

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

**UNIONAMERICA INSURANCE COMPANY LTD'S OBJECTION
TO THE ACE COMPANIES' REQUEST TO COMPEL PRODUCTION OF DOCUMENTS**

NOW COMES Unionamerica Insurance Company Ltd. ("Unionamerica"), for the limited purpose of opposing the ACE Companies' Request to compel Production of Documents on the grounds that Unionamerica is not a party to these *in rem* proceedings and, further, has not been effectively served with the ACE Companies' discovery requests. Unionamerica makes a special appearance in these proceedings for the sole purpose of challenging jurisdiction and defects in service and in no way concedes to the jurisdiction of the Court by filing this objection.

I. INTRODUCTION

1. By their current Motion, the ACE Companies invite the Court to grant them powers that the law grants exclusively to the Liquidator. Having filed Proofs of Claim in these *in rem* proceedings, Unionamerica has subjected itself to the claims approval process and may be required to submit additional documentation at the Liquidator's request. However, the filing of a Proof of Claim does not make Unionamerica a party to the dispute between the ACE Companies and the Liquidator over the ACE Companies' reinsurance obligations to the Home Estate. Nor does it render Unionamerica amenable to service by mail. The Court should deny the ACE Companies' Request to Compel Production of Documents.

2005 APR -4 P 2:01
NH SUPERIOR COURT
MERRIMACK COUNTY
CONCORD, NH

II. BACKGROUND

2. Unionamerica is an insurance company incorporated under the laws of England and Wales. Unionamerica is not licensed to transact insurance business in the State of New Hampshire. (*See* Exhibit A, Affidavit of Mark C. Everiss, at ¶¶ 4-5).

3. During the period from 1974 through 1984, Unionamerica ceded insurance risk to the Home Insurance Company (the “Home”) through the Home’s branch office located in the United Kingdom. The Home wrote this reinsurance business in the United Kingdom as a member of the American Foreign Insurance Association (“AFIA”). The reinsurance agreements provided, in their Arbitration Clauses, that they would be “governed by and construed in accordance with the law of England” (*See* Exhibit B, Sample Reinsurance Agreement, at 16).

4. After this Court entered its Order of Liquidation respecting the Home, the Liquidator endorsed a compromise agreement reached in the United Kingdom between the Joint Provisional Liquidators of the Home and certain AFIA Cedents, including Unionamerica (the “Agreement”). On February 22, 2004, the Liquidator filed a motion seeking this Court’s review and approval of the Agreement.

5. The ACE Companies, who reinsure the Home, have intervened in these proceedings to oppose the Agreement. The ACE Companies’ opposition rests chiefly on two grounds: (a) that the Agreement violates the priority provisions of RSA 402-C:44; and (b) that the Agreement somehow violates certain obligations the Home allegedly owes the ACE Companies as its reinsurer. (*See* Exhibit C, Interlocutory Appeal Statement, at 3; Exhibit C2, Transcript of July 15, 2004 Oral Argument, at 1, 2 & 5).

6. In June 2004, Unionamerica filed certain Proofs of Claim with the Liquidator of the Home. The ACE Companies have never challenged the validity of these Proofs of Claim.

7. On October 1, 2004, the ACE Companies submitted a Proposed Discovery Schedule to this Court “to provide the parties with the requisite evidentiary support for their respective positions” in favor of and in opposition to the Agreement. To that end, the ACE Companies represented to the Court that they would serve interrogatories and document requests solely on the Liquidator and would depose only those seven persons who had “provided an affidavit to this Court or in the UK proceedings regarding the Agreement with the AFIA Cedents” (*see* Exhibit D, Proposed Discovery Schedule). On October 8, 2004, this Court authorized the parties to “conduct discovery limited to the necessity, fairness, and reasonableness of the compromise and agreement” (Exhibit C1, Order on Remand, at 14).

8. Notwithstanding the narrowly circumscribed discovery authorized by the Court and promised by the ACE Companies, Tammy Lewis of Unionamerica received by mail on January 20, 2005, a letter from the ACE Companies’ attorneys enclosing a ten-page document styled the Respondents ACE Companies’ First Request for Production of Documents by Unionamerica Insurance Company. The ACE Companies purported to propound these requests to Unionamerica “pursuant to Rule 35 of the Superior court of the State of New Hampshire and the Order Establishing Procedures Regarding Claims Filed with the Home Insurance Company entered on December 19, 2003 (as amended)” (Exhibit E, ACE Document Requests, at 1).

