

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' STATUS REPORT AND PROPOSED
SCHEDULE FOR DISCOVERY AND EVIDENTIARY HEARING**

In connection with the March 4, 2005 conference with the Court and as a supplement to the January 31, 2005 assented-to motion by Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as liquidator (the "Liquidator") of The Home Insurance Company ("Home"), requesting a status conference, 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 submit the following update on discovery and proposed schedule for the completion of discovery and an evidentiary hearing on the Liquidator's motion (the "Motion") for approval of the Liquidator's compromise of the AFIA Cedents' claims (the "Proposed Agreement" or "Agreement").¹ The ACE Companies state as follows:

Introduction

1. The ACE Companies served their initial discovery requests six months ago. However, their diligent efforts to move discovery along and obtain vital information relating to the Proposed Agreement have been frustrated at every turn, despite the ACE Companies' willingness to limit the scope of discovery and grant reasonable extensions of time. Indeed, the

ACE Companies have filed (or intend to file) motions to compel against two AFIA Cedents (both of which had submitted affidavits to the Court on the Motion) and the Liquidator for the production of documents that have been withheld based on what the ACE Companies believe are improper assertions of privilege, relevance and undue burden objections. The ACE Companies anticipate that additional motions to compel may be necessary because nine other AFIA Cedents on whom requests were served (the “Other AFIA Cedents”) are taking the position that they are not before the Court and are not required to produce documents at all, even though they signed and are the beneficiaries of the Proposed Agreement, have submitted claims in Home’s liquidation and are likely to have relevant documents in their possession.

2. The schedule proposed below takes into account the pending (and possible) motion practice on discovery issues as well as the fact that the ACE Companies will be deposing a number of witnesses, some of whom are located abroad.² The ACE Companies have conferred with the Liquidator and Benjamin Moore & Company (“Benjamin Moore”) on the proposed schedule. Benjamin Moore agreed to the schedule, but the Liquidator has not responded to the ACE Companies’ proposal.

3. The ACE Companies respectfully submit that the proposed schedule is reasonable and will allow for the development of the record required by the New Hampshire Supreme Court’s Order of September 13, 2004 (the “September 13 Order”). The adoption of the proposed discovery and hearing deadlines will also prevent the Liquidator and the AFIA Cedents from continuing with their apparent strategy of delay and obstruction. On the other hand, there would

¹ Although the ACE Companies agreed to the request for a status conference, the Liquidator’s description of the discovery in paragraphs 3 and 4 of his motion is incomplete and must be updated.

² The proposed schedule assumes that the Court has jurisdiction over the AFIA Cedents and that they will cooperate with the ACE Companies in providing discovery. Logistical difficulties in obtaining such discovery or unforeseen motion practice could jeopardize the schedule.

be no prejudice to the Liquidator if the proposed schedule were adopted. The Liquidator and the AFIA Cedents could quite easily extend their agreed-upon deadline for Court approval of the Proposed Agreement (which they have done on several occasions.) Accordingly, the ACE Companies respectfully request that the Court order the schedule set forth below.

Background

I. The New Hampshire Supreme Court's Broad Mandate

4. The Supreme Court has made it abundantly clear that there must be a full and complete record on the Motion. In the September 13 Order, the Supreme Court noted the lack of “a sufficient evidentiary record” and it remanded the case for a ruling on certain issues. (September 13 Order, attached as Exhibit A, at 1-2). The Supreme Court held that the Court “shall support its determination on these issues with factual findings” and shall set forth the factual basis for its conclusions. (*Id.* at 2; emphasis added.)

5. In determining the standard of fairness for the hearing yet to take place in this case, the Supreme Court cited two bankruptcy cases, *In re Boston & Providence R.R. Corp.*, 673 F.2d 11 (1st Cir. 1982) (per curiam) and *In re Estate of Indian Motorcycle Mfg., Inc.*, 299 B.R. 8 (D. Mass. 2003). (*See* Ex. A at 1-2.) *In re Boston* held that a “court approving a compromise in reorganization proceedings ... must play a quasi-inquisitorial role, ensuring that all aspects of the reorganization are ‘fair and equitable.’” 673 F.2d at 12. The *In re Boston* court emphasized that the court should not defer to the arguments of the party supporting the compromise and that the court’s analysis must “be set forth on the record in sufficient detail that a reviewing court could distinguish it from ‘mere boilerplate approval’ of the trustee’s suggestions.” 673 F.2d at 12 (citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 434 (1968)). The First Circuit criticized the lower court for accepting the trustee’s

assertions without closer scrutiny and noted that the court’s findings must “demonstrate an independent evaluation” of the evidence. *In re Boston*, 673 F.2d at 12-13. *See also In re Harvard Pilgrim Health Care, Inc.*, 434 Mass. 51, 62 (Mass. 2001) (lower court “should have called for the underlying documents or required the commissioner to provide a more detailed explanation of the bases for her conclusory opinions”); *In re Liquidation of American Mut. Liab. Ins. Co.*, 632 N.E.2d 1209, 1217 (Mass. 1994) (court must give settlement agreements comprehensive consideration, examine a full factual record based on discovery, including an inspection of the receiver’s records, and conduct a hearing). The foregoing cases underscore the Supreme Court’s holding in the September 13 Order that there must be a fully developed record in this matter, including discovery of the Liquidator’s documents, depositions and an evidentiary hearing — anything less would be a simple rubber-stamping of the assertions by the Liquidator and the affiants.

