THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In the Matter of the Liquidation of
The Home Insurance Company

No. 2005-0740

ACE COMPANIES' REPLY IN FURTHER SUPPORT OF MOTION TO STRIKE PORTIONS OF BRIEFS AND APPENDICES FILED BY NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AND COMMISSIONER OF INSURANCE AS LIQUIDATOR OF THE HOME INSURANCE COMPANY

Appellants Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, the "ACE Companies"), by their attorneys, Lovells and Orr & Reno P.A., respectfully submit this reply in further support of their motion (the "Motion") for an order striking certain portions of the briefs and appendices (the "Subject Portions") filed by the National Association of Insurance Commissioners (the "NAIC") and the Commissioner of Insurance as Liquidator of the Home Insurance Company (the "Liquidator"). In further support of their motion, the ACE Companies respectfully state as follows:

Introduction

1. It is undisputed that the Superior Court did not consider the Subject Portions in issuing the Orders that are on appeal. Accordingly, they are outside the evidentiary record and should be stricken under Supreme Court Rule 13(1).

2. The Liquidator claims in his opposition to the Motion that the Court may still take judicial notice of the Subject Portions. The Liquidator, however, is misusing the judicial notice doctrine and has not shown how the Subject Portions are relevant to the issues on appeal. Rule 16(6) of this Court's Rules prohibits the inclusion of "irrelevant" and "immaterial" matters, and states that such matters may be stricken. Given that the Liquidator has not established (and cannot

establish) the relevance of the Subject Portions, the ACE Companies respectfully request that the Court enter an order striking them.

Argument

3. The Liquidator's heavy reliance on the judicial notice doctrine is unavailing. The doctrine has limited application in relation to facts, and it is intended to permit the courts to consider matters that are uncontroverted (such as matters of scientific fact or general acceptance). *See* N.H. Rule Evid. 201. The Liquidator is attempting to expand the judicial notice doctrine beyond these narrow boundaries by asking the Court to draw inferences from post-hearing facts, which the Liquidator has inaccurately characterized.[1]

4. In addition, the judicial notice doctrine does not supersede this Court's requirement that matters submitted by the parties must be relevant. Rule 16(6) states that "[b]riefs and memoranda of law must be compact, logically arranged with proper headings, concise and free from burdensome, irrelevant, and immaterial matter. Briefs and memoranda of law not complying with this section may be disregarded and stricken by the [Court]." Sup. Ct. R. 16(6). The Subject Portions should be stricken because they are irrelevant and immaterial.

5. In attempting to justify his references to the High Court proceedings, the Liquidator vaguely asserts that this Court should be "aware" of "procedural developments concerning the status of the Scheme contemplated by the [Proposed] Agreement." (Liquidator's Obj. at ¶ 2.) The Liquidator does not explain how the High Court proceedings regarding the approval of the Scheme under English law are in any way material to the Court's consideration of the issues on this appeal, which concern the fairness, reasonableness and necessity of the Proposed Agreement under New

[1] The Liquidator attempts to portray the High Court proceedings as "foreign law" of which this Court may take notice. (Liquidator's Obj. at ¶ 3.) However, there are no English law issues involved in this case, so clearly the Liquidator is attempting to present the High Court proceedings as a "fact" from which the Court should draw an inference (*i.e.*, that the Proposed Agreement is fair, reasonable and necessary). As discussed below, the High Court stated that no such inference should be drawn.

Hampshire law. The High Court proceedings cannot be relevant here, as they involved a wholly different issue.

6. Indeed, the High Court emphasized that its November 2005 ruling has no bearing on the legality of the Proposed Agreement. (*See* L.A. 588, 590.) The High Court stated: "I do not seek to trespass in any way on the matters which are germane to the deliberations of the New Hampshire Supreme Court in the pending appeal." (L.A. 590 at ¶ 22.) The High Court also pointed out that during the July 2005 evidentiary hearing the Superior Court had ruled that testimony regarding the approval of the Scheme under English law is inadmissible on relevance grounds. (L.A. 588 at ¶ 17; *see also* Hearing Tr. Vol. 2-B at 220:5-20.)[2] Because the High Court proceedings are not relevant, the Court has no reason to take judicial notice of them on this appeal.

7. The NAIC's recent actions with respect to the Insurer Receivership Model Act ("IRMA") are also irrelevant. The Liquidator argues that the revisions in IRMA and one of the drafting notes adopted by the NAIC are "clearly pertinent to [the] interpretation of the New Hampshire statutes" (Liquidator's Obj. at ¶ 6), without stating how they are material to the issues on appeal. The Liquidator's appellate brief is marred by the same failure to articulate any valid reason for this Court to consider the IRMA revisions and drafting note. (*See* ACE Companies' Reply Br. at 1, 3-5.) These omissions are not surprising, since an examination of the IRMA revisions and drafting note shows that they do not in fact relate to the situation presented in this appeal.