9. In a series of letters, the ACE Companies contended that they were authorized to propound discovery to Unionamerica because Unionamerica had filed a Proof of Claim in the Home Liquidation. Despite repeated inquiries from Unionamerica, the ACE Companies never identified any procedural basis for effecting service by mail on an insurance company domiciled

in the United Kingdom (*see* Exhibits F4 & F6, Letters from Tim Open to Ronald Snow dated February 28 and March 14, 2005).¹

10. On March 15, 2005, the ACE Companies filed their Request to Compel Production of Documents (the “ACE Motion”). Their sole basis for asserting that the Court has jurisdiction to compel discovery from Unionamerica is the fact that Unionamerica has filed a Proof of Claim with the Home Estate (ACE Motion at 2-3). The ACE Companies ignore completely the issue of whether Unionamerica was properly served with the document requests.

III. ACE’S MOTION MUST BE DENIED

A. Unionamerica Is Not Subject To The General Jurisdiction Of This Court.

11. As noted above, Unionamerica is domiciled in the United Kingdom. Its reinsurance agreements with the Home were executed in the United Kingdom and are governed by English law. It is not a licensed insurer within the State of New Hampshire. Unionamerica has not submitted an affidavit in support of the Agreement.

12. As ACE Companies concede, their contention that Unionamerica is subject to the general jurisdiction of this Court is based upon a single theory, *i.e.*, by “fil[ing] a claim with the Liquidator in the Merrimack County Superior Court . . . [Unionamerica] submitted itself to the jurisdiction of this Court.” (*See* Exhibit F2 at 1-2; ACE Motion at ¶¶ 3, 6).

13. However, as the very case law the ACE Companies cite to the Court confirms, by filing a claim, the claimant submits only to the jurisdiction of the court regarding issues the Liquidator raises in connection with the allowance or disallowance of the claim. *See, e.g.*,

¹ Moreover, after conceding that they had mistakenly referred to Unionamerica as Continental Insurance Company NY (*see* Exhibit F5), the ACE Companies continue to allude to an \$8 million claim that Unionamerica has allegedly filed with the Home Estate (*see* ACE Motion at ¶ 3). Unionamerica has repeatedly asked the ACE Companies to explain how they arrived at this number, which does not correspond to the Proofs of Claim Unionamerica has filed (*see* Exhibit F6).

Katchen v. Landy, 382 U.S. 323 (1966); Langenkamp v. Culp, 498 U.S. 42 (1990). The Court's supervision of claim adjudication does not extend to a request by the ACE Companies to obtain documents from Unionamerica, for use in its separate dispute with the Liquidator over the ACE Companies' reinsurance obligations to the Home Estate.

14. The Insurers Rehabilitation and Liquidation Act supports this narrow view of the court's jurisdiction. The statute provides for very limited discovery from a claimant. The Liquidator alone has the right to compel the production of documents in support of a claim.

SUPPLEMENTARY INFORMATION. At any time *the liquidator may request the claimant to present information or evidence supplementary to that required under paragraph I* [regarding the contents of a proof of claim], and may take testimony under oath, require production of affidavits or depositions or otherwise obtain additional information or evidence.

RSA 402-C:38.II (emphasis added). The statute neither permits parties other than the Liquidator to obtain documents nor grants the Court authority to hear such requests.

15. Similarly, the Order Establishing Procedures Regarding Claims Filed with the Home Insurance Company entered on December 19, 2003 (as amended) (the "Claims Procedure Order"), which the ACE Companies cite as authority for their Document Requests, does not permit third parties like the ACE Companies to obtain discovery from claimants. (See Exhibit G, Claims Procedure Order, at ¶ 5d (quoting the language of RSA 402-C:38.II)).

16. The Court's jurisdiction is limited to the issues raised by the Liquidator regarding the adjudication of the claim because the Court's jurisdiction of this over claimants is *in rem* in nature. See, Blackhawk Heating & Plumbing Co., Inc. v. Geeslin, 530 F.2d 154, 158 (1976) ("The appointment of a receiver and institution of liquidation proceedings . . . constitutes an action *in rem*"); In the Matter of the Rehabilitation of Nat'l Heritage Life Ins. Co., 656 A.2d 252,

260 (Del. Ch. 1994) (“A dissolution proceeding is an *in rem* action”); Couch on Insurance § 228:1 (2004) (“The institution of state court proceedings for liquidation and appointment of a receiver for an insurance company constitute *in rem* proceedings”); *Law and Practice of Insurance Company Insolvency* 318 (ABA 1986) (“the liquidation court’s power is limited to exercising jurisdiction over the property in its control, *i.e.*, it possesses only in rem jurisdiction”).

