

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

RECEIVED

In the Matter of the Liquidation of
The Home Insurance Company

APR 01 2005

N.H. INSURANCE DEPARTMENT

LIQUIDATOR'S OPPOSITION TO
ACE COMPANIES' MOTION TO COMPEL

Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator of The Home Insurance Company, hereby opposes the ACE Companies' March 22, 2005, motion to compel production of documents. As reasons therefor, the Liquidator states:

Background

A. Discovery after the Order on Remand

1. At the status conference held on October 4, 2004, the Court allowed the ACE Companies and Benjamin Moore & Co. ("BMC") to pursue discovery "limited to the necessity, reasonableness and fairness of the agreement" with AFIA Cedents. See Order on Remand at 13 (October 8, 2004). That same day, the ACE Companies served a set of 25 interrogatories and 29 document requests on the Liquidator. BMC served a set of 8 interrogatories and 3 document requests on the Liquidator on October 13, 2004.

2. On November 11, 2004, counsel for the ACE Companies asked whether the Liquidator would be producing documents from the Joint Provisional Liquidators as part of the Liquidator's production. Counsel for the Liquidator responded on November 15, 2004, by advising that the Liquidator had requested and received documents from the Joint Provisional Liquidators and would "make production in accordance with the Liquidator's written response to ACE document request, which will be forthcoming on November 24, 2004." See Exhibit A.

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3. The Liquidator served written responses to both the ACE Companies' and BMC's interrogatories and document requests on November 24, 2004. The Liquidator made the initial document production on December 16, 2004, and supplemented that production on January 5, 2005. The production totaled approximately 2,700 pages of documents, including approximately 800 pages of documents from the Joint Provisional Liquidators.¹

4. The Liquidator provided the ACE Companies and BMC with privilege logs on December 21, 2004 and January 5, 2005. ACE Exs. 3 and 4. The ACE Companies sent a letter raising various concerns about the privilege logs on January 19, 2005, ACE Ex. 5, and the Liquidator responded to the questions and provided revised privilege logs on February 14, 2005. ACE Exs. 6 (the "February 14th Letter"), 1 (the "December 21 Privilege Log") and 2 (the "January 5 Privilege Log"). The Privilege Logs total 443 entries (many involving strings of emails).² The February 14th Letter also enclosed a revised legend (the "Legend") identifying the persons appearing on the logs. The ACE Companies did not include the Legend with their motion, and a copy is attached as Exhibit B. The ACE Companies raised further questions on February 18, 2005, and the Liquidator responded on March 11, 2005 (the "March 11th Letter"). ACE Exs. 7 and 8.

¹ The ACE Companies suggest that the Liquidator's production was somehow dilatory. This ignores the extent of the effort required to assemble documents and review them for privilege. The document production was based on review of files from the New Hampshire Insurance Department, the Special Deputy Liquidator, and liquidation staff involved in the subject matters of the requests (Home's Chief Operating Officer and Home's Chief Actuary), as well as files from the Joint Provisional Liquidators. The Liquidator also produced emails existing on the computer systems of the Special Deputy Liquidator, Home, the Insurance Department, and Ernst & Young (UK) (on behalf of the Joint Provisional Liquidators). The Liquidator also inquired into and produced e-mails from available archived/backup information at Home and the Insurance Department.

² The number of entries on the privilege logs is not surprising considering that the Agreement with AFIA Cedents was the product of transatlantic negotiations over a three month period beginning after the first meeting of the Informal Creditors' Committee ("ICC") established in the UK provisional liquidation proceeding on October 21, 2003 and running through the circulation of the final Agreement for signature on January 23, 2004. As discussed below, the negotiations for the Home interests involved teams of representatives and counsel for the Joint Provisional Liquidators and the Liquidator. The conduct of complex multiparty negotiations obviously required extensive discussions among the US and UK liquidation teams.

B. The Joint Provisional Liquidators.

5. The ACE Companies' motion to compel rests in great part on the assertion that the involvement of certain individuals at Ernst & Young LLP ("E&Y") in London, England, effects a waiver of the attorney-client privilege. This reflects a fundamental misunderstanding of the role of the Joint Provisional Liquidators. The Joint Provisional Liquidators are E&Y partners specializing in the firm's corporate restructuring/insolvency practice, and in conducting the provisional liquidation they operate through their colleagues in that E&Y practice. To clarify matters, the roles of the Liquidator and the Joint Provisional Liquidators are addressed below.

