

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 THE LIQUIDATOR**

2005 MAR 22 P 3:10
NH SUPERIOR COURT
MERRIMACK COUNTY
CONCORD, NH

The Liquidator has impeded discovery in this case by withholding several hundred critical documents that — based on the information provided in the Liquidator’s privilege logs and follow-up correspondence— are not protected by any privilege. The documents at issue (the “Subject Documents”) make up nearly three-quarters of the total number of documents that the Liquidator has withheld on privilege grounds.¹ 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 Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as liquidator (the “Liquidator”) of The Home Insurance Company (“Home”), to produce the Subject Documents. In support of the Motion, the ACE Companies respectfully state as follows:

Introduction

1. The majority of the Subject Documents should be produced because any privilege that may have originally attached to them was waived when the Liquidator shared the documents

¹ The ACE Companies have annexed, as Exhibits 1 and 2, the versions of the Liquidator’s privilege logs that were provided on February 14, 2005. A listing of the Subject Documents, which are 550 in number, is attached to this Motion at Appendix 1.

with third parties outside of the attorney-client relationship between the Liquidator and his counsel. The relevant provisions in Rule 502(b) of the New Hampshire Rules of Evidence generally restrict the attorney-client privilege to communications between or among the client (or the client's representatives) and the lawyer (or the lawyer's representatives). The Liquidator waived any applicable attorney-client privilege by sharing documents and information with employees of Ernst & Young LLP ("E & Y"), which cannot be considered the "lawyer," a "client," a "representative of the lawyer" or a "representative of a client" under Rule 502(b).

2. The Liquidator has claimed that a small number of the Subject Documents are also protected under the attorney work-product doctrine. However, the sharing of such documents with a third party caused a waiver of any work-product protection as well.

3. The balance of the Subject Documents were not privileged in the first instance and must be produced because they do not constitute communications between the Liquidator and his counsel (or between representatives of the Liquidator) that were "made for the purpose of facilitating the rendition of professional legal services" to the Liquidator.

4. In sum, the Liquidator has withheld documents that are clearly relevant to the subject matter of this dispute, but has failed to carry his burden of demonstrating that the strict requirements for privilege are satisfied. Therefore, the ACE Companies respectfully request that the Court order the production of the Subject Documents.²

² As discussed below, the information provided in the privilege logs demonstrates that the majority of the Subject Documents are not privileged and should be produced without any need for an in camera review. The Liquidator also appears to have waived the privilege with respect to other documents that are identified below in Paragraph 24, but the ACE Companies respectfully request that the Court review those documents in camera to confirm that they are not privileged.

Background

5. On the day of the October 4, 2004 status conference with the Court and in keeping with the Supreme Court's broad mandate in its September 13, 2004 Order, the ACE Companies served their First Set of Interrogatories to Liquidator and First Request for Production of Documents by Liquidator (collectively, the "Discovery Requests"). The Discovery Requests track the allegations in the Liquidator's Motion for Approval of the Proposed Agreement.

6. The Liquidator provided a privilege log on December 21, 2004 and a supplemental privilege log on January 5, 2005 for the documents withheld from production. (Copies of these privilege logs are attached as Exhibits 3 and 4, respectively.) The privilege logs are 82-pages long and contain 442 separate entries. Also, many of the 442 entries have multiple sub-entries for e-mails or attachments, which are considered separate documents. In total, the two logs listed 784 documents. Thus, the number of documents withheld may equal or exceed the number of documents produced.³

7. The December 21 log included a "legend" identifying the initials used on the log. The E & Y employees listed on the legend are Benjamin Cairns ("BC"), Matthew Harrison ("MH") and Sarah Ellis ("SE"). (See Ex. 3.)

