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

2005 MAY 10 P 2:30
NH SUPERIOR COURT

ACE COMPANIES' RESPONSE TO LIQUIDATOR'S "MEMORANDUM" CONCERNING MOTIONS TO COMPEL AND CONSOLIDATED REPLY ON MOTIONS TO COMPEL PRODUCTION OF DOCUMENTS BY THE JOINT PROVISIONAL LIQUIDATOR, ZÜRICH AND UNIONAMERICA

Despite this Court's finding that respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, the "ACE Companies") are entitled to deposition discovery in advance of the July 2005 hearing on the Proposed Agreement, the other parties to this proceeding have presented one obstacle after another to the ACE Companies' attempts to obtain the production of documents that are directly related to the upcoming depositions. All the parties have agreed that depositions are a prerequisite to the July 2005 hearing and (with one exception of the Paula Rogers deposition) those depositions have been scheduled without any difficulty. However, the same parties have resisted the production of relevant documents — even after the ACE Companies narrowed their requests — and are trying to force the ACE Companies to conduct the depositions in the absence of a full production of documents.

In early March 2005, the ACE Companies filed motions to compel the production of documents by (1) Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as liquidator (the "Liquidator") of The Home Insurance Company ("Home"); (2) Equitas, Ltd. ("Equitas"); (3) Gareth Hughes, as one the Joint Provisional Liquidator

in Home's U.K. ancillary proceeding (the "JPL"); (4) Zürich Versicherung Aktiengesellschaft ("Zürich"); and (5) Unionamerica Insurance Company Ltd. ("Unionamerica"). The Liquidator has filed unauthorized submissions in response to the ACE Companies' motions, including a "Memorandum Concerning ACE Companies' Motions to Compel Directed to Nonparty Witnesses," dated April 13, 2005 (the "Memorandum") and a sur-reply on the motion to compel allegedly privileged documents. The other parties against whom the ACE Companies filed motions to compel have focused on jurisdictional issues, claiming that the Court lacks the power to compel them to produce documents, even though (as shown below) they have submitted to the Court's jurisdiction.

In order to reduce the number of filings with the Court, the ACE Companies respectfully submit this response to the Memorandum and consolidated reply on the motions to compel the production of documents by the JPL, Zürich and Unionamerica. In support of the response and consolidated reply, the ACE Companies state as follows:

Summary

1. In the September 13, 2004 Order, the New Hampshire Supreme Court made it abundantly clear that further information was needed in order to assess the fairness and reasonableness of the Proposed Agreement. The Liquidator refuses to recognize the Supreme Court's broad mandate and has repeatedly attempted to limit the ACE Companies' ability to engage in meaningful discovery. At the March 4, 2005 hearing, for example, counsel for the Liquidator argued that the Supreme Court's Order "said nothing about discovery." (Tr. of March 4, 2005 Hearing, annexed as Ex. A, at 19.) The Court rejected the Liquidator's attempt to limit the Supreme Court's Order and

directed the parties to move forward with discovery. While the parties have been able to schedule most of the depositions on consent, the Liquidator continues to resist the production of documents and now has even gone so far as to submit the unauthorized Memorandum regarding motions to compel directed against other parties.

2. The Memorandum seeks to reargue points that have been decided already and to buttress the objections of the JPL, Zürich and Unionamerica to the ACE Companies' document requests by claiming that (1) the scope of discovery in this proceeding is limited; (2) the JPL has complied with the requests; and (3) the requests on Equitas, Zürich and Unionamerica are overbroad and seek irrelevant information. (If anything, the Memorandum implicitly recognizes the weakness of the jurisdictional defenses that have been raised.) As shown below, the Memorandum misstates the scope of the discovery requests and the JPL's alleged compliance, and contends — without any justification — that the Court should limit the ACE Companies' document requests.

3. The Liquidator's motive in submitting the Memorandum is apparent: he is attempting to undermine the ACE Companies' discovery rights by forcing them to conduct depositions in the absence of the production of relevant documents. The ACE Companies respectfully request that the Court reject the Liquidator's gamesmanship, which violates the mandate of the Supreme Court, this Court's recognition that discovery in advance of the July 2005 hearing is necessary and the ACE Companies' right, under the New Hampshire rules and in accordance with due process, to obtain discovery of relevant documents before proceeding with depositions.

