

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

**In the Matter of the Liquidation of
The Home Insurance Company**

**LIQUIDATOR'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW AFTER EVIDENTIARY HEARING**

Roger A. Sevigny, Commissioner of Insurance of the State of New Hampshire ("Commissioner"), as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby submits proposed findings of fact and conclusions of law after the five-day evidentiary hearing held July 25 through July 29, 2005 on the necessity, fairness and reasonableness of the Agreement with AFIA Cedents.

I. Proposed Findings of Fact.

1. As provided in the Order on Remand entered October 8, 2004, the evidentiary hearing was held to receive evidence concerning the necessity, fairness and reasonableness of an agreement with a number of cedents (reinsureds) of Home referred to as the AFIA Cedents. Order on Remand at 13.

2. The Liquidator presented the testimony of six witness: Jonathan Rosen, the Chief Operating Officer and Reinsurance Counsel of Home responsible for the day-to-day operations of the company in liquidation [Tr. I:60]; Sarah Ellis, an Assistant Director at Ernst & Young LLP in London, England ("E&Y"), responsible for the day-to-day conduct of the provisional liquidation of Home in the United Kingdom for the Joint Provisional Liquidators [Tr. II:75, 77]; Gareth Hughes, a chartered accountant and licensed insolvency practitioner, corporate restructuring partner of E&Y, and the lead Joint Provisional Liquidator of Home appointed by

the High Court of Justice in London, England (“English Court”) [Tr. II:142-45; Ex. 26]; Peter Bengelsdorf, the Special Deputy Liquidator of Home appointed by the Liquidator and the Court [Tr. III:130, 163; Ex. HHH]; Gernot Warmuth, from Scheiber & Partner in Frankfurt, Germany, counsel for Zurich Versicherung Aktiengesellschaft (Deutschland), successor to Agrippina Versicherung Aktiengesellschaft (“Agrippina”), an AFIA Cedent [Tr. III:202-03]; and Rhydian Williams, Head of Pools, Security and Insolvencies of Equitas Limited (“Equitas”), an AFIA Cedent. [Tr. IV:86]

3. The Liquidator was opposed by four member companies of the ACE group (“ACE”) (Century Indemnity Company (“Century”), ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company, and ACE American Reinsurance Company) [Ex. 1 ¶ 25], and Benjamin Moore & Company (“BMC”). As described below, one of the ACE companies, Century, reinsures 100% of Home’s obligations to AFIA Cedents. [Tr. I:74, IV:214-15; Ex 3 ¶ 2, Ex. 6]

4. National Indemnity Company, a member of the Berkshire Hathaway group of companies, reinsures over \$1,000,000,000 of Century’s obligations, including Century’s obligations under the Home-AFIA program. [Tr. V:21-22] BMC is also a member of the Berkshire Hathaway group of companies. [Tr. V:22] BMC does not speak for other creditors. [Tr. I:46-47]

5. ACE presented the testimony of five witnesses: Michael Durkin of ACE INA Services U.K. Limited (“ACE INA Services”), the ACE company that administers AFIA and other European claims for ACE [Tr. IV:165-66]; William O’Farrell, Senior Vice President of Reinsurance Recoverables for ACE [Tr. V:8]; Richard Hacker of 3-4 South Square in London, England, an English Queen’s Counsel expert on English law [Tr. V:70]; Robert Craig of Robert

F. Craig P.C., Omaha, Nebraska, an attorney presented as an expert [Tr. V:88]; and Thomas Wamser, Senior General Counsel for ACE. [Tr. V:142] BMC presented no witnesses.

6. Home is a New Hampshire domiciled insurance company subject to regulation by the New Hampshire Insurance Department. Home was incorporated in New Hampshire in 1973, and its predecessor insurance companies were established as long ago as 1853. Home and its subsidiaries wrote property and casualty insurance and reinsurance in the United States and in certain other countries, including the United Kingdom. [Ex. 1 ¶¶ 1-3] Prior to 1995, when Home was placed in runoff, Home was writing approximately \$2 billion in premium per year, 85% in complex commercial business and 15% in property and personal lines. [Tr. III:136] Home did business in the UK through its unincorporated UK branch (“Home UK Branch”), which was authorized to do business in the UK and regulated by the Financial Services Authority (“FSA”) and its predecessor regulators in the UK. [Ex. 1 ¶ 4]

7. After a rehabilitation proceeding commencing on March 5, 2003, the Court entered an Order of Liquidation for Home on June 13, 2003. [Ex. 1 ¶¶ 5, 6] The Order of Liquidation declared that Home was insolvent and appointed the Commissioner as liquidator of Home. The Order of Liquidation enjoined, to the full extent of the Court’s jurisdiction and principles of comity, the assertion of claims against Home, except by the filing of proofs of claim with the Liquidator. The Order of Liquidation also set the last day for the filing of claims against Home as one year from the date of the order, i.e., June 13, 2004. [Tr. III:137; Ex. 1 ¶ 6, Ex. 43]

8. On May 8, 2003, the Commissioner (as Rehabilitator of Home) petitioned the English Court to appoint joint provisional liquidators for the Home UK Branch under English law. That same day, the English Court appointed Gareth Hughes and Margaret Mills, licensed insolvency practitioners and partners of E&Y, as joint provisional liquidators (“Joint Provisional

Liquidators”) in a provisional liquidation proceeding for Home’s UK Branch ancillary to the New Hampshire proceeding for Home. [Tr. II:145-46; Ex. 1 ¶¶ 7, 8, Ex. 26] The UK provisional liquidation is to protect and collect the assets of the UK estate. It serves to protect UK assets from claims by creditors through a stay. [Tr. II:146, III:12, V:81]

9. Home wrote insurance and reinsurance business in the UK as a participating member of the American Foreign Insurance Association (“AFIA”), an unincorporated association of American insurers. As a participating member, Home entered insurance contracts with policyholders and cedents in the UK, and Home reinsured that business with AFIA as well as a number of other reinsurers. Among other things, Home entered certain reinsurance treaties (the “AFIA Treaties”) under which a number of insurers (the “AFIA Cedents”) ceded and Home assumed insurance risk through the Home UK Branch. [Tr. I:62-63; Ex. 1 ¶¶ 11-12]

10. Pursuant to contracts dated December 30, 1983, entitled Purchase Agreement No. 1 and Purchase Agreement No. 2, CIGNA Corporation (“CIGNA”) and certain of its subsidiaries purchased AFIA. [Tr. I:62-63, 65-66; Ex. 1 ¶ 13, Ex. 2]

11. As part of that transaction, one of the CIGNA subsidiaries, Insurance Company of North America (“INA”), entered an Insurance and Reinsurance Assumption Agreement dated January 31, 1984 (the “Assumption Agreement”) with Home and other companies. [Ex. 3] Under the Assumption Agreement, INA agreed among other things 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. INA’s obligations included responsibility to adjust claims and indemnify Home through payment of Home’s losses under the AFIA Treaties. [Tr. I:66-69, V:148-49; Ex. 3, ¶ 2]

12. With the exception of the AFIA Treaties, the Home UK Branch's AFIA insurance and reinsurance business (consisting of general direct and marine and aviation business) was formally transferred to a CIGNA subsidiary under English law in 1986. This effected a novation such that the transferred business became a direct obligation of the CIGNA subsidiary, and Home had no further involvement with that business. The AFIA Treaties were not formally transferred under English law and accordingly remain an obligation of Home subject to the Assumption Agreement. [Tr. I:66, 214; Ex. 1 ¶¶ 16, 17]

