

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**

**JOINT PROVISIONAL LIQUIDATOR'S OPPOSITION TO ACE
COMPANIES' MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Non-party Gareth Howard Hughes, as Joint Provisional Liquidator of The Home Insurance Company ("Joint Provisional Liquidator"), appears specially by and through his attorneys, Rackemann, Sawyer & Brewster, P.C., for the limited purpose of opposing the ACE Companies' Motion to Compel Production of Documents by Gareth Howard Hughes (the "ACE Motion") on jurisdictional grounds. As reasons therefor, the Joint Provisional Liquidator states:

1. Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator ("Liquidator") of the Home Insurance Company ("Home"), served a motion for approval of an agreement with AFIA Cedents (the "Agreement") in this matter on February 11, 2004. The Agreement is reflected in a letter agreement signed by the Joint Provisional Liquidator and certain AFIA Cedents dated January 22, 2004 and attached to the Liquidator's motion for approval. As stated in the Agreement, the Liquidator approved the Agreement.

2. Gareth Hughes was appointed as one of the Joint Provisional Liquidators for Home under the English Insolvency Act 1986 by order entered on May 8, 2003 (the "Appointment Order") by the High Court of Justice in London, England ("UK Court"). Exhibit 1 at 1. The Joint Provisional Liquidator is a partner in Ernst & Young LLP in England, and a licensed insolvency practitioner under the English Insolvency Act 1986. Id.

2005 APR - 8 A 9:43

3. The ACE Companies and Benjamin Moore & Company opposed the Liquidator's motion for approval of the Agreement. After various proceedings, this Court entered the Order on Remand dated October 8, 2004. The Order on Remand authorized discovery "limited to the necessity, reasonableness, and fairness of the agreement." Order on Remand at 13, 14.

4. In October 2004, the ACE Companies served written document requests (seeking 29 categories – and numerous sub-categories – of documents) on the Liquidator. See ACE Ex. G. In connection with his response, the Liquidator requested and received documents from the Joint Provisional Liquidators and advised the ACE Companies that production of those documents would be made "in accordance with the Liquidator's written response to ACE's document request, which will be forthcoming on November 24." See Exhibit A to ACE Ex. D. The Liquidator did so, and explained that the production included documents from the Joint Provisional Liquidators in his discovery responses and again in a letter dated January 14, 2005. See ACE Ex. G at 3; ACE Ex. H at 7 (specifying that documents H01131 through H01905 came from the Joint Provisional Liquidators). The Liquidator also provided the ACE Companies with privilege logs that listed withheld documents received from the Joint Provisional Liquidators. See ACE Ex. D at 1.¹

5. Nonetheless, on January 21, 2005, the ACE Companies mailed to the Joint Provisional Liquidator in England a request for production of documents seeking 68 categories (and numerous sub-categories) of documents. ACE Ex. A. As the ACE Companies did not

¹ In view of the production of approximately 800 pages of documents from the Joint Provisional Liquidators as part of the Liquidator's production and the inclusion of approximately 140 documents (including strings of emails) from the Joint Provisional Liquidators on the Liquidator's privilege logs, it is difficult to understand that basis for the ACE Companies assertion that the Joint Provisional Liquidator has "refused" to engage in discovery. ACE Motion ¶ 3. The ACE Companies offer no explanation for their contention that the Joint Provisional Liquidator cannot incorporate the privilege log provided by the Liquidators. ACE Motion ¶ 33.

include it with their motion, a copy of the cover letter to the Joint Provisional Liquidator is attached as Exhibit 2.

