Superior Court reasonably concluded the issue is not clear cut under U.S. law, especially where ACE had autonomously dealt with AFIA Cedents' claims prior to Home's liquidation, a factor that would support constructive novation. J.A. 54. ACE's emphasis on the insolvency clause ignores the clear contemplation of the Assumption Agreement that INA (and thus Century) would assume all AFIA liabilities as direct obligations. Tr. I 68; L.A. 159. Where the Nationwide case left open the status of cut through in Home's insolvency, and the Koken case showed cut through is allowable on particular facts, the Court had ample reason to conclude that direct dealing was a credible threat.[30]

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[28] The Liquidator's position does not mean that the Liquidator has conceded that cut through is not a basis for the Agreement (ACE Br. 11). The Superior Court denied ACE's proposed finding on this point, just as it denied the proposed finding that the Liquidator recognized that the Assumption Agreement precluded cut through. J.A. 59 (denying ACE F. ¶¶ 112, 117). There is a difference between a position and acceptance of that position by others.

[29] In granting ACE's proposed finding concerning advice to Cedents that cut through was not permissible under New York law (ACE F. ¶ 119), the Superior Court added "with the finding that there was also contrary information." J.A. 59.

[30] Creditors of insolvent insurers have often sought to obtain payments directly from reinsurers based on the reinsurers' conduct or the nature of the agreement. In addition to Koken, 831 A.2d at 1239-1242, see, e.g., Allstate Ins. Co. v. Administratia Asigurarilo De Stat, 948 F. Supp. 285, 307-09 (S.D.N.Y. 1996) (New York law); Venetsanos v. Zucker, Facher & Zucker, 638 A.2d 1333, 1337-40 (N.J. Super. 1994); O'Hare v. Damon H. Pursell

This is particularly the case given the numerous suggestions that direct dealing was being considered by AFIA Cedents, and ACE's refusal to give assurances that it would not discuss side deals. See pages 9-13 above. The issue is not just a litigation issue because, if ACE and a Cedent entered a secret deal, the Liquidator might have suspicions but not a basis to mount a legal challenge.[31] Moreover, contrary to ACE's assertion that any litigation would not involve "significant costs," the Nationwide case was litigated through the appellate level and the NEMGIA case involved a "time consuming and expensive trial." L.A. 23 (L.F. ¶ 87). The Superior Court reasonably concluded that the Agreement was necessary to collect from ACE.

B. The Superior Court's Finding That The Agreement Is Fair And Reasonable Should Be Upheld.

The Superior Court's finding that the Agreement is fair and reasonable, J.A. 55-57; L.A. 15 (L.F. ¶¶ 111, 116; L.C. ¶ 8), should be upheld. In making these findings, the Superior Court properly fulfilled its supervisory function. It recognized that it has an independent obligation to assess the fairness of the Agreement without giving "undue deference" to the Liquidator. L.A. 3, 78 (granting L.C. ¶ 7; ACE R. D). See In re American Reserve Corp., 841 F.2d 159, 162 (7th Cir. 1987); Matter of Boston & Providence R. Corp., 673 F.2d 11, 12 (1st Cir. 1982). This is fully consistent with giving some deference to the business judgment of the Liquidator. See In re Healthco Int'l, 136 F.3d at 50 n.5; Indian Motorcycle, 299 B.R. at 21. The Superior Court thoroughly evaluated the Agreement through a five day evidentiary hearing.

The Superior Court applied the proper legal standard: whether the Agreement is fair and reasonable from the perspective of the estate and its creditors. See RSA 402-C:25, IX; American

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Constr. Co., Inc., 329 S.W.2d 614, 620-22 (Mo. 1959); Hunt, 68 N.H. at 306-08. See generally 26 Appleman on Insurance 2d § 167.2 at 144-47 (Supp. 2005); 1A Couch on Insurance 3d § 9:30 at 9-79 (2003).

[31] The Superior Court reasonably did not view ACE's vague commitment to advise the Liquidator of "any other side deals" as meaningful given ACE's artful ambiguity and refusal to give direct assurances that it would not enter side deals. J.A. 46. Indeed, the evidence revealed discussions between ACE and Equitas over a global commutation and a simultaneous exchange of information over Home's AFIA related liabilities. ACE did not notify Home of those discussions which only became known during discovery. L.A. 12 (L.F. ¶ 41).