8. Following receipt of the privilege logs, the ACE Companies, as required under New Hampshire law, attempted to "meet and confer" by addressing the deficiencies in the Liquidator's privilege logs in a letter dated January 19, 2005. (A copy of the letter is attached hereto as Exhibit 5.) Among other things, counsel for the ACE Companies pointed out to counsel for the Liquidator that under New Hampshire law the attorney-client privilege is limited

³ In order to keep track of the documents, the parties have adopted the practice of using parentheses to refer to the sub-entries. For example, item number 13 in Exhibit 3 has two entries, a December 18,

by Rule 502(b) and that the Liquidator has the burden of proving that the documents listed on the privilege logs were shared only with the individuals covered under Rule 502(b). (*See id.* at 1-2.) Counsel for the ACE Companies also noted that the Liquidator had not established the link to an attorney or legal advice with respect to certain enumerated documents. (*Id.* at 2.)

9. Counsel for the Liquidator took nearly one month, until February 14, 2005, to respond to the ACE Companies' letter. In the February 14 letter (a copy of which is attached hereto as Exhibit 6), counsel for the Liquidator clarified some of the privilege claims, but not others. The Liquidator also produced about 152 pages of documents that had been withheld before, implicitly acknowledging that his previous assertions of privilege were unfounded. (*See id.* at 1-2.) The Liquidator, however, did not address the fundamental issue of waiver, nor did he provide any basis for claiming privilege as to documents that were sent to third parties.⁴

10. By letter dated February 18, 2005 (just four days after the Liquidator's service of the revised privilege logs), counsel for the ACE Companies noted that "[w]e continue to be troubled by the positions that the Liquidator has taken" on privilege issues. (February 18 letter, a copy of which is attached as Exhibit 7, at 1.) However, the February 18 letter focused on certain areas where the ACE Companies hoped the parties could reach a compromise and avoid Court intervention. Among other things, the counsel for the ACE Companies pointed out that the Liquidator still had not provided a basis for his assertion of attorney-client privilege regarding documents that were not authored or received by an attorney. (*See id.*)

2003 e-mail and an e-mail attachment also dated December 18, 2003. The parties have referred to the first entry as 13(1) and the one below it as 13(2). This Motion follows the same convention.

⁴ The Liquidator also enclosed the revised privileged logs that are attached as Exhibits 1 and 2 to the Motion. The revised logs have 443 entries and list 764 documents.

11. Nearly a month later, counsel for the Liquidator responded to the ACE Companies' February 18 letter. (See March 11, 2005 letter attached as Exhibit 8.) The Liquidator produced a few documents, again acknowledging that his earlier assertion of privilege was improper, but the March 11 letter did not adequately address the issue of documents that were not authored or received by an attorney. (See *id.* at 1-4.)

12. On March 21, 2005, counsel for the ACE Companies noted that the parties had reached an impasse on this issue as well as the Liquidator's failure to justify a claim of privilege regarding documents that were disclosed to third parties. (See March 21 e-mail, a copy of which is attached as Exhibit 9.)

Request for Relief

I. New Hampshire Law On Privilege

13. The Liquidator has the burden, as the party resisting discovery, to demonstrate that any communication or document withheld from production is actually privileged and, if so, that the privilege has not been waived. See, e.g., *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 attorney-client privilege in New Hampshire is statutory and, as such, it "must be strictly construed." *State v. LaRoche*, 122 N.H. 231, 233, 442 A.2d 602, 603 (1982).

II. Communications Involving E & Y Are Not Privileged and Must Be Produced

14. Rule 502(b) states that a party may withhold "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client," but only if the communications are (1) between the client (or the client's representative) and the lawyer (or the lawyer's representative); (2) between the client or the lawyer (or their representatives)

and a lawyer (or the lawyer's representative) representing another party in a pending action concerning a matter of common interest; (3) between representatives of the client or between the client and a representative of the client; or (4) among lawyers and their representatives representing the same client. N.H. R. EVID. 502(B).