8. As the ACE Companies noted in the Motion, IRMA includes a new provision stating that a liquidator has the power to pay Class I administration costs "where the payments assist or result in the collection or recovery of property of the insurer that provides a net benefit to creditors of the estate." (IRMA § 504(A)(3)(b); NAIC Appendix at 52.) This is nothing more than a

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[2] At the evidentiary hearing, counsel for the Liquidator tried to justify the admission of testimony regarding the approval of the Scheme by arguing that it "relates to the question of fairness and reasonableness." (*Id.* at 220:15-16.) The Superior Court rejected that argument and the Liquidator did not appeal the Superior Court's ruling.

restatement of the powers that currently exist in RSA 402-C:44, I, which provides that a liquidator may pay, as Class I administration costs, "the actual and necessary costs of preserving or recovering the assets of the insurer." Thus, the recent IRMA revision does not assist in the interpretation of RSA 402-C:44, I because it fails to add anything new regarding administration costs.

9. The drafting note cited by the Liquidator and NAIC similarly sheds no light on the statutes at issue here. The drafting note — which, as the Reinsurance Association of America ("RAA") notes in its amicus brief, was deliberately removed from the text of IRMA (*see* RAA Amicus Br. at 2-4) — simply states that payments for administration costs to lower priority creditors (*i.e.*, creditors who also have other, unrelated claims against the estate) do not, by themselves, constitute distributions in violation of the priority statute. (NAIC Appendix at 93.) The drafting note does not address the issue here, where the Liquidator has admitted that the proposed payments to the AFIA Cedents are on account on, and directly relate to, the AFIA Cedents' pre-liquidation, Class V claims. (*See* ACE Companies' Reply Br. at 1, 3-5.)

10. In sum, the Liquidator has not shown how the NAIC activity that took place after the issuance of the Superior Court's September 2005 decision has any relevance to this appeal.

11. The Liquidator argues that IRMA is "not a new issue" because earlier NAIC proceedings concerning IRMA were discussed at the July 2005 evidentiary hearing before the Superior Court. (Liquidator's Obj. at ¶ 6.) As an initial matter, the fact that NAIC proceedings from the pre-July 2005 period are part of the appellate record does not mean that NAIC proceedings from the post-July 2005 period are relevant. The Superior Court only took into account the former, and not the latter.

12. Moreover, no purpose would be served if this Court were to consider the post-July 2005 NAIC proceedings. As the Superior Court noted in the September 2005 Order, Mr. Craig testified accurately that the NAIC refused, on several occasions, to put the drafting note referred to above into the text of IRMA. (J.A. at 52.) What Mr. Craig acknowledged on cross-examination

(and never attempted to deny) is that the version of IRMA adopted at the intermediate NAIC level included the drafting note. (*Id.*)[3] The current version of IRMA does the same thing. As before, the NAIC refused to put the language of the drafting note in the text of IRMA. (*See* RAA Amicus Br. at 2-4.) Thus, the post-July 2005 NAIC proceedings simply confirm what is in the record already.

13. Finally, the Liquidator seeks refuge in this Court's Rule 16(7), which allows for the submission of "late authorities, newly enacted legislation, or other intervening matters." Rule 16(7), however, does not override the relevance requirement in Rule 16(6), which the Liquidator cannot meet. Furthermore, the NAIC evidence that the Liquidator is attempting to include in the record does not involve any legal authority or legislation, since the revisions to the Model Act that are contained in IRMA have not been adopted by any state.

[3] The Superior Court drew an incorrect inference that Mr. Craig's testimony was somehow "undermined" by this acknowledgement. (*Id.*) To the contrary, Mr. Craig's sole point was that the NAIC did not see fit to include the drafting note in the text of IRMA itself.

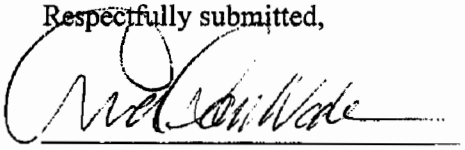
WHEREFORE, the ACE Companies respectfully request that this Court enter an order:

A. Striking the portions of the briefs and appendices submitted by the Liquidator and NAIC that are identified above; and

B. Granting such other and further relief as this Court deems just and proper.

Dated: April 10, 2006

Respectfully submitted,



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Certificate of Service

I, Lisa Snow Wade, Esq., hereby certify that on this 10th day of April, 2006, I have caused a copy of the foregoing ACE COMPANIES' REPLY IN FURTHER SUPPORT OF MOTION TO STRIKE PORTIONS OF BRIEFS AND APPENDICES FILED BY NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AND COMMISSIONER OF INSURANCE AS LIQUIDATOR OF THE HOME INSURANCE COMPANY to be forwarded by first class US mail to:

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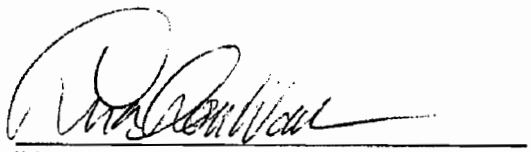

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