2006 DEC 18 A 11:35
NH SUPERIOR COURT
MERRIMACK COUNTY
CONCORD, NH

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In the Matter of the Liquidation of
The Home Insurance Company

No. 2005-0740

BENJAMIN MOORE & CO.'S MOTION FOR REHEARING AND RECONSIDERATION OF OPINION ISSUED ON DECEMBER 5, 2006

Appellant Benjamin Moore & Co. ("Benjamin Moore") respectfully moves, pursuant to Rule 22 of the Supreme Court Rules, for a rehearing and reconsideration of this Court's Opinion issued on December 5, 2006 (the "Opinion") affirming the Superior Court's approval of an agreement (the "Proposed Agreement") between the Liquidator of Home Insurance Company ("Home") and a subclass of reinsurance creditors known as the "AFIA Cedents." In support of its motion, the Benjamin Moore respectfully states as follows.

INTRODUCTION

The Court has misapprehended important points of law and fact in upholding the Superior Court's approval of an agreement by Home's Liquidator to pay the pre-liquidation claims of AFIA Cedents as administrative expenses, in order to induce the filing of their Class V claims. As the Court's Opinion recognizes, the AFIA Cedents are estimated to have claims against Home under pre-liquidation reinsurance contracts of approximately $231 million. The Liquidator proposes to distribute to them, in partial satisfaction of those claims, and on a priority basis, approximately $78 million. (Opinion, at 5). Thus, the Proposed Agreement cannot be upheld unless the Court reads the priority provisions of the New Hampshire Insurer's Liquidation Act to permit the pre-liquidation claim of a reinsurance creditor to be paid as an administrative expense, under the circumstances presented here. No other state court has ever

read the priority provisions of an insurer's liquidation statute so broadly, nor has any federal bankruptcy court read the very similar provisions of the Bankruptcy Code so broadly. This Court's decision if not reconsidered would amount to an unprecedented enlargement of the narrow scope of administrative expense priority heretofore recognized by courts in liquidation cases. It would also grant discretionary authority to insurance liquidators to reorder statutory distribution priorities in the name of maximizing estate assets. The Legislature should decide if payment of Class V claims as administrative expenses is a tool insurance liquidators can use to attempt to maximize estate assets, not this Court, as the question raises important public policy issues properly suited to legislative study and decision.

The Court should defer to the Legislature especially because no asset of the estate will be forfeited or irretrievably lost absent the Proposed Agreement. The Court's liberal construction of the priority statute was predicated on a misapprehension of the facts as to the impact of a disapproval of the agreement. Given the competing evidence as to the true risks presented to Home's recovery of reinsurance absent the Proposed Agreement, there is no reason for the Court to adopt a broad and unprecedented interpretation of the priority statute, especially where doing so raises important public policy issues best suited for the Legislature.

ARGUMENT

A. This Appeal Squarely Presents The Issue Whether A Reinsurance Creditor's Pre-Liquidation Claim Can Be Paid As An Administrative Expense.

The Court's Opinion overlooks or misapprehends the clear and unmistakable nexus between the pre-liquidation claims of the AFIA Cedents and the priority distributions to be made to them on those claims under the Proposed Agreement. The Court cannot accept, without completely overlooking the very language of the Proposed Agreement, trial admissions made by Liquidator's witnesses, and findings made by the Superior Court, that the distributions to be

made to the AFIA Cedents are, in substance, partial distributions on their reinsurance claims. Any settlement made by a Liquidator with a reinsurance creditor to pay the creditor's pre-liquidation claim on a priority basis is, by definition, a post-liquidation agreement. Thus, the question cannot be whether the creditor's right to payment under such an agreement with an insurance liquidator "arises" post-liquidation. If that were the only criteria for administrative expense priority, a liquidator could decide to pay any pre-liquidation creditor as an administrative claimant, rather than according to the statutory order of priority, on the theory that the creditor's administrative claim "arises" under the post-liquidation settlement agreement. Surely that cannot be what the Court intended, as it would permit the unbridled use of administrative expense priority to elevate the claim of any class or subclass of lower priority creditor, giving liquidators the power to reorder statutory priorities as they see fit.

The issue as framed by the other courts that have addressed efforts to pay pre-liquidation creditors as administrative claimants is whether, looking beyond the form of a transaction to its substance, as an equity court must, a creditor's pre-liquidation claim against the estate is being paid with the funds to be distributed as an administrative expense.[1] If in substance the liquidation estate is proposing to distribute estate assets in satisfaction of a pre-liquidation claim of a creditor, the claim being paid is "the antithesis of [an] administrative expense." In re Kmart Corp., 359 F.3d 866, 872 (8th Cir. 2004). The fact that the liquidation estate may have agreed to make the payment to the creditor after the liquidation commenced (how could the timing be otherwise?) does not magically transform the claim the pre-liquidation claim into an administrative expense.