6. The interests of Home (and its policyholders and other creditors) in the negotiations concerning the Agreement were represented by the Liquidator and the Joint Provisional Liquidators. The Liquidator is the Commissioner of Insurance of Home's domicile, New Hampshire. New Hampshire law (and the law of the other states and territories of the United States) provides for the appointment of the chief insurance regulator of the insurer's domiciliary state as liquidator to liquidate the company in the interests of its policyholders and other creditors worldwide. See RSA 402-C:21; RSA 402-C:57. The Order of Liquidation entered by this Court on June 13, 2003, accordingly appointed the Commissioner as Liquidator to carry out the liquidation of Home and its worldwide operations. See Order of Liquidation ¶¶ (s), (v), (w).

7. The Liquidator conducts the liquidation of Home principally through Peter Bengelsdorf, the Special Deputy Liquidator appointed pursuant to RSA 402-C:25, I, although the Liquidator is also supported by others at the New Hampshire Insurance Department (principally Alexander Feldvebel, the Deputy Commissioner). The Special Deputy Liquidator oversees approximately 90 Home liquidation personnel.

8. Other sovereigns also have an interest in the liquidation of insurers that do business in their jurisdiction. New Hampshire law recognizes those interests and the control of other nations over assets in their jurisdiction. See RSA 402-C:61. The Order of Liquidation reflects this by requesting other jurisdictions to grant comity and authorizing the Liquidator to work with any joint provisional liquidator or other person appointed by a foreign tribunal with respect to any portion of the Home estate located outside of the United States. Order of Liquidation ¶¶ (o), (v).

9. Home did business in the United Kingdom through its unincorporated United Kingdom branch. In order to protect Home assets and creditors in the United Kingdom, the New Hampshire Commissioner (as Rehabilitator) petitioned the High Court of Justice in London, England (the “UK Court”), for appointment of joint provisional liquidators under the Insolvency Act 1986. The English insolvency regime differs from the United States regime in that the person(s) appointed as liquidator(s) or provisional liquidator(s) to a company, including an insurance company, are not regulatory officials but will typically be non-governmental individuals who are qualified under English law to act as insolvency practitioners and willing to take the relevant appointment.³ See Affidavit of Gareth Hughes (“Hughes Aff.”) ¶ 7 (attached as Exhibit C). In practice, an insolvency practitioner is usually a member of a firm that practices in the insolvency area. See Hughes Aff. ¶¶ 19, 20.

10. In this case, the UK Court entered an order appointing the Joint Provisional Liquidators for Home under the English Insolvency Act 1986 on May 8, 2003 (the “Appointment Order”). Hughes Aff. ¶¶ 1, 8, GHH2 at 1 (the Appointment Order). The UK Court appointed “Gareth Howard Hughes and Margaret Elizabeth Mills both Chartered Accountants and Licensed

³ Where no such individuals have been asked or are willing or available to take the appointment, an officer of the court and civil servant known as the “official receiver” will take the relevant appointment.

Insolvency Practitioners of Ernst & Young LLP” as Joint Provisional Liquidators of Home. Appointment Order at 1 (emphasis added).

11. As the Appointment Order indicates, the Joint Provisional Liquidators are licensed insolvency practitioners and partners at E&Y. Hughes Aff. ¶ 8. Mr. Hughes is the head of the E&Y Financial Services Corporate Restructuring team (“Corporate Restructuring”) in London. The Corporate Restructuring team provides services to troubled companies, including formal insolvency procedures such as provisional liquidations, administrative receiverships, administrations, schemes of arrangement, and creditors’ and members’ voluntary liquidations. Id. ¶ 5. Ms. Mills is also a member of the E&Y Corporate Restructuring team. Id. ¶ 6. In this case, Mr. Hughes is the lead Joint Provisional Liquidator with overall responsibility for the provisional liquidation of the Home. Id. ¶¶ 6, 12.1. At E&Y, one partner will have principal responsibility for the conduct of the proceeding and the second partner is appointed in order to have a person authorized to act in the event the first partner is unable to do so. Id. ¶ 6.