17. This being so, a liquidation court’s powers relate to the marshalling of assets within its actual or constructive control. *See, e.g., People ex rel. Gerber v. Central Casualty Co.*, 226 N.E.2d 862 (Ill. 1967)(holding that the summary jurisdiction of a liquidation court under the Insurance Code is limited to assets in the court’s actual or constructive possession); *Kinder v. Superior Court*, 144 Cal Rptr. 291 (Ct. App. 1978)(holding that the equitable power of a receivership court to use its summary process to marshal assets of an insolvent estate should not be extended to the recovery of funds not in the constructive possession of the liquidator). By extension, this Court’s jurisdiction is limited to supervising the distribution of the Home’s assets.

18. The ACE Companies’ attempt to extend this Court’s *in rem* jurisdiction to obtain general jurisdiction over a claimant is without legal foundation. *See* R. Wiebusch, *New Hampshire Practice, Civil Practice and Procedure* § 2.07 (Matthew Bender & Co. 2004) (“*In rem* jurisdiction is the power to determine the rights of claimants in particular property which is subject to the court’s control. The personal rights and obligations of the claimants are not subject to the court’s power in such a case”).

19. The very case law cited by the ACE Companies supports a narrow interpretation of the Court’s authority. For example, in *Benjamin v. Credit General Ins. Co.*, 2004 WL 3090181 (Ohio App. 2004), the bankruptcy trustee of an insolvent insurer’s parent corporation sought the return of certain funds held by the Liquidator. The court determined that the trustee’s

remedies were strictly limited by the terms of the liquidation statute. The trustee was therefore required to file a proof of claim for the assets to which it alleged legal title. Significantly, the liquidation statute empowered the liquidator to adjudicate all claims against the insolvent insurer's property, and the trustee was unable to interfere with the adjudication process as limited by the statute.

20. The ACE Companies provide no authority for the proposition that a claimant has submitted to the general jurisdiction of the Court such that it could be ordered to provide evidence related to their separate and distinct dispute with the Liquidator. The ACE Companies rely on Katchen v. Landy, 382 U.S. 323 (1966) for the proposition that by presenting a claim against the estate, the claimant submits to "all the consequences that attach to an appearance." Id. at 335. However, when read as a whole, it is clear that the court does not have jurisdiction over the claimant for all purposes. The Katchen court holds that by presenting a claim against the estate, the claimant submitted to the jurisdiction of the court to resolve: (a) all of the claimant's claims against the estate and (b) all of the Liquidator's claims against the claimant with respect to the assets of the estate. Id.

21. The ACE Companies also cite Langenkamp v. Culp, 498 U.S. 42 (1990) in support of its argument that submitting a claim subjects the claimant to the court's "equitable power." Id. at 44. The holding is far more narrow than the ACE Companies suggest. The court explicitly limits its equitable powers over the claimant to "the process of 'allowance and disallowance of claims.'" Id.

22. Finally, the ACE Companies rely on Todd v. Lakeland Chrysler-Plymouth-Dodge, 834 P.2d 387 (Kan. App. 1992). The court in the Todd case goes no further than the rulings noted above. It holds that the submission of claims in the liquidation proceeding by an

out-of-state party subjects that party to personal jurisdiction in the proceeding only for the limited purpose of resolving both the claimants' claim against the estate and the commissioner's claim to recover from the claimant unearned premiums.

23. In sum, the cases cited by the ACE Companies stand for the proposition that if a party files a claim against an estate, that party submits to the jurisdiction of the court regarding the allowance or disallowance of the claim.² None expand the Court's *in rem* jurisdiction to jurisdiction over the claimant for all purposes. None permit any party except the Liquidator to obtain discovery from a claimant. None give third parties the right to seek information from another claimant for use in their separate disputes with the Liquidator. Accordingly, ACE Companies' motion to compel Unionamerica to produce documents for use in their own dispute with the Liquidator is a matter outside the jurisdiction of this Court.

B. Unionamerica Has Not Been Properly Served.

24. The ACE Companies' mere act of mailing their Document Requests and Motion to Unionamerica falls woefully short of effecting proper service.

25. As an initial matter, Unionamerica is not a party to this action. Unionamerica thus did not receive a summons by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, November 15, 1965, 20 U.S.T. 361.

² The ACE Companies also refer to certain "New Hampshire Supreme Court . . . authority" that they cited to Unionamerica in correspondence (ACE Motion at ¶ 6) but fail to cite that authority in their Motion. Because the reference is apparently to Druding v. Allen, 122 N.H. 823 (1982) (*see* Exhibit F5), it is understandable that the ACE Companies would not have cited it in their Motion. In Druding, the court agreed that the exercise of *in rem* jurisdiction was insufficient to vest the court with the power to adjudicate a party's rights. *Id.* at 826. This is precisely Unionamerica's position. Moreover, as required by Druding, Unionamerica has made a special appearance in these proceedings for the sole purpose of challenging jurisdiction and defects in service.