[1] These state and federal cases are discussed in Benjamin Moore's opening brief at pp. 21-22.

This point is illustrated best by analyzing the claims of AFIA Cedents that are to be paid with the $78 million payable under the Proposed Agreement, as distinguished from the claim of a typical administrative claimant, such as a legal or accounting professional firm retained to provide services to the estate. Assume further that such a claimant has a pre-liquidation claim against the estate for pre-liquidation services rendered, to match more closely the relationship of the AFIA Cedents to the Home estate. Under the priority provisions of RSA 402-C:44, this professional firm would have two separate claims: a Class V claim for its pre-liquidation services rendered, and a Class I administrative claim for its post-liquidation services rendered. The estate certainly could not induce the professional firm to provide post-liquidation services by agreeing to pay some or all of the firm's pre-liquidation bills as administrative expenses. That is because only new costs or expenses incurred by the liquidation estate (as opposed to old debts of the pre-liquidation debtor) are compensable as administrative costs of the liquidation.[2] The fact that the professional firm may have a pre-liquidation claim against the estate does not automatically preclude the firm from also becoming an administrative claimant, entitled to priority payment for services rendered to the liquidation estate (as opposed to the pre-liquidation debtor). But its pre-liquidation claim can only be paid as a lower Class V claim, whereas its post-liquidation claim is normally entitled to administrative expense priority.

Unlike this hypothetical professional firm, the AFIA Cedents' claims under pre-liquidation reinsurance contracts are to be paid as administrative costs of the estate, even though these claims arise entirely on the basis of Home's pre-liquidation reinsurance contracts with the AFIA Cedents. In essence, the Class V claims of the AFIA Cedents are being transformed into Class I administrative priority claims to the extent of the $78 million to be distributed to them

---

[2] This is an axiomatic proposition that underlies all of the authorities on administrative expense priority cited by Benjamin Moore and the ACE Companies, and which the Liquidator of Home cannot seriously question, as there is no authority stating otherwise.

under the Proposed Agreement. And it is not just a matter of happenstance that the AFIA Cedents are holders of pre-liquidation claims against the estate. As the Superior Court found, and this Court has recognized, the Liquidator has proposed to pay them on a priority basis specifically to induce the filing of their Class V claims. (Opinion at 12). Conversely, the AFIA Cedents entered into the Proposed Agreement specifically to obtain a priority distribution on their Class V claims. The record supports only one conclusion as to the substantive effect of the Proposed Agreement: it treats approximately $78 million of the Class V claims of AFIA Cedents as administrative costs. Only by recognizing squarely the true substantive effect of the Proposed Agreement can the Court properly resolve the question whether the statutory scheme permits this result on the basis of the justifications offered by the Liquidator.

B. The Statutory Scheme Does Not Grant Insurance Liquidators Power To Re-Adjust The Legislatively Established Order Of Priority To Achieve The Objectives Of A Liquidation, And Such Power Can Only Be Granted By The Legislature.

The Court misapprehended the law in concluding that the justification offered by the Liquidator for the Proposed Agreement—the recovery of reinsurance assets for the estate—permits a discretionary decision by the Liquidator to re-adjust the mandatory statutory priorities by paying Class V claims as administrative expenses. The plain language of RSA 402-C:44 makes it clear that administrative costs are those costs and expenses the payment of which is essential to the conduct or operation of the liquidation. The obvious policy justification for administrative expense priority is that creditors should pay administrative costs off the top because the liquidation cannot function without them, and creditors are the beneficiaries of the liquidation effort. Liquidators of course have the discretion to decide on appropriate service providers for the liquidation estate and what are reasonable costs for those services (subject to

court approval), but the Liquidator's discretion is strictly limited to making administrative expense payments for "actual and necessary" costs of recovering assets.

The important question not dealt with in the Court's opinion is whether the statute grants a liquidator discretion to agree to pay a Class V creditor's claim as an administrative expense, where there is no showing that such payment is essential to the conduct of the liquidation. The Liquidator never demonstrated, and the Superior Court never found, that the Proposed Agreement was essential to the conduct or operation of the liquidation. Instead, the essential predicate for the approval of the Proposed Agreement was the Liquidator's discretionary judgment that the agreement was necessary to put the estate in a position to recover reinsurance assets. (Opinion, p. 11). Thus, the Court's Opinion as it stands allows insurance liquidators, whenever they deem it necessary to recover assets, to make agreements to pay the claims of Class V creditors as administrative costs.

