

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 ZURICH**

2005 APR - 5 P 3:47  
NH SUPERIOR COURT  
MERRIMACK COUNTY  
MERRIMACK, NH

Zürich Versicherung Aktiengesellschaft (Deutschland) (“Zürich”), as successor to Agrippina Versicherung Aktiengesellschaft, is attempting to withhold critical information from the Court and other parties on the grounds that communications with AFIA Cedents regarding the Proposed Agreement somehow fall within the narrowly construed “common interest” privilege. As demonstrated below, Zürich cannot satisfy its heavy burden under New Hampshire law of showing that the “common interest” privilege applies. Moreover, if the Court were to allow Zürich to shield its communications with other AFIA Cedents from disclosure, it would impede the meaningful deposition and cross-examination of the Zürich witness who played a substantial role in negotiating the Proposed Agreement and submitted an affidavit with the Court in support of the Liquidator’s motion for approval of the Proposed Agreement.

Accordingly, 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., move this Court for an order compelling Zürich to produce communications between and among AFIA Cedents regarding the Proposed Agreement. In support of their Motion, the ACE Companies respectfully state as follows:

## Introduction

1. The Court should reject Zürich's attempt to prevent the full disclosure of information relating to the Proposed Agreement. Zürich cannot rely on the "common interest" privilege for three reasons: (1) the AFIA Cedents involved in the withheld communications were not parties to a "pending action," as required under New Hampshire law; (2) based upon Zürich's privilege log, it appears that the communications in question were not directed solely to an attorney or attorney representative of the AFIA Cedent in question; and (3) the communications are not protected by a valid, underlying privilege in the first instance.

2. The documents that Zürich has improperly withheld from disclosure go to the very heart of the issues that will be decided by the Court. The Liquidator enlisted Zürich to lend its support to the Proposed Agreement by submitting the Affidavit of Gernot Warmuth dated March 31, 2004 (the "Warmuth Affidavit," attached as Exhibit A).<sup>1</sup> In that affidavit, Mr. Warmuth makes several statements about whether Zürich would have filed a claim in Home's liquidation in the absence of the Proposed Agreement and whether Zürich would consider an alternative mechanism for recovering funds from the ACE Companies. Ex. A at ¶¶ 8-10.

3. However, the sparse documentation produced in this case thus far does not support the assertions in the Warmuth Affidavit. The ACE Companies are entitled to a complete production by Zürich in order to determine whether there is in fact any evidence to back up Mr. Warmuth's sworn assertions. The continued absence of evidence is clearly relevant, for it shows that the Warmuth Affidavit is a self-serving attempt to prop up the Proposed Agreement and should be disregarded by the Court. Full discovery would also prevent a grossly unfair situation

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<sup>1</sup> Zurich also has submitted a claim in this proceeding and is one of the signatories to the Proposed Agreement.

in which Mr. Warmuth testifies that there are documents or communications supporting his claims, but that they are protected from disclosure under the “common interest” privilege.

4. In sum, the production of all documents that the ACE Companies seek from Zürich is essential because it will allow the Court to properly evaluate the untested assertions in the Warmuth Affidavit and the Liquidator’s claim that the Proposed Agreement is fair and reasonable. The September 13, 2004 Order by the New Hampshire Supreme Court requires that the Court assess the fairness and reasonableness of the Proposed Agreement based on a complete evidentiary record, which includes the cross-examination of witnesses who have submitted affidavits. An order rejecting Zürich’s unsupported claims of privilege and requiring the production of documents relating to communications between and among the AFIA Cedents would enable the Court to fulfill the broad mandate in the September 13 Order.

#### **Factual Background**

5. On December 9, 2004, the ACE Companies served their First Request for Production of Documents by Gernot Warmuth and Zürich (the “Document Requests”) upon Zurich, seeking specific information and documents regarding the negotiation and execution of the Proposed Agreement. (A copy of the Document Requests is attached hereto as Exhibit B.) The Document Requests were addressed specifically to Mr. Warmuth, and many of them tracked, virtually line by line, the statements made in the Warmuth Affidavit.

6. On February 4, 2005, Zürich agreed through its counsel, Mr. Warmuth, to a partial, limited production. In the February 4 letter, Zürich asserted the protection of the “common interest” privilege as to communications between and among AFIA Cedents regarding the Proposed Agreement, but also asserted several objections that are not the subject of this Motion. (Zürich’s letter of February 4, 2005 is attached hereto as Exhibit C.)

7. The ACE Companies attempted on February 18, 2005 to “meet and confer” (as required by New Hampshire law) by responding to each of Zürich’s objections. In the same letter, the ACE Companies asked for a clarification of Zürich’s privilege claims and of certain ambiguities and inconsistencies in the February 4 letter, as well as for a privilege log for those documents as to which Zürich was asserting a claim of privilege. (A copy of the ACE Companies’ letter of February 18, 2005 is attached as Exhibit D.)