Mut., 632 N.E.2d at 1216. As the Court recognized, the interests of creditors are "paramount" in evaluating the Agreement and thus central to its role. J.A. 55. See RSA 402-C:1, IV; Boston & Providence, 673 F.2d at 13 ("the court must act independently, out of its own initiative, for the benefit of all creditors"). ACE tellingly omits this factor from its formulation. ACE Br. 30 n.16. ACE's proposed factors apply to evaluation of a settlement between two litigating parties, which was not the situation before the Superior Court. The Agreement principally reflects the Liquidator's conclusion that AFIA Cedents would not prosecute claims beyond offset without an economic incentive to do so. That is not a litigation issue, but one of "commercial leverage": what does it take to persuade the AFIA Cedents to pursue claims they would not otherwise prosecute, so that assets may be collected for the benefit of Home's other creditors? The Agreement also addressed the risk that direct dealings between AFIA Cedents and ACE might pare away those assets. That is not simply a litigation concern, but one of business risk: without an Agreement, would Cedents and ACE negotiate secret deals to circumvent the liquidation? Having determined that the Agreement was necessary to address these asset collection issues, the Superior Court then properly evaluated the Agreement by considering whether it reasonably and fairly addressed the concerns and benefited creditors.

The Superior Court's finding that the Agreement is fair and reasonable is supported by the record. The Court found that Agreement formula provides Cedents with reason to prosecute valid claims they otherwise would not pursue through payments contingent upon success in collecting from ACE. If the Agreement's purpose of enabling the Liquidator to collect assets is not achieved, no payments will be made. J.A. 56; L.A. 30 (L.F. ¶ 111). It also found that asset collections from claims settled by way of offset that the Liquidator could expect to receive without the Agreement will not give rise to payments, and that the Agreement will cover the

costs of collection from ACE and the costs of court approvals before any payments are made. L.A. 30 (L.F. ¶ 112). It further found that the 50% allocation of proceeds is necessary, fair and reasonable based on the bargaining leverage of the AFIA Cedents, and that the percentage was tested through extensive negotiations, starting at 25% and moving through a lock step proposal. J.A. 48-50; L.A. 24 (L.F. ¶¶ 88-103, 113). The Court considered that the Agreement would promote a sustained prosecution of claims over a number of years; that it had been the subject of protracted negotiation; that the AFIA Cedents had a "considerable amount of commercial leverage"; that the liquidation team was experienced; and that the FSA (the UK insurance regulatory authority) had not objected. J.A. 57; L.A. 21 (L.F. ¶¶ 78, 100, 103).

CONCLUSION

For the foregoing reasons, the Court should affirm the Approval Order.

Respectfully submitted,

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

By his attorneys,

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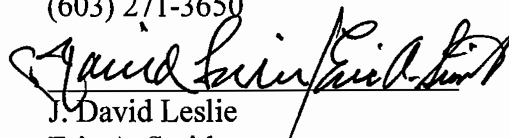

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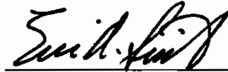
Oral Argument

The Liquidator requests to be heard orally. J. David Leslie will present argument (15 minutes).

Certificate of Service

I, Eric A. Smith, hereby certify that two copies of the foregoing brief have been served by overnight mail, postage prepaid, on Gary S. Lee, Lovells, 900 Third Avenue, 16 Floor, New York, NY 10022 (with two copies of the Liquidator's Appendix) and Lisa Snow Wade, Orr & Reno, One Eagle Square, P.O. Box 3550, Concord, NH 03302-3550 for ACE and Andre D. Bouffard, Downs Rachlin Martin PLLC, P.O. Box 190, 199 Main Street, Burlington, VT 05402-190 (with two copies of the Liquidator's Appendix) for BMC, on February 9, 2006.



