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

EMERGENCY MOTION OF ACE COMPANIES TO STRIKE LIQUIDATOR'S OFFERS OF PROOF AND FOR SANCTIONS AND RELATED RELIEF

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., respectfully submit this motion (the "Motion") for an order (i) pursuant to New Hampshire Rule of Evidence 408, striking and expunging from the Court's record the offers of proof dated April 28, 2005 and related affidavits and exhibits (the "Offer of Proof") filed by Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as liquidator (the "Liquidator") of The Home Insurance Company ("Home") with respect to the Liquidator's motion (the "Liquidator's Motion") for approval of the Liquidator's proposed compromise with the AFIA Cedents (the "Proposed Agreement"), (ii) pursuant to N.H. Rev. Stat. Ann. § 507:15, granting sanctions against the Liquidator, including (a) awarding attorneys' fees and costs to the ACE Companies, (b) denying the relief sought by the Proposed Agreement in full, and (c) awarding such other sanctions and relief as the Court deems appropriate. This Motion is made as an emergency motion and seeks an expedited ruling because depositions in this contested matter commence on May 24, 2005.

I. INTRODUCTION

1. The purpose of this Motion is to bring to the Court's attention, and to strike and expunge from the record, knowing and egregious disclosures in the Offer of Proof filed by the

Liquidator and its counsel of admittedly "without prejudice" communications between the ACE Companies and representatives of Home, in clear violation of Rule 408 of the New Hampshire Rules of Evidence, which precludes the admission of evidence of settlement negotiations. The breaches are not only inappropriate, but are highly prejudicial and should not be countenanced by this Court. On the contrary, as set forth below, substantially all of the submissions in the Liquidator's Offer of Proof should be stricken. In addition, this Court should impose sanctions on the Liquidator, including but not limited to the compensation of the ACE Companies for their fees and expenses in the making and prosecution of this Motion.[1]

II. THE NEW HAMPSHIRE SUPREME COURT'S REMAND FOR TRIAL REGARDING PROPOSED SETTLEMENT

2. By Order dated September 13, 2004, the New Hampshire Supreme Court remanded the proceedings with respect to the Liquidator's Motion, indicating that there was a lack of "a sufficient evidentiary record" on the fairness and reasonableness of the Proposed Agreement. (September 13 Order at 1-2.) In connection with the upcoming trial on the issues remanded, the Liquidator has filed the Offer of Proof that is the subject of this Motion.

III. THE OFFER OF PROOF CONTAINS INADMISSIBLE STATEMENTS AND DOCUMENTS WHICH SHOULD BE STRICKEN

3. The Offer of Proof indicates that in mid-September of 2003 (i.e., prior to the time of the referenced "without prejudice" discussions with the ACE Companies' representatives which are sought to be struck by this Motion), representatives of the Liquidator and the Joint Provisional Liquidators for the Home UK branch (the "JPLs") agreed to contact the ACE

[1] For the purposes of this Motion, the ACE Companies do not seek to challenge the veracity or nuance of the offending statements proffered in the Offer of Proof, because such statements should be expunged entirely. However, the ACE Companies reserve all of such rights.

4. Companies and "arrange to meet for exploratory discussions about a potential agreement to commute the indemnity obligations of Century under the Assumption Agreement and address other aspects of the situation, including the BAFCO Agreements and the expected assertion by AFIA Cedents of direct rights against ACE." (Offer of Proof ¶30.) Leaving aside the fact that the AFIA Cedents did not have any such "direct rights," this statement indicates that the Liquidator and the JPLs were aware of a potential dispute or disputes among Home, the ACE Companies and the AFIA Cedents and wanted to meet to compromise or "commute" such disputes. Yet, the Liquidator boldly seeks to introduce in the Offer of Proof evidence of meetings and information precisely regarding such disputes, much of which is in the form of the Liquidator's self-serving notes or "presentations." As more fully set forth in the accompanying affidavits of Michael Durkin, all such meetings and information exchanges were conducted with the understanding that actual or potential disputes relating to rights and obligations of the parties with respect to the AFIA business existed among the ACE Companies, the Home and the AFIA Cedents, and with the express proviso by the ACE Companies and agreement by the other parties that the meetings were "without prejudice" and with a full reservation of all rights.