12. The Appointment Order authorizes the Joint Provisional Liquidators to locate, protect, secure, take possession of, collect and get in the property and assets and the books and records of Home within England and Wales; to investigate the affairs of Home so far as necessary to collect the assets of the Home within England and Wales; and to do all things necessary or expedient for the protection of Home’s property or assets within England and Wales. Appointment Order at 2, ¶ 1; Hughes Aff. ¶ 9. These broad powers include the power to consider whether it would be desirable to implement a scheme of arrangement between Home and its creditors; to nominate an informal creditors’ committee; and to finalize the terms of a scheme of arrangement. Id. at 2-3, ¶ 2; Hughes Aff. ¶ 10. Recognizing that Home is a New Hampshire domiciled company, the Appointment Order further directs that the Joint Provisional

Liquidators are to exercise their powers as requested and approved by the Liquidator, “save where this Court [the UK Court] shall otherwise direct and save where to do so would cause them to contravene English law.” *Id.* at 4, ¶ 1(2).

13. Given the breadth of the Joint Provisional Liquidators powers and responsibilities in respect of the Company under the Appointment Order, the complexity and international nature of the Company's estate and the amount of time required in order to conduct the provisional liquidation effectively, it has not been possible nor indeed desirable for the Joint Provisional Liquidators to personally perform all of the work necessary to the provisional liquidation. The Joint Provisional Liquidators do not have their own staff but, as partners in E&Y, rely on a team of E&Y personnel at different levels to assist in the conduct of the provisional liquidation under the Joint Provisional Liquidators’ supervision. *Hughes Aff.* ¶ 11.

14. The Home provisional liquidation has been staffed principally as follows:

- Gareth Hughes, Partner, Corporate Restructuring (the Joint Provisional Liquidator and engagement partner). Mr. Hughes has overall responsibility for the provisional liquidation of the Company pursuant to his appointment as Joint Provisional Liquidator in the Appointment Order;
- Sarah Ellis, Assistant Director, Corporate Restructuring (the engagement manager). Ms. Ellis is the person responsible for the day-to-day management of the Company's provisional liquidation, and she supervises the work performed by other staff engaged in the administration of the provisional liquidation.
- Benjamin Cairns, Senior Executive, Corporate Restructuring. Mr. Cairns has had responsibility for the management of certain specific areas within the provisional liquidation, including consideration of the business of the City Insurance Company (a company which was merged into the Company in 1995). Mr. Cairns reports to Ms. Ellis. His involvement in the provisional liquidation has declined over time and is currently minimal..
- Matthew Harrison, Executive, Corporate Restructuring. Mr. Harrison assists Ms. Ellis and Mr. Cairns in their duties, carrying out more time consuming tasks or recurring case management tasks. For example, Mr. Harrison has recently taken responsibility for much of the day-to-day credit contact and claim determination process. Mr. Harrison regularly reports to Ms. Harris. *Hughes Aff.* ¶ 12.

15. While Ms. Ellis, Mr. Cairns, and Mr. Harrison are the Joint Provisional Liquidators' principal staff, this core team is supplemented by other E&Y staff as necessary for particular tasks. Ms. Ellis, Mr. Cairns and Mr. Harrison had the Joint Provisional Liquidator's authority to seek legal advice on his behalf from Clifford Chance with respect to the conduct of the provisional liquidation and have been in regular communication with Clifford Chance in that regard. Ms. Ellis, Mr. Cairns and Mr. Harrison also had the authority to act on legal advice received from Clifford Chance with respect to the conduct of the provisional liquidation under the Joint Provisional Liquidator's supervision. Hughes Aff. ¶ 13.

16. Because of the complexity and international nature of the issues involved, the negotiations regarding the Agreement with AFIA Cedents were a joint effort involving teams for both the New Hampshire (US) liquidation and the UK provisional liquidation. The Joint Provisional Liquidators' team consisted of Mr. Hughes and the three core staff noted above, advised by counsel from Clifford Chance LLP (David Steinberg, Philip Hertz and Jeanette Best). Hughes Aff. ¶ 22. The Liquidator's team included the Liquidator, the Special Deputy Liquidator, Home's Chief Operating Officer (Jonathan Rosen), and, to a lesser extent, the Deputy Commissioner and Home's Chief Actuary (Karl Moller), as well as counsel from the Office of the Attorney General (Peter Roth), and counsel from Rackemann, Sawyer & Brewster (David Leslie and Eric Smith). See Exhibit B.

ARGUMENT

17. The ACE Companies' principal contention is that the involvement in communications of individuals at E&Y other than the Joint Provisional Liquidators waives the attorney-client privilege. This argument is based on a mistaken understanding of E&Y's role. The Joint Provisional Liquidators (partners at E&Y) conduct the provisional liquidation through

their staff at E&Y, who either constitute part of the “client” or are “representatives of a client” within N.H. Rule of Evidence 502. Thus, the involvement of the staff members in communications does not effect a waiver. The ACE Companies also make a number of subsidiary arguments that are addressed separately below.