Eric A. Smith

Statutory Addendum

RSA 402-C:1 (2005)..1

RSA 402-C:21 (2005)..2

RSA 402-C:25 (2005)..4

RSA 402-C:36 (Cumulative Supp. 2005)..6

RSA 402-C:37 (2005)..7

RSA 402-C:41 (2005)..7

RSA 402-C:44 (Cumulative Supp. 2005)..8

RSA 402-C:45 (2005)..9

RSA 405:49 (2005)..10

402-C:1. Title, Construction and Purpose.

I. SHORT TITLE. This chapter may be cited as the "Insurers Rehabilitation and Liquidation Act."

II. CONSTRUCTION: NO LIMITATION OF POWERS. This chapter shall not be interpreted to limit the powers granted the commissioner by other provisions of the law.

III. LIBERAL CONSTRUCTION. This chapter shall be liberally construed to effect the purpose stated in paragraph IV.

IV. PURPOSE. The purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of proprietors, through:

(a) Early detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures, neither unduly harsh nor subject to the kind of publicity that would needlessly damage or destroy the insurer;

(b) Improved methods for rehabilitating insurers, by enlisting the advice and management expertise of the insurance industry;

(c) Enhanced efficiency and economy of liquidation, through clarification and specification of the law, to minimize legal uncertainty and litigation;

(d) Equitable apportionment of any unavoidable loss;

(e) Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process, and by extension of the scope of personal jurisdiction over debtors of the insurer outside this state; and

(f) Regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business.

Source.

1969, 272:1, eff. June 23, 1969.

402-C:21. Liquidation Orders.

I. Order to Liquidate. An order to liquidate the business of a domestic insurer shall appoint the commissioner and his successors in office liquidator and shall direct the liquidator forthwith to take possession of the assets of the insurer and to administer them under the orders of the court. The liquidator shall be vested by operation of law with the title to all of the property, contracts and rights of action and all of the books and records of the insurer ordered liquidated, wherever located, as of the date of the filing of the petition for liquidation. He may recover and reduce the same to possession except that ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers which are prescribed in RSA 402-C:55, III for ancillary receivers appointed in this state as to assets located in this state. The filing or recording of the order with any register of deeds in this state imparts the same notice as a deed, bill of sale or other evidence of title duly filed or recorded with that register of deeds.

II. Fixing of Rights. Upon issuance of the order, the rights and liabilities of any such insurer and of its creditors, policyholders, shareholders, members and all other persons interested in its estate are fixed as of the date of filing of the petition for liquidation, except as provided in RSA 402-C:22 and 39.

III. Alien Insurer. An order to liquidate the business of an alien insurer domiciled in this state shall be in the same terms and have the same legal effect as an order to liquidate a domestic insurer, except that the assets and the business in the United States shall be the only assets and business included under the order.

IV. Declaration of Insolvency. At the time of petitioning for an order of liquidation, or at any time thereafter, the commissioner may petition the court to declare the insurer insolvent, and after such notice and hearing as it deems proper, the court may make the declaration.

V. Any order issued under this section shall require financial reports to the court by the liquidator. Financial reports shall include, at a minimum, the assets and liabilities of the insurer and all funds received or disbursed by the liquidator during the current period. Financial reports shall be filed within one year of the liquidation order and at least annually thereafter.

VI. (a) On or before January 6, 1992, or, if later, within 5 days after the initiation of an appeal of an order of liquidation, which order has not been

stayed, the commissioner shall present for the court's approval a plan for the continued performance of the defendant company's policy claims obligations, including the duty to defend insureds under liability insurance policies, during the pendency of an appeal. Such plan shall provide for the continued performance and payment of policy claims obligations in the normal course of events, notwithstanding the grounds alleged in support of the order of liquidation including the ground of insolvency. If the defendant company's financial condition is, in the judgment of the commissioner, unable to support the full performance of all policy claims obligations during the appeal pendency period, the plan may prefer the claims of certain policyholders and claimants over creditors and interested parties as well as other policyholders and claimants, as the commissioner finds to be fair and equitable considering the relative circumstances of such policyholders and claimants. The court shall examine the plan submitted by the commissioner and if it finds the plan to be in the best interests of the parties, the court shall approve the plan. No action shall lie against the commissioner or any of his deputies, agents, clerks, assistants or attorneys by any party based on preference in an appeal pendency plan approved by the court.