15. In other words, the Subject Documents must be produced unless the Liquidator proves that the E & Y employees are "representatives," under Rule 502(b), of either the client's lawyers (*i.e.*, the New Hampshire Attorney General's Office, Rackemann, Sawyer & Brewster, or Clifford Chance) or the client (*i.e.*, the Liquidator, Home or the Joint Provisional Liquidators ("JPLs")).⁵ As demonstrated below, the Liquidator cannot carry that burden.⁶

A. E & Y Is Not A "Representative Of The Lawyer" Under Rule 502

16. Under Rule 502(a), a representative of the lawyer is "one employed by the lawyer to assist the lawyer in the rendition of professional legal services." N.H. R. EVID. 502(A)(4). There is no evidence in this case that E & Y was employed by the lawyers involved in the Home liquidations to assist in the "rendition of professional legal services." E & Y is primarily an auditing and accounting firm and was presumably engaged by the "client" (either the Liquidator,

⁵ E & Y cannot be considered a "lawyer" for purposes of Rule 502(b) because it was not providing legal services in this matter, and it is not the "client" because the client is defined as an entity that "is rendered professional services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." N.H. R. EVID. 502(A)(1). E & Y is a service provider rather than the recipient of legal advice from the various lawyers involved here. The Liquidator may argue that the E & Y employees listed on the privilege logs are effectively the "client" because the JPLs are also E & Y employees. That argument, however, would be unavailing because the U.K. court appointed Gareth Hughes and Margaret Mills, individually, and did not appoint E & Y as the JPLs. E & Y is a third party engaged by Mr. Hughes and Ms. Mills as the JPLs.

⁶ Any work-product protection attaching to the Subject Documents would also be waived if the Court were to hold that the E & Y employees are third parties. *See State v. Dedrick*, 135 N.H. 502, 507-08, 607 A.2d 127, 130-31 (1992) (holding that work-product had been waived through disclosure); *State v. Settle*, 124 N.H. 832, 836, 480 A.2d 6, 8 (1984) (same). *See generally U.S. v. Nobles*, 422 U.S. 225, 239 (1975) ("Like other qualified privileges, [the work-product privilege] may be waived.").

Home or the JPLs) to provide those types of services. Therefore, E & Y employees do not meet the definition of a “representative of the lawyer” under Rule 502(a).

17. The First Circuit dealt with a similar situation in *Cavallaro v. U.S.*, 284 F.3d 236 (1st Cir. 2002), and held that a client had waived the attorney-client by sharing documents with its accountant, E & Y. As noted in *Cavallaro*, the general rule is that “disclosing attorney-client communications to a third party undermines the privilege.” *Id.* at 246-47. “An exception to this general rule exists for the third parties employed to assist a lawyer in rendering legal advice.” *Id.* at 247. That exception, however, is limited to cases where “[t]he involvement of the third party [is] nearly indispensable[,] or serve[s] some specialized purpose[,] in facilitating the attorney-client communications.” *Id.* at 249. The *Cavallaro* court found that the privilege was waived because E & Y was not employed to assist the lawyer in rendering legal advice to the client and was instead acting in its capacity as an accounting firm.

18. The Court should reach the same conclusion here because a closer examination of the Liquidator’s privilege logs confirms that the E & Y employees were not engaged to assist in the rendering of legal advice to the clients.

1. Documents Where E & Y Employees Are The Author, Sole Recipient Or One Of A Limited Number Of Recipients

19. E & Y employees are listed as the author, sole recipient or one of a limited number of recipients on only 165 of the Subject Documents, which is about 30 percent of the total number of Subject Documents. Even from the sparse descriptions provided in the logs, it is clear that many of those communications do not meet the threshold requirement for the assertion of attorney-client privilege, which is that they must relate to the rendering of legal advice. For example, document numbers 19(1) and 19(2) on the December 21 log are described as e-mails between the Special Deputy Liquidator, Peter Bengelsdorf, and Sarah Ellis of E & Y regarding

