

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

2005 JUN 21 P 4: 00

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

**ACE COMPANIES' REPLY IN FURTHER SUPPORT OF MOTION
TO COMPEL PRODUCTION OF DOCUMENTS BY EQUITAS**

Despite three opportunities to do so, Equitas still has not produced documents consistent with the letter and spirit of the Court's discovery orders -- the deposition of Rhydian Williams revealed, beyond any doubt, that Equitas continues to withhold documents. The question presented by this motion is whether the Court can fulfill the Supreme Court's mandate and its quasi-inquisitorial role at the same time that the ACE Companies are denied clearly relevant documents and deprived of a meaningful ability to cross-examine the Liquidator's proof at trial. The ACE Companies respectfully submit that it cannot, and request that the Williams Affidavit be stricken, together with the relevant portions of the Offer of Proof or, in the alternative, that appropriate document disclosure be made and Mr. Williams' deposition be continued.

I. Equitas' Persistent Non-Disclosure

1. Denial of the ACE Companies' motion would allow the Liquidator and Equitas to benefit from a "trial by ambush" strategy. The most glaring example of this strategy is Equitas' and the Liquidator's failure to disclose to the Court and the ACE Companies all documents concerning the circumstances surrounding the commutation agreement between Equitas and the Home that was submitted to the Court on February 10, 2004 and approved on February 18, 2004 -- before the approval of the Proposed Agreement. In reliance upon the Liquidator's own

assurance at the April 21, 2004 Status Conference that the commutation between Equitas and the Home did not involve AFIA business, the ACE Companies essentially agreed not to seek from Equitas documents or deposition discovery concerning the commutation agreement. (*See* Transcript of April 21, 2004 Status Conference, annexed as Exhibit 1, at 24:16-26:1.) Without that assurance from the Liquidator, the ACE Companies obviously never would have agreed with Equitas not to seek discovery on this topic, so Equitas' estoppel argument is baseless.

2. The true facts came to light only after Mr. Williams' deposition and after Referee Rogers ruled on disclosure of Appendix 4 documents. A previously redacted portion of the commutation agreement between Equitas and the Home, disclosed by the Liquidator after Mr. Williams' deposition, showed that Equitas and the Home had agreed to share AFIA recoveries. (*See* Reinsurance Commutation Agreement, Settlement and Release, annexed as Exhibit 2, at 12.) The ACE Companies have assumed that the Liquidator was merely mistaken when he assured the ACE Companies and the Court that the commutation agreement between Equitas and the Home did not involve AFIA business, but, no matter what, the ACE Companies have been deprived of an opportunity to depose Mr. Williams about this commutation agreement. Therefore, at a minimum, it is critical that Mr. Williams appear for additional questioning and that all documents concerning the commutation agreement be produced.

3. Since the deposition of Mr. Williams, moreover, Jonathan Rosen confirmed that the Liquidator and the AFIA Cedents agreed that the Home would not enter into a commutation agreement with the ACE Companies without first advising the AFIA Cedents. (*See* Uncertified Transcript of Deposition of Jonathan Rosen, annexed as Exhibit 3, at 295:2-18.) This testimony was elicited based upon documents produced pursuant to Referee Rogers' Appendix 4 ruling. The documents in Appendix 4 show that, shortly after the discussions with the ACE Companies

commenced, the Home effectively agreed with the AFIA Cedents not to provide information on AFIA Cedent liabilities (provided by the AFIA Cedents) to the ACE Companies for the purposes of those discussions. Because the ACE Companies had no way of knowing about these facts before Referee Rogers made her ruling, additional questioning of Mr. Williams is entirely warranted if the Court decides not to strike the Williams Affidavit.

II. The ACE Companies Are Entitled to the Documents Requested in the Motion and the Continuance of Mr. Williams' Deposition, or the Williams Affidavit Should Be Stricken

4. With respect to each category of documents requested by the ACE Companies, the Liquidator's and Equitas' opposition papers either miss the point or mischaracterize Mr. Williams' testimony.

5. As to documents regarding meetings and discussions among AFIA Cedents, the Court's May 12 and June 1 Orders clearly required disclosure of all documents relied upon in drafting the Williams Affidavit, including the documents in question. Mr. Williams testified that "a handful" of such meetings took place and that the AFIA Cedents discussed such matters as set off and the length of time it would take to file a claim in the Home estate. (*See* Transcript of Deposition of Rhydian Williams, annexed as Exhibit 4, at 43:3-44:1, 46:10-18, 78:3-13.) He also testified that he took notes or that notes existed, but only one meeting note has been produced. (*Id.* at 43:3-44:1.) The Liquidator's argument that "[c]ontrary to ACE's assertion, notes were produced," therefore, misses the point. Moreover, since the Williams Affidavit necessarily reflects the content of communications among AFIA Cedents, it would be inequitable for the ACE Companies to be hamstrung in its ability to meaningfully cross-examine Mr. Williams on these points. Consistent with protecting the ACE Companies' rights, the Court's discovery orders have broadly construed the meaning of "relied upon." All such documents that

address any matters raised in the Williams Affidavit are subject to production. Accordingly, Equitas' attempt to limit its production of such documents should be rejected, and at a minimum Equitas should be ordered to produce all such meeting and discussion notes.

