

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 MEMORANDUM CONCERNING
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), submits this memorandum, after the evidentiary hearing held on July 25 through 29, 2005, concerning proposed findings of fact and conclusions of law.

**I. The Court Should Make Findings On Necessity To Provide A
More Complete Record On Appeal.**

At the beginning and conclusion of the evidentiary hearing, ACE raised the issue whether the Court should make findings concerning necessity. As the Liquidator indicated at that time, the issue relates to potential appellate review.

As an initial matter, "necessity" has always been understood to be within the scope of the evidentiary hearing. The Court in its October 8, 2004 Order on Remand permitted "discovery limited to the necessity, fairness, and reasonableness of the agreement." Order on Remand at 13, 14 (Oct. 8, 2004). In its discovery orders, the Court stated that the purpose of the hearing "is to present relevant evidence regarding whether the proposed [agreement] is necessary, fair and reasonable". Order at 1 (May 12, 2005); Order at 1 (June 1, 2005). It reiterated in its final discovery order that the focus of the hearing "is upon whether the agreement with AFIA Cedents

is necessary, fair and reasonable and upon the rationales of the Liquidator and JPL in negotiating and reaching the agreement.” Order on Discovery at 1 (June 28, 2005).

The issue of necessity was raised long ago by the Liquidator in the course of addressing the question whether the payments to AFIA Cedents contemplated by the Agreement are administrative expenses within RSA 402-C:44, I. That statute provides Class I priority for administrative costs, which are defined as “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” *Id.* (emphasis added). As noted in the Order on Remand, “[t]he Liquidator argued that any monies received by AFIA Cedents under the agreement were administrative expenses, necessary to enhance the distributions to Class II policyholder claimants and preserve to the fullest, a substantial asset of the estate.” Order on Remand at 7 (emphasis added).

The Court has specifically quoted the statutory definition including “necessity” in addressing the fifth question posed by the Supreme Court: “Whether the payment to AFIA Cedents qualifies as an administrative expense under RSA 402-C:44, I.” In the Order on Remand, the Court “found that the payments to the AFIA Cedents are administrative expenses. They are ‘actual and necessary costs of preserving or recovering the assets of the insurer’ under RSA 402-C:44, I.” Order on Remand at 10 (emphasis added).¹

The Court’s findings on this and other issues in the Order on Remand were based on the affidavits submitted to the Court. See, e.g., Order on Remand at 8. By arguing that the Court should not address “necessity” in its findings after the evidentiary hearing, ACE appears to be

¹ The Court also considered the provisions of RSA 402-C:25, IV, VI and XXII, among others, in examining the Liquidator’s authority to enter the Agreement. Order on Remand at 9, 11. Those sections authorize the Liquidator to “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 (emphasis added).

attempting to limit the record before the Supreme Court on the administrative expense issue to the affidavits and provide avenues of appellate attack on the Order on Remand. This is inappropriate. In its September 13, 2004 Order, the Supreme Court directed that the Court support its determinations on the issues set forth in the Supreme Court's Order "with factual findings, as appropriate." Order at 2, No. 2004-0319 (Sept. 13, 2004). Having heard extensive evidence on the necessity issue, among others, at the evidentiary hearing, the Court should make findings as it deems appropriate with respect to the two disputed issues from the Supreme Court's Order: whether the payments to AFIA Cedents under the Agreement are administrative expenses within RSA 402-C:44, I, and whether the Agreement with AFIA Cedents is fair and reasonable in the independent assessment of the Court. See Order at 2, No. 2004-0319 (Sept. 13, 2004). While the Court has addressed the administrative expense issue in the Order on Remand, it is appropriate to supplement that interlocutory Order in a final order referring to pertinent findings made after the five-day evidentiary hearing. The matter will be best presented for appellate review based on full findings by the Court on the disputed issues, not on artificially limited findings as suggested by ACE.

II. The Issues To Be Decided.

As noted above, this matter is before the Court on remand from the Supreme Court to address the issues set forth in the Supreme Court's Order "with factual findings, as appropriate." Order at 2, No. 2004-0319 (Sept. 13, 2004). The two issues that have been disputed are whether the payments to AFIA Cedents under the Agreement are administrative expenses within RSA 402-C:44, I, and whether the Agreement with AFIA Cedents is fair and reasonable. In the Order on Remand, the Court found that the payments to AFIA Cedents under the Agreement were administrative expenses within RSA 402-C:44, I, and recognized that it had an independent obligation to assess the fairness and reasonableness of the Agreement. Order on Remand at 6-

10, 11-12. It authorized discovery on the necessity, fairness and reasonableness of the Agreement, Order on Remand at 13, 14, and it scheduled the July 25 hearing to be focused “upon whether the agreement with AFIA Cedents is necessary, fair and reasonable and upon the rationales of the Liquidator and JPL in negotiating and reaching the agreement.” E.g., Order on Discovery at 1.

Now that the Court has heard five days of testimony and received over ninety exhibits, the Liquidator submits that the Court should make the findings of fact and conclusions of law proposed in the Liquidator’s Proposed Findings of Fact and Conclusions of Law After Evidentiary Hearing. Those findings and conclusions address the following issues:

1. Whether the payments to AFIA Cedents under the Agreement are administrative expenses within RSA 402-C:44, I. See Order at 2 (No. 2004-0319). To be administrative expenses, the payments must be “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. This issue was addressed in the Order on Remand but should be considered here insofar as it includes the factual issue of whether the payments are necessary to preserve or recover an asset of the insurer. That “necessity” question has been the subject of the evidentiary hearing.

2. Whether the payments to AFIA Cedents conflict with the priorities of RSA 402-C:44 or create subclasses of Class V creditors within RSA 402-C:44, V. See Order at 2 (No. 2004-0319). As administrative expenses within RSA 402-C:44, I, the payments would not conflict with the priorities or create subclasses. This issue was implicitly addressed in the Order on Remand but appropriately could be expressly addressed here.

3. Whether, 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. See Order at 2 (No. 2004-0319). Transactions in an insurer liquidation are to be upon “fair and reasonable” terms. See RSA 402-C:25, IX. This factual “fairness and reasonableness” issue includes the issues of whether 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.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE
COMMISSIONER OF THE STATE OF NEW
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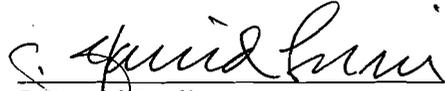


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August 12, 2005

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Memorandum Concerning Proposed Findings of Fact and Conclusions of Law 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

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