13. The Assumption Agreement contains an "insolvency clause" within paragraph 6. [Tr. I:91; Ex. 1 ¶ 18, Ex. 3 at 5-6] The insolvency clause requires INA to pay obligations under the Assumption Agreement directly to Home or Home's liquidator in the event of Home's insolvency. [Ex. 1 ¶ 50] The claims are to be paid on the basis of Home's liability on the claims, without diminution because of Home's insolvency or because Home's liquidator has failed to pay all or part of a claim. The insolvency clause also permits INA to interpose a defense in the determination of claims in the applicable proceeding. [Ex. 1 ¶ 19, Ex. 3 at 5-6]

14. In 1996, INA was part of a corporate restructuring pursuant to which INA's rights and obligations under the Assumption Agreement with respect to the AFIA Treaties were transferred to INA's successor, Century. [Tr. I:74-76; Ex. 1 ¶ 20, Ex. 6] As part of a 1999 transaction, CIGNA sold INA Corporation and its subsidiaries, including Century, to ACE INA Holdings, Inc., a subsidiary of ACE Limited. Under the transaction, Century became part of ACE. [Ex. 1 ¶¶ 22, 23, 24, Ex. 52]

15. The ACE group of companies also includes ACE-INA Services, a company that provided claim administration services with respect to the AFIA Treaties pursuant to the Assumption Agreement. [Tr. IV:165-66; Ex. 1 ¶¶ 26, 27]

16. Prior to Home's liquidation, and at least since 1993, claims submitted by the AFIA Cedents under the AFIA Treaties were handled on Home's behalf by INA and its successor, Century, and their agents, including ACE INA Services, at INA's and Century's own expense pursuant to the Assumption Agreement. [Ex. 1 ¶ 29] The AFIA Cedents submitted claims under the AFIA Treaties directly to ACE INA Services (or its predecessors), acting for INA and then Century, in London. [Tr. IV:168] Also at least since 1993, claims submitted by the AFIA Cedents under the AFIA Treaties have been paid on Home's behalf by ACE INA Services drawing on a trust account funded from various sources. [Tr. IV:170, 201-03; Ex. 1 ¶¶ 30, 39]

17. ACE INA Services prepared financial statements for the Home UK Branch to be filed with the FSA for the year ending December 31, 2002. [Tr. I:90, IV:215-16; Ex. 1 ¶ 32, Ex. 10] Those statements [Ex. 10] reported that the expected claims under the AFIA Treaties, and thus Century's obligations for those treaties under the Assumption Agreement, as of December 31, 2002, totaled approximately £143 million (or approximately \$231 million). [Tr. I:89-90, III:142, IV:215-16; Ex. 1 ¶ 33, Ex. 10 at 5] The £143 million estimate was ACE INA Services' best estimate at that point in time of Home's AFIA-related liabilities. [Tr. IV:215]

18. Home was also reinsured with respect to its liabilities under the AFIA Treaties under reinsurance contracts with BAFCO Reinsurance Company of Bermuda Limited ("BAFCO"), a Bermudan company. These reinsurance contracts consisted of an Excess of Loss Reinsurance Agreement dated December 23, 1982, a Second Excess of Loss Reinsurance Agreement dated December 23, 1982 and a First Supplemental Excess of Loss Reinsurance Agreement dated February 1, 1985 (as amended, the "BAFCO Agreements").

19. The BAFCO Agreements provide that they are subject to English law and that disputes will be resolved by arbitration in England. They provide coverage to Home for net

losses exceeding \$95 million in the aggregate. Home's net losses exceeded that amount long ago. [Tr. I:69-71; Ex. 1 ¶¶ 35-37, Ex. 4]

20. BAFCO's obligations under the BAFCO Agreements have been assumed by another member of the ACE group of companies, Century Indemnity Reinsurance Company ("CIRC"). [Tr. I:71-74; Ex. 1 ¶ 38]

21. The Assumption Agreement and the BAFCO Agreements operate independently. The Assumption Agreement places INA directly behind Home [Ex. 3 at 2], and the BAFCO Agreements provide additional reinsurance protection to Home. [Tr. I:74; Ex. 1 ¶¶ 35, 42, Ex. 5 at 2]

22. The trust account drawn on by ACE INA Services to pay AFIA Cedents' claims was funded principally by CIRC, as successor to BAFCO, on behalf of Century, as well as third party reinsurance and the AFIA sellers (to the extent of uncollectible third party reinsurance). [Tr. IV:170, 201-03; Ex. 1 ¶¶ 38, 39] Home was providing none of the funding immediately prior to entry of the Liquidation Order. [Tr. IV:203]

23. The liquidation of Home had three significant effects with respect to the claims of AFIA Cedents under the AFIA Treaties and the obligations of Century and/or CIRC.

24. *First*, as a result of Home's liquidation, the AFIA Cedents' claims under the AFIA Treaties were required to be filed with and determined by the Liquidator, as opposed to Century (through ACE INA Services), subject to review and approval by the Court. [Tr. I:91-92, III:137-38; Ex. 1 ¶ 43] See RSA 402-C:37, 402-C:41, 402-C:45, 402-C:57. The Order of Liquidation enjoined (to the extent of the Court's jurisdiction and principles of comity) other means of asserting claims against Home. [Ex. 1 ¶ 44, Ex. 43 at (n)] The Claims Procedures Order (first

entered on December 19, 2003 and amended since) provides procedures for the determination of claims against Home. [Tr. I:92; Ex. 11]

25. *Second*, Century must make payments under the Assumption Agreement and/or CIRC must make payments under the BAFCO Agreements with respect to determined claims under the AFIA Treaties to Home or its Liquidator (or the Joint Provisional Liquidators, as appropriate), not the AFIA Cedents. [Tr. I:91, III:19, 140; Ex. 1 ¶ 46] See RSA 402-C:21, I; RSA 402-C:25, VI. The Order of Liquidation directs that Home's assets be paid to the Liquidator. [Ex. 1 ¶ 47, Ex. 43 at (q)]

26. *Third*, AFIA Cedents' claims would receive a distribution respecting their claims from the Home estate only if estate assets are sufficient to reach the priority class to which their claims are assigned. See RSA 402-C:44. Claims of the AFIA Cedents fall in the Class V priority class. [Tr. I:93; Ex. 1 ¶ 53] See RSA 402-C:44, V.

27. In April 2003, the Special Deputy Liquidator estimated that there would be a substantial distribution from Home's assets to Class II (policyholder) level creditors but that there would be no distribution to creditors below priority Class II. That was also the Special Deputy Liquidator's best estimate when he testified at the hearing. [Tr. III:138]

28. Certain AFIA Cedents were also reinsurers of Home. To the extent that Home has reinsurance or other claims against individual AFIA Cedents, those AFIA Cedents may offset their allowed claims against Home against Home's claims against them pursuant to RSA 402-C:34. [Tr. I:94; Ex. 1 ¶ 54] Home's claims against AFIA Cedents are expected to constitute a significant amount of money but only a relatively small percentage of the AFIA Cedents' total claims against Home. [Tr. I:192, III:143, 162]

29. During the Summer of 2003, the Special Deputy Liquidator and the US liquidation team were principally focused on identifying and marshaling assets, dealing with the transfer of claims to guaranty funds, creating a stand alone Home organization, setting up an information technology function, and meeting with ancillary receivers. [Tr. III:138-40] The Joint Provisional Liquidators and the UK liquidation team were principally focused on investigating the assets, liabilities and general financial position of the Home UK Branch. [Tr. II:146-47] These investigations identified the Assumption Agreement and BAFCO Agreements as assets involved with the Home UK Branch. [Tr. II:147-49]