(b) The appeal pendency plan shall not supersede or affect the obligations of any insurance guaranty association.

(c) Any such plans shall provide for equitable adjustments to be made by the liquidator to any distributions of assets to guaranty associations, in the event that the liquidator pays claims from assets of the estate, which would otherwise be the obligations of any particular guaranty association but for the appeal of the order of liquidation, such that all guaranty associations equally benefit on a pro rata basis from the assets of the estate. Further, in the event an order of liquidation is set aside upon any appeal, the company shall not be released from delinquency proceedings unless and until all funds advanced by any guaranty association, including reasonable administrative expenses in connection with the proceedings relating to obligations of the company, shall be repaid in full, together with interest at the judgment rate of interest or unless an arrangement for repayment thereof has been made with the consent of all applicable guaranty associations.

Source.
1969, 272:1. 1991, 96:5, eff. Jan. 1, 1992.

Amendments
—**1991.** Added pars. V and VI.

402-C:25. Powers of Liquidator.

The liquidator shall report to the court monthly, or at other intervals specified by the court, on the progress of the liquidation in whatever detail the court orders. Subject to the court's control, he may:

I. Appoint a special deputy to act for him under this chapter, and determine his compensation. The special deputy shall have all powers of the liquidator granted by this section. The special deputy shall serve at the pleasure of the liquidator.

II. Appoint or engage employees and agents, legal counsel, actuaries, accountants, appraisers, consultants and other personnel he deems necessary to assist in the liquidation. RSA 98 shall not apply to such persons.

III. Fix the compensation of persons under paragraph II, subject to the control of the court.

IV. Defray all expenses of taking possession of, conserving, conducting, liquidating, disposing of or otherwise dealing with the business and property of the insurer. If the property of the insurer does not contain sufficient cash or liquid assets to defray the costs incurred, the liquidator may advance the costs so incurred out of any available appropriation. Any amounts so paid shall be deemed expense of administration and shall be repaid for the credit of the insurance department out of the first available moneys of the insurer.

V. Hold hearings, subpoena witnesses and compel their attendance, administer oaths, examine any person under oath and compel any person to subscribe to his testimony after it has been correctly reduced to writing, and in connection therewith require the production of any books, papers, records or other documents which he deems relevant to the inquiry.

VI. Collect all debts and moneys due and claims belonging to the insurer, wherever located, and for this purpose institute timely action in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts; do such other acts as are necessary or expedient to collect, conserve or protect its assets or property, including sell, compound, compromise or assign for purposes of collection, upon such terms and conditions as he deems best, any bad or doubtful debts; and pursue any creditor's remedies available to enforce his claims.

VII. Conduct public and private sales of the property of the insurer in a manner prescribed by the court.

VIII. Use assets of the estate to transfer policy obligations to a solvent assuming insurer, if the transfer can be arranged without prejudice to applicable priorities under RSA 402-C:44.

IX. Acquire, hypothecate, encumber, lease, improve, sell, transfer, abandon or otherwise dispose of or deal with any property of the insurer at its market value or upon such terms and conditions as are fair and reasonable, except that no transaction involving property the market value of which exceeds $10,000 shall be concluded without express permission of the court. He also may execute, acknowledge and deliver any deeds, assignments, releases and other instruments necessary or proper to effectuate any sale of property or other

transaction in connection with the liquidation. In cases where real property sold by the liquidator is located other than in the county where the liquidation is pending, the liquidator shall cause to be filed with the register of deeds for the county in which the property is located a certified copy of the order appointing him.

X. Borrow money on the security of the insurer's assets or without security and execute and deliver all documents necessary to that transaction for the purpose of facilitating the liquidation.

XI. Enter into such contracts as are necessary to carry out the order to liquidate, and affirm or disavow any contracts to which the insurer is a party.

XII. Continue to prosecute and institute in the name of the insurer or in his own name any suits and other legal proceedings, in this state or elsewhere, and abandon the prosecution of claims he deems unprofitable to pursue further. If the insurer is dissolved under RSA 402-C:23, he may apply to any court in this state or elsewhere for leave to substitute himself for the insurer as plaintiff.

XIII. Prosecute any action which may exist in behalf of the creditors, members, policyholders or shareholders of the insurer against any officer of the insurer, or any other person.