5. Remarkably, the Liquidator concedes that information was obtained in a "without prejudice" meeting, and nonetheless feels unconstrained by law or ethics to either exclude such information entirely from its Offer of Proof or to seek an advance ruling by the Court before attempting to introduce such information. For example, in ¶32 of Offer of Proof the Liquidator refers to a "without prejudice" meeting among representatives of the Liquidator, the JPLs and the ACE Companies, and then seeks to introduce as Exhibit 17 the presentation material used by the Liquidator at such meeting, which materials themselves state "without prejudice" on the bottom of each page. In deference to the strong public policy of encouraging settlements and

compromise, the Court should strike the offending portions of the Offer of Proof and impose sanctions to deter such behavior.

6. In addition to the above, the Offer of Proof is replete with other disclosures relating to "without prejudice" discussions held among the ACE Companies and the Liquidator, including the following:

(a) ¶ 21 of the Offer of Proof indicates that a "concern arose from the conduct and statements of both the AFIA Cedents and ACE" that AFIA Cedents would not file and prosecute their claims in the New Hampshire liquidation proceeding. As set forth in the accompanying affidavit of Michael Durkin, all communications held between the Liquidator and the ACE Companies with respect to AFIA claims were held with the express statement that they were "without prejudice" and with reservation of all rights. (Durkin Aff. ¶¶2, 6-7.) Indeed, Mr. Durkin's affidavit states that at one point, Mr. Rosen, on behalf of the Liquidator, acknowledged that all discussions were understood to be without prejudice and that Mr. Durkin need not reiterate such terms each and every time (but Mr. Durkin and the ACE Companies continued their policy to do so anyway). (Durkin Aff. ¶6.) Therefore, evidence of any "conduct" of the ACE Companies which the Liquidator asserts caused him "concern" (whether reasonable or imagined) would be inadmissible.

(b) ¶23 of the Offer of Proof refers to a September 17, 2003 meeting among representatives of the Liquidator, Unionamerica (an AFIA Cedent), the JPLs, and the ACE Companies. As set forth in the accompanying affidavit of Mr. Durkin, the September 17, 2003 meeting was "without prejudice" and was for the purpose of attempting to resolve disputes which had arisen with respect to a specific AFIA Cedent's claims. (Durkin Aff. ¶7(i).)

(c) ¶24 of the Offer of Proof refers to "several September 2003 discussions with Michael Durkin of ACE INA Services," held by representatives of the Liquidator and the JPLs. All of such discussions were subject to the "without prejudice" proviso. (Durkin Aff. ¶7(ii).) Furthermore, the JPLs provided written confirmation that prior discussions between ACE Companies and Home representatives regarding monies payable to Home with respect to the reinsurance provided by ACE were "without prejudice." (Durkin Aff. ¶6.)

(d) ¶ 25 of the Offer of Proof refers to one such conversation with Michael Durkin and a September 13, 2003 email document (Exhibit 13 to the Offer of Proof) produced by Mr. Durkin. Again, the conversation was expressly "without prejudice." (Durkin Aff. ¶7(ii).) Moreover, Mr. Durkin did not provide such document to the Liquidator as alleged in the Offer of Proof, and a review of Exhibit 13 indicates that it is a communication among the ACE Companies' counsel and would be inadmissible under the attorney/client privilege. (*See* Rule 502 of New Hampshire Rules of Evidence.)

(e) ¶26 of the Offer of Proof refers to a meeting with Mr. Durkin and Mr. Rosen's notes of such meeting (Exhibit 14 to the Offer of Proof). The meeting and the notes derived therefrom were expressly "without prejudice." (Durkin Aff. ¶7(ii).)

(f) ¶28 of the Offer of Proof refers to "the [without prejudice] discussions noted above" as a basis for the sending of a letter dated September 26, 2003 from the Liquidator and the JPLs to Century (Exhibit 16 to the Offer of Proof). The letter itself also refers to "certain discussions between Jonathan Rosen, Gareth Hughes and Michael Durkin." Both the reference to the discussions in the Offer of Proof, and the September 26, 2003 letter itself are inadmissible because they relate to "without prejudice" discussions. (Durkin Aff. ¶7(iv).)

(g) ¶ 29 of the Offer of Proof refers to the ACE Companies' purported "lack of response" to the inadmissible September 26, 2003 letter. That is inadmissible.