30. Between May and September 2003, Ms. Ellis met with several AFIA Cedents, including Excess Insurance Company (“Excess”), Equitas, KWELM, and English & American Insurance Company Ltd. (“English & American”). [Tr. II:78, 79, 83, 84] These AFIA Cedents raised a number of concerns, including in various combinations concerns over the difficulty of dealing with ACE INA Services about claims, whether a recently effective European Union Directive applied and affected the priority of reinsurer creditors (which had previously been equal to that of direct insurance creditors), whether they would receive any distribution from Home’s estate, and whether there would be any benefit to them to file claims in the New Hampshire liquidation. [Tr. II:78-81, 83-86] Certain cedents also indicated that the amount of their claims was greater than indicated on ACE INA Services’ books. [Tr. II:83-85] Ms. Ellis reported on these meetings to Mr. Hughes. [Tr. II:81, 85, 86]

31. Ms. Ellis sent letters at the end of July 2003 to sixteen of the AFIA Cedents expected to have the largest claims asking for the total amount of their claims and whether the cedent would be interested in serving on an informal creditors’ committee regarding the provisional liquidation. Ms. Ellis also asked for a high level indication of their claims (to

compare with ACE's numbers) and whether the cedent intended to file a proof of claim. [Tr. II:86, 92, 172]

32. Ms. Ellis received responses from four of the sixteen AFIA Cedents, three of whom provided high level claims information and indicated an intent to file a proof of claim. [Tr. II:92; Exs. E, G, BM R]

33. The fourth, Unionamerica, responded that it was investigating its position and reserved its rights but was willing to serve on an informal creditors' committee. It also withdrew its request for payment of claims previously approved for payment by ACE INA Services. [Tr. II:87, 158-60; Ex. 13]

34. Ms. Ellis compared the claim information she received from the three AFIA Cedents with the information for those cedents provided by ACE INA Services. She concluded that the AFIA Cedents felt their claims were significantly higher than was shown on ACE INA Services' books. Ms. Ellis reported her conclusions to Mr. Hughes. [Tr. II:92-93, 169]

35. Mr. Rosen spoke with Karen Amos of Equitas in early August 2003 to discuss a potential commutation of Home's ceded business to Equitas. [Tr. I:95, 111] Prior to that call, Ms. Amos sent an email to Mr. Rosen outlining various scenarios Equitas was considering. [Tr. 95; Ex. 12] One of those options was to seek to cut through and deal directly with ACE over Equitas' AFIA-related claims above offset amounts. [Tr. I:94-95, 99-101; Ex. 12 at 2] Mr. Rosen advised Ms. Amos that cut through was unacceptable. [Tr. I:102-03]

36. The AFIA Treaties included agreements, referred to as Treaty R or Contract R, between Home and members of the Ruddy Pool, including Agrippina. Under the Treaty R with Agrippina [Ex. 8], Home reinsured 100% of claims against Agrippina arising from Agrippina's

participation in the Ruddy Pool and was responsible for the cost of administering the inwards claims against Agrippina. [Tr. I:82]

37. As part of Treaty R, Agrippina had assigned to Home its rights to other reinsurance known as the “common account reinsurances.” [Tr. III:208] Under the Assumption Agreement, ACE was to perform the administration of claims as required by Treaty R on Home’s behalf. [Tr. I:68-69, IV:166] Agrippina and Home (through ACE) had been involved in contentious arbitration proceedings involving Treaty R since 1999 or 2000. [I:107, 109, III:205-06, 207] ACE INA Services had stopped processing Agrippina Treaty R claims prior to entry of the Order of Liquidation. [Tr. IV:199]

38. On September 12, 2003, Mr. Rosen, Mr. Hughes, and Ms. Ellis met with Mr. Warmuth and Guido Aubach for Agrippina to discuss the pending arbitration proceeding and issues arising from Home’s liquidation. [Tr. I:112-13, III:209] During the meeting, Mr. Warmuth stated that Agrippina was entitled to terminate Treaty R and recapture the reinsurances assigned to Home; that this would deprive Home of an asset; and that unless Home was prepared to offer consideration, Agrippina would terminate Treaty R and attempt to get some consideration or reward from ACE. Mr. Rosen and Mr. Warmuth debated whether Agrippina had the right to terminate Treaty R in light of the Order of Liquidation. [Tr. I:112-14, II:22-26, 155-57, III:65, 211-13]

39. Mr. Rosen met with Mr. Williams and Ms. Amos of Equitas during September 2003. During that meeting, Mr. Rosen stated that cut throughs were legally impermissible. Mr. Williams disagreed and said that, based on the course of dealing 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 to obtain consideration for the AFIA liabilities. [Tr. I:110-12, IV:92]

40. Mr. Williams made statements that indicated (and were intended to indicate) to Mr. Rosen that Equitas was in discussions with ACE to resolve their global relationship and that the discussions included AFIA liabilities. [Tr. I:112]

41. ACE and Equitas had begun discussions over a potential global commutation prior to the time of Mr. Rosen's September 2003 meeting with Mr. Williams. [Tr. V:11, 15] ACE and Equitas were also in the process, at approximately that time, of exchanging information that included information with respect to Home's AFIA-related liabilities. [Tr. IV:103, 132-33, 139-40, V:11, 16, 32; Ex. 56] ACE did not notify Home of those discussions. [Tr. V:19]

42. During the Fall of 2003, Equitas sought advice of counsel in both the UK and the US concerning the permissibility of cut through under UK and US law. [Tr. IV:120, 125] Counsel in both the UK and US advised Equitas that it was permissible. [Tr. IV:142-43, 147-48; Exs. AAA, CCC] When he brought the Agreement to his superior for signing in January 2004, Mr. Williams was not sure whether Equitas would choose the Agreement due to discussions going on with ACE. [Tr. IV:103, 139-40]

43. Mr. Rosen was concerned about cut through or circumvention because of his September 2003 meetings with Equitas and Agrippina. [Tr. I:116-17] He was also concerned because one AFIA Cedent, Nationwide, had previously pursued cut through litigation and the Sixth Circuit had issued a decision denying cut through under the then-existing facts but deferring the issue in the context of Home's insolvency as not ripe.¹ [Tr. I:88, 121-22; Ex. 9] Mr. Rosen was also concerned in light of a decision in the Legion liquidation permitting certain

¹ Nationwide Mut. Ins. Co. v. Home Ins. Co., 150 F.3d 545 (6th Cir. 1998) [Ex. 9]

policyholders to cut through to reinsurance on the facts there presented.² [Tr. I:122-23, 124-25; Ex. 15]

44. On September 16, 2003, Mr. Rosen met with Mr. Durkin and Michael Smith of ACE INA Services. [Tr. I:114-15; Ex. 1 ¶ 63] During the meeting, Mr. Rosen expressed concern 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 non-committal and would not address the issue. [Tr. I:114-17, 120-24, II:20, IV:188]

45. Mr. Rosen was concerned by the Unionamerica letters withdrawing its request for payment on claims already approved for payment by ACE INA Services [Ex. 13] and had requested a meeting with Unionamerica. [Tr. I:104-07]

46. Mr. Rosen and Ms. Ellis, accompanied by Barbara Nowak of ACE INA Services, met with Tammy Lewis and Alistair Gunn of Unionamerica on September 17, 2003. [Tr. I:127, II:90] At that meeting, Unionamerica would not explain why it had withdrawn its request for payment of claims previously approved for payment. Its representatives said they were reserving their rights and could not comment any further, and that the matter had been transferred to St. Paul (Unionamerica's holding company in the United States) and that they would be taking direction from St. Paul. [Tr. I:127-29, II:90]

