

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 FOR ORDER COMPELLING PRODUCTION,
OR *IN CAMERA* REVIEW, OF DOCUMENTS AND INFORMATION
WITHHELD BY LIQUIDATOR AND JOINT PROVISIONAL LIQUIDATOR**

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., respectfully move the Court for an order (1) compelling the Liquidator and Joint Provisional Liquidator ("JPL") to produce to the ACE Companies the documents listed in Appendix 4 to the ACE Companies' motion to compel dated March 22, 2005 or, in the alternative, to produce the documents to the Court for *in camera* review; and (2) compelling the Liquidator to provide testimony and produce documents relating to any legal opinion or advice the Liquidator received with respect to two of the central issues that the Liquidator put before the Court in the motion for approval of the Proposed Agreement. In support of their motion, the ACE Companies respectfully state as follows:

Introduction

1. The Liquidator and the JPL have refused to produce any of the documents listed in Appendix 4. The Liquidator and JPL are impeding discovery by taking an overly restrictive view of the Court's orders at the May 12, 2005 hearing regarding the production of relevant documents in Appendix 4. As demonstrated below, those documents specifically relate to one of

the main issues in this proceeding, which is whether there was any reasonable justification for the Proposed Agreement. As such, they must be produced.

2. Citing the attorney-client privilege, the Liquidator has also refused to allow certain testimony on the opinions or advice he received regarding the legality of the AFIA Cedents' alleged threat to "wall off" (or "ring fence") U.K. assets. The Liquidator cited the purported threat of "walling off" as one of the reasons for the Proposed Agreement. Under the "at issue" doctrine adopted by the New Hampshire courts, any applicable privilege was waived and the Liquidator should be ordered to provide testimony and produce relevant documents on any legal opinion or advice he received on the "ring fencing" question.

3. A similar order should be entered with respect to any opinion or advice that the Liquidator received on alleged side arrangements between the AFIA Cedents and the ACE Group (also known as "cut throughs"). Even though the Liquidator has claimed that the threat of "cut throughs" is a reason for the Proposed Agreement and took legal advice on the issue, he has refused to divulge that advice. New Hampshire law does not allow a party to rely on legal advice to support its claim and at the same time refuse to produce it.

Argument

I. The Court Should Order The Liquidator And The JPL To Produce The Documents In Appendix 4 Or, At A Minimum, Should Review Them *In Camera*

4. At the May 12 hearing, the Court ordered the JPL to produce "any documents shared by the JPL with members of his firm, Ernst & Young" so long as the documents "are relevant as provided in the Court's guidance re: scope of discovery." (Ex. 1 hereto.)¹ The Court's guidance of the same date stated that "[w]hen considering what documents are

¹ Exhibit 1 will be referred to herein as the "JPL Order."

privileged, the parties should bear in mind that the rationales of the JPL and Liquidator in reaching and/or approving the agreement are focuses of the July 25 hearing.” (Ex. 2 hereto at 1.) Thus, the Court held that documents must be produced if they bear on the basis for, and the negotiation of, the Proposed Agreement with the AFIA Cedents.

5. At the May 12 hearing, the Court further ordered the Liquidator to produce any documents that were “relied upon” in developing the affidavits that the Liquidator submitted to the Court in connection with his request for approval of the Proposed Agreement. (*Id.* at 2.)² However, in light of the JPL Order and the additional guidance provided by the Court at the May 12 hearing (where the Court defined relevance broadly to include any documents relating to the rationale for the Proposed Agreement), the words “relied upon” cannot be read narrowly. The Court's order regarding the affidavits must encompass any document that touches on the statements made in those affidavits concerning the reasons for the Proposed Agreement or the course of negotiations leading up to its execution.³

6. The Hughes Affidavit, for instance, alleges that (1) certain AFIA Cedents stated that they would not file proofs of claims (except to preserve their setoff rights); (2) certain AFIA Cedents were considering the negotiation of a direct agreement with the ACE Group; and (3) certain AFIA Cedents were investigating the possibility of “ring-fencing” U.K. assets. (*See* Hughes Affidavit, annexed as Ex. 3, at ¶¶ 13-15.) Mr. Hughes claimed that he learned this information through discussions with the AFIA Cedents. (*See id.*)

² The Court similarly ordered the JPL to produce documents “relied upon” in developing the Hughes Affidavit. (*Id.* at 3.)