I. The Involvement Of The Joint Provisional Liquidators’ Staff In the Communications Does Not Waive The Attorney-Client Privilege.

18. The ACE Companies contend that the sharing of privileged documents with Sarah Ellis, Benjamin Cairns, or Matthew Harrison of E&Y constitutes a waiver. See ACE Motion ¶¶ 1, 2, 7. However, the ACE Companies ignore the relationship of these individuals to the Joint Provisional Liquidators⁴ and make erroneous assumptions as to the role of E&Y. The Joint Provisional Liquidators cannot be cut-off from their colleagues at E&Y who work on the Home provisional liquidation engagement. As explained below, the individuals that are the subject of the motion were members of the Joint Provisional Liquidator’s staff, and they are either the “client” or “representatives of a client” within Rule 502. Accordingly, their involvement with the documents listed on Appendices 2-4 does not constitute a waiver of the attorney-client privilege.⁵

19. The ACE Companies concede that the Joint Provisional Liquidators are a “client” within Rule 502 and thus the attorney-client privilege applies. ACE Motion ¶ 15.⁶ This is

⁴ The Legend identified the three individuals whose roles are the basis for the ACE Companies’ argument as “Sarah Ellis, Ernst & Young (UK), Joint Provisional Liquidators”; “Benjamin Cairns, Ernst & Young (UK), Joint Provisional Liquidators”; and “Matthew Harrison, Ernst & Young (UK), Joint Provisional Liquidators.” “E&Y” is identified as “Ernst & Young (UK), firm of Joint Provisional Liquidators.” Ex. B.

⁵ The Liquidator agrees that E&Y did not act as a “representative of a lawyer.” The argument at ¶¶ 16-26 of the ACE Motion and cases involving the role of an accounting firm in facilitating effective attorney-client communications, e.g., *Cavallaro v. U.S.*, 284 F.3d 236 (1st Cir. 2002), are accordingly beside the point.

⁶ “Client” means “a person, public officer, or corporation, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view toward obtaining professional legal services from him.” N.H. Rule of Evidence 502(a)(1). This definition “includes every

correct, as the Joint Provisional Liquidators are the licensed insolvency practitioners appointed by the UK Court as joint provisional liquidators for Home pursuant to the English Insolvency Act 1986. See Appointment Order. However, the ACE Companies take too narrow a view in attempting to distinguish the Joint Provisional Liquidators from the E&Y staff. The Appointment Order itself recognizes that the Joint Provisional Liquidators are partners of E&Y and appoints them in that capacity. Appointment Order at 1; Hughes Aff. ¶ 8. Indeed, the lead Joint Provisional Liquidator, Gareth Hughes, is the head of E&Y's Corporate Restructuring practice, which includes administering formal insolvency proceedings such as provisional liquidations. Hughes Aff. ¶¶ 5, 6.

20. While the Joint Provisional Liquidators are appointed in a personal capacity, the day-to-day management of the provisional liquidation is done through staff under the supervision of the Joint Provisional Liquidators. Hughes Aff. ¶¶ 11-13. Thus, the Joint Provisional Liquidators and staff at E&Y are inextricably linked. *Id.* at ¶ 21. There is some recognition in English law that most insolvency practitioners are members of a firm and that they themselves or their firm have employees who will carry out many of the tasks involved in a liquidation. *Id.* ¶ 19. See Bailey, Groves & Smith, Corporate Insolvency, § 2.1 (Butterworths 2005) (“Only an individual may be qualified to act as an insolvency practitioner, although in recognition of the fact that most insolvency practitioners are members of a firm and that they themselves or their firm have employees who will carry out many of the tasks involved in a liquidation or administration, the Insolvency Rules 1986 (SI 1986/1925) do in a number of cases give specific authorisation for acts to be carried out by employees of an insolvency practitioner or his firm.”).

conceivable public or private individual or entity that might seek or obtain legal services.” Reporter’s Notes to N.H. Rule of Evidence 502.