47. Outside of the meeting with Unionamerica, Mr. Rosen, accompanied by Ms. Ellis, asked Ms. Nowak why she thought Unionamerica had withdrawn its claims. Ms. Nowak responded that she did not know but that she presumed it would be because Unionamerica might be seeking to do a side deal with ACE. This caused Mr. Rosen and Ms. Ellis concern. [Tr. I:129, II:19, 90-91]

² Koken v. Legion Ins. Co., 831 A.2d 1196 (Pa. Commw. 2003) [Ex. 15]

48. Mr. Rosen and Mr. Warmuth met again on September 17, 2003. [Tr. I:129, III:213] During that meeting Mr. Warmuth reiterated that unless Home was prepared to come up with consideration, Agrippina would terminate Treaty R and attempt to obtain consideration from ACE. [Tr. I:129-30, II:91-92, III:214-15] In a later telephone call with Mr. Rosen, Mr. Warmuth stated that Agrippina would terminate Treaty R unless Home had made a proposal by December 15, 2003. [Tr. III:215-16, IV:64]

49. Mr. Rosen reported on his concerns over cut through and circumvention arising from his meetings with Equitas, Agrippina, and Unionamerica to the Special Deputy Liquidator. [Tr. I:138-39]

50. Equitas was expected to be the AFIA Cedent with the largest claims, Agrippina's claims under Treaty R were expected to be substantial, and Unionamerica was also expected to have large claims. [Tr. II:40-41, 157, 160, 179, 180, III:145] Their claims represented a large potential recovery from ACE and a significant asset of Home. [Tr. I:164-66, II:157]

51. On September 16, 2003, Lovells (counsel for ACE) sent a letter to Clifford Chance (counsel for the Joint Provisional Liquidators). [Ex. 1 ¶ 64] The letter accused Mr. Rosen of interfering with ACE's relationship with AFIA Cedents and suggesting that this raised issues concerning the enforceability of the Assumption Agreement. [Ex. 17] Stroock (US counsel for ACE) sent a copy of this letter to Alexander Feldvebel of the New Hampshire Insurance Department. [Tr. I:131-38, V:153-54; Ex. 17]

52. By late September, 2003, the Special Deputy Liquidator and the lead Joint Provisional Liquidator were aware that ACE's obligations to Home for Home's obligations to the AFIA Cedents represented a significant asset of the Home estate (£143 million based on the FSA return for Home's UK Branch as of December 31, 2002), and that the collectibility of this asset

depended on the filing and prosecution of claims by AFIA Cedents. [Tr. II:147-50, III:140-42; Ex. 10] The Special Deputy Liquidator and lead Joint Provisional Liquidator had received indications that the asset might be more than the amount reflected in the FSA return. [Tr. II:169, 183, III:142-43] The ACE obligations were the single largest reinsurance asset of the Home estate. [Tr. II:55-56]

53. As a result of the various discussions and correspondence with AFIA Cedents and with ACE, the Special Deputy Liquidator and the lead Joint Provisional Liquidator were at this time concerned that the AFIA Cedents would not pursue their claims against the estate, for lack of an economic benefit, and might pursue other options such as asserting cut through rights against or seeking to negotiate side deals for payment directly from ACE. [Tr. I:138-39, II:162-66, 172, III:144-45]

54. Due to their concerns, the Special Deputy Liquidator and lead Joint Provisional Liquidator arranged for a letter from the Liquidator and the lead Joint Provisional Liquidator to ACE to seek assurances that ACE would not engage in cut through discussions or circumvent Home's liquidation. The Special Deputy Liquidator also asked Mr. Rosen to arrange a meeting with ACE. Clifford Chance was directed to prepare a response to the Lovell's September 16, 2003 letter. [Tr. II:165-66, III:145-46]

55. The Liquidator and Joint Provisional Liquidators sent a letter to Century dated September 26, 2003 [Ex. 19] to express concern that attempts might be made to deal directly between Century and AFIA Cedents; to advise that the Liquidator and Joint Provisional Liquidators viewed such efforts as unlawful; and to request assurances. The letter requested that ACE confirm that (1) ACE would not participate in such efforts, and (2) would notify the

Liquidator and Joint Provisional Liquidators if it was aware of any such efforts. [Tr. I:139, II:167, III:146; Ex. 19]

56. On September 29, 2003, Clifford Chance sent a letter to Lovells responding to the issues raised in Lovells' September 16, 2003 letter, including a description of the Liquidator's approach to the potential commutation of Home's ceded business with Equitas. [Tr. I:137-38; Ex. 18] (Home ultimately entered a commutation agreement with Equitas. The commutation agreement excluded and did not commute Home's AFIA-related obligations to Equitas. It capped Equitas' potential offset at \$20 million and gave Equitas until June 30, 2008 to prove up its claims. If Equitas does not do so, Equitas will have to pay Home the unproved amount plus interest. [Tr. I:103-104; Ex. AA])

57. At Mr. Bengelsdorf's direction, Mr. Rosen contacted Mr. Wamser of ACE and arranged for a meeting on September 30, 2003. [Tr. I:140, III:146]

58. On September 30, 2003, a meeting was held in New York among Mr. Bengelsdorf and Mr. Rosen for the Liquidator, Mr. Hughes and Ms. Ellis for the Joint Provisional Liquidators, and Mr. Wamser and Howard Denbin for ACE. [Tr. I:140-43, II:93, 167-68, III:146, V:160] At the meeting, Mr. Bengelsdorf outlined his view of the relationships and responsibilities among the parties and suggested the possibility of a three-cornered commercial resolution among Home, ACE and the AFIA Cedents. [Tr. II:170-71, III:148, V:162, 164-66; Ex. 20]

59. At the September 30, 2003 meeting, Mr. Wamser and Mr. Denbin stated that they did not have authority to commit ACE to enter into commutation discussions but would go back to their superiors at ACE and determine whether ACE was interested in pursuing commutation discussions. [Tr. II:170-71, III:149, V:167] The difference between ACE INA Services' valuation of the AFIA Cedents' claims and the indications from the Cedents was discussed, and

the ACE representatives noted that the ACE valuation of the AFIA liabilities had gone down since the 2002 FSA return. [Tr. I:147, II:34, 93-94, 169-70, V:164]

60. The Special Deputy Liquidator and the lead Joint Provisional Liquidator recognized that Home did not have the claims information needed for effective commutation discussions, that such information needed to be collected from AFIA Cedents, and then the Special Deputy Liquidator and lead Joint Provisional Liquidator would see if exploratory discussions could continue. [Tr. I:154-55, II:169-71, III:149-50, V:164] The Liquidator did not accept ACE's view of the size of the AFIA liabilities because the Cedents had provided indications that ACE's numbers were low, ACE had lowered its valuation since December 31, 2002, and the payout pattern graphs provided by ACE INA Services' chief actuary appeared infirm to Mr. Rosen. [Tr. I:147-48, II:36, III:46-49]

61. The Liquidator's and Joint Provisional Liquidator's September 26, 2003 joint letter to ACE was also discussed during the September 30, 2003 meeting. Mr. Wamser and Mr. Denbin did not provide the assurances requested in the letter. [Tr. I:143, II:168, III:147]

62. 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,³ 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 Stroock. [Tr. I:143-45, II:168-69, III:147, V:163-64; Ex. 21]

63. As a result of the September 30 meeting, Home and ACE agreed to investigate the differing views of cedents and ACE by attempting to reconcile the positions of three AFIA Cedents, KWELM, Equitas, and Unionamerica, with those of ACE. The process was to start