“RW’s View of Actuarial Model.” (“RW” is Rhydian Williams of Equitas, Ltd., who has submitted an affidavit to this Court in support of the Proposed Agreement.) These e-mails between a representative of the client and a third party touch on actuarial issues, not legal issues, raised by another third party. Two Clifford Chance attorneys are listed as “cc’s,” but it is well established that the mere copying of an attorney on a non-legal matter does not make the communication privileged. *See Pacamor Bearings, Inc. v. Minebea Co., Ltd.*, 918 F. Supp. 491, 511 (D.N.H. 1996) (“[D]ocuments prepared by non-attorneys and addressed to non-attorneys with copies routed to counsel are generally not privileged ...”).

20. Moreover, even if the Liquidator could carry his burden of showing that the communications were made for the purpose of providing legal advice, there is no indication that Mr. Bengelsdorf was communicating with Ms. Ellis so that E & Y could lend “indispensable” or “specialized” assistance in the rendering of legal advice. To the contrary, it is clear that Ms. Ellis was being consulted on an actuarial matter, which is in keeping with E & Y’s expertise.⁷

21. In Appendix 2 to this Motion, the ACE Companies have listed all the documents that — as with the documents discussed above — should be produced because they do not involve the rendering of legal advice or, at the very least, do not reflect that E & Y assisted in the rendering of legal advice. Many of the documents discuss actuarial or accounting issues and simply list attorneys as “cc’s.” For example, document number 92(2) on the December 21 log is an e-mail from Matthew Harrison of E & Y to Gareth Hughes, one of the JPLs, regarding “OSLR Figures.” “OSLR” refers to “outstanding loss reserves,” which is a figure that accountants or actuaries will often calculate for reinsurers. Although two Clifford Chance

⁷ Document numbers 132(1), 132(2), 133, 221(1), 221(2), 222 and 306(2) on the December 21 log and 8(2) on the January 5 log appear to be duplicates of 19(1) and 19(2).

attorneys were copied on the e-mail, it is clear from the context that this was for informational purposes and that no legal advice was being sought. *See Pacamor*, 918 F. Supp. at 511.

22. Document numbers 13(2), 20, 127(1), 127(2), 146, 197, 202, 207(1) and 207(2) on the December 21 log and document number 46 on the January 5 log similarly involve accounting or actuarial issues. At least one of the documents, document number 197 on the December 21 log, apparently discusses how much of a distribution the AFIA Cedents will receive, which is a key issue in determining the fairness and reasonableness of the Proposed Agreement.⁸

23. In sum, the ACE Companies respectfully request that the Court order the immediate production of the documents listed in Appendix 2 because the Liquidator's privilege logs demonstrate that (a) there was no legal advice being provided in those documents; and (b) even assuming the lawyers were rendering legal advice, the third-party E & Y employees were consulted for the purpose of advising on accounting or actuarial issues, not for the purpose of providing "indispensable" or specialized assistance to the lawyers rendering legal advice.

24. Appendix 3 to this Motion lists the balance of the 165 documents where E & Y employees are the author, sole recipient or one of a limited number of recipients. Given that the E & Y employees were clearly not assisting the lawyers in rendering legal advice with respect to the documents in Appendix 2, it is likely that the Liquidator also waived the attorney-client privilege for the documents in Appendix 3 (which involve many of the same individuals and subjects). Because the ACE Companies have shown a "reasonable probability" that these

⁸ The rest of the documents in Appendix 2 are described as "discussions with Mike Durkin" or "discussions with Rhydian Williams." The Liquidator may not attempt to hide the contents of discussions that E & Y employees had with third parties by relying on the fact that the documents relating to those conversations were circulated to attorneys.

communications are not privileged, an in camera review is necessary. *See Bennett v. ITT Hartford Group, Inc.*, 150 N.H. 753, 846 A.2d 560, 567 (2004).