6. The Joint Provisional Liquidator responded in a letter dated March 16, 2005, from counsel at Clifford Chance LLP. See ACE Ex. D. That letter made several points. First, it noted that the Joint Provisional Liquidators had provided documents within the scope of the ACE document request to the Liquidator for production in accordance with the Liquidator's document production response, and that the ACE Companies appeared to have accepted this approach. As the ACE Companies' request to the Joint Provisional Liquidator in great part duplicated the request to the Liquidator, the Joint Provisional Liquidator objected to the requests as duplicative, unnecessary and unduly burdensome. Id. at 1-2.² Second, the letter questioned whether the ACE Companies' request imposed any obligation to respond because the Joint Provisional Liquidator (appointed by the UK Court) is not subject to the jurisdiction of this Court, and the request is not authorized by Superior Court Rule 35 and does not comply with the Hague Convention. However, the letter noted that the Joint Provisional Liquidator had already provided a reasonable production on a voluntary basis by providing documents to the Liquidator. Id. at 2. Third, it reiterated the objections and limitations on discovery that the Liquidator had made in his discovery responses. Id. at 2-3. Fourth, it set forth responses to each of the 68 ACE requests identifying and incorporating the responses provided by the Liquidator where applicable and also

² The ACE Companies acknowledge that they initially accepted the production of documents from the Joint Provisional Liquidators through the Liquidator's production as an appropriate approach. See ACE Motion ¶ 8. They assert, however, that the Liquidator subsequently "disclaimed" the production (ACE Motion ¶¶ 9, 14, 27) and that the Joint Provisional Liquidators later confirmed that it was "piecemeal" (id. ¶¶ 10, 27). This is an inaccurate characterization of the letters from the Liquidator's counsel and Joint Provisional Liquidators' counsel. See ACE Ex. H at 7 ("[T]he Liquidator requested that the Joint Provisional Liquidators provide documents within the scope of the Liquidator's responses and has produced documents received from the Joint Provisional Liquidators in accordance with the Liquidator's responses (documents H01131 through H01905)."); ACE Ex. D. at 1 ("As described in the Liquidator's responses, the Joint Provisional Liquidators and their Staff provided the documents requested.").

setting forth objections as appropriate, particularly where the requests exceeded the scope of discovery authorized by the Order on Remand. Id. at 3-18.³

7. The ACE Companies responded in a letter dated March 17, 2005. They then filed their motion to compel on March 22, 2005, without even waiting to receive a response from the Joint Provisional Liquidators. See ACE. Ex. F. The Joint Provisional Liquidators nonetheless responded to the ACE letter on March 24, 2005. A copy of the letter (and a cover letter) is attached as Exhibit 3. The letter disagreed with the ACE Companies' assertion that the documents from the Joint Provisional Liquidator produced through the Liquidator's responses were "lacking," pointed out the unreasonable way in which the ACE Companies sought to expand discovery beyond that permitted by the Order on Remand, and renewed the Joint Provisional Liquidator's jurisdictional objections. Exhibit 3 at 3-4.

8. The ACE Companies sent the motion to compel to Clifford Chance by overnight courier. The Joint Provisional Liquidator is not aware of any other attempts at service.

³ The ACE Companies assert that the documents requested are all relevant to the fairness and reasonableness of the Agreement and are relevant as they track the Hughes affidavit. See ACE Motion ¶¶ 11, 26, 28. As noted in the Joint Provisional Liquidator's letter response, however, the requests go far beyond the scope of the limited discovery allowed in this matter. See ACE Ex. D at 3-14. Even the requests purportedly arising from the affidavit are not limited to subjects in the Hughes affidavit that the ACE Companies focus on in the motion. ACE Motion ¶¶ 5, 21. Moreover, the ACE Companies fail to note that large numbers of the requests are described in the request itself as inquiring into other matters. See ACE Ex. A at 18 ("Document Requests Regarding the First Witness Statement"), 19 ("Document Requests Regarding the Second Witness Statement"; "Document Requests Regarding Your Dealings with the Liquidator").

ARGUMENT⁴

9. The ACE Companies assert that their document request to the Joint Provisional Liquidator was “served” on the Joint Provisional Liquidator. ACE Motion ¶¶ 1, 9, 15. The document request, however, was merely mailed to the Joint Provisional Liquidator in England. See Exhibit 2. It is accordingly not enforceable for lack of service. While the document request relies on Superior Court Rule 35, nothing in that rule purports to impose obligations without service of a subpoena. Cf. Wiebusch, Civil Practice & Procedure § 22.08 at 517 (2d ed. 1997) (“However, when a nonparty objects, the discovering party must bring a bill of discovery in aid of the pending or threatened action and serve it upon the nonparty.”) (emphasis added).