³ National Employers' Mut. Gen. Ins. Ass'n. Ltd. v. AGF Holding (UK) Ltd., [1997] 2 BCLC 191 [Ex. 21]

with KWELM, a net debtor in insolvency proceedings, as some work had been done and KWELM wanted to proceed. [Tr. II:83-84, 94, 170, Tr. III:153]

64. E&Y saw its role to facilitate and mediate meetings between the Cedents (with KWELM being first) and ACE to compare the claims and amounts on their respective ledgers and then review files where there was a discrepancy. [Tr. II:94-96] E&Y did not itself have claims information. [Tr. II:95] The ledger comparison for KWELM was completed in December 2003, and it identified approximately 190 claims as appearing on KWELM but not ACE ledgers. [Tr. II:95]

65. ACE wanted to review the 190 claim files to see if they were valid and asked that they be resubmitted. ACE was not prepared to discuss KWELM's case reserves or IBNR until the paid loss reconciliation was complete. That paid reconciliation could not occur until the 190 claim files were reviewed by ACE and E&Y was concerned that they would not be reviewed by the claim submission bar date. [Tr. II:94-97] The Equitas reconciliation never started. [Tr. II:97]

66. Mr. Bengelsdorf and Mr. Rosen had a further telephone conversation with Mr. Wamser on October 16, 2003. [Tr. I:146, III:150, V:171] During that call, Mr. Wamser said that ACE was interested in discussing a two-party commutation between ACE and Home, but he rejected the three-cornered proposed transaction structure suggested by Home at the September 30, 2002 meeting. [Tr. III:151, 154, V:173-74] He also said that ACE would not commute at the amount set forth in the 2002 FSA return and that ACE's valuation of the AFIA Cedents' claims had dropped in the meantime. [Tr. I:146-49, V:194-96]

67. During the October 16, 2003 conference call, the Liquidator participants did not believe that Mr. Wamser gave the assurances requested in the September 26, 2003 letter. [Tr.

III:151] They understood Mr. Wamser to stand by the analysis of NEMGIA provided at the September 30, 2003 meeting and that he believed cut throughs were legal in the US and the UK. [Tr. I:148, V:185] The Liquidator representatives understood from the call that ACE would advise them if it entered a side deal with an AFIA Cedent but that ACE was not prepared to commit that it would not have side deal discussions with Cedents. [Tr. III:154, 185, V:175, 188, 191-92]

68. In order to obtain bargaining leverage in potential commutation discussions with Home, ACE did not clearly provide the assurances requested by the Liquidator and Joint Provisional Liquidator and told the Special Deputy Liquidator and other Home representatives that the NEMGIA case permitted direct dealing in order to cause Home to conclude ACE believed it could lawfully pursue cut through or circumvention agreements. [Tr. V:171-72]

69. Mr. Wamser did not personally believe that the NEMGIA case supported direct deals between ACE and AFIA Cedents, although he did not say this to the Liquidator or Joint Provisional Liquidators. [Tr. V:171-72, 183-85] ACE also reduced its estimate of Home's AFIA related liabilities from the December 31, 2002 figure, in part, to increase its negotiating leverage with the Liquidator. [Tr. V:195]

70. Based on the foregoing, the Liquidator was reasonably concerned that ACE might engage in discussions with AFIA Cedents over some form of direct arrangement. [Tr. III:153]

71. During the period between October 16, 2003 and February 11, 2004, ACE did not make a commutation proposal to Home, nor did it initiate any discussions with Home concerning commercial resolution of the situation. ACE did not follow up in any way on the September 30 or October 16 discussions. [Tr. III:155, V:196-97] Neither Home nor ACE had any contractual obligation to commute with the other. [Tr. II:43-44; Exs. 3, 4]

72. An Informal Creditors' Committee ("ICC") was established in the UK provisional liquidation proceeding to consult with the Joint Provisional Liquidators. The ICC consisted of nine AFIA Cedents expected to have the largest claims against Home under the AFIA Treaties [Tr. II:151-52]: Equitas, Continental Insurance Company of New York ("Continental"), Unionamerica, Excess, English & American, Bermuda Fire & Marine Insurance Company in Liquidation (a.k.a. KWELM), Mentor Insurance Company (UK) Ltd., Riverstone Management Limited (as agent for Sphere Drake), and Agrippina. [Exs. 23, 27]

73. At Equitas' invitation, representatives of a number of the ICC members met about a week before the first formal meeting of the ICC on October 21, 2003 to discuss the Home-AFIA situation and consider their collective options. [Tr. IV:93] At that meeting, which was not known to the Liquidator or Joint Provisional Liquidators, the ICC members present discussed issues including the priority applicable to AFIA Cedents, the potential for distributions from the Home estate, and the dependence of the Liquidator on Cedents' claims to collect on the reinsurance asset from ACE. [Tr. IV:94-95; Ex. 50] The ICC members present reached a consensus that they would not file and prosecute claims in the Home liquidation, except to preserve offset rights, unless they could receive some additional benefit. [Tr. IV:94-95; Ex. 50]

74. The first formal meeting of the ICC was held on October 21, 2003. [Ex. 27 at 1] It was attended by representatives of the ICC members, the lead Joint Provisional Liquidator, the Liquidator, and their representatives. During the meeting, many points were discussed, including the priority applicable to reinsurance creditors (cedents). [Tr. III:153, II:174-75; Ex. 27 at 5]

75. At the October 21 meeting, Mr. Bengelsdorf made a presentation. [Tr. I:156; Ex. 22] Although in his overview of the Home proceeding Mr. Bengelsdorf observed that it was expected to be a high distribution proceeding, the ICC members asked about the percent of

claims represented by direct insurance creditors (Class II creditors) as opposed to cedents (Class V creditors) and were informed that 90% of the expected claims were direct insurance claims. See RSA 402-C:44, II, V. Equitas and other ICC members understood at the time that there was no prospect of a return for reinsurance creditors. [Tr. II:107, 175-76, III:157-58, IV:95-96; Ex. 27 at 1, 6, 7]

76. Mr. Hughes and Mr. Bengelsdorf requested information as to the amount of the AFIA Cedents' claims but the ICC members were not prepared to give the information. [Tr. I:154, II:46, 176-77, III:156] The Cedents asked for a comfort letter stating that any information provided would not be construed as a claim in the estate or used for a commercial resolution with ACE. [Tr. III:51-53; Ex. 27 at 6, 7] Cedents expressed frustration over dealing with ACE respecting adjustment of their claims and said pursuing claims would be costly and time consuming. [Tr. I:153-54; Ex. 27 at 7]

77. Toward the conclusion of the meeting, Mr. Williams summarized the situation as follows:

- There was a lot of uncertainty (in particular regarding the eventual size of the estate)
- Reinsurers ranked down the priority list and would probably get nothing from the estate (save for offset against Home's claims)
- The ACE reinsurance provided the largest asset in the estate and this asset depended on claims made by creditors.