4. The opposition of the JPL, Equitas, Zürich and Unionamerica to the ACE Companies' discovery requests is more limited, but equally unavailing. Those entities

have asserted that they are mere volunteers and are under no obligation to produce documents to the ACE Companies before their depositions are taken. Such objections are contrary to New Hampshire law and the facts of this case. As shown below, each of the entities is subject to the Court's jurisdiction, either because (in the JPL's case) it is a representative of Home or because (in the case of Zürich and Equitas) they have submitted affidavits in this proceeding, are significant claimants (Unionamerica) and are potential beneficiaries of the Proposed Agreement. Under the circumstances, the JPL, Zürich, Equitas and Unionamerica cannot say that they have submitted to the Court's jurisdiction for some purposes, but not for others.

Argument

I. The Court Should Ignore The Memorandum, Which Was Not Authorized And Misstates The Facts And The Relevant Law

A. The Memorandum Should Be Stricken

5. As a threshold matter, the Court should strike the Memorandum because the Liquidator has improperly made additional arguments on its behalf and on behalf of other parties. The Liquidator had an opportunity to make any objection to the scope of discovery in his filings with the Court (which included an unnecessary sur-reply) in opposition to the ACE Companies' motion to compel the production of documents by the Liquidator. The Liquidator should not be permitted to make numerous submissions to the Court on the same issues. The Memorandum is also an attempt to make arguments that the JPL, Equitas, Zürich and Unionamerica could have presented, but did not, in their respective oppositions to the ACE Companies' motions to compel. Those parties are represented by counsel and are fully capable of raising issues with the Court. The

Liquidator has no right to submit briefs on behalf of other parties, especially when he has been afforded a full opportunity in this proceeding to discuss discovery-related issues.[1]

B. Even If The Court Does Not Strike The Memorandum, It Should Reject The Liquidator's Unsupported Arguments Regarding The Production Of Documents By The JPL, Equitas and Zürich

6. Under the guise of educating the Court on "the context in which these motions to compel arise," (Memo. at 2), the Liquidator mischaracterizes the role of the ACE Companies, the law on whether discovery should be permitted and the breadth of the ACE Companies' requests for production.

7. First, the Liquidator tries to create the general impression that the ACE Companies' document requests are overbroad, claiming that they "have conducted an ever expanding discovery campaign." (*Id.* at 5.) The Liquidator's allegation is demonstrably wrong. As outlined in the ACE Companies' filings, they have worked with the various parties to narrow the scope of the requests. The ACE Companies, moreover, have been forced to pursue discovery and file motions to compel because of the refusal of the Liquidator and other parties to produce relevant documents, even after the ACE Companies winnowed down their requests. In the face of the Liquidator's meager production, the ACE Companies sought discovery from other sources such as the JPL and selected AFIA Cedents.

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[1] The Liquidator has displayed an unfortunate tendency to bend or violate the Court's rules for the sake of expediency. The most egregious example is the Liquidator's recently filed Offer of Proof, which extensively relies on "without prejudice" discussions that are inadmissible (and do not even support the Liquidator's arguments). If the Liquidator does not withdraw such allegations from the Offer of Proof, the ACE Companies will seek appropriate relief from the Court.

8. The Liquidator complains at length about the ACE Companies' requests for the production of documents by the JPL (*see* Memo. at 6-11), failing to recognize that the ACE Companies have been forced to pursue those requests because of the Liquidator's own actions. The Liquidator has claimed that his responses to the ACE Companies' document requests constitute compliance with the document requests served on the JPL. (*See id.* at 8.) In fact, the Liquidator refused to confirm the completeness or scope of the JPL's "voluntary" production. In the correspondence cited by the Liquidator in the Memorandum, the Liquidator and the JPL merely state that the documents were produced "within the scope of the Liquidator's responses" to the ACE Companies' requests. (*Id.*) In that response, however, the Liquidator made it clear that he was not responding on behalf of the JPL. (January 14, 2005 Letter, annexed as Exhibit B, at 7.) Thus, the only way for the ACE Companies to ensure a full production was to pursue discovery directly from the JPL. The ACE Companies have been — and remain — willing to narrow the requests served on the JPL (as they have with other parties), but they cannot be forced to accept the JPL's unilateral determination of what to produce on a "voluntary" basis.