Obviously, granting such broad discretion to insurance liquidators subjects the order of priority in liquidation to adjustment in their discretion. The wisdom of the such a grant of authority is a Legislative policy decision, as is clearly evidenced by the fact that the matter has been the subject of debate in connection with ongoing efforts to modernize the uniform law on which many state insurer liquidation laws are based. This Court has traditionally been careful to avoid public policy issues best resolved by the Legislature,[3] and should be similarly cautious here. Otherwise, it would be reading into the current statute a unique and broad grant of discretion to insurance liquidators, without having the opportunity to hear, study, investigate, and

[3] In re: Plaisted, 149 N.H. 522, 526; 824 A.2d 148, 152(2003); Minuteman, LLC v. Microsoft Corp., 147 N.H. 634, 641; 795 A.2d 833, 840 (2002)(whether indirect purchasers should be allowed to bring claims under New Hampshire anti-trust law is a public policy question for the Legislature, even though existing law may grant a windfall to direct purchasers).

examine all the potential consequences of doing so, some of which have been discussed in the Appellants' briefs and the brief of amicus curiae.

C. The Court Misapprehended The Facts As To Risk Of Loss Of Reinsurance Assets Absent The Agreement, Leading To An Unnecessarily Liberal Interpretation Of The Priority Statute.

The Court has misapprehended the facts in concluding that the interpretation of the priority statute advanced by Benjamin Moore would "prevent collection of additional assets by barring payment of necessary costs." (Opinion, p. 16). While the Superior Court made findings as to the reasonableness of risks perceived by the Liquidator as to the filing and prosecution of claims by AFIA Cedents, and other potential risks to recovery of reinsurance by the estate, there was also abundant evidence submitted showing that these risks were illusory. The asset in question is rights to payment under existing contracts between Home and Century Indemnity, and those contracts remain in effect no matter what the outcome of the dispute over the Proposed Agreement. This is not a case where the estate's right to ownership of an asset was put in jeopardy, but is instead a case where the value of a potential reinsurance asset was put in question because of conditions precedent to recovery of the asset. Thus, the Court misapprehended the facts in concluding that there would be an effective forfeiture of an asset by the estate absent the Proposed Agreement.

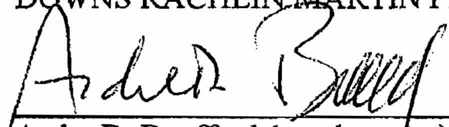
The Court should reconsider it liberal construction of the administrative expense priority in this case (Opinion, p. 16) in consideration of the fact that there would be no asset forfeiture in the event the Proposed Agreement is not approved. The parties would revert to their pre-Agreement positions, with no parties having forfeited any rights or property. It would be a mistake for the Court to adopt such a broad and unprecedented interpretation of the priority statute where the predicate for doing so is not factually supported.

WHEREFORE, Benjamin Moore respectfully requests that the Court enter an order granting (a) a rehearing and reconsideration of the facts and law referred to in this Motion; and (b) such other and further relief as it deems just and proper.

Respectfully submitted,

December 14, 2006

DOWNS RACHLIN MARTIN PLLC

By: 

Andre D. Bouffard (*pro hac vice*)
Eric D. Jones
Attorneys for Benjamin Moore & Co.
199 Main Street
P.O. Box 190
Burlington, VT 05402-0190
(802)863-2375

CERTIFICATE OF SERVICE

I hereby certify that on this day 14th of December, 2006, a copy of Benjamin Moore & Co.'s Motion For Rehearing and Reconsideration of Opinion dated December 5, 2006, was served by first class mail, postage prepaid to the following:

J. Christopher Marshall, Esq.
Senior Assistant Attorney General
Environmental Protection Bureau
Department of Justice
State of New Hampshire
33 Capitol St.
Concord, NH 03301-6397

J. David Leslie, Esq.
Eric A. Smith, Esq.
Rackemann, Sawyer & Brewster
One Financial Center
Boston, MA 02111

Lisa Snow-Wade, Esq.
Orr & Reno, PA
One Eagle Square
PO Box 3550
Concord, NH 03302-3550

Gary Lee, Esq.
LOVELLS
900 Third Ave., 16th FL
New York, NY 10022

Hon. William S. McGraw
Merrimack County Superior Court
163 North Main Street
Concord, NH 03302-2880

Burlington, Vermont.

December 14, 2006

DOWNS RACHLIN MARTIN PLLC

By:
Andre D. Bouffard
199 Main Street
P.O. Box 190
Burlington, VT 05402-0190
Telephone: 802-863-2375
Fax: 802-862-7512

Attorneys for Benjamin Moore & Co.

BTV.545156.01