Mr. Williams asked what incentive there was for reinsureds to put claims into the estate. [Ex. 27 at 7] The Liquidator and lead Joint Provisional Liquidator saw the ICC members as presenting a unified front in asserting that they saw no good reason to file and prosecute claims (beyond offset) since they would obtain no benefit as Class V creditors. [Tr. I:153, II:176, IV:95]

78. Based on the foregoing, the Special Deputy Liquidator, the lead Joint Provisional Liquidator and Mr. Rosen all reasonably concluded by the end of the October 21 ICC meeting

that without some form of commercial resolution with the ICC members the ACE reinsurance asset (in excess of offset claims) could be lost to the estate because AFIA Cedents would not prosecute claims beyond offset without an economic incentive to do so. [Tr. I:153-55, 157, II:177-81, 182-83, III:158-60]

79. The value potentially lost to the Home estate (the value above the offset claims) was estimated by the Special Deputy Liquidator to range from \$87.5 million to in excess of \$150 million. [Tr. III:159]

80. At the end of the ICC meeting, the Special Deputy Liquidator advised the ICC members that the Liquidator would consider and make some form of proposal to them. [Tr. II:116-17, III:76, 158]

81. After the ICC meeting, the Liquidator, Special Deputy Liquidator, the lead Joint Provisional Liquidator, staff and counsel discussed a concept for an agreement to provide a payment as an administrative expense to incentivize prosecution of claims that lead to collections from ACE (in excess of offset claims). A scheme of arrangement under English law was suggested as a flexible tool to bind all AFIA Cedents (not just the ICC members). It was decided to seek to negotiate such an arrangement with AFIA Cedents. [Tr. II:184-85, III:99-100, 159]

82. Based on the foregoing, the Liquidator exercised reasonable judgment in seeking to negotiate an agreement with AFIA Cedents in order to collect the reinsurance asset from ACE.

83. Mr. Williams consistently advised the Liquidator and the Joint Provisional Liquidators that Equitas (the largest AFIA Cedent) would not file and prosecute claims beyond offset without additional consideration. [Tr. IV:102-03] He also believed that without an agreement Equitas would not have prosecuted claims except to protect offset rights. [Tr. IV:103]

84. Mr. Warmuth advised the Liquidator and Joint Provisional Liquidator in September 2003 that Agrippina (an AFIA Cedent with large claims) would terminate Treaty R absent the payment of additional consideration. He also believed that without an agreement Agrippina would have terminated Treaty R and pursued the common account reinsurances instead of pursuing claims against Home. [Tr. III:222]

85. Only three (of sixteen) AFIA Cedents had responded to the July 31, 2003 letter by providing high level claim information and stating an intention to file a proof of claim. [Tr. II:92] Those cedents represented a small portion of the overall AFIA Cedents claims; one of them (English & American) was a net debtor with an incentive to prosecute all of its claims to preserve offset rights; the information was at a high level insufficient to support commutation with ACE; their statements were not binding; and the letters were written before the ICC meeting at which AFIA Cedents asserted that they would not prosecute claims beyond offset. [Tr. II:92, III:108-16, 151-52, IV:95; Exs. E, G, BM R]

86. Mr. Craig, ACE's proffered expert, has very little personal experience in dealing with reinsureds' claims against insolvent insurers and seeking to collect reinsurance or international reinsurance disputes. [Tr. V:123, 125, 135-36] Mr. Craig agreed with the Liquidator's witnesses that cedents would typically file claims and prosecute their claims where they had a reason such as offset; he provided no credible testimony concerning what AFIA Cedents would do with respect to claims beyond offset. [Tr. V:127-28, 129-30]

87. According to Mr. Hacker, ACE's expert on English law, the legality of cut throughs (including circumvention agreements) is an unresolved issue of English law, and the NEMGIA decision cited by ACE is the only decision that addresses the issue. [Tr. V:85] There is no notice requirement for such agreements; they could be structured among parents or

affiliates; the trial on the only case to raise the legality of a cut through agreement was time consuming and expensive; and a company could choose to enter a cut through agreement (including a circumvention agreement) as a matter of commercial judgment. [Tr. V:85-87]

88. Negotiations with the AFIA Cedents were conducted principally by the Joint Provisional Liquidator and his staff and counsel, overseen by the Special Deputy Liquidator in consultation with the Liquidator and the US liquidation team. [Tr. III:160]

89. After the ICC meeting, the lead Joint Provisional Liquidator and his counsel, in consultation with the US liquidation team, prepared a draft proposal. The draft was provided to Mr. Williams of Equitas for comment on November 10, 2003 because Mr. Williams, as de facto chair of the ICC, could act as a sounding board prior to circulation to the ICC. [Tr. II:185-87] (The negotiations began with the November 10, 2003 proposal and ended on January 22, 2004. [Tr. II:219-20])

90. The November 10, 2003 draft proposed that AFIA Cedents (i) provide information concerning paid losses, case reserves and IBNR to Home by November 30, 2003 for specified purposes, including attempting to reach a commercial resolution of the value of ACE's obligations, (ii) agree that the proposal would be the sole source of recovery so as to preclude side deals or circumvention, and (iii) agree to a scheme of arrangement under English law under which the AFIA Cedents would receive a 25% portion of net proceeds (after deductions of a number of costs and offsets) received from ACE with respect to claims under the AFIA Treaties. [Tr. II:187-89; Ex. 28] The 25% figure was chosen as a starting point as a minimum that would attract the attention of AFIA Cedents. [Tr. II:186] Under the proposal, the Cedents would have been obligated to provide claims information before the Court approved the agreement. [Ex. 28]

91. Mr. Williams responded that the 25% was far too low (especially in light of the deductions) and would not be acceptable to the ICC and that he would not recommend circulating it. He also said that AFIA Cedents should not provide claims information to the Liquidator (and thus lose control over the information) until after the agreement was approved (and made binding on the Liquidator) by the New Hampshire Court. [Tr. II:190-92; Ex. 29]

92. After discussion with the US team, Mr. Hughes provided Mr. Williams with a revised proposal on November 18, 2003. The November 18 draft proposal provided that the portion of net recoveries to be paid to AFIA Cedents would increase in “lockstep” as recoveries increased: 25% for proceeds under \$150 million, 35% for proceeds from \$150 million up to \$250 million, 45% for proceeds from \$250 million up to \$350 million, and 50% for proceeds over \$350 million. It also provided for the AFIA Cedents to provide claim information only after the New Hampshire Court had approved the agreement. [Tr. II:192-95; Ex. 30]

93. Mr. Williams responded that, while the percentage was too low, this proposal would be worthwhile circulating to the ICC, and a substantially similar draft proposal was circulated to the members of the ICC on November 21, 2003. [Tr. II:195-96; Ex. 31]

94. Members of the ICC met with Mr. Hughes and others on November 28, 2003 to discuss the proposal and illustrations as to how it would work. Ms. Ellis made a presentation, the ICC members raised numerous questions, and in response to a Cedent’s suggestion Mr. Hughes proposed to add language to address the situation where ACE commuted with the Liquidator based on AFIA Cedents’ claims submissions. [Tr. II:197-200; Ex. 32]

95. Mr. Williams examined the illustration in depth and prepared revised schedules. He also advised that the “lockstep” approach was not viewed by ICC members as fair, and that

the ICC would more likely accept a 50/50 sharing of net proceeds or better. [Tr. II:200-01; Ex. 33]

96. On December 12, 2003, Richard Leedham, a representative of Excess, provided Mr. Hughes with a marked-up draft of the proposal letter reflecting comments on behalf of the ICC generally, although Mr. Leedham noted that individual Cedents still might raise additional issues. Among other things, the mark-up used a flat 50% portion in defining net recoveries, included a 150% “multiplier” applicable to amounts received from any commutation with ACE, required the prior consent of 75% by value of the ICC before such a commutation, and extended the period for providing claim information. [Tr. II:202-04; Ex. 34]

97. The Special Deputy Liquidator and lead Joint Provisional Liquidator determined that they would not respond on the percentage amount until the language of the agreement was otherwise final. [Tr. II:205] On December 15, 2003, Philip Hertz, counsel to the Joint Provisional Liquidators, responded to the ICC with a revised draft that left the percentage amount blank. The draft also removed the commutation multiplier and changed the commutation consent requirement into a consultation provision. [Tr. II:204-06; Ex. 35]