(h) ¶¶32-34 of the Offer of Proof refer to an admittedly "without prejudice" meeting of September 30, 2003 among representatives of the Liquidator, the JPLs and the ACE Companies. Therefore, all contents of such meetings and follow-up, as well as meeting notes or exchanges of documents (Exhibits 17-19), are not admissible.

IV. LEGAL ARGUMENT

A. The New Hampshire Rules of Evidence Prohibit Use of Settlement Discussions

7. Rule 408 of the New Hampshire Rules of Evidence, entitled "Compromise and Offers To Compromise," expressly provides that information obtained in compromise negotiations is not admissible.

8. Rule 408 provides in relevant part that:

> In any other case [besides a tort case], evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.
> **Evidence of conduct or statements made in compromise negotiations is likewise not admissible. However, this rule does not require the exclusion of any evidence otherwise admissible merely because it is presented in the course of compromise negotiations.**

(emphasis added).

9. Courts in New Hampshire have held that Rule 408, which is modeled after its Federal Rule of Evidence counterpart, is intended to advance the strong public policy favoring the compromise of disputes by encouraging parties to engage in full and open discussions which

may lead to settlement, without the fear that they will jeopardize their positions in a potential litigation.[2] *See McInnis v. A.M.F., Inc.*, 765 F.2d 240, 247 (1st Cir. 1985) ("[T]he rule illustrates Congress' desire to promote a public policy favoring the compromise and settlement of claims by insulating potential litigants from later being penalized in court for their attempts to first resolve their dispute out of court."). Thus, parties are encouraged to engage in discussions regarding a dispute which are stated to be "without prejudice" or "for settlement purposes only" or words to such effect. *See, e.g,, Tactical Software, LLC v. Digi Int'l, Inc.*, Civil No. 03-166, 2003 U.S. Dist. LEXIS 18831, *10 n.3 (D.N.H. October 16, 2003) (Concluding from notation on letter stating "[s]ubject to Fed. R. Evid. 408" that "counsel for Digi wished to make clear that: (1) he viewed his letter as an 'offer to compromise' Digi's infringement claims against Tactical; and (2) nothing contained in that letter would (or, perhaps more accurately, should) be admitted against Digi in any subsequent patent litigation between the parties.").

10. Rule 408 applies equally in the context of pre-litigation settlement negotiations as well as settlement discussions occurring after suit has been commenced, so long as there is a claim or dispute at issue at the time of the discussions. *See Carballo Rodriguez v. Clark Equip. Co.*, 147 F. Supp. 2d 66, 76 (D.P.R. 2001) (excluding letter written by an attorney for the purpose of seeking authorization to settle a case after litigation commenced); *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 827 (2d Cir. 1992) (applying Rule 408 before actual litigation commenced). Any documents or notes created or exchanged during settlement negotiations are inadmissible as well, unless they were independently obtained and there is an independent basis

[2] Federal Rule of Evidence 408 provides: Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

for their admissibility. *See Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1106 (5th Cir. 1981) (excluding architect's report analyzing construction defects prepared to facilitate settlement negotiations); *Blu-J, Inc. v. Kemper C.P.A. Group*, 916 F.2d 637, 642 (11th Cir. 1990) (excluding accountant's evaluation prepared as part of settlement negotiations).

11. Here, there is no question that at the time of the meetings and exchanges of information sought to be stricken, there were pre-existing and ongoing disputes regarding the nature and extent of the ACE Companies' obligations to Home under the Assumption Agreement as well as disputes with individual AFIA Cedents regarding their claims. (Durkin Aff. ¶5.) It is presumably because of the existence of such disputes that the Liquidator and JPLs engaged in the meetings the Liquidator references in the Offer of Proof. (*See* Offer of Proof ¶5.)

12. Based on the case law cited above, it is indisputable that the admittedly "without prejudice" September 30, 2003 meeting referenced in ¶32 of the Offer of Proof, and the admittedly "without prejudice" presentation materials used by the Liquidator at such meeting are inadmissible. Also, the communications and the Liquidator's conclusions derived from other communications which were in the context of settlement discussions and "without prejudice" are equally inadmissible, as are the notes and other documents created or exchanged during such communications. To rule otherwise would not only have a chilling effect on the proceedings in this case but also would erode the trust that parties have historically been able to place in the inadmissibility of settlement discussions.