21. The ACE Companies assert that E&Y “presumably” has been retained by the Joint Provisional Liquidators to provide auditing/accounting services. See ACE Motion ¶ 16. This is not the case. The Joint Provisional Liquidators have not ‘retained’ E&Y to provide auditing, accounting services or other services in respect of the Home. Hughes Aff. ¶ 15. The Joint Provisional Liquidators are partners at E&Y and, as such, are entitled to use E&Y's premises, services, facilities and staff in the conduct of their appointments. In particular, no charges are levied upon the Joint Provisional Liquidators in respect of any work carried on by the E&Y staff or other services/facilities made available to the Joint Provisional Liquidators. Id. The fees charged by the Joint Provisional Liquidators in respect of their appointment are charged together with the fees incurred by the E&Y staff in accordance with Rule 4.30 of the Insolvency Rules 1986. See Hughes Aff. ¶ 16, (GHH2, page 31). When the Joint Provisional Liquidators apply to the UK Court for approval of their fees, the fees consist, not only of the Joint Provisional Liquidators’ time charges but also the time charges of all E&Y staff who have billed time to the Home provisional liquidation. Id. Any fees so approved or otherwise paid are not paid to the Joint Provisional Liquidators in their personal capacity, but to E&Y as a firm. The Joint Provisional Liquidators are remunerated in respect of their position as partners of E&Y by way of drawings based upon E&Y’s overall profits. Id. ¶ 17. Accordingly, the Joint Provisional Liquidator “client” includes not only Gareth Hughes and Margaret Mills of E&Y but also the staff at E&Y who conduct the liquidation under their supervision.

22. Even if E&Y staff were not properly part of the Joint Provisional Liquidator “client,” they were acting for the Joint Provisional Liquidators in conducting the provisional liquidation of Home and constitute “representatives of a client” within Rule 502. “A ‘representative of a client’ is one having authority to obtain professional legal services, or to act

on advice rendered pursuant thereto, on behalf of the client.” N.H. Rule of Evidence 502(a)(2) (emphasis added). The Joint Provisional Liquidators do not personally conduct all of the activities required in the provisional liquidation. Instead, as E&Y partners, they rely on a team of E&Y personnel at different levels to conduct the provisional liquidation under their supervision. Hughes Aff. ¶ 11. In the case of the Home proceeding, the principal staff members are Ms. Ellis, an Assistant Director at E&Y working in the Corporate Restructuring area and the engagement manager for the Home provisional liquidation; Mr. Cairns, a Senior Executive in Corporate Restructuring at E&Y; and Mr. Harrison, an Executive in Corporate Restructuring at E&Y. Id. ¶ 12. These individuals are the principal staff members conducting the provisional liquidation of Home. Id. ¶ 13. In that capacity, they have the authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the Joint Provisional Liquidators. Id.

23. The ACE Companies’ argument inaccurately portrays the role of E&Y and seeks to artificially separate the Joint Provisional Liquidators from their staff. See ACE Motion ¶ 16. E&Y has not been retained by the Joint Provisional Liquidators to provide auditing and accounting services to the Joint Provisional Liquidators, as ACE “presumes.” See ACE Motion ¶ 16. Instead, two insolvency practitioners who are partners at E&Y have been appointed in that capacity as Joint Provisional Liquidators by the UK Court. Those individuals, acting themselves and through their staff at E&Y, are conducting the provisional liquidation as contemplated by English law.

24. The staff at issue in this motion are representatives of a client within the language of Rule 502(a)(2). They constituted the team working with the Joint Provisional Liquidators in negotiating the Agreement with AFIA Cedents. Hughes Aff. ¶ 22. As members of that team,

they were authorized to obtain legal services or to act on advice received in furtherance of those efforts. *Id.* ¶ 13. Because the provisional liquidation generally and the negotiations in particular were a joint team effort, the staff members were involved in many communications, including communications with legal counsel and the US liquidation team. See ACE Exs. 1, 2.

25. The ACE Companies contend that the so-called “control group” test applies and that Ms. Ellis, Mr. Cairns and Mr. Harrison are not within that group. However, the “control group” test applies “in the special context of corporate activity.” Reporter’s Notes on N.H. Rules of Evidence 502. That test has no application in the context of a provisional liquidation of an insurer by court appointed joint provisional liquidators who operate in a professional team (partner/engagement manager/senior executive/executive). It makes no sense to analyze such a team as a corporation.⁷

26. If the “control group” test were applicable, it would be satisfied. The Joint Provisional Liquidator controls the Home UK Branch pursuant to the Appointment Order. As is demonstrated by the privilege logs, the Joint Provisional Liquidator has been extensively involved in matters relating to the Agreement with AFIA Cedents, along with Ms. Ellis and, to a lesser extent, Mr. Cairns and Mr. Harrison. These four individuals acted as a team with respect to dealings with the AFIA Cedents and the Agreement, Hughes Aff. ¶ 22, and that team should be viewed as the control group. Indeed, the case that originated the control group test would support just such a result. See Philadelphia v. Westinghouse Elec. Co., 210 F. Supp. 483, 485 (E.D. Pa. 1962) (“[I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the