9. In the Memorandum, the Liquidator also attempts to portray the discovery sought from Equitas and Zürich as overbroad and irrelevant because the ACE Companies seek documents relating to various assertions made by Mr. Williams and Mr. Warmuth in their affidavits. (*See* Memo. at 11-12.) The Liquidator claims that the "positions taken by the AFIA Cedents" are not relevant to the fairness and reasonableness of the Proposed Agreement. The Liquidator's argument can only be described as absurd.

10. Mr. Williams and Mr. Warmuth filed their affidavits with the Court in order to support the Liquidator's motion for approval of the Proposed Agreement, and they made several allegations in the affidavits regarding their intent to file a proof of claim and their consideration of several alternative means of obtaining a recovery. In various submissions to the Court, the Liquidator has cited those very allegations as a justification for the Proposed Agreement. It is undisputed that the ACE Companies are entitled to examine Mr. Williams and Mr. Warmuth about the affidavits at the upcoming depositions. In order to conduct meaningful depositions, the ACE Companies must have access to any documents relating to the allegations in the affidavits.

11. Second, the Liquidator argues that the ACE Companies have only a "limited" role in this proceeding and that their discovery rights should be restricted accordingly. (See Memo. at 2-5.) To the contrary, the ACE Companies' status as intervenors is recognition of their clear interests at stake. Neither the Supreme Court nor this Court has described the ACE Companies' role as "limited." This Court in the Order on Remand explicitly held that the ACE Companies have standing and noted "the direct interests of ACE Companies .... are interests that would be prejudiced absent an opportunity to respond ...." (Order on Remand at p. 5).

12. The Liquidator's reliance on the Supreme Court's September 2004 Order and the cases cited therein is puzzling, since the Supreme Court was clearly requiring the Court to obtain more, not less, information. Indeed, this Court has already determined that an evidentiary hearing is necessary in order to make the factual findings required by the Supreme Court. In addition, at the March 5, 2005 hearing, the Court directed the parties to undertake deposition discovery, thereby rejecting the Liquidator's attempt to

read the Supreme Court's Order narrowly and to limit the discovery in furtherance of the July 2005 hearing. It cannot be denied that a meaningful examination at the upcoming depositions depends on the production of relevant documents.[2]

II. The Court Should Reject The Jurisdictional Objections To The ACE Companies Discovery Requests

13. The JPL, Zürich and Unionamerica have insisted that the Court lacks jurisdiction over them and therefore cannot compel the production of documents. Those claims lack any merit and should be rejected.

A. Jurisdiction Over The JPL

14. The JPL is situated differently from the Zürich and Unionamerica, and his objection should be rejected summarily. Home's U.K. Branch was never incorporated in the United Kingdom, and the U.K. proceeding in which the JPL was appointed is wholly ancillary to the New Hampshire liquidation. (Exhibit GHH2 to the Affidavit of Gareth Howard Hughes, annexed as Exhibit C, at 1, 4.) Thus, the JPL's power derives from the existence of Home's liquidation in this Court. Put simply, the JPL is a representative of Home just as the Liquidator and the Special Deputy Liquidator are representatives of Home. Accordingly, as a general matter, the JPL is before this Court and cannot object to the Court's exercise of jurisdiction over him.

15. The JPL has also submitted to the Court's jurisdiction by signing the Proposed Agreement and by filing an affidavit in support of the motion for approval of

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[2] The Liquidator's reliance on the case law cited by the Supreme Court is misplaced. In *In re Boston & Providence Railroad Corp.*, 673 F.2d 11 (1st Cir. 1982), the court held that the supervising court must play a "quasi-inquisitorial role." Moreover, the court in *In re Liquidation of American Mutual Liability Insurance Co.*, 632 N.E.2d 1209, 1216 (Mass. 1994) specifically required discovery.

the Proposed Agreement. The submission of an affidavit, by itself, constitutes consent to the Court's jurisdiction. *See Lyford v. Trustees of Berwick Academy*, 97 N.H. 167, 168, 83 A.2d 302, 302 (1951); *Druding v. Allen*, 122 N.H. 823, 826, 451 A.2d 390, 393 (1982). New Hampshire law does not require the ACE Companies to demonstrate that the JPL has "presented issues as a litigant." Although *Lyford* and *Druding* courts dealt with litigants on the facts before them, the standard is broader: "[A]n objection to service or notice is waived when a party, by general appearance or otherwise, submits any other question, except the sufficiency of service or notice, to the court or other tribunal." *Lyford*, 97 N.H. at 168 (emphasis supplied).