8. In a letter dated February 23, 2005, Zürich responded by reasserting its refusal to produce the disputed documents and threatening to “consider a request for monetary sanctions against [the ACE Companies], and, possibly, against [counsel for the ACE Companies].” (A copy of Zürich’s letter dated February 23, 2005 is attached as Exhibit E.)

9. By letter dated March 1, 2005, the ACE Companies again requested the disputed documents along with a privilege log. In light of Zürich’s threat for sanctions, the ACE Companies stated that further communications on this topic would not be productive. (A copy of the ACE Companies’ letter dated March 1, 2005 is attached as Exhibit F.)

10. On March 3, 2005, Zürich restated its refusal to cooperate with the ACE Companies and respond to their discovery requests. (Zürich’s letter dated March 3, 2005 is attached as Exhibit G.) Zürich agreed, however, to produce a privilege log in support of its claim for withholding responsive documents. The ACE Companies responded by accepting the limited privilege log proposed by Zürich and acknowledging the impasse in the resolution of all the remaining disputed discovery issues. (The ACE Companies’ letter dated March 3, 2005 is attached as Exhibit H.)

11. By letter dated March 4, 2005, Zürich claimed that it had already produced all non-privileged, responsive documents. Zürich also indicated that it would produce a privilege

log “shortly.” (A copy of Zürich’s letter dated March 4, 2005 is attached as Exhibit I.) That log, however, was not produced until nearly three weeks later. (A copy of Zürich’s log is attached as Exhibit J.) The subject matter of many of the withheld communications is -- “negotiations with Home” -- showing that the documents sought by this Motion are likely to bear upon the fairness and reasonableness of the Proposed Agreement. Ex. J at 1.

### **Argument**

#### **I. No Documents Sought by the ACE Companies Are Privileged**

12. Zürich claims that communications between and among AFIA Cedents are protected from disclosure under the “common interest” privilege. As shown below, that privilege is inapplicable here and the withheld documents should be produced.

13. As the party asserting privilege, Zürich bears the burden of demonstrating that any communication or document withheld from production is in fact privileged. *State v. Gordon*, 141 N.H. 703, 705, 692 A.2d 505, 506 (1997); *Moore v. Medeva Pharmaceuticals, Inc.*, No. Civ. 01-311-M, 2003 WL 1856422, at \* 2 (D.N.H. Apr. 9, 2003) (applying New Hampshire law). The “common interest” privilege in New Hampshire is statutory, and thus “must be strictly construed.” *State v. LaRoche*, 122 N.H. 231, 233, 442 A.2d 602, 603 (1982).

14. Under applicable New Hampshire law, the “common interest” privilege would only attach to communications between Zürich and another AFIA Cedent if that AFIA Cedent were “another party in a pending action,” and only if the “common interest” asserted concerned that “pending action.” N.H. R. EVID. 502(b)(3). Thus, the “common interest” privilege is designed to protect only the privileged communications between and among parties to a litigation that concern issues *currently* being litigated. See *Boston Auction Co., Ltd. v. Western Farm Credit Bank*, 925 F. Supp. 1478, 1483 (D. Haw. 1996) (applying state statute with identical

language, court rejected “common interest” claim because “‘pending action’ requires the institution of legal proceedings....”); *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 388 (M.D.N.C. 2003) (requirement that “actual” litigation be pending “serves to restrict expansion of the privilege to situations where the benefit and the necessity are at their highest, and to restrict the opportunity for misuse”). Here, the only possible “pending action” is the litigation that has resulted from the Liquidator’s motion for approval of the Proposed Agreement, which was filed in March 2004. However, all but three of Zurich’s withheld documents were created in October, November and December 2003. Ex. J at 1. Zürich, therefore, cannot withhold documents that relate to the negotiation of the Proposed Agreement, which was months before the approval of the Proposed Agreement was sought.

15. Moreover, even assuming there were such a “pending action,” a communication between Zürich and another AFIA Cedent would not fall under the “common interest” privilege unless directed solely to an attorney or attorney representative of the AFIA Cedent in question. *Id.* Accordingly, communications with anyone who is not an attorney or attorney representative of the AFIA Cedent are subject to production. *See also In re Tyco Int’l, Inc. Multidistrict Litig.*, No. MDL 02-1335-B, Civ. 02-352-B, 02-1357-B, 2004 WL 556715, at \* 2 (D.N.H. Mar. 19, 2004) (“[T]he common interest exception exists to permit *lawyers* for parties bound by a common interest to work together to achieve a shared goal.” (emphasis supplied).) Because Zürich has not shown that the communications among AFIA Cedents were solely directed to, or authored by, attorneys or attorney representatives of those AFIA Cedents, it cannot claim the protection of the “common interest” privilege.

