

# Lovells

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19 January 2005

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Matter ref 10718.00023

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Boston, MA 02111

**RE: IN THE MATTER OF THE LIQUIDATION OF THE HOME INSURANCE COMPANY  
DOCKET NO. 03-E-0106**

Dear Mr. Smith:

We write on behalf of the ACE Companies ("ACE") in response to your December 21, 2004 letter enclosing the Liquidator's first privilege log and corresponding production as well as your January 5, 2005 letter enclosing the Liquidator's supplemental privilege log and production.

The Liquidator has claimed privilege for many communications and documents which will shed light on the circumstances surrounding the negotiation and execution of the Agreement. These communications and documents relate directly to the Agreement's necessity, reasonableness and fairness, as to which the Court has ordered discovery. Given their significance, it is crucial that the parties to this dispute comply with their respective disclosure obligations and abide by the rules of discovery as completely as possible. For this reason, ACE seeks a clarification, if not a revision, of the Liquidator's privilege logs.

As the party asserting privilege, the Liquidator 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 Liquidator's privilege logs, as they stand today, fail to provide sufficient information to satisfy the Liquidator's burden with regard to many of the withheld communications and documents. We have set forth in this letter ACE's principal objections to each category of document withheld on the basis of these privilege logs. In order to avoid formal motion practice, we ask that these issues be addressed in a revised log and that any non-privileged documents responsive to ACE's First Request for the Production of Documents be produced immediately. Moreover, we ask that any redacted documents be properly logged. As you will see, this letter lists eight categories of documents or communications which appear to be

improperly withheld, require clarification, or should be included in a redaction log. For each of the eight categories, the attached exhibit lists each questionable log entry or the Bates numbers for the documents that fall under each category.

**1. Documents Whose Links to An Attorney Have Not Been Demonstrated**

On each of the logs, a large number of documents were withheld by the Liquidator on the basis that they are protected by the attorney-client privilege. Those documents are listed by log entry number on Exhibit 1. While the Liquidator has provided a list of individuals, with regard to those outside of the Home Insurance Company or the Liquidator's office, the "Legend" attached to the December 21 privilege log does not clearly identify each such individual as: (1) an attorney for the Liquidator or the Home Insurance Company, (2) a representative of such an attorney, (3) a "representative of a client" as defined under the New Hampshire Rules of Evidence or (4) an attorney or attorney's representative for another party with a common legal interest. As you are aware, New Hampshire Rule of Evidence 502(b) would only extend the protection of the attorney-client privilege to communications between or among the Liquidator and/or a member of one (or more) of these four groups. Since little indication is provided as to the roles and/or identities of the individuals on the listed documents, we must conclude that the Liquidator has not met its burden of establishing that protection from disclosure is warranted in regard to any of the documents on Exhibit 1. Accordingly, please identify which individuals on the listed documents, if any, are attorneys or otherwise qualify under the groups of persons defined under New Hampshire Rule of Evidence 502(b).

Furthermore, the Liquidator has apparently withheld non-privileged documents or communications on the ground that they were later forwarded to, or shared with, an attorney. For example, entry 23 in the December 21 log includes an original e-mail message between Jonathan Rosen and Sarah Ellis -- which would not be privileged in the first instance -- that was attached to two e-mail messages later sent to counsel. A non-privileged communication or document does not become cloaked in privilege merely because it is subsequently forwarded to, or shared with, an attorney. See, e.g., Pacamor Bearings, Inc. v. Minebea, Co., Ltd., 918 F. Supp. 491, 511 (D.N.H. 1996). Thus, any such documents or communications must be withdrawn from the logs and produced, unless you can revise the logs to show that all such documents were originally privileged and that the privilege was never waived. Please confirm that each such document will be produced or the logs revised to reflect the basis of the Liquidator's claim of privilege.

Finally, both logs reference an individual initialled "PR," but this individual is not included in the "Legend" attached to the Liquidator's December 21 log. Please identify him or her.

