

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

**ACE COMPANIES' MOTION TO COMPEL
PRODUCTION OF DOCUMENTS BY LIQUIDATOR**

Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, the "ACE Companies"), by their attorneys, Orr & Reno P.A., respectfully move for an order compelling Roger A. Sevigny, as liquidator (the "Liquidator") of Home Insurance Company ("Home"), to produce any legal opinions or analyses he received prior to the submission of the motion for approval of the Proposed Agreement on (1) "side arrangements" or "cut-through" deals between any of the ACE Companies and the AFIA Cedents; (2) the "walling off" or "ring fencing" of the Home's assets in the U.K.; or (3) any alleged novation, waiver and/or estoppel created by direct dealings between the AFIA Cedents and any of the ACE Companies. In support of their motion, the ACE Companies respectfully state as follows:

Introduction

1. The Liquidator is again refusing to comply with his discovery obligations and this Court's Orders regarding the production of relevant documents. The Court and the Referee have already held on several occasions — including an order entered today — that the Liquidator has improperly withheld documents on privilege grounds. The Court should once more order the Liquidator to produce documents that he has unjustifiably withheld from production.

2. In seeking approval of the Proposed Agreement, the Liquidator alleged that the motivating factors for the Proposed Agreement included threats by the AFIA Cedents to wall off or ring fence Home's U.K. assets and the potential for side arrangements or cut throughs between the AFIA Cedents and certain ACE Companies. The affidavits of Rhydian Williams, Gernot Warmuth and Jonathan Rosen that the Liquidator submitted to the Court also identified another purported threat. They allege that there was a concern about the AFIA Cedents' right to seek recovery directly from the ACE Companies based on a theory that dealings between the AFIA Cedents and representatives of the ACE Companies created a novation or would support an estoppel or waiver argument. (*See Williams Aff. at ¶ 12(c); Warmuth Aff. at ¶ 9, Rosen Aff. at ¶ 7.*) Any legal opinions or analyses that the Liquidator received regarding the foregoing topics are highly relevant because they go to the reasonableness of the Proposed Agreement. The documents relating to the alleged threat of a direct recovery from the ACE Companies may show, for example, that the AFIA Cedents had no such right, just as the evidence adduced thus far has undermined the Liquidator's allegations regarding ring fencing and cut throughs.

3. At his deposition, Mr. Bengelsdorf testified that the Liquidator received legal opinions or analyses on both ring fencing and cut throughs. The Liquidator, however, refused to produce those documents and, citing the attorney-client privilege, his counsel would not permit Mr. Bengelsdorf to testify about them. On May 27, 2005, the ACE Companies moved to compel the production of the documents referred to at the Bengelsdorf deposition.

4. In response, the Court issued another discovery order, dated June 1, 2005 (the "June 1 Order"), stating that the Liquidator must produce all documents that relate to the rationale for, and negotiation of, the Proposed Agreement. (June 1 Order at 1.) The June 1 Order makes it clear that (as the Court stated at the May 12, 2005 hearing) the Liquidator may

not resist the production of such documents by asserting they are privileged. The June 1 Order clarified any ambiguity in the earlier Orders by removing the word “non-privileged” from the discovery guidelines issued by the Court. Accordingly, the Liquidator must produce all legal opinions or analyses on ring fencing or cut throughs.

5. The same holds true for legal opinions or analyses on the ability of the AFIA Cedents to make direct claims as a result of their dealings with representatives of the ACE Companies. Such documents are equally relevant and cannot be shielded from production.

Argument

I. The Court Has Already Ordered The Production Of The Documents That Are The Subject Of This Motion

6. As demonstrated above, the Liquidator is required under the June 1 Order to produce any documents relating to the rationale for, or negotiation of, the Proposed Agreement and may not withhold those documents from production on privilege grounds. On June 7, 2005, counsel for the ACE Companies requested that, in light of the June 1 Order, the Liquidator produce any legal opinions or analyses on the topics identified in Paragraph 2 above. Counsel for the Liquidator has refused to do so, claiming that the June 1 Order did not address the production of the legal opinions or analyses and that the June 1 Order does not require the production of privileged documents.

7. There is no support for the Liquidator’s reading of the June 1 Order. The Court specifically amended the discovery guidelines to emphasize that all relevant documents (as defined by the guidelines) must be produced, regardless of whether there is an assertion of privilege. This amendment was a restatement of what the Court had already held at the May 12, 2005 hearing. Indeed, when counsel for Equitas, Ltd. questioned whether the Court’s Orders extend to legal advice, the Court unambiguously stated that they did. (*See* Hearing Tr. at 20.) It

cannot be the case that, as the Liquidator suggests, the Court's Orders are narrower when applied to the Liquidator.

8. Therefore, the Liquidator has no basis for refusing to produce the legal opinions or analyses he received on ring fencing or cut throughs. The relevance of those documents cannot be denied because they relate to the reasonableness of the Liquidator's actions.

9. Also, although the documents relating to the effect of the direct dealings between the AFIA Cedents and the ACE Companies' representatives were not part of the ACE Companies' original May 27, 2005 motion, they too fall within the scope of the June 1 Order.

II. Even If The June 1 Order Did Not Address The Documents Sought In This Motion, The Court Should Order The Liquidator To Produce Them

10. Even assuming, for the sake of argument, that the production of above-referenced legal opinions or analyses is not required under the June 1 Order, the ACE Companies respectfully submit that the Court should enter a separate order compelling their production.

11. The ACE Companies demonstrated in their May 27, 2005 motion that the Liquidator has put the legal opinions or analyses at issue by citing ring fencing and cut throughs as bases for the Proposed Agreement and by admitting, through the testimony of Mr. Bengelsdorf, that the Liquidator had legal advice on those issues prior to submitting the Proposed Agreement for approval. Any legal opinions or analyses on the ability of the AFIA Cedents to make claims directly against the ACE Companies are similarly at issue because the Liquidator submitted several affidavits to the Court referring to that threat.

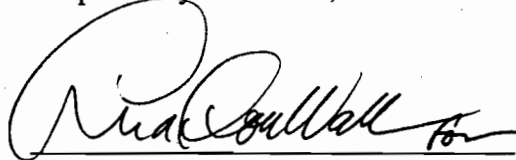
12. The Court may order the production of the subject documents even if it finds that the "at issue" doctrine does not apply here. The Court has ruled that, with respect to other allegedly privileged documents, the privilege was overcome and the Liquidator must produce the documents. The same principle applies here, given the indisputable relevance of the documents.

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

A. Compelling the Liquidator to produce any legal opinions or analyses on (1) side arrangements or cut-through deals between any of the ACE Companies and the AFIA Cedents; (2) the walling off or ring fencing of the Home's assets in the U.K.; or (3) any alleged novation, waiver and/or estoppel caused by direct dealing between the AFIA Cedents and any of the ACE Companies; and

B. Granting such other and further relief as the Court deems just and proper, including an award of the fees and costs incurred by the ACE Companies in bringing this Motion.

Respectfully submitted,



Date: June 9, 2005

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing pleading has been served on Roger A. Seigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail on June 9, 2005:

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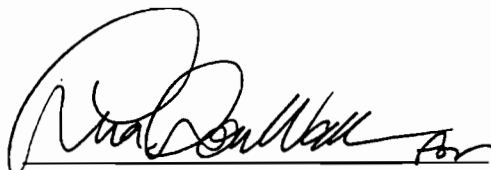
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