⁷ In the more usual provisional liquidation, the insurer might have its own employees whose activities during the liquidation would be overseen by the Joint Provisional Liquidators and their staff. In that context, a control group test conceivably might apply. The Home UK branch, however, had no employees, as its business was handled by runoff agents, including ACE INA Services (UK) Ltd.

corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect he is (or personifies) the corporation” (emphasis added). It would be artificial to split the Joint Provisional Liquidator from the team for purposes of privilege analysis, see *Hughes Aff.* ¶ 21, and the cases cited by the ACE Companies do not support such a result.⁸

27. For these reasons, the involvement of the Joint Provisional Liquidators’ staff – Ms. Ellis, Mr. Cairns, and Mr. Harrison – in the documents listed on Appendices 2, 3, and 4 does not waive the attorney-client privilege.⁹

⁸ The ACE Companies’ reliance on *National Tank Co. v. The 30th Judicial Dist. Ct.*, 851 S.W.2d 193, 197 (Tex. 1993), and *Langdon v. Champion*, 752 P.2d 999, 1002 (Alaska 1988), for the proposition that “client representatives” cannot include non-employees is misplaced. The language from *National Tank* is overly broad dicta, and other courts have held that non-employees can be within the control group. See *National Converting & Fulfillment Corp. v. Bankers Trust Corp.*, 134 F. Supp. 2d 804, 806 (N.D. Tex. 2001) (*National Tank* “must be read in light of the fact that the court was dealing with a situation where employees had made the allegedly privileged statements. Thus, the language of the opinion naturally was couched in terms of what type of employee fell within the scope of the control group test.”) (holding non-employee is within control group). The cases involved facts that have no bearing on the situation here, where the Joint Provisional Liquidators are legally in control of the Home UK Branch but work – with their staff – at E&Y. Cf. *National Tank*, 851 S.W.2d 193 (statements of employee witnesses to investigators from corporate home office); *Langdon*, 752 P.2d at 1002 (statements of employees to corporation’s insurer).

⁹ In these circumstances, the Court need not address the question whether the work product doctrine that protects certain of these documents has been waived. However, the Liquidator notes that the purpose of the work-product doctrine is to protect against unnecessary intrusion by “opposing parties and their counsel.” *Hickman v. Taylor*, 329 U.S. 495, 510-511 (1947). See N.H. Superior Court Rule 35(b)(2); *State v. Zwicker*, 151 N.H. 179, 191 (2004) (“At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case.” (quoting *U.S. v. Nobles*, 422 U.S. 225, 238 (1975))); *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 275 (1966). The disclosure of work product materials to persons with allied interests (such as the staff working for the Joint Provisional Liquidators here) accordingly does not waive work product protection. See *FDIC v. Nash*, 1998 U.S. Dist. LEXIS 23520, *13 (D.N.H. 1998) (“To share work product information without risk of forfeiture, the transferor and transferee must share common interests in the litigation against a common adversary although they need not be co-parties.”). Thus, contrary to the ACE Companies’ position (ACE Motion at n.6), the items identified as subject to the work product doctrine on Appendices 2, 3 and 4 continue to be protected even if the attorney-client privilege were not applicable.

II. The ACE Companies' Other Objections Are Ill-Founded, But The Liquidator Will Provide Documents For In Camera Review If The Court Wishes.

28. The ACE Companies also contend that a number of documents are not subject to the attorney-client privilege for a variety of reasons. In many instances, the ACE Companies' assertions rely on the erroneous view that communications with E&Y could not have been for the purpose of facilitating the rendering of legal advice. ACE Motion ¶¶ 19, 25. Although this is wrong (as E&Y was involved as the client or representative of a client), the ACE Companies make the further arguments and challenge certain documents as examples. ACE Motion ¶¶ 19-24 & n.8. The Liquidator addresses these examples below.

29. Appendices 2 and 3. Rather than engage in protracted discussions of the entries on the privilege logs, which have already led to lengthy correspondence in which the Liquidator's counsel attempted to provide information concerning the documents without waiving the privilege (see ACE Exs. 6, 8), the Liquidator also proposes to provide the documents listed on Appendices 2 and 3 to the Court for in camera review. The Liquidator makes this proposal because the ACE Companies have already requested in camera review of the documents on Appendix 3 and such a review would likely expedite the resolution of this motion.