98. In discussions over the next several days, Mr. Leedham advised that seven of nine ICC members would agree to the letter if the percentage were 50%, but that Unionamerica and Agrippina were not in agreement. [Tr. II:206-08, 217] This concerned Mr. Hughes because 75% by value of the creditors were needed to approve a scheme of arrangement as proposed. [Tr. II:209-10] Mr. Warmuth advised that Agrippina had not yet completed its analysis of the options it was considering and would abstain from the ICC vote on the letter. [Tr. III:221-22] Mr. Hughes met with Unionamerica to discuss the proposal on December 23, 2003. [Tr. II:210-11]

99. On December 31, 2003, Unionamerica advised that it was not prepared to sign the proposal as drafted, and it provided a draft of a letter stating that it generally would be willing to support a scheme of arrangement with certain features. [Tr. II:211-13; Ex. 36] After discussions, on January 7, 2004, Unionamerica provided a marked up revision of the Joint Provisional Liquidators' proposal letter raising issues regarding ICC approval of any commutation with ACE and seeking to describe terms of the scheme of arrangement. [Tr. II:213-15; Ex. 37]

100. The Special Deputy Liquidator and the Joint Provisional Liquidator reasonably concluded that in order to obtain agreement of sufficient AFIA Cedents to approve the proposed scheme of arrangement it was necessary to agree to a 50/50 sharing of the Net Proceeds (after the negotiated deductions, including amounts received on offset claims, the costs of the UK provisional liquidation, the cost of approval of the agreement and collection from ACE). [Tr. II:217, III:119]

101. On January 15, 2004, after further discussions, David Steinberg, counsel for the Joint Provisional Liquidators, provided Mr. Williams with a draft proposal reflecting changes discussed with Unionamerica for circulation to the ICC. The draft provided for consultation over commutations with ACE but included 50% and a more detailed discussion of the provisions of the proposed scheme of arrangement as requested by Unionamerica. [Tr. II:215-17; Ex. 38]

102. Unionamerica subsequently advised that it would sign the proposed letter agreement, and Mr. Hughes sent the signed letter agreement to the ICC members for signature. [Tr. II:218-19; Exs. 39, 40] All of the ICC members except Agrippina, which abstained, returned signed letter agreements (collectively, the "Agreement") on or before February 2, 2004. [Tr. II:218-19, III:221; Ex. 23] The lead Joint Provisional Liquidator and Special Deputy Liquidator then determined that a sufficient number of AFIA Cedents had agreed to the proposal. This was

formally acknowledged to the ICC members by letter dated February 23, 2004. [Tr. II:219; Ex. 41]

103. The Liquidator kept the FSA informed of the negotiations over the Agreement, and the FSA supported the Liquidator's efforts. [Tr. II:225-26, III:162-63]

104. After advising ACE of the Agreement, the Liquidator served the motion for approval of the Agreement on February 11, 2004. [Tr. III:154-55; Ex. H] Agrippina signed the Agreement in March, 2004, so all ICC members ultimately agreed to it. [Tr. III:230-31]

105. The Agreement provides for a "scheme of arrangement" between Home and all AFIA Cedents under § 425 of the English Companies Act 1985 (the "Scheme"). [Tr. II:184-85; Ex. 1 ¶ 82, Ex. 23] Under the Scheme, as described in the Agreement, a portion of the net proceeds received from ACE (or any reinsurer of Home's AFIA business other than an ACE company) with respect to the AFIA Cedents' claims will be allocated to the Scheme for distribution to the AFIA Cedents, with the remainder to vest with the Liquidator. Agreement § 1.9. The amount to be allocated to the Scheme for the AFIA Cedents is determined by taking the amounts actually received from ACE with respect to the AFIA Treaties (i.e., the amounts due from Century and/or CIRC less the amounts that Century and/or CIRC successfully withholds as offsets on account of ACE's claims against Home) and deducting:

- (i) the costs of the UK provisional liquidation;
- (ii) collection costs;
- (iii) costs of obtaining approvals from the New Hampshire and English Courts;
- (iv) amounts received by Home on account of Home AFIA liabilities which will be settled with the AFIA Cedent by way of offset (i.e., amounts for which an AFIA Cedent that also has obligations to Home as a reinsurer will receive a credit against its obligations to Home); and
- (v) amounts received by Home on account of any costs orders entered against it in disputed claims proceedings (which otherwise will not be paid by Home).

Agreement § 1.3 (definition of “Proceeds”). Fifty percent of these net “Proceeds” (plus the previously deducted amounts received on costs orders) will be paid to AFIA Cedents as “Net Recoveries,” and the remaining 50% will be retained by Home. Agreement § 1.2. [Ex. 1 ¶83, Ex. 23]

106. Because of the deductions, the actual portion of any amounts received from ACE that will be allocated to the AFIA Cedents under the Agreement are likely to be less than 50%. Based on the \$231 million value of the AFIA Cedents’ claims estimated by ACE INA Services as of December 31, 2002 and other assumptions, approximately two-thirds of the amounts received from Century would be retained by the Liquidator with one-third paid to the AFIA Cedents. [Tr. I:160-61, II:223]

107. The Agreement provides for a Standstill Period during which signatory AFIA Cedents will not seek to agree on “cut-through” agreements with ACE. This period originally ran until the earlier of the date on which a required approval is not obtained or June 1, 2004. Agreement §§ 1.6, 1.7. It has been extended to September 30, 2005. [Ex. 1 ¶ 91] The Scheme will preclude AFIA Cedents from entering “cut through” or other agreements to obtain consideration from ACE on AFIA liabilities. Agreement §1.5. [Ex. 1 ¶ 91, Ex. 23]

108. Under § 425 of the Companies Act, the Scheme is subject to the approval of (a) a majority in number and (b) 75% in value of the AFIA Cedents, and then sanctioned by the English Court. [Tr. I:165, II:184-85; Ex. 1 ¶ 87] Once the Scheme is effective, it will be binding on all AFIA Creditors as a matter of English law. [Ex. 1 ¶ 89, Ex. 23] As a result, all AFIA Cedents will be precluded from entering cut through or other agreements to obtain consideration from ACE on AFIA liabilities. Agreement § 1.5. [Ex. 23]

109. The AFIA situation is unique, and there are no other creditors similarly situated to the AFIA Cedents. [Tr. I:166-67]

110. Based on the foregoing, the Agreement is necessary. If the Liquidator had not addressed the issue by agreement, then the estate would not be able to collect an asset of significant value: the obligations of Century under the Assumption Agreement (and/or CIRC under the BAFCO Agreements) for AFIA Cedents' claims in excess of amounts they could offset, thereby depriving Home's creditors of the benefit of the asset.

111. Based on the foregoing, the Agreement is fair and reasonable. It is the result of extensive arms length negotiations and provides for contingent payments to provide the AFIA Cedents with reason to file and prosecute claims that they believe are valid but that they otherwise would not pursue. The Agreement's formula provides the AFIA Cedents with reason to prosecute claims, but only if the cedent involved believes the claim to be valid (otherwise the time and expense incurred by the AFIA Cedent in pursuing a claim will be lost). The formula makes the payments contingent upon success in collecting from ACE. Proceeds are defined as actual recoveries from ACE (less certain deductions). If the purpose of the Agreement to enable the Liquidator to collect assets is not achieved (because recoveries from ACE are not forthcoming), then no payments to AFIA Cedents will be made.