16. Here, the JPL's affidavit submits several questions to the Court, such as whether AFIA Cedents have explored the possibility of any "cut-through" arrangements. (Aff. of Gareth Hughes ("Hughes Affidavit"), annexed as Ex. D, at 4.) After placing in issue these matters, which are highly relevant to the fairness and reasonableness of the Proposed Agreement whose negotiation and execution he supervised, the JPL may not now claim that the Court lacks jurisdiction over him.

17. The JPL's reliance on the letters rogatory mechanism under the Hague Convention is misplaced. (*See* JPL Opp'n at ¶ 10.) A United Kingdom domiciliary, such as the JPL, may be properly served under the Hague Convention by mail from the United States. *See, e.g., McCarron v. British Telecom*, No. CIV.A. 00-CV-6123, 2001 WL 632927, at * 1-2 (E.D. Pa. June 6, 2001); *EOI Corp. v. Medical Marketing Ltd.*, 172 F.R.D. 133, 142 (D.N.J. 1997); *Trump Taj Mahal Assocs. v. Hotel Servs., Inc.*, 183 F.R.D. 173, 181 (D.N.J. 1998). Article 10(a) of the Hague Convention states: "Provided the State of destination does not object, the present Convention shall not interfere with (a)

the freedom to send judicial documents, by postal channels, directly to persons abroad...." Because the United Kingdom has not objected to the use of "postal channels," the JPL's opposition based upon the Hague Convention must fail. *See McCarron*, 2001 WL 632927, at * 1-2; *EOI Corp.*, 172 F.R.D. at 142 (D.N.J. 1997); *Trump Taj Mahal*, 183 F.R.D. at 181.[3]

B. Jurisdiction Over Zürich

18. Like the JPL, Zürich is before the Court because its representative submitted an affidavit in this proceeding in support of the Proposed Agreement (which it negotiated and executed). The affidavit of Gernot Warmuth (the "Warmuth Affidavit") affirmatively addressed substantive issues before this Court, and thus constituted a submission to this Court's jurisdiction. *See Lyford*, 97 N.H. at 168; *Druding*, 122 N.H. at 826. For instance, by attesting that Zürich would not file proofs of claim against Home in the absence of a scheme like the Proposed Agreement, the Warmuth Affidavit provided support for the Liquidator's claim that the Proposed Agreement was necessary. (Warmuth Affidavit, annexed as Ex. E, at 2.) Indeed, in approving the Proposed Agreement, this Court cited the Warmuth Affidavit in support of the Court's finding that "AFIA Cedents would have little reason to file and prosecute claims" in the absence of the Proposed Agreement. (Order on Remand, annexed as Ex. F, at 8.) Thus, Zürich, like the JPL, cannot claim that the Court lacks jurisdiction over it. *See Lyford*, 97 N.H. at 168; *Druding*, 122 N.H. at 826.

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[3] The JPL cannot avoid his discovery obligations by claiming that he should have been served with a subpoena under Rule 35 of the New Hampshire rules. (JPL's Opp'n at ¶ 9.) As a representative of Home, the JPL is a party before the Court. Moreover, the purpose of any discovery is to provide the recipient with notice and an opportunity to object. The ACE Companies' document requests satisfy those requirements.

19. By filing a claim in this proceeding, Zürich has also submitted to the general, equitable jurisdiction of this Court, not just the Court's jurisdiction over the claims allowance process. *See, e.g.*, *Katchen v. Landy, Trustee in Bankruptcy*, 382 U.S. 323, 335 (1966); *Langencamp v. Culp*, 498 U.S. 42, 44 (1990). Even if, however, this Court's jurisdiction over Zürich were limited to the claims allowance process, the Proposed Agreement is the key to the allowance and distribution of the AFIA Cedents' claims, and thus is squarely within what Zürich concedes is the Court's jurisdiction.