10. The ACE Companies seek to leap over the requirement of service and compliance with the law governing discovery of persons abroad. However, the Joint Provisional Liquidator, appointed by the UK Court and located in London, England, is an out-of-state (and out-of-country) witness “beyond the subpoena powers of the State courts.” Moore v. Conifer Corp., 130 N.H. 795, 800 (1988), citing Ela v. Ela, 68 N.H. 312, 314 (1895). If the ACE Companies wished to impose obligations, they could have sought to compel production under the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, T.I.A.S. No. 7444, 23 U.S.T. 2555, reprinted in 28 U.S.C.A. § 1781 (West Supp. 2004) (the “Hague Convention”). They did not do so, and therefore have no basis to seek production beyond the voluntary production already provided through the Liquidator.⁵

⁴ The Joint Provisional Liquidator restricts his argument to jurisdictional issues, and does not argue or request a ruling on his other objections to the ACE Motion (such as those based on relevance or burden), to avoid any argument by the ACE Companies that the Joint Provisional has consented to jurisdiction by waiver. See ACE Motion ¶ 30. These other objections are reserved.

⁵ The ACE Companies’ have reason to try and avoid the Hague Convention, as their document requests are probably not enforceable under it. The United Kingdom will not execute Letters of Request “issued for the purpose of obtaining pre-trial discovery of documents,” including requests “to produce any documents other than particular documents specified in the Letter of Request.” Hague Convention, “Notification of [the United Kingdom] in

11. The ACE Companies contend that the Court has jurisdiction over the Joint Provisional Liquidator because of his “voluntary appearance as affiant” in this proceeding or his “voluntarily producing certain documents as part of the Liquidator’s production.” ACE Motion ¶¶ 29, 30. Those voluntary actions do not satisfy ACE’s burden of establishing personal jurisdiction and it has otherwise offered nothing as a basis for its assertions.⁶ While the Joint Provisional Liquidator voluntarily submitted an affidavit, voluntarily produced all non-privileged documents circumscribed by the Court’s discovery order, will voluntarily submit to a deposition and will voluntarily testify at the evidentiary hearing on this matter, these accommodations do not waive the Joint Provisional Liquidator’s jurisdictional objections because he has not sought to litigate any issues in this Court.

12. As an initial matter, the Joint Provisional Liquidator – the appointee of a foreign court in a foreign provisional liquidation proceeding – is not a party to this proceeding. The litigant here is the Liquidator, who seeks approval of the Agreement with AFIA Cedents. The ACE Companies’ assertion that the Joint Provisional Liquidator has “appeared” in this matter uses the word in a different sense than a general or special “appearance” by a party litigant.

13. The cases cited by the ACE Companies have no bearing here because they involve persons who sought to litigate matters before the Court. The ACE Companies cite Lyford v. Trustees of Berwick Academy, 97 N.H. 167, 168 (1951), for the rule that “an objection to service or notice is waived when a party, by general appearance or otherwise, submits any other question, except the sufficiency of service or notice, to the court or other tribunal.” ACE

Conformity with Article 42, under a and e, of the Convention,” reprinted in 28 U.S.C.A. § 1781 at 86 (West Supp. 2004). Further, the relevance and undue burden of the 68 requests propounded by the ACE Companies, and the reasonable voluntary production already provided, would be a consideration for this Court in determining if letters of request should issue.

⁶ The burden of establishing personal jurisdiction rests on the person asserting it. See Skillsoft Corp. v. Harcourt General, Inc., 146 N.H. 305, 307 (2001).