30. The ACE Companies first assert that many of the documents do not relate to the rendering of legal advice. ACE Motion ¶¶ 19-22. As the Liquidator has noted, the subject matter descriptions on the initial privilege logs generally tracked the "re" lines found in the email at issue, and the Liquidator amplified those descriptions in the revised privilege logs. ACE Ex. 6 at 3. As is evident from the descriptions and the persons involved as shown on the privilege logs, the documents relate to legal advice. See generally Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 144-45 (D. Del. 1977). Turning to the ACE Companies' examples, the documents concerning "RWs View of Actuarial Model" are emails between or among members of the US

and UK liquidation teams, including counsel, regarding communications with Rhydian Williams of Equitas Limited (“Equitas”), an AFIA Cedent, about an “actuarial model” that was discussed as part of the negotiations. See ACE Exs. 1 at 3, 29 (December 21 Privilege Log 19(1), 19(2), 20, and 197) and 2 at 9 (January 5 Privilege Log 46). The documents regarding outstanding loss reserve figures are also emails among the teams, including counsel, with respect to information pertinent to the negotiations. See ACE Exs. 1 at 14, 18, 21, 29, 30 and 3 at 2 (December 21 Privilege Log 13(2), 92(2), 127(1), 127(2), 146, 202, 207(1), and 207(2)). Such communications concerning the ongoing negotiations relate to the rendering of legal advice. (The written communications with AFIA Cedents during the negotiations, including the “actuarial model” and any loss reserve information provided to them, have of course been produced, e.g., H00484, H00598, as has similar information that was not part of communication with counsel, e.g., H00349, H00469).

31. Client communications with counsel concerning the course of negotiations are properly protected from disclosure by the attorney-client privilege, even if they involve actuarial or reserve issues or information. “Many [lawyers] have expertise in special areas of knowledge that enhances their skill as lawyers, and that does not diminish their legal status.” Montgomery County v. Microvote Corp., 175 F.3d 296, 302 (3d Cir. 1999). Counsel representing the Liquidator and the Joint Provisional Liquidator must be familiar with and be prepared to advise their clients regarding actuarial and reserve issues and how best to use such information when pertinent to negotiations. “Negotiating, drafting or assisting in the creation of [a contract] in an effort to resolve the dispute . . . is at the heart of a lawyer’s task.” Id. at 302-03. “It is very important in the practice of law, . . . , that the [client] have complete freedom of consultation fostered by the client-attorney privilege.” Id. At 303.

32. Appendix 4. The Liquidator does not suggest in camera review of the documents listed on Appendix 4 because the ACE Companies' only ground for challenging those documents is that they were addressed or copied to recipients including the Joint Provisional Liquidator's staff at E&Y. See ACE Motion ¶¶ 25-26. Since those persons are part of the client or representatives of clients for purpose of the privilege review as explained above, their presence as recipients does not waive the privilege or require a determination as to whether their presence facilitated the rendering of legal advice. Since this is the only basis for the ACE Companies' challenge to these documents, in camera review would be an unnecessary burden.¹⁰ If the Court wishes, however, the Liquidator will provide the documents for in camera review as well.

33. Appendix 5. The ACE Companies finally assert that fifteen documents listed on Appendix 5 were not privileged because they do not involve lawyers. ACE Motion ¶¶ 31-37. These documents are communications among the client group (which includes Ms. Ellis, Mr. Cairns and Mr. Harrison as shown above) that generally concern or convey the substance of legal advice and are therefore themselves privileged. See Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 442 (S.D.N.Y. 1995) (privilege protects communications among corporate employees that reflect legal advice); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 518 (D. Conn. 1976) (same).

¹⁰ The only documents specifically challenged by the ACE Companies in ACE Motion ¶¶ 25-26 are documents 12(1) and 12(2) from the December 21 Privilege Log. Document 12(2), which preceded 12(1), is an email from Jonathan Rosen (Home's Chief Operating Officer) to the Joint Provisional Liquidator with copies to others, including counsel, concerning the negotiations. That it sought legal advice is evident from the fact that counsel, Philip Hertz, responded in an e-mail (Document 12(1)) to those participating in Document 12(2) informing them of a recent conversation with Richard Leedham and his advice regarding the impact of this conversation. See ACE Ex. 1 at 1-2.