II. The ACE Companies’ Ongoing Discovery Efforts

6. In keeping with the Supreme Court’s mandate, the ACE Companies promptly and diligently pursued discovery from the Liquidator and the AFIA Cedents relating to the Motion. However, they have been stymied in their efforts to obtain timely and complete responses to the discovery requests (or, from several parties, any discovery at all).

A. Discovery Served On The Liquidator

7. On the day of the October 4, 2004 status conference with the Court, 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 Motion, seeking documents and information relating to the Liquidator’s specific allegations regarding the Proposed Agreement.

8. After obtaining an extension of the time to respond, the Liquidator served written responses to the Discovery Requests (the “Discovery Responses”) on November 24, 2004. In the Discovery Responses, the Liquidator initially refused, on relevance grounds, to provide answers to interrogatories or produce documents on several topics, including the Liquidator’s position that the proposed payments to the AFIA Cedents would be administrative expenses under RSA 402-C:44, I. The ACE Companies, in the spirit of cooperation, agreed to withdraw some of the Discovery Requests and narrowed the allegedly objectionable requests to the administrative expense issue. After a series of correspondence and a “meet and confer” session in which the ACE Companies pointed out the relevance of the requested information, the Liquidator finally relented. The Liquidator, however, still did not supplement the Discovery Responses until February 23, 2005, some four and a half months after the Discovery Requests were first served.³

9. The Liquidator’s production of documents has also been unsatisfactory. Although the Liquidator served Discovery Responses on November 24, 2004, he did not begin producing documents until December 20, 2004, *i.e.*, two and half months after the Discovery Requests were served. The ACE Companies had granted extensions of the deadline to produce documents in the hope that the additional time would lead to more complete discovery. It did not.

10. The Liquidator has produced just one box of documents in total, at least a third of which are duplicates. Another 300 pages of documents consist of Home’s publicly available

³ On the same day, counsel for the Liquidator confirmed that no documents regarding the classification of the proposed payments to the AFIA Cedents as administrative expenses had been withheld on relevance grounds. It does not appear from the Liquidator’s privilege log that any such documents were withheld as privileged. Since there are no documents in the Liquidator’s document production or privilege log on this issue that pre-date the filing of the Motion, the only conclusion to be drawn is that the Liquidator developed the current theory on administrative expenses late in the day. The ACE Companies have asked for the date on which the Liquidator determined that the payments would constitute administrative expenses. Counsel for the Liquidator has refused to provide the information, stating only that the determination “was part of the Liquidator’s decision to negotiate and ultimately enter [into] the Agreement.” (*See* February 23, 2005 letter, annexed as Ex. B hereto, at ¶ 4.)

filings in the U.K. The Liquidator has asserted a claim of privilege over an inordinately large number of documents; the privilege logs for the Liquidator's productions (which, as described below, were recently revised) total 78 pages and have 443 entries covering multi-page documents. Indeed, it appears that the number of documents withheld by the Liquidator rivals or exceeds the number of non-duplicate documents produced.⁴

11. As will be set forth in the ACE Companies' motion to compel, the Liquidator has not shown that many of the documents withheld are in fact privileged. The Liquidator initially served privilege logs on December 21, 2004 and January 5, 2005. The ACE Companies, by letter dated January 19, 2005, pointed out that certain of the withheld documents are not, on their face, privileged and that the privilege logs generally fail to provide sufficient information to satisfy the Liquidator's burden of demonstrating privilege. The Liquidator took nearly one month, until February 14, 2005, to respond to the ACE Companies' letter. The Liquidator produced about 152 pages of documents that had been withheld before, implicitly acknowledging that his previous assertions of privilege were unfounded. The Liquidator also revised the privileged logs, but they still do not provide the required information. Moreover, even with the revised privilege logs, it appears that a number of the documents on the logs should have been produced because they are not attorney-client communications for the purpose of rendering legal advice.

12. By letter dated February 18, 2005 (just four days after the Liquidator's service of the revised logs), the ACE Companies advised the Liquidator of the continued deficiencies in his assertion of privilege and the privilege logs. Counsel for the Liquidator informed counsel for the

⁴ On January 21, 2005, the ACE Companies served document requests on the Joint Provisional Liquidators in Home's U.K. proceedings (the "JPLs") because the Liquidator refused to provide all relevant documents on their behalf. Counsel for the JPLs recently requested (and was given) an extension until March 11, 2005 to respond to the document requests.

ACE Companies that he would not be able to discuss the privilege issues until the week of February 28, 2005. As of March 3, 2005, counsel for the Liquidator still had not contacted counsel for the ACE Companies.

B. Discovery Served On Equitas And Zürich

13. On November 8, 2004 and December 9, 2004, the ACE Companies also served document requests on Equitas Limited (“Equitas”) and Zürich Versicherung Aktiengesellschaft (Deutschland) (“Zürich”) (as successor to Agrippina Versicherung Aktiengesellschaft), respectively, which are the AFIA Cedents whose representatives (Rhydian Williams and Gernot Warmuth, respectively) filed affidavits with the Court in support of the Motion. The document requests served on Equitas and Zürich — like the Discovery Requests — are narrowly drawn and closely follow the allegations in the Williams and Warmuth Affidavits. The requested documents are critical to the ACE Companies’ ability to depose and subsequently cross examine Messrs. Williams and Warmuth, whose affidavits were already relied upon by the Court in the Order on Remand.

14. After several extensions of time and other delays, Zürich produced approximately 250 pages of documents on February 4, 2005 (nearly two months after they were due). Equitas similarly delayed in producing documents. Even though the documents were originally due on December 28, 2004 (following an extension of time) and counsel for Equitas stated on several occasions that the production of documents would be forthcoming soon, Equitas waited until March 2, 2005 to produce a small number of documents. This