20. The Proposed Agreement makes plain that, if approved, it would be part of the claims allowance process in this liquidation proceeding. It states that recoveries under the Proposed Agreement are to be distributed "to all AFIA Cedents according to the value of their claims against Home under the AFIA Treaties *as agreed or adjudicated (net of any applicable set-off) in the New Hampshire liquidation of Home*." (Ex. G annexed hereto at 4; emphases supplied.) By signing the Proposed Agreement, moreover, Zürich agreed that, "in determining [its] entitlement (if any) to receive any distribution payable to [it] in [its] capacity as a creditor in Home's New Hampshire liquidation [it] will bring into account, and give credit for, any payments received by [it] pursuant to [the Proposed Agreement]." *Id.* at 3. Thus, there is no basis for finding that the claims allowance process is distinct from the Proposed Agreement.

21. Finally, Zürich cannot use the Hague Convention as a shield to discovery. Zürich has submitted to the Court's jurisdiction by addressing substantive issues in the Warmuth Affidavit and by supporting the relief sought by the Liquidator, which will redound to Zürich's benefit. It has also participated in the process by producing certain documents and agreeing to appear for a deposition. Zürich acknowledges, in citing *Tulip*

Computers Int'l, B.V. v. Dell Computer Corp., 254 F. Supp. 2d 469, 474 (D. Del. 2003), that the courts may allow for alternatives to the Hague Convention, especially where, as here, there is an easy and efficient alternative. (*See* Zürich Opp'n at ¶ 20.) Thus, this case presents a situation where there is no need to follow the Hague Convention, especially since Zürich is well aware of the document requests and may have any of its objections to them adjudicated by this Court.

22. In any event, requiring the ACE Companies to adhere to the Hague Convention for service on Zürich would unnecessarily delay the proceedings, since the letters rogatory process could take months. It would make no sense to delay the July 2005 hearing simply because Zürich — which already has notice of the document requests — wishes to receive the same requests through the issuance of a letter rogatory.

C. Jurisdiction Over Unionamerica

23. As a signatory to the Proposed Agreement, Unionamerica has filed a claim for tens of millions of dollars, the distribution of which requires the Court's approval. Despite standing to gain tens of millions of dollars through this Court's exercise of jurisdiction, Unionamerica has refused to produce documents that will shed light on the fairness and reasonableness of the Proposed Agreement. Like Zürich, Unionamerica apparently believes that it is entitled to all the benefits of this Court's jurisdiction and the Proposed Agreement, but none of the obligations.

24. Unionamerica's objection to the Court's jurisdiction is based upon the proposition that, by filing a claim in an insolvency proceeding, a claimant only "submits to the jurisdiction of the court regarding the allowance or disallowance of the claim." (Unionamerica Opp'n at ¶ 13.) However, as discussed above, the Proposed Agreement is

central to the allowance and distribution of the AFIA Cedents' claims, and therefore Unionamerica is within the Court's jurisdiction.

25. Finally, despite Unionamerica's invocation of the Hague Convention, the fact is that the ACE Companies properly served the document requests upon Unionamerica in sending them by mail. As detailed above with respect to the JPL, because the United Kingdom has not objected to the use of "postal channels," Unionamerica's opposition based upon the Hague Convention must fail. *See McCarron*, 2001 WL 632927, at * 1-2; *EOI Corp.*, 172 F.R.D. at 142 (D.N.J. 1997); *Trump Taj Mahal*, 183 F.R.D. at 181. Unionamerica's attempt to hide behind technicalities of the Hague Convention is all the more inappropriate because Unionamerica has already injected itself into this proceeding by signing onto the Proposed Agreement as a means for recovering from the Home estate.

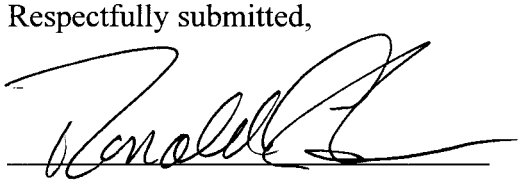
Conclusion

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

A. Requiring the Liquidator, Gareth Hughes, Zürich and Unionamerica to produce all non-privileged documents responsive to the ACE Companies' document requests directed toward them; and

B. Granting such other and further relief as this Court deems just and proper, including, but not limited to, the fees and costs incurred by the ACE Companies in bringing the Motions.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing pleading has been served on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail on May 10, 2005:

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