13. Moreover, one of the documents sought to be introduced by the Offer of Proof, Exhibit 13, was not provided by Mr. Durkin of the ACE Companies as indicated by the Liquidator (*see* Offer of Proof at ¶25), and is a communication among an in-house and an outside attorney of the ACE Companies. (Durkin Aff. ¶7(ii).) Even if the document were not obtained

by the Liquidator in settlement discussions, it was clearly an inadvertent disclosure of a privileged attorney work product and attorney/client communication, and must be stricken on that ground alone under Rule 502.

14. The Liquidator has declined the ACE Companies' request that he withdraw the "without prejudice" communications, thus necessitating this Motion. The Liquidator has argued that the information relates to the reasonableness of his actions and is not being introduced to prove the validity of a claim or its amount. However, the Liquidator's attempt to bring himself within the limited exception of Rule 408 fails completely. Here, the thrust of the ACE Companies' objection to the Proposed Settlement is that the Liquidator and the JPLs entered into an improper agreement to incentivize AFIA Cedents to file claims and to give such claims priority precisely in order to create a claim against the ACE Companies. Stated more simply, the entire reason for the Proposed Agreement is to contrive a claim against the ACE Companies in the hundreds of millions of dollars. Hence, the "without prejudice" discussions go to the core of the ACE Companies' purported liability. Furthermore, the fact that any such information may have been exchanged in discovery does not change its inadmissibility. Rule 408 expressly states that settlement negotiations are not admissible in order to prove the validity of a claim or its amount, and such information should be stricken from the Offer of Proof.

B. English Rules of Evidence Also Prohibit Use of Settlement Discussions and Materials

15. The items sought to be struck would be inadmissible even if the English rules of evidence are applied to the meetings referenced in the Offer of Proof, either because the meetings took place in England or because the JPLs have heretofore taken the position that they are not subject to the jurisdiction of the New Hampshire courts and their duties are governed by

English law. (*See* JPL's Opposition to ACE Companies' Motion to Compel Production of Documents, dated April 7, 2005 at ¶14.) As more fully set forth in the accompanying expert affidavit of Richard Hacker, QC, statements and written materials produced or exchanged during "without prejudice" negotiations regarding a dispute are not admissible as evidence under English law. As in the US, the rule exists to advance the strong public policy in favor of settlements, and is also premised upon the notion that an express or implied contract is formed when a party indicates that a meeting will be "without prejudice" and the other participants acknowledge by their words or actions that they accept that condition to the meeting.

C. New Hampshire Law Mandates Denial of the Liquidator's Motion, Plus Costs and Fees, As a Sanction

16. New Hampshire Revised Statutes Annotated ("RSA") § 507:15 provides for a grant of summary judgment as relief to a party who has been made the subject of an improper pleading. The statute's purpose is to make certain that "[p]articipants in the legal process bear responsibility for ensuring that suits are not instituted for any improper purpose...." *Opinion of Justices*, 138 N.H. 445, 451 (1994).

17. RSA 507:15 provides:

> If, upon the hearing of any contract or tort action, it clearly appears to the court that the action or any defense is frivolous or intended to harass or intimidate the prevailing party, then the court, upon motion of the prevailing party or on its own motion, may order summary judgment against the party who brought such action or raised such defense, and award the amount of costs and attorneys' fees incurred by the prevailing party plus $1,000 to be paid to the prevailing party, provided such costs and fees are reasonable. The trial judge shall also report such conduct to the supreme court committee on professional conduct.

18. At the very least, under Rule 408 of the Rules of Evidence, the Court should strike the offending provisions of the Offer of Proof, but in addition, RSA 507:15 authorizes the striking of the Liquidator's Motion in its entirety. The act of including in the Offer of Proof conversations which were conducted "without prejudice" as well as exhibits which state "without prejudice" is so clearly proscribed by New Hampshire Rules of Evidence that it amounts to a frivolous action as described by RSA 507:15. Inclusion of these conversations and exhibits in direct contravention of Rule 408 also suggests an attempt by the Liquidator to prejudice the ACE Companies by presenting the inadmissible evidence before the very Court that will preside over the upcoming trial. To rectify the prejudice to the party against whom such inequity is commenced, RSA 507:15 provides for summary judgment against the party performing the discriminatory action, as well as costs and attorneys' fees.