26. Furthermore, Unionamerica did not receive proper service of the ACE Companies' Document Requests. Under circumstances such as those presented here, the method for obtaining discovery from a foreign non-party is to request that the New Hampshire court issue a Letter of Request pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, October 26, 1968, 23 U.S.T. 2555 (the "Hague Convention").

27. The Hague Convention requires American courts to "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522, 546 (1987). In determining whether to require a litigant to employ the Hague Convention procedures, the court must weigh "considerations of comity, the relative interests of the parties including the interest in avoiding abusive discovery, and the ease and efficiency of alternative formats for discovery." Tulip Computers Intern'l B.V. v. Dell Computer Corp., 254 F. Supp. 2d 469, 474 (D. Del. 2003) (citations omitted).

28. Where, as here, the entity from which discovery is sought is a non-party, the balance tips decidedly in favor of requiring the party seeking discovery to first pursue discovery by means of the Hague Convention. *See, e.g., Orlich v. Helm Brothers, Inc.*, 560 N.Y.S.2d 10, 14-15 (N.Y. App. Div. 1990) ("*When discovery is sought from a non-party in a foreign jurisdiction, application of the Hague Convention, which encompasses principles of international comity, is virtually compulsory*") (emphasis added). The ACE Companies did not even seek, much less obtain, a Letter of Request from this Court.³

³ Should this Court determine that ACE may serve discovery requests outside of the Hague Convention of the Taking of Evidence (which we do not believe it will), New Hampshire law requires ACE to utilize a bill of discovery. "[W]hen a nonparty objects [to discovery

29. The considerations of comity informing the court's decision to require compliance with the Hague Convention are especially compelling here, where Unionamerica's agreements with the Home all provide that they are to be "governed by and construed in accordance with the law of England." Assuming, solely for the sake of argument, that the ACE Companies are correct in asserting that they can propound their Document Requests pursuant to the Claims Procedure Order, then the ACE Companies could not seek discovery any broader than would be permitted under English law. *See* Exhibit G at ¶ 26 (where a reinsurance agreement provides for a more limited discovery than permitted under this Claims Procedure Order, the extent of discovery . . . shall be limited to that which would have otherwise been available under the contractually provided procedure").

30. Because Unionamerica has not been properly served in these proceedings, the ACE Companies' Motion should be denied in full.

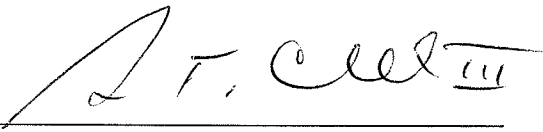
31. Unionamerica specifically reserves its rights to oppose the discovery propounded by the ACE Companies on any and all other grounds available to it, including without limitation that: (a) the discovery sought is irrelevant to the issues presented in the dispute between the ACE Companies and the Liquidator over the "necessity, reasonableness and fairness" of the Agreement; (b) the discovery seeks privileged communications and attorney work product; (c) the discovery sought is burdensome and oppressive; (d) the discovery is impermissible under governing English law; and (e) the discovery sought is barred by the doctrines of waiver and estoppel.

requests under Rule 35], the discovering party must bring a bill of discovery in aid of the pending or threatened action and serve it upon the nonparty." R. Wiebusch, *New Hampshire Practice, Civil Practice and Procedure* § 22.08 (Matthew Bender & Co. 2004). Since Unionamerica objected to ACE's Discovery Requests under Rule 35, ACE would be required to file and serve a bill of discovery.

Respectfully submitted,

UNIONAMERICA INSURANCE CO., LTD
By its Attorneys
ROBERT STEIN & ASSOCIATES, PLLC

Dated: April 4, 2005

By: 

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CERTIFICATION

I hereby certify that a copy of the foregoing Objection to the ACE Companies' Request to Compel Production of Documents has been forwarded this fourth day of April, 2005 via First Class Mail to:

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The Home Insurance Company
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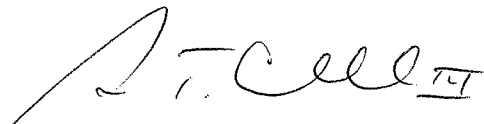
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George T. Campbell, III

THE STATE OF NEW HAMPSHIRE

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- C. Interlocutory Appeal Statement (November 5, 2004).
 - C1. Merrimack County Superior Court Order on Remand (October 8, 2004).
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- F. Group Exhibit - Correspondence Between Unionamerica and the ACE Companies:
 - F1. Letter from Tammy Lewis to Ronald L. Snow (February 8, 2005).
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 - F5. Letter from Ronald L. Snow to Tim Open (March 7, 2005).
 - F6. Letter from Tim Open to Ronald L. Snow (March 14, 2005).
- G. Order Establishing Procedures Regarding Claims Filed with the Home Insurance Company entered on December 19, 2003 (as amended).