112. The formula also provides that asset collections the Liquidator could expect to receive without the Agreement do not give rise to payments to AFIA Cedents and that costs incurred because of the Agreement are paid for out of recoveries before any payment to AFIA Cedents are made. The deduction for AFIA Cedents' claims to be settled by way of offset (Agreement § 1.3.4) means that claims that likely would have been filed and prosecuted without the Agreement do not give rise to payment. The deductions of the costs of collection and the

costs of the approvals from the Court and English Courts (Agreement §§ 1.3.2 and 1.3.3) provide for the Agreement to cover such costs before any payments to AFIA Cedents are made. [Ex. 23]

113. Based on the foregoing, the 50% allocation of Proceeds is necessary, fair and reasonable. The possibility of a lower percentage was tested through extensive negotiations involving numerous parties. The Joint Provisional Liquidators and the Liquidator initially proposed a lower percentage (25%), and then proposed a lockstep, but it was necessary to move to 50% to persuade the signatory AFIA Cedents to agree.

114. Although the exact amount of the benefit to Home's creditors cannot be determined because it depends on future events, including the filing, prosecution and allowance of AFIA Cedents' claims, it is estimated that it will range between \$87.5 million to well in excess of \$150 million. [Tr. III:159]

115. The Agreement is fair and reasonable to ACE. ACE will be involved in the determination of the AFIA Cedents' claims as provided in the negotiated Claims Protocol. [Tr. I:162-63, III:161, IV:174; Ex. 1 ¶ 97, Ex. 25] The obligations of ACE are not increased over what they would have been had Home remained solvent and not been placed in liquidation. [Tr. I:162] ACE offered no evidence to show that the Agreement harmed it. ACE would receive a windfall, compared to its obligations pre-liquidation, if AFIA Cedents did not file and prosecute their claims beyond offset.

116. Based on the foregoing, the Agreement reflects the reasonable judgment of the Liquidator in pursuit of his obligation to marshal assets. The terms of the Agreement are fair and reasonable. The consideration to be paid to AFIA Cedents pursuant to the Agreement is a necessary cost of preserving and collecting a material asset of Home.

II. Proposed Conclusions of Law.

1. The purpose of the Insurers Rehabilitation and Liquidation Act is “the protection of the interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of proprietors.” RSA 402-C:1, IV. The statute shall be liberally construed to effectuate its purpose. See RSA 402-C:1, III.

2. The Liquidator is authorized to among other things “do such . . . acts as are necessary or expedient to collect, conserve or protect [the insurer’s] assets or property” and to do other acts “as are necessary or expedient for the accomplishment of or in aid of the purpose of liquidation.” RSA 402-C:25, VI, XXII. See also Order on Remand at 9, 11; RSA 402-C:25, IV, VI and XXII.

3. The costs and expenses of administration are a Class I priority claim in the order of distribution. See RSA 402-C:44, I. The costs and expenses of administration, include but are not limited to the “actual and necessary costs of preserving or recovering the assets of the insurer.” Id.

4. The payments to AFIA Cedents under the Agreement are administrative expenses within RSA 402-C:44, I, because they are necessary costs of recovering a substantial asset of the Home estate as explained at pages 6-10 of the Order on Remand and for the reasons set forth in the Court’s findings of fact.

5. The five-day evidentiary hearing has reinforced the Court’s conclusion in its Order on Remand that the Liquidator could not have marshaled this asset absent the contingent payments to AFIA Cedents.

6. As the payments to AFIA Cedents are administrative expenses within RSA 402-C:44, I, the payments do not conflict with the priorities of RSA 402-C:44 or create subclasses of Class V creditors within RSA 402-C:44, V.

7. The Court has an independent obligation to assess the fairness of the Agreement with AFIA Cedents. See Order on Remand at 11. See also Order at 2, No. 2004-0319 (N.H. Sup. Ct. Sept. 13, 2004).

8. In the exercise of its independent obligation to assess the fairness of the Agreement with AFIA Cedents, the Court concludes that the Agreement and its terms are fair and reasonable for the reasons set forth in the Court's findings of fact.

9. The Court concludes that the Liquidator acted as a reasonable liquidator would act under the circumstances in (i) assessing the information available, (ii) pursuing and negotiating the Agreement with AFIA Cedents, and (iii) endorsing the Agreement with AFIA Cedents.

10. The Court further concludes that the Agreement with AFIA Cedents is in the best interests of Home and its policyholders and other creditors.

11. The Court accordingly APPROVES the Agreement with AFIA Cedents.

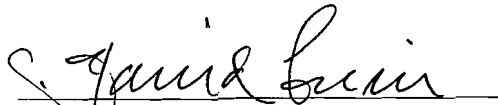
Respectfully submitted,

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

By his attorneys,

KELLY A. AYOTTE
ATTORNEY GENERAL

Suzanne M. Gorman
Senior Assistant Attorney General
Civil Bureau
33 Capitol Street
Concord, New Hampshire 03301-6397
(603) 271-3650



J. David Leslie
Eric A. Smith
Rackemann, Sawyer & Brewster
One Financial Center
Boston, MA 02111
(617) 542-2300

August 12, 2005

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Proposed Findings of Fact and Conclusions of Law After Evidentiary Hearing was sent, this 12th day of August, 2005, by first class mail, postage prepaid to all persons on the attached service list.



J. David Leslie

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 03-E-0106

SERVICE LIST

Ronald L. Snow, Esq.
Lisa Snow Wade, Esq.
Orr & Reno
One Eagle Square
P.O. Box 3550
Concord, New Hampshire 03302-3550

Gary Lee, Esq.
Pieter Van Tol, Esq.
Lovells
16th Floor
900 Third Avenue
New York, New York 10022

Gail M. Goering, Esq.
Adam Goodman, Esq.
Eric Haab, Esq.
Lovells
One IBM Plaza
330 N. Wabash Avenue, Suite 1900
Chicago, Illinois 60611

Andre Bouffard, Esq.
Eric D. Jones, Esq.
Downs Rachlin Martin PLLC
199 Main Street
P.O. Box 190
Burlington, Vermont 05402-0190

Peter G. Callaghan, Esq.
Preti, Flaherty, Beliveau, Pachos
& Haley, PLLP
57 North Main Street
P.O. Box 1318
Concord, New Hampshire 03302-1318

Martin P. Honigberg, Esq.
Sulloway & Hollis, P.L.L.C.
9 Capitol Street
P.O. Box 1256
Concord, New Hampshire 03302-1256

George T. Campbell, III, Esq.
Robert A. Stein, Esq.
Robert A. Stein & Associates, PLLC
One Barberry Lane
P.O. Box 2159
Concord, New Hampshire 03302-2159

David M. Spector, Esq.
Dennis G. LaGory, Esq.
Kristy L. Allen, Esq.
Schiff Hardin LLP
6600 Sears Tower
Chicago, Illinois 60606

Jack B. Gordon, Esq.
Fried, Frank, Harris, Shriver
& Jacobson, LLP
1001 Pennsylvania Avenue
Washington, D.C. 20004

Andrew W. Serell, Esq.
Rath, Young and Pignatelli
One Capital Plaza
P.O. Box 1500
Concord, New Hampshire 03302-1500

Stephan P. Parks, Esq.
Doreen F. Connor, Esq.
Wiggin & Nourie, P.A.
670 North Commercial Street, Suite 305
P.O. Box 808
Manchester, New Hampshire 03105-0808

Michael Cohen, Esq.
Cohen & Buckley, LLP
1301 York Road
Baltimore, Maryland 21093