

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 SUR-REPLY TO ACE COMPANIES' REPLY IN  
FURTHER SUPPORT OF MOTION TO COMPEL PRODUCTION OF  
DOCUMENTS BY THE LIQUIDATOR

Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator of The Home Insurance Company, submits this sur-reply to briefly respond to three points raised in the ACE Companies' Reply in Support of their Motion to Compel Production of Documents By the Liquidator ("Reply") as follows:

1. The ACE Companies' Reply ignores the express language of Rule of Evidence 502(a)(2) by arguing throughout the Reply that representatives of a client must have the power to control the client.<sup>1</sup> This is not the case. Rule 502(a)(2) defines a "representative of a client" as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." *Id.* (emphasis added). The ACE Companies' arguments on the control group test depend on the erroneous assumption the Rule must be read conjunctively, or that only the second of the two conditions is determinative. This does not reflect the language of the Rule. Moreover, the control group test is aimed at corporations. It does not apply here, where a court has appointed partners at E&Y and the lead partner operates through his staff in

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<sup>1</sup> See ACE Reply ¶¶ 2 ("The JPLs may not, however, share privileged information with such professionals unless the latter have power to make binding decisions on behalf of the JPLs."), 3 ("[T]he Liquidator must show . . . they had the power to accept or reject legal advice for the JPLs."), 11 ("the authority to make final decisions on behalf of the JPLs"), 12 ("only an employee who controls the actions of the corporation can personify the corporation" and "the employee must have 'discretion to either accept or reject the legal advice'"), 13 ("individual must have the authority to accept or reject the legal advice on behalf of the organizational client"), 16 ("E&Y Employees do not control the actions of the JPLs").

conducting the proceeding. In any event, the test does not mandate a waiver of the privilege whenever persons other than those actually in control participate in privileged discussions. That would prevent a corporation from having a meeting of officials at different levels to discuss a problem with legal implications. Under ACE's logic, the individual court-appointed liquidator is the only person entitled to the privilege, no matter how large or complex the insolvency. That makes no sense, and Mr. Hughes' reliance on a small team of E&Y employees does not waive the privilege.

2. The ACE Companies rely on National Tank Co. v. The 30<sup>th</sup> Judicial Dist. Ct., 851 S.W.2d 193, 197 (Tex. 1993) ("NATCO"), but there the Texas Supreme Court misinterpreted the Texas Rule 502(a)(2). As noted by the Texas Court of Appeals in a later decision:

[T]he [NATCO] Court may have caused some confusion later in its opinion when it stated, "[U]nder Rule 503(a)(2), the qualifying employees must be those actually having authority to hire counsel and to act on counsel's advice...." This statement appears to conflict with the plain language of the rule which states the test disjunctively.

We believe this isolated sentence was an inadvertent statement by the Court. In the next paragraph, the Court observed that National Tank offered no evidence to prove that a particular manager's position in the corporation "vested [him] with authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of [National Tank]." Thus, we conclude that in order to qualify as a representative of an entity under Rule 503, a person must be shown to either have the authority to obtain professional legal services on behalf of the organization or to act on advice rendered pursuant to a request made under such authority. Later opinions confirm this conclusion.

Osbourne v. Johnson, 954 S.W.2d 180, 184 (Tex. Ct. App. 1997) (emphasis added) (citations omitted). The ACE Companies misconstrue the Rule just like the NATCO court.

3. The ACE Companies urge the Court to "strictly construe" Rule 502 because the Rules are "statutory." See ACE Motion ¶ 13 ("The attorney-client privilege in New Hampshire is statutory and, as such, it 'must be strictly construed,'" citing State v. LaRoche, 122 N.H. 231, 233 (1982)), ACE Reply ¶¶ 8 ("the statutory privilege must be construed narrowly"), 12 (referring to "the intent of the New Hampshire legislature in adopting" Rule 502). The Rules of

Evidence, however, were adopted by the New Hampshire Supreme Court, not the Legislature. See N.H. R. Evid. 100; State v. Newell, 141 N.H. 199, 202 (1996). The case cited by ACE involved the statutory physician-patient privilege of RSA 329:26. LaRoche, 122 N.H. at 233. Principles of strict construction for statutory privileges are not applicable here. See Weibusch, Civil Practice & Procedure § 22.19 at 528 & n.93 (1997) (lawyer-client privilege absent from list of statutory privileges). Rule 502 should not be construed in a cramped manner that would frustrate the policy of open communication with counsel.

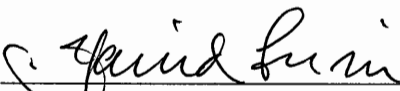
### CONCLUSION

For the reasons stated above and in the Liquidator's opposition, the Court should deny the ACE Companies' motion to compel production of documents by the Liquidator.

Respectfully submitted,  
ROGER A. SEVIGNY, INSURANCE  
COMMISSIONER OF THE STATE OF NEW  
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April 19, 2005

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Sur-Reply to ACE Companies' Reply in Further Support of Motion to Compel Production of Documents By the Liquidator was sent, this 9th day of April, 2005, by first class mail, postage prepaid to all persons on the attached service list.

  
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J. David Leslie

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