**2. Documents Whose Subject Matter Is Inadequately Described**

On each of the logs, it appears that the Liquidator has withheld a number of communications and documents on the basis of the attorney-client privilege, without adequately describing the subject matter of such materials. These documents are listed on Exhibit 2. The "Subject Matter" column on neither log demonstrates that any of these communications or documents were for the purpose of facilitating professional legal services, as required under New Hampshire Rule of Evidence 502(b). For example, the subject matter of entry 222 is "RW's View of Actuarial Model." On its face, a discussion of actuarial matters would not involve legal advice. Moreover, many of the entries on the logs have too generic a description to

enable ACE to ascertain whether the documents in question contained any communications which were legal or confidential and thus protected from disclosure under any theory. For example, the subject matter of entry 216 is "Home UK Branch," which fails to support any argument that the document in question should be protected from disclosure as privileged. We ask, therefore, with respect to each entry in Exhibit 2, that you provide sufficient detail regarding the subject matter of the communication in order to demonstrate the basis for the Liquidator's claim of privilege.

**3. Notes Prepared by Non-Lawyers**

The Liquidator has withheld from discovery a number of documents (referenced in Exhibit 3) described on each log as "notes prepared for discussion with counsel" or "notes for discussion with counsel." These notes in each instance appear to have been prepared by non-lawyers. Therefore, the December 21 log entries do not establish a basis to withhold these documents or communications as privileged. Unless the Liquidator can demonstrate that these notes reflect the substance of confidential attorney-client communications (or are otherwise protected), they are subject to discovery. Accordingly, with respect to each entry in Exhibit 3, please provide sufficient detail regarding the documents and communications withheld under this category to demonstrate the basis for the Liquidator's claim of privilege.

**4. Documents Where the Author or Recipient Has Not Been Identified**

As evidenced by the December 21 log, the Liquidator has withheld a number of documents or communications (listed on Exhibit 4) as to which no author or recipient has been specified. There is no indication, therefore, that those materials are entitled to any protection and the Liquidator has failed to meet its burden to establish that they are entitled to protection under the attorney-client privilege. We ask, therefore, with respect to each entry in Exhibit 4, that you provide sufficient information regarding the author or recipient of the communication or documents withheld to demonstrate the basis for the Liquidator's claim of privilege.

**5. "Work-Product" Documents Whose Dates of Creation Have Not Been Given**

The Liquidator has withheld from production a number of documents (referenced on Exhibit 5) claimed to be protected by the work-product doctrine. As to all of those documents, the December 21 privilege log fails to provide the date the documents were created to enable us to determine whether such documents were indeed created in anticipation of litigation or for trial, as required by New Hampshire Superior Court Rule 35(b)(2). Since the Liquidator has not met its burden as to this category of documents, with respect to each entry in Exhibit 5, please provide sufficient information (including the date the document was created) to demonstrate the basis for the Liquidator's claim of work-product protection.

**6. Documents Lacking any Indication of Having Been Created in Anticipation of Litigation**

The Liquidator has withheld from production a number of documents (referenced in Exhibit 6) as protected under the work-product doctrine without demonstrating on the face of the entries that they were created in anticipation of litigation or for trial. It is unclear from the information provided on the December 21 log whether any of these documents were created in anticipation of litigation or for trial, as required by New Hampshire Superior Court Rule 35(b)(2). For example, entry 48 in the December 21 log is described as "comments regarding draft matrix" dated October 16, 2003. The Liquidator has not indicated whether any litigation or trial was

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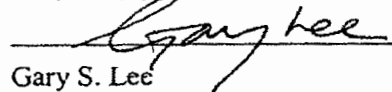
anticipated as of that date, nor is it apparent from the privilege log entry how the "draft matrix" relates to any anticipated litigation or trial. For each entry in Exhibit 6, please provide sufficient information to establish that the documents in question were in fact created in anticipation of litigation or for trial, and are entitled to protection from disclosure.

**7. Redacted Documents Not Listed on Any Log**

The documents listed on Exhibit 7 were redacted by the Liquidator but were not included in either log. Please provide a separate redaction log that references the Bates numbers of each redacted document and clearly sets forth the basis for redacting any listed document.

We look forward to receiving your response to this letter along with a revised privilege log and redaction log in response to this letter no later than February 7, 2005. We appreciate your cooperation.