XIV. Remove any records and property of the insurer to the offices of the commissioner or to such other place as is convenient for the purposes of efficient and orderly execution of the liquidation.

XV. Deposit in one or more banks in this state such sums as are required for meeting current administration expenses and dividend distributions.

XVI. File any necessary documents for record in the office of any register of deeds or record office in this state or elsewhere where property of the insurer is located.

XVII. Assert all legal and equitable defenses available to the insurer as against third persons. A waiver of any defense by the insurer after a petition for liquidation has been filed shall not bind the liquidator.

XVIII. Exercise and enforce all the rights, remedies and powers of any creditor, shareholder, policyholder or member, including any power to avoid any transfer or lien that may be given by law and that is not included within RSA 402-C:30-32.

XIX. Intervene in any proceeding wherever instituted that might lead to the appointment of a receiver or trustee, and act as the receiver or trustee whenever the appointment is offered.

XX. Enter into agreements with any receiver or commissioner of any other state relating to the rehabilitation, liquidation, conservation or dissolution of an insurer doing business in both states.

XXI. Exercise all powers now held or hereafter conferred upon receivers by the laws of this state not inconsistent with this chapter.

XXII. The enumeration in this section of the powers and authority of the liquidator is not a limitation upon him, 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 purpose of liquidation.

402-C:36. Liability of Insurer.

The amount recoverable by the liquidator from a reinsurer shall not be reduced as a result of delinquency proceedings regardless of whether the reinsurance contract provides, in substance, that in the event of the insolvency of the ceding insurer, the reinsurance shall be payable by the assuming insurer on the basis of the claims allowed against the ceding insurer in the insolvency proceedings, under contract or contracts reinsured without diminution because of the insolvency of the ceding insurer. Such payments shall be made directly to the ceding insurer or to its domiciliary liquidator or receiver except:

I. Where the contract specifically provides another payee of such reinsurance in the event of the insolvency of the ceding insurer; or

II. Where the assuming insurer with the consent of the direct insured or insured has assumed such policy obligations of the ceding insurer as direct obligations of the assuming insurer to the payees under such policies and in substitution for the obligations of the ceding insurer to such payees.

Source.

1969, 272:1, eff. June 23, 1969. 2003, 218:3, eff. Aug. 30, 2003. 2005, 248:4, eff. Sept. 12, 2005.

Amendments

—2005. Substituted "regardless of whether" for "unless" in the first sentence, and inserted "such payments shall be made" at the beginning of the second sentence.

402-C:37. Filing of Claims.

I. Deadline for Filing. Proof of all claims must be filed with the liquidator in the form required by RSA 402-C:38 on or before the last day for filing specified in the notice required under RSA 402-C:26, except that proof of preferred ownership claims and proprietary claims under RSA 402-C:44 need not be filed at all, and proof of claims for cash surrender values or other investment values in life insurance and annuities need not be filed unless the liquidator expressly so requires.

II. Excused Late Filings. For a good cause shown, the liquidator shall recommend and the court shall permit a claimant making a late filing to share in dividends, whether past or future, as if he were not late, to the extent that any such payment will not prejudice the orderly administration of the liquidation. Good cause includes but is not limited to the following:

(a) That existence of a claim was not known to the claimant and that he filed within 30 days after he learned of it;

(b) That a claim for cash surrender values or other investment values in life insurance or annuities which was not required to be filed was omitted from the liquidator's recommendations to the court under RSA 402-C:45, and that it was filed within 30 days after the claimant learned of the omission;

(c) That a transfer to creditor was avoided under RSA 402-C:30-32 or was voluntarily surrendered under RSA 402-C:33, and that the filing satisfies the conditions of RSA 402-C:33;

(d) That valuation under RSA 402-C:43 of security held by a secured creditor shows a deficiency, which is filed within 30 days after the valuation; and

(e) That a claim was contingent and became absolute, and was filed within 30 days after it became absolute.