³ As discussed below in paragraph 10, the ACE Companies respectfully submit that the Court should order the production or *in camera* review of all the documents in Appendix 4, even if they do not fit the definition of “relied upon,” because those documents relate to the rationale for the Proposed Agreement.

7. The descriptions of the Appendix 4 documents in the Liquidator's privilege log clearly show that they relate to the matters set forth in the Hughes Affidavit and, in particular, Mr. Hughes' discussions with the AFIA Cedents. Set forth below are a few examples of such documents from the Liquidator's December 21, 2004 log:⁴

| Item # | Date | Subject Matter | To | From |
|--------|----------|--|---|---------------|
| 26 | 11/26/03 | Discussions with Rhydian Williams | Peter Bengelsdorf | Gareth Hughes |
| 58 | 11/10/03 | Updates re: Rhydian Williams | Peter Bengelsdorf Jonathan Rosen Peter Roth | Gareth Hughes |
| 125 | 12/18/03 | Discussions with Rhydian Williams regarding St. Paul and Agrippina | David Steinberg | Gareth Hughes |
| 145(2) | 12/18/03 | Discussions with AFIA Cedents | Peter Bengelsdorf Peter Roth Phillip Hertz Jonathan Rosen David Steinberg | Gareth Hughes |
| 205(3) | 12/20/03 | Discussion with Rhydian Williams | Jonathan Rosen | Gareth Hughes |
| 208 | 12/18/03 | Discussions with Creditors | Peter Bengelsdorf Jonathan Rosen Peter Roth David Steinberg | Gareth Hughes |
| 213 | 12/23/03 | Unionamerica Meeting | Jonathan Rosen Peter Bengelsdorf David Leslie Peter Roth | Gareth Hughes |
| 230 | 11/28/03 | Summary of informal ICC meeting | Peter Bengelsdorf Jonathan Rosen Peter Roth David Leslie | Gareth Hughes |
| 303(1) | 12/22/03 | Discussions with Rhydian Williams | Phillip Hertz | Gareth Hughes |

⁴ A copy of each one of the documents listed below was also sent to one or more E & Y employees.

(See Ex. 4 annexed hereto at 4, 8, 17, 20, 30, 32, 34 and 48.)

8. The foregoing documents — which are representative of others in Appendix 4 — should have been produced by the Liquidator and the JPL because they reflect Mr. Hughes' contemporaneous discussions with the very parties whose statements allegedly caused the Liquidator to pursue and finalize the Proposed Agreement.⁵

9. The documents in Appendix 4 are also directly relevant to the allegations in the Bengelsdorf Affidavit concerning the motivation for, and negotiation of, the Proposed Agreement. (See, e.g., Bengelsdorf Aff., annexed as Exhibit 6, at ¶¶ 8-10.) Like the Hughes Affidavit, the Bengelsdorf Affidavit discusses information that had allegedly been relayed by the AFIA Cedents. (See *id.* at ¶ 8.) The chart in Paragraph 7 above and the other items listed in Appendix 4 show that documents from Mr. Hughes were a source for Mr. Bengelsdorf's information about the AFIA Cedents. Mr. Bengelsdorf is also the author of several of documents that were withheld even though they indisputably relate to communications with the AFIA Cedents. (See, e.g., items 17(5) and 216 on Ex. 4 and item 3 on Ex. 5.)⁶

10. The Hughes and Bengelsdorf Affidavits illustrate the direct relevance of the documents in Appendix 4 to the statements made in the various affidavits submitted by the Liquidator. Those documents, however, are relevant — regardless of what statements are made in the affidavits — because they relate to the rationale for the Proposed Agreement. (See Ex. 1.)

11. In sum, the Liquidator and JPL have refused to comply with the May 12 orders and have instead tried to thwart the Court's intent by reading the orders very narrowly.

⁵ Copies of the December 21, 2004 and January 5, 2005 privilege logs are annexed hereto as Exhibits 4 and 5. The circled items on the logs correspond to the documents listed in Appendix 4.

⁶ Over a hundred of the documents in Appendix 4 are described as having come from Mr. Bengelsdorf's files.

Accordingly, the Court should order the Liquidator and the JPL to produce to the ACE Companies all the documents listed in Appendix 4.⁷

12. At a minimum, the documents in Appendix 4 should be reviewed by the Court *in camera*. Under New Hampshire law, an *in camera* review is necessary where there is a “reasonable probability” that the communications at issue are not privileged. *See Bennett v. ITT Hartford Group, Inc.*, 150 N.H. 753, 846 A.2d 560, 567 (2004). The ACE Companies have satisfied the standard for *in camera* review and, indeed, the Liquidator offered to make the documents available, stating that “[i]f the Court wishes ... the Liquidator will provide the documents [in Appendix 4] for an in camera review as well.” (Liquidator’s Opp’n to Mot. to Compel at ¶ 33.)