6. Second, prior drafts of the Williams Affidavit are patently relevant to the final version, and therefore must be produced. The Liquidator's opposition appears to be based upon the notion that such drafts are subject to production only if Mr. Williams had explicitly testified that he relied upon them in drafting his affidavit. But, as noted above, the Court's discovery orders have broadly construed the meaning of "relied upon." Although, as Equitas points out, the ACE Companies have not specifically asked about drafts of the Williams Affidavit, the simple reason is that the ACE Companies did not know of such drafts until Mr. Williams was deposed. Equitas' privilege argument, moreover, is baseless; the Court's June 1 Order expressly states that privileged documents are subject to production if relevant.

7. Third, all internal Equitas communications regarding the negotiation of the Proposed Agreement should be produced. As with communications among AFIA Cedents, the Court's May 12 and June 1 Orders clearly call for production of these documents. The fact is that Mr. Williams testified to internal Equitas communications regarding matters cited in the Williams Affidavit. The Liquidator's claim that the ACE Companies are obligated to demonstrate that documents concerning those communications were *not* produced is baseless. To the extent that Equitas claims that it has produced all documents, that claim should be measured against the Court's broad construction of the phrase "relied upon" -- not Equitas' broad reading, which effectively requires no disclosure at all. All such documents that address any matters raised in the Williams Affidavit are subject to production.

8. Fourth, any documents created by a colleague of Mr. Williams, Karen Amos, in connection with the Proposed Agreement are subject to production. Mr. Williams testified to Ms. Amos' involvement in matters cited in his affidavit, and it is not the ACE Companies' obligation to confirm that all documents on this point were produced. While the Liquidator and Equitas attempt to portray Ms. Amos' involvement in alleged cut-through discussions with the ACE Companies as irrelevant, the Williams Affidavit relies upon the alleged threat of such a cut-through. Likewise, Ms. Amos' discussions regarding set off in connection with the commutation agreement with the Home are relevant to the Williams Affidavit, since that affidavit makes an assertion concerning set off.

9. Fifth, Equitas should produce all documents created by Mr. Heap in connection with the negotiation of the Proposed Agreement and preparation of Mr. Williams' affidavit. Mr. Williams testified to Mr. Heap's involvement in the drafting of his affidavit and in certain matters cited in his affidavit, and it is not the ACE Companies' obligation to confirm that all documents on this point were produced. To the extent that Equitas claims that it has produced all documents subject to production, that claim should be held to the Court's broad construction of the phrase "relied upon." All such documents that address any matters raised in the Williams Affidavit are subject to production. Equitas' apparent privilege argument, moreover, is baseless; the Court's June 1 Order expressly states that privileged documents are subject to production if relevant.

10. Sixth, the ACE Companies are entitled to any documents created by in-house counsel for Equitas, Robert Fleming, in connection with the negotiation of the Proposed Agreement. Mr. Williams testified to Mr. Fleming's involvement in the negotiation of the Proposed Agreement, which must have involved matters cited in Mr. Williams' affidavit. Again,

it is not the ACE Companies' obligation to confirm that all documents on this point were produced. Equitas' attempt to limit its discovery obligation, moreover, flies in the face of the Court's broad construction of the phrase "relied upon."

11. Finally, with regards to the unwarranted redactions, despite Equitas' assurances that the redactions do not contain privileged material, the ACE Companies submit that, in light of Equitas' history in impeding discovery in this proceeding, the ACE Companies are at least entitled to in camera review of the redacted material.

12. In sum, the ACE Companies' motion cites to Mr. Williams' testimony concerning communications regarding the Proposed Agreement and his affidavit, and it is Equitas' obligation to produce any such documents that exist, or, if such documents do not exist, to confirm their nonexistence within the ambit of this Court's discovery orders -- not Equitas' hyper-technical, narrow view of them.

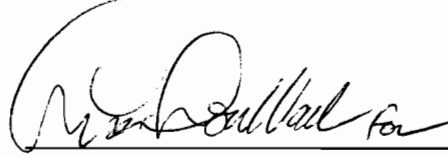
WHEREFORE, the ACE Companies respectfully request that the Court enter an order:

A. Striking the Williams Affidavit and verification of the paragraphs in the Offer of Proof set forth above;

B. In the alternative, stating that (a) Equitas must produce the documents or portions of documents identified above or the Williams Affidavit and verification will be stricken; and (b) Mr. Williams must appear in New York for a continuation of his deposition; and

C. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted,



Date: June 21, 2005

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing pleading has been served on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail on June 21, 2005:

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