III. Unexcused Late Filings. The liquidator may consider any claim filed late which is not covered by paragraph II, and permit it to receive dividends, other than the first dividend, which are subsequently declared on any claims of the same or lower priority if the payment does not prejudice the orderly administration of the liquidation. The late-filing claimant shall receive, at each distribution, the same percentage of the amount allowed on his claim as is then being paid to other claimants of the same priority plus the same percentage of the amount allowed on his claim as is then being paid to claimants of any lower priority. This shall continue until his claim has been paid in full.

Source.
1969, 272:1, eff. June 23, 1969.

References in text.
RSA 98, referred to in par. II, was repealed by 1986, 12:12, I, effective March 27, 1986. See now RSA 21-I.

Cross References.
State personnel system, see RSA 21-I.

402-C:41. Disputed Claims.

I. Notice of Rejection and Request for Hearing. When a claim is denied in whole or in part by the liquidator, written notice of the determination shall be given to the claimant and his attorney by first class mail at the address shown in the proof of claim. Within 60 days from the mailing of the notice, the claimant may file his objections with the court. If no such filing is made, the claimant may not further object to the determination.

II. Notice of Hearing. Whenever objections are filed with the court, the liquidator shall ask the court for a hearing as soon as practicable and give notice of the hearing by first class mail to the claimant or his attorney and to any other persons directly affected, not less than 10 nor more than 20 days before the date of the hearing. The matter may be heard by the court or by a court-appointed referee.

Source.
1969, 272:1, eff. June 23, 1969.

402-C:44. Order of Distribution.

The order of distribution of claims from the insurer's estate shall be as stated in this section. The first $50 of the amount allowed on each claim in the classes under paragraphs II, V, and VI except claims of the guaranty associations as defined in RSA 404-B, 404-H, 404-D, and 408-B shall be deducted from the claim. Claims may not be cumulated by assignment to avoid application of the $50 deductible provision. Subject to the $50 deductible provision, every claim in each class shall be paid in full or adequate funds retained for the payment before the members of the next class receive any payment. No subclasses shall be established within any class.

I. Administration Costs. The costs and expenses of administration, including but not limited to the following: the actual and necessary costs of preserving or recovering the assets of the insurer; compensation for all services rendered in the liquidation; any necessary filing fees; the fees and mileage payable to witnesses; and reasonable attorney's fees.

II. Policy Related Claims. All claims by policyholders, including claims for unearned premiums in excess of $50, beneficiaries, and insureds arising from and within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company, and liability claims against insureds which claims are within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company and claims of the New Hampshire Insurance Guaranty Association, the New Hampshire Life and Health Insurance Guaranty Association and any similar organization in another state. All claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds or investment values, shall be treated as loss claims. That portion of any loss for which indemnification is provided by other benefits or advantages recovered or recoverable by the claimant shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligations of support or by way of succession at death or as proceeds of life insurance, or as gratuities. No payment made by an employer to an employee shall be treated as a gratuity.

III. Claims of the Federal Government.

IV. Wages.

(a) Debts due to employees for services performed, not to exceed $1,000 to each employee which have been earned within one year before the filing of the petition for liquidation. Officers shall not be entitled to the benefit of this priority.

(b) Such priority shall be in lieu of any other similar priority authorized by law as to wages or compensation of employees.

V. Residual Classification. All other claims including claims of any state or local government, not falling within other classes under this section. Claims, including those of any non-federal governmental body, for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction or proceeding out of which the penalty or forfeiture arose with reasonable and actual costs occasioned thereby. The remainder of such claims shall be postponed to the class of claims under paragraph VIII.

VI. Judgments. Claims based solely on judgments. If a claimant files a claim and bases it both on the judgment and on the underlying facts, the claim shall

be considered by the liquidator who shall give the judgment such weight as he deems appropriate. The claim as allowed shall receive the priority it would receive in the absence of the judgment. If the judgment is larger than the allowance on the underlying claim, the remaining portion of the judgment shall be treated as if it were a claim based solely on a judgment.

VII. Interest on Claims Already Paid. Interest at the legal rate compounded annually on all claims in the classes under paragraphs I through VI from the date of the petition for liquidation or the date on which the claim becomes due, whichever is later, until the date on which the dividend is declared. The liquidator, with the approval of the court, may make reasonable classifications of claims for purposes of computing interest, may make approximate computations and may ignore certain classifications and time periods as de minimis.