19. Accordingly, the ACE Companies request that the Court deny the Liquidator's Motion for approval of the Proposed Agreement in full. Such relief would combat, with finality, the Liquidator's violation of clear public policy, as well as its willful disregard for the rules of conduct before this Court. This relief is supported by, and advances, "the power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court," which the New Hampshire Supreme Court has characterized as "a power absolutely necessary for a court to function effectively and do its job of administering justice." *In re Judicial Conduct Comm.*, 151 N.H. 123, 126 (2004); *see also State v. Fecteau*, 140 N.H. 498, 504 (1995) ("The trial court has inherent power to control every aspect of the proceeding before it."); *State v. LaFrance*, 124 N.H. 171, 180 (1983) ("A judge of a court of general jurisdiction (such as the Superior Court) has inherent power to control and order every aspect of any judicial proceeding before him, involving control of the courtroom and all that

takes place in it. This inherent power to control the proceedings is a necessary attribute of judicial power in order that the presiding judge may function effectively as a judge.") (internal citations omitted).

20. RSA 507:15 also provides for an award of attorneys' fees and costs. The ACE Companies' expenditure of funds to defend themselves against a violation of a patent rule of evidence is clearly unfair. *See Business Publications v. Finnegan*, 140 N.H. 145, 147 (1995) ("Although parties generally are responsible for their own attorney's fees, 'we have recognized exceptions where an individual is forced to seek judicial assistance to secure a clearly defined and established right **if bad faith can be established; where litigation is instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious or bad faith conduct; as compensation for those who are forced to litigate in order to enjoy what a court has already decreed; and for those who are forced to litigate against an opponent whose position is patently unreasonable**.'") (citing *Clipper Affiliates v. Checovich*, 138 N.H. 271, 278 (1994) and RSA 507:15) (emphasis added).

21. Corresponding Rule 12(f) of the Federal Rules of Civil Procedure grants courts "the authority to strike portions of filings that are 'redundant, immaterial, impertinent or scandalous.'" *Greenier v. Pace, Local No. 1188*, 201 F. Supp. 2d 172, 185 (D. Me. 2002) (*citing* Fed. R. Civ. P. 12(f)). It is accordingly appropriate, at a minimum, to order stricken all of those portions of the Offer of Proof which unfairly prejudice the ACE Companies and transgress Rule 408. *See Greenier*, 201 F. Supp. 2d at 186 ("Under the circumstances, it is within the Court's discretion to restrict Plaintiff's filings to those which comport with the pleading Rules."). *See also Water Keeper Alliance v. United States DOD*, 199 F.R.D. 445, 446 (D.P.R. 2001) (striking inflammatory portions of pleading); *Martin v. Hunt*, 28 F.R.D. 35, 36 (D. Mass. 1961) (striking

in *toto* complaint that failed to comply with the letter of spirit of the Federal Rules of Civil Procedure). New Hampshire's policy of imposing sanctions to deter frivolous pleadings is also bolstered by, the policy of Rule 11 of the Federal Rules of Civil Procedure, which imposes monetary and non-monetary sanctions for, among other things, pleadings filed for any "improper purpose," (Rule 11(b)(i)), or pleadings which make allegations or other factual contentions that do not "have evidentiary support" (Rule 11(b)(iii)).

22. The Liquidator's inclusion of "without prejudice" conversations and exhibits in the Offer of Proof can only be explained as an improper attempt to prejudice the ACE Companies by submitting knowingly inadmissible evidence. Sanctions against the Liquidator are thus appropriate.

V. CONCLUSION

WHEREFORE, the ACE Companies respectfully request that the Court:

A. ORDER stricken at least the inadmissible portions of the Offer of Proof enumerated above;

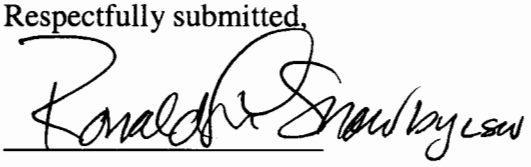
B. ORDER payment by the Liquidator of the ACE Companies' attorneys' fees and costs in connection with this Motion;

C. ORDER that the Liquidator's Motion be denied; and

D. ORDER such other sanctions and relief as this Court deems appropriate.

Dated: May 11, 2005

Respectfully submitted,



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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 May 11, 2005:

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