2. Documents Where E & Y Employees Are Shown On The Privilege Logs As “CC’s” Or One Of Multiple Recipients

25. The privilege logs also reveal that E & Y employees often received the communications for informational purposes only. E & Y employees are shown on the logs as “cc’s” or one of multiple recipients on 367 of the Subject Documents (*i.e.*, two-thirds of the total number of Subject Documents).⁹ As discussed above, a third party will be deemed to assist a lawyer in rendering legal advice in very limited circumstances where the third party’s involvement is “nearly indispensable” or “serve[s] some specialized purpose” in facilitating attorney-client communications. *Cavallaro*, 284 F.3d at 249. Even assuming, for the sake of argument, that the documents in Appendix 4 relate to the rendering of legal advice, it cannot be said that the E & Y employees were “indispensable” or served a “specialized purpose” because it is obvious that they received the communications simply for their information.

26. For example, document number 12(1) on the December 21 log, which is an e-mail regarding “discussions with Richard Leedham,” was sent by a Clifford Chance attorney to seven people, including Sarah Ellis of E & Y. A related e-mail, document number 12(2), was sent by Jonathan Rosen to Gareth Hughes, with a “cc” to six people, including Ms. Ellis. There is no suggestion that Ms. Ellis was acting on the e-mail or lending “indispensable” assistance on legal matters, and the context proves otherwise. Document numbers 12(1) and 12(2) are illustrative of the hundreds of other documents in Appendix 4, all of which should have been produced by the Liquidator.

⁹ These documents are set forth in Appendix 4 to the Motion.

B. E & Y Is Not A “Representative Of A Client” Under Rule 502

27. Rule 502 states that “a representative of a client” is “one having authority to obtain professional legal services, or to act on advice pursuant thereto, on behalf of a client.” N.H. R. EVID. 502(A)(2). The New Hampshire Evidence Manual notes that Rule 502(a)(2) reflects the “most restricted position” regarding the definition of a client representative, which is the “control group” test. 1 N.H. EVID. MANUAL § 502.02[7]. *See also National Tank Co. v. The 30th Judicial Dist. Ct. (“NATCO”),* 851 S.W.2d 193, 197 (Tex. 1993) (noting that the definition of a client representative in the Texas statute, which is the same as Rule 502(a)(2), “adopts the ‘control group’ test previously recognized by many federal courts”).

28. The “control group” test “generally protect[s] only statements made by the upper echelon of corporate management.” *Id.* There are sound public policy reasons for narrowly defining which employees may be considered client representatives:

The “control group” test is preferable to the principal alternative, which is that the privilege cover[s] any employee communication to counsel directed by the employer and referring to the performance of his duties. This approach would permit a corporation to insulate all of its normal fact gathering about a matter by using the medium of communication with counsel for it.

1 N.H. EVID. MANUAL § 502.02[7].

29. In this case, the E & Y employees cannot be considered the “upper echelon” of the client because they are not even employees of the client. *See Langdon v. Champion,* 752 P.2d 999, 1002 (Alaska 1988) (holding, without further consideration, that the “control group” definition cannot apply to third parties). Some courts have gone beyond the holding in *Langdon* by examining whether employees of a third party may be client representatives, but they have also required express instructions from the client providing the third party “with discretion to either accept or reject the legal advice.” *NATCO,* 851 S.W.2d at 199. Even if this Court were to

hold that the “control group” test applies to third parties, there is no evidence that the E & Y employees were provided with the requisite authority.

30. Accordingly, the Liquidator cannot rely on Section 502(a)(2) to argue that the privileged was maintained when communications were shared with E & Y employees.