December 21, 2004 Privilege Log

- Document 13(1) was produced in redacted form on February 14, 2005 (H02543). The redacted paragraph responds to the attached email (document 13(2)) from Matt Harrison to counsel, Philip Hertz, David Steinberg, David Leslie and Peter Roth, which has been withheld as privileged. ACE Ex. 3 at 2. As discussed in the March 11th Letter (ACE Ex. 8 at 1), the text is redacted because it contains the substance of legal advice previously provided by counsel.
- Document 93 is a draft email prepared by the Special Deputy Liquidator, Peter Bengelsdorf, directed to the Joint Provisional Liquidator and counsel (as evidenced by specific instructions to/requests of Eric Smith and David Leslie contained in the draft). ACE Ex. 1 at 14. As previously noted in the February 14th Letter and March 11th Letter, Document 93 was withheld as a document that was prepared for a communication with counsel. See ACE Exs. 6 at 2, 8 at 2.
- Document 94 is a draft email prepared by the Special Deputy Liquidator and directed to Sarah Ellis, which was ultimately sent to Sarah Ellis and counsel (as reflected on the Privilege Log at Documents 96(2), 120(2), 206(2)). ACE Ex. 1 at 14, 17 and 30. As previously noted in the February 14th Letter and March 11th Letter, Document 94 was withheld as a document that was prepared for a communication with counsel. See ACE Ex. 6 at 2, 8 at 2.
- Document 136(1) and Document 179(1) are two copies of an email in which Karl Moller (Home's Chief Actuary) responds to Jonathan Rosen (Home's Chief Operating Officer) concerning proposed language in Documents 136(3)/179(3) (which are privileged) for a letter to cedents which had been circulated to Mr. Rosen and others by counsel. ACE Ex. 1 at 19-20, 25. As discussed in the February 14th Letter and March 11th Letter, the text is redacted because it comments on communication to counsel. See ACE Exs. 6 at 2, 8 at 2.
- Document 136(2) and 179(2) are two copies of an email from Jonathan Rosen to Karl Moller that contains no text but forward an attached communication from counsel concerning proposed language for inclusion in letter to AFIA Cedents (136(3)/179(3)) that is privileged. See ACE Exs. 1 at 19, 25, 6 at 3.
- Document 203(2), in conjunction with Document 203(1), comprises essentially one email sent to the Joint Provisional Liquidator and counsel. ACE Ex. 1 at 29. As explained in the March 11th Letter, Document 203(2) is Sarah Ellis' email to Gareth Hughes that she forwarded "for information" twenty minutes later to counsel, Philip Hertz, David Steinberg, and David Leslie, in Document 203(1). See ACE Ex. 8 at 2. A communication to keep counsel apprised of business matters is privileged where, as here, it embodies an implied request for legal advice. See Pacamor Bearings, Inc. v. Minebea Co., Ltd., 918 F. Supp. 491, 511 (D.N.H. 1996).
- Document 301(1) is an email from the Special Deputy Liquidator to the Liquidator summarizing and restating for the Liquidator's benefit the attached Document 301(2),

which is a privileged email from counsel, Philip Hertz. ACE Ex. 1 at 47. As explained in the February 14th Letter and March 11th Letter, Document 301(1) is withheld because it reflects legal advice previously provided by counsel. See ACE Exs. 6 at 2, 8 at 2.

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- Document 33(1) is a blank email from Jonathan Rosen to Peter Bengelsdorf that, as discussed in the February 14th Letter, forwards an attached email (33(2)) from Philip Hertz that is privileged. See ACE Exs. 2 at 7, 6 at 3.
- Documents 84(1) and 84(2) are the same emails as Documents 136(1)/136(2) and Documents 179(1)/179(2), which are discussed above. ACE Ex. 2 at 16.

These documents were properly withheld as privileged.¹¹

¹¹ On review, Documents 22(3), 25(3) and 25(4) are being produced beginning at H02762. Other copies of these documents have been produced previously, e.g., as H02545 and H02697.

CONCLUSION

For the reasons stated above, the Court should deny the ACE Companies' motion.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE
COMMISSIONER OF THE STATE OF NEW
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April 1, 2005

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Opposition to ACE Companies' Motion to Compel was sent, this 1st day of April, 2005, by first class mail, postage prepaid to all persons on the attached service list.

A handwritten signature in cursive script, appearing to read "Eric A. Smith", written over a horizontal line.

Eric A. Smith

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 03-E-0106

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