Motion ¶ 30. However, the Court held there was no waiver because the defendant “did not undertake at the same time [to] invoke the judgment of the court upon the merits of the case and deny its jurisdiction.” Lyford, 97 N.H. at 169 (internal quotations and citations omitted). While the Lyford rule was extended beyond “disputes involving named parties” in Druding v. Allen, 122 N.H. 823, 826 (1982), the Court continued to ask whether the person had presented issues as a litigant. In Druding, the plaintiffs had sought to enforce a judgment against assets of the principal stockholder shareholder (Mr. Astles) of the corporate defendant. Id. at 825. The Court found a waiver because “Mr. Astles, in his individual capacity and acting through counsel, filed various pleadings with the court, including requests for substantive findings and rulings” and that he “did not litigate the issue of jurisdiction prior to the disposition of the substantive issues raised in his pleadings.” Id. at 826-27. By contrast, the Joint Provisional Liquidator here neither filed any pleadings nor sought resolution of any issues by the Court prior to the ACE Motion. He did not consent to jurisdiction merely by providing an affidavit and documents to the Liquidator.

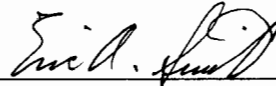
14. Finally, the Joint Provisional Liquidator notes that, as the appointee of the UK Court, he is responsible to that Court. It would be inappropriate for this Court to exercise jurisdiction over the Joint Provisional Liquidator in the exercise of his duties, just as it would be inappropriate for the UK Court to exercise jurisdiction over the Liquidator in the exercise of his duties. Cf. Bartlett v. Dumaine, 128 N.H. 497, 517-19 (1986) (declining jurisdiction sua sponte, despite existence of in personam jurisdiction, in light of the policy favoring orderly supervision of trusts in state of primary supervision).

CONCLUSION

For the reasons stated, the Court should deny the ACE Companies' motion to compel and award the Joint Provisional Liquidator the costs (including counsel fees) incurred in opposing the motion.

GARETH HOWARD HUGHES, AS JOINT
PROVISIONAL LIQUIDATOR OF THE HOME
INSURANCE COMPANY,

By his attorneys,



Thomas M. McHugh

N.H. ID # 14224

J. David Leslie, pro hac vice

Eric A. Smith, pro hac vice

Rackemann, Sawyer & Brewster

One Financial Center

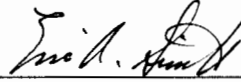
Boston, MA 02111

(617) 542-2300

April 7, 2005

Certificate of Service

I hereby certify that a copy of the foregoing Joint Provisional Liquidator's Opposition to ACE Companies' Motion to Compel Production of Documents was sent, this 7th day of April, 2005, by first class mail, postage prepaid to all persons on the attached service list.



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

SERVICE LIST

Ronald L. Snow, Esq.
Orr & Reno
One Eagle Square
P.O. Box 3550
Concord, New Hampshire 03302-3550

Gary Lee, Esq.
Pieter Van Tol, Esq.
Lovells
16th Floor
900 Third Avenue
New York, New York 10022

Gail M. Goering, Esq.
Adam Goodman, Esq.
Eric Haab, Esq.
Lovells
One IBM Plaza
330 N. Wabash Avenue, Suite 1900
Chicago, Illinois 60611

Andre Bouffard, Esq.
Eric D. Jones, Esq.
Downs Rachlin Martin PLLC
199 Main Street
P.O. Box 190
Burlington, Vermont 05402-0190

Peter G. Callaghan, Esq.
Preti, Flaherty, Beliveau, Pachos &
Haley, PLLP
57 North Main Street
P.O. Box 1318
Concord, New Hampshire 03302-1318

Martin P. Honigberg, Esq.
Sulloway & Hollis, P.L.L.C.
9 Capitol Street
P.O. Box 1256
Concord, New Hampshire 03302-1256

George T. Campbell, III, Esq.
Robert A. Stein, Esq.
Robert A. Stein & Associates, PLLC
One Barberry Lane
P.O. Box 2159
Concord, New Hampshire 03302-2159

Suzanne M. Gorman, Esq,
Senior Assistant Attorney General
Department of Justice
State of New Hampshire
33 Capitol Street
Concord, New Hampshire 03301-6397