III. Another Group Of Documents Withheld By The Liquidator Were Never Privileged

31. In addition to the documents for which any arguable privilege was waived, the Liquidator has withheld fifteen documents that were never privileged at all because there is no indication in the privilege logs that they were communications between the lawyer and the client (or the client’s representatives) “made for the purpose of facilitating the rendition of professional legal services to the client.” N.H. R. EVID. 502(B).¹⁰

32. The main flaw in the Liquidator’s assertion of privilege is that the documents in Appendix 5 involve only non-lawyers. The Liquidator may try to argue that the communications are “between representatives of the client” under Rule 502(b), but there are several problems with such an argument. First, several of the documents — document numbers 22(3), 94 and 203(2) on the December 21 log and 25(3) and 25(4) on the January 5 log — were also sent to Sarah Ellis of E & Y, who is demonstrably not a client representative. Second, the Liquidator has not shown how the communications in Appendix 5 were expressly “made for the purpose of facilitating the rendition of professional legal services to the client.” N.H. R. EVID. 502(B). This is an essential component of the statute; otherwise, a client could cloak all the communications of its employees under the mantle of attorney-client privilege.

¹⁰ The documents are listed in Appendix 5 to this Motion.

33. When the ACE Companies brought some of these and other documents to the Liquidator's attention, his counsel purported to address the ACE Companies' concerns in the March 11 letter. The letter, however, only confirms that documents were withheld improperly.

34. Counsel for the Liquidator admitted in the March 11 letter that two e-mails (document numbers 24(1) and 24(2) on the January 5 log) should have been produced and enclosed them with the letter. (The e-mails are annexed to this Motion as Exhibit 10.) A review of the two e-mails shows that the Liquidator lacked any basis for withholding the documents originally and it raises suspicion about the Liquidator's other claims of privilege.

35. The Liquidator's attempted justification in the March 11 letter for withholding other documents in Appendix 5 falls far short and instead supports the ACE Companies' assertions. For example, counsel for the Liquidator claimed that document number 203(2) on the December 21 log was properly withheld because document numbers 203(1) and 203(2) "comprise essentially one email sent to counsel." (Ex. 8 at 2.) However, counsel for the Liquidator also admitted that document number 203(2) was forwarded to counsel "for information" in document number 203(1). (*Id.*) The mere forwarding of an unprivileged e-mail to counsel "for information" does not make the underlying e-mail a communication for the purpose of legal advice. It also provides another reason for holding that document number 203(1) is not privileged, since clearly no legal advice was being sought.¹¹

36. In the March 11 letter, counsel for the Liquidator also tried to portray other documents — namely, document numbers 136(1), 179(1) and 301(1) on the December 21 log and document numbers 84(1) on the January 5 log — as privileged because they related to allegedly privileged communications. (Ex. 8 at 2.) Those documents, however, cannot be

characterized as facilitating the rendition of any legal services by the Liquidator's counsel because they were after the alleged rendition of legal services on which the Liquidator relies.¹²

37. Finally, in the March 11 letter, counsel for the Liquidator stated that document numbers 25(3) and 25(4) on the January 5 log were properly withheld because they are e-mails "addressed to counsel." (Ex. 8 at 2.) However, the descriptions for document numbers 25(3) and 25(4) list only Jonathan Rosen, Gareth Hughes, Sarah Ellis and Matthew Harrison as senders or recipients. None of those individuals is a "lawyer" for purposes of Rule 502(b).

WHEREFORE, the ACE Companies respectfully request that the Court:

- A. Enter an Order compelling the Liquidator to produce to the ACE Companies the documents listed in Appendices 2, 4 and 5;
- B. Enter an Order compelling the Liquidator to produce to the Court, for in camera review, the documents listed in Appendix 3; and
- C. Grant 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.

¹¹ The ACE Companies have moved for the production of document number 203(1) on the separate and independent ground that any applicable privilege was waived.

¹² The ACE Companies do not concede that the underlying documents are privileged. For example, any privilege attaching to document numbers 179(4) and 301(2) on the December 21 log was waived because they were sent to E & Y employees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that I served a copy of the foregoing on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via facsimile and First Class mail on March 22, 2005

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