Very truly yours,

  
Gary S. Lee

Attachments

### Exhibit 1

Please note: Where the Liquidator has included more than one document in one privilege log entry, the document is referenced by a parenthesized number that represents the document's place in that privilege log entry's sequence of documents. For example, the third document in log entry 134 is referenced as 134(3).

#### December 21, 2004 Privilege Log

13(1)	23(3)	24(2)	31-32	35	37
39(2)	41	43-44	47	50	60-61
66-67	75	82-84	87	91	93-95
106(1)	117-19	121	134(3)	135(2)	136(1)-(2)
149	159	161	164(2)	166(3)	177(1)-(2)
178(1)	179(1)-(2)	187(3)	203(2)	223(3)	224(2)
225(1)-(2)	247	262(4)	263(2)	265-72	274
275	300	301(1)	307(3)	338(1)-(2)	339-340(1)
341(1)	345(1)-(2)	345(2)	357		

#### January 5, 2005 Privilege Log

11(3)	24(1)-(2)	25(3)-(4)	32(1)-(3)	32(5)	33(1)
59(1)-(3)	60(2)-(4)	63(2)	64(2)	78(1)	84(1)-(2)

**Exhibit 2**

**December 21, 2004 Privilege Log**

All logged documents fall under this category, except the following:

1-5	7-9	42	44-46	55	57
66	69(1)-(3)	97-108	114(1)-(3)	158-59	167-69
173	183(1)-185	188	243	250(1)-251	282
299	313(1)-(2)	315-316(2)	317(1)- 318(2)	321-22	347-50
357					

**January 5, 2005 Privilege Log**

All logged documents fall under this category, except the following:

31	33(1)-(2)	37	61(1)-(2)	67	
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Exhibit 3

December 21, 2004 Privilege Log

35(1)	82	95	149
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Exhibit 4

December 21, 2004 Privilege Log

1-10	31-32	35	37	41	43-44
47	50	55	61	66	70
73-75	82-85	87-89	91	95	97-101
103-04	115	117-19	149	158-59	161
172	187(3)	247	265-72	274-75	357



**Exhibit 5**

**December 21, 2004 Privilege Log**

2-3	8-9	44	274	357	
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Exhibit 6

December 21, 2004 Privilege Log

1-9	42	44-46	48	55	66
69(1)-71(6)	73-74	76(1)-(3)	97-108	159	165(1)-(4)
167-170(2)	172	183(1)-185	188	234	243
245(1)-(5)	273(1)-274	281	282	285-286(5)	288-292(2)
299	321-22	343(1)-344	346-57		

Exhibit 7

November 24, 2004 Production

H00369	H00370	H00371	H00375	H00447	H00448
H00484	H00656	H00657	H00726	H00730	H00735
H00747	H00794	H00797	H00802	H00807	H00809
H00823	H00868	H00925	H01082-83	H01109	H01120
H01168	H01174	H01179	H01193	H01229	H01230
H01234	H01269	H01272	H01276	H01279	H01281
H01282	H01291	H01292	H01352	H01412	H01417
H01432	H01481	H01630	H01675	H01683	H01684
H01687	H01690	H01701	H01705	H01707	H01769
H01793	H01811-12	H01865	H01898	H01899	H01900
H01910	H01912	H01913	H01915	H01916	H01917
H01924	H01930	H01946	H01947	H01948	H01950
H01951	H01954	H01955	H01957	H01959	H01963
H01964	H01966	H01989	H02004	H02010	H02017
H02018	H02019	H02020	H02033-34	H02035	H02039
H02042					

January 5, 2005 Production

H0481.1	H02106	H02111	H02126	H02139	H02152
H02165	H02205	H02209	H02222	H02224	H02233
H02237	H02241	H02248	H02253	H02254	H02259
H02263	H02269	H02279	H02280	H02305	H02317
H02320	H02342	H02345	H02346	H02350	H02351
H02376	H02386	H02408	H02409	H02446	H02472
H02478	H02482	H02485	H02488	H02491	H02492
H02495	H02496	H02513	H02515		