II. The Court Should Order The Liquidator To Provide Testimony And To Produce All Legal Opinions, Advice Or Analyses Regarding The Validity Of “Cut Throughs” And “Ring Fencing”

13. As the Court is well aware, the Liquidator has alleged that the Proposed Agreement is justified because certain AFIA Cedents were investigating the possibility of “cut throughs” or “ring fencing” U.K. assets. (*See, e.g.*, Ex. 6 at ¶ 8.) Therefore, one of the main questions in this case — which has been put at issue by the Liquidator — is whether the Liquidator reasonably believed that “cut throughs” or “ring fencing” were realistic threats to the Home estate. The Liquidator has already produced one opinion from Robin Knowles QC and Professor Ian Fletcher that wholly undermines the Liquidator’s position because it unequivocally states that “English law will not allow for the UK Branch assets [of Home] to be ring-fenced for the benefit of UK Branch creditors.” (Ex. 7 annexed hereto at 9.)

⁷ The Liquidator and JPL cannot complain that the documents in Appendix 4 are not relevant. As the ACE Companies pointed out at the May 12 hearing, all the documents on the Liquidator’s logs are, by definition, relevant because the Liquidator would not have logged irrelevant documents.

14. However, at the recent deposition of Mr. Bengelsdorf, counsel for the Liquidator refused to allow the witness to testify as to whether the Liquidator ever received any advice on “ring fencing” that is contrary to the opinion of Mr. Knowles and Prof. Fletcher. (*See* excerpt from Bengelsdorf deposition, annexed as Ex. 8, at 52-53.) The ACE Companies are entitled to know whether such an opinion exists and, if it does, the Liquidator should be ordered to produce it because it goes to an issue that the Liquidator himself has raised in this proceeding. *See Aranson v. Schroder*, 140 N.H. 359, 369, 671 A.2d 1023, 1030 (1995) (stating that “the principle of ‘at-issue’ waiver of the attorney-client privilege appears to be well-accepted in American jurisprudence”).

15. Mr. Bengelsdorf also testified that it is “possible” that the Liquidator received a legal opinion on “ring fencing” that is similar to the opinion of Mr. Knowles and Prof. Fletcher. (*See id.* at 65-67.) Once again, if such an opinion (or opinions) exist, the ACE Companies are entitled to receive copies as soon as possible.

16. Mr. Bengelsdorf further testified at his deposition that the Liquidator received an opinion that “cut throughs” would not be legal. (*See id.* at 26-28.) In notes dated September 17, 2003, Mr. Bengelsdorf questioned the “ability of ACE to do an end run around Home legally” and then immediately referred to several questions for the Liquidator’s counsel. (*See* Ex. 9 annexed hereto.) The Liquidator, however, redacted those questions from the document produced, even though they go directly to whether the Liquidator’s cited concern about “cut throughs” was justified. The Liquidator should be ordered to produce an unredacted version of Exhibit 9 as well as advice or analysis on the “cut through” question, even if it were originally privileged, because the Liquidator has put at issue the question of whether “cut throughs” were a realistic threat. *See Aranson*, 140 N.H. at 369, 671 A.2d at 1030.

III. Request For Expedited Hearing

17. Because of the upcoming depositions, the ACE Companies respectfully request that this Motion be scheduled for a hearing on or before June 1, 2005 as they would be substantially prejudiced if forced to proceed without the requested documents and information.

18. Counsel for the ACE Companies has previously requested that counsel for the Liquidator reconsider its position and produce the documents in Appendix 4. That effort was unsuccessful. Accordingly, and due to the nature of this Motion, the concurrence of the Liquidator's counsel was not sought prior to its filing.

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

A. Compelling the Liquidator and the JPL to produce to the ACE Companies the documents listed in Appendix 4 or, in the alternative, requiring the Liquidator and the JPL to produce such documents for an *in camera* review;

B. Compelling the Liquidator to provide testimony and produce documents relating to any legal opinions or advice he received on "cut throughs" and "ring fencing"; and

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ronald L. Snow", written over a horizontal line.

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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 27, 2005:

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