VIII. Miscellaneous Subordinated Claims. The remaining claims or portions of claims not already paid, with interest, as in paragraph VII:

(a) Claims under RSA 402-C:39, II;

(b) Claims subordinated by RSA 402-C:61;

(c) Claims filed late;

(d) Portions of claims subordinated under paragraph V;

(e) Claims or portions of claims payment of which is provided by other benefits or advantages recovered or recoverable by the claimant.

IX. Preferred Ownership Claims. Surplus or contribution notes, or similar obligations, and premium refunds on assessable policies. Interest at the legal rate shall be added to each claim, as in paragraphs VII and VIII.

X. Proprietary Claims. The claims of shareholders or other owners.

Source.

1969, 272:1. 1975, 348:14. 1977, 499:1, eff. Sept. 12, 1977. 1998, 99:1, eff. July 19, 1998. 2005, 248:5, eff. Sept. 12, 2005.

Amendments

—2005. Inserted "404-H" following "as defined in RSA 404-B" in the introductory paragraph.

402-C:45. Liquidator's Recommendations to the Court.

I. Recommended Claims. The liquidator shall review all claims duly filed in the liquidation and shall make such further investigation as he deems necessary. He may compound, compromise or in any other manner negotiate the amount for which claims will be recommended to the court. Unresolved disputes shall be determined under RSA 402-C:41. As often as practicable, he shall present to the court reports of claims against the insurer with his recommendations. The reports shall include the name and address of each claimant, the particulars of the claim and the amount of the claim finally recommended, if any. As soon as reasonably possible after the last day for filing claims, he shall present a list of all claims not already reported. If the insurer has issued annuities or life insurance policies, the liquidator shall report the persons to whom, according to the records of the insurer, amounts are owed as cash surrender values or other investment values and the amounts owed. If the insurer has issued policies on the advance premium plan, the liquidator shall report the persons to whom, according to the records of the insurer, unearned premiums are owed and the amounts owed.

II. Allowance of Claims. The court may approve, disapprove or modify any report on claims by the liquidator, except that the liquidator's agreements with other parties shall be final and binding on the court on claims settled for $500 or less. No claim under a policy of insurance shall be allowed for an amount in excess of the applicable policy limits.

Source.

1969, 272:1, eff. June 23, 1969.

405:49. Reinsurance Insolvency.

I. No credit shall be allowed, as an admitted asset or deduction from liability, to any ceding insurer for reinsurance, unless the reinsurance contract provides, in substance, that in the event of the insolvency of the ceding insurer, the reinsurance shall be payable by the assuming insurer on the basis of the claims allowed against the ceding insurer in the insolvency proceedings, under contract or contracts reinsured without diminution because of the insolvency of the ceding insurer directly to the ceding insurer or to its domiciliary liquidator or receiver except:

(a) Where the contract specifically provides another payee of such reinsurance in the event of the insolvency of the ceding insurer; or

(b) Where the assuming insurer with the consent of the direct insured or insured has assumed such policy obligations of the ceding insurer as direct obligations of the assuming insurer to the payees under such policies and in substitution for the obligations of the ceding insurer to such payees.

II. A reinsurance contract may provide that the domiciliary liquidator or receiver of any insolvent ceding insurer shall, within a specified or reasonable time after the claim is filed in court or in the receivership, give written notice to the assuming insurer of all or part of any claim against the ceding insurer on the policy or bond reinsured. During the pendency of the claim, any assuming insurer may investigate the claim and, unless forbidden to do so by the reinsurance agreement, may intervene in the proceeding in which the claim is pending and interpose any defenses it considers available which have not been raised by the ceding insurer, its liquidator or receiver. The expenses incurred by the assuming insurer in this type of action are payable up to the amount of the expenses or the amount of the benefit produced, whichever is less, as expenses of the receivership. If 2 or more assuming insurers have potential liability because of the same claim, the expenses shall be apportioned among them in proportion to the benefit received.

Source.
1899, 86:3. PL 275:43. RL 325:48. RSA 405:49. 1986, 196:1, eff. Aug. 2, 1986. 2004, 186:1, eff. July 31, 2004.