16. Finally, it is well established that the “common interest” privilege only applies where the underlying communication disclosed to another party is privileged. *See, e.g.*,

*Cavallero v. United States*, 284 F.3d 236, 240 (1st Cir. 2002). Communications between Zürich and other AFIA Cedents, however, are not protected by the attorney-client privilege because the AFIA Cedents are not members of any of the groups covered under New Hampshire Rule of Evidence 502(b). Moreover, any argument by Zürich that the underlying documents are protected under the work-product doctrine fails for one simple reason: Zürich, as a nonparty to this proceeding, cannot assert work-product protection. *See Gomez v. City of Nashua, New Hampshire*, 126 F.R.D. 432, 434 n. 2 (D.N.H. 1989). In *Gomez*, the United States District Court for the District of New Hampshire held that the work product doctrine did not apply to documents created by a nonparty, citing the language in Federal Rule of Civil Procedure 26(b)(3) *which is identical* to New Hampshire Superior Court Rule 35(b)(2): “The [work-product] rule applies only to documents which are prepared in anticipation of trial ‘by or for another party or by or for that party's representative... .’” *Id.*

17. Moreover, when the Proposed Agreement was being negotiated, Zürich had no reason to believe that any dispute regarding the Proposed Agreement would arise, and there are no documents to indicate otherwise. In fact, the documents produced to date in this proceeding contain no reference to any anticipated litigation during the time the Proposed Agreement was being negotiated. Therefore, any claim that litigation was anticipated by Zürich at that time is merely self-serving and unsubstantiated.

## **II. Fairness And Due Process Requires The Production Of The Documents Sought By The ACE Companies In This Motion.**

18. The discovery sought by the ACE Companies was consciously designed to track, line by line, the factual assertions made by Gernot Warmuth in his affidavit submitted in support of the Liquidator's Motion for Approval of the Proposed Agreement. The Warmuth Affidavit makes assertions that bear upon the Proposed Agreement's fairness and reasonableness, and as

such is directly related the subject of the discovery ordered by this Court. To illustrate, the Warmuth Affidavit avers that, in the absence of a scheme as contemplated by the Proposed Agreement, Zurich would never file a claim against the Home estate, in part because, if Zurich were a Class V creditor, it would be unlikely to recover from the estate. Exhibit A at 3. *All* responsive documents in Zurich's possession regarding the Proposed Agreement (and especially communications between and among AFIA Cedents) can potentially shed light on the facts underlying this assertion. Individual representatives of AFIA Cedents have necessarily discussed the Proposed Agreement, the rationale for entering into it, and the impact on their claims. Those communications go to the heart of the fairness and reasonableness of the Proposed Agreement, i.e., the fair and reasonable impact on all of Home's creditors, including certain Class V creditors but not others, to recover against the estate. The Warmuth Affidavit further addresses Zurich's consideration of other central issues, such as alternatives to the Proposed Agreement, which directly relate to whether the decision to proceed with the Proposed Agreement was fair and reasonable. Therefore, documents and information relating to such communications are clearly within the purview of authorized discovery here.

19. Based on the role played thus far in the proceeding by Zurich, the ACE Companies intend to depose Gernot Warmuth on the substance and bases for the factual assertions made by him in this proceeding. Without all of the documents that support those assertions, the ACE Companies will be unable to conduct a meaningful cross-examination of Mr. Warmuth. Thus, the non-disclosure of communications between and among AFIA Cedents regarding the Proposed Agreement would severely prejudice the ACE Companies by depriving them of their due process right to a meaningful cross-examination and, by the same token, would be contrary to the Supreme Court's September 13 Order.



20. The prejudice to the ACE Companies is particularly significant in the context of discovery propounded upon Zurich because this Court relied upon the Warmuth Affidavit in its Order on Remand dated October 8, 2004 in finding that payments under the Proposed Agreement constitute “administrative expenses” under RSA 402-C:44, thereby approving the Proposed Agreement. The Court cited the Warmuth Affidavit in endorsing the justification advanced by the Liquidator that “AFIA Cedents would have little reason to file and prosecute claims if neither setoff nor distribution were likely.” That justification is central to the present inquiry into whether the Proposed Agreement is fair and reasonable, and renders the documents reflecting the AFIA Cedents’ position on those issues necessary in this discovery process. To curtail discovery of those matters on which the Court itself has relied in approving the Proposed Agreement would be severely prejudicial to the ACE Companies and would seriously jeopardize any chance of having a fair hearing and a complete factual record for evaluating the fairness and reasonableness of the Proposed Agreement.

21. Due to the nature of this Motion, the concurrence of Zürich’s counsel was not sought.


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

A. Requiring Zürich to produce all documents responsive to Document Requests 2, 6, 7(d), 9(c), 10(b), 23(g), and 24; 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 this Motion.

Date: April 5, 2005

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ronald L. Snow", written over a horizontal line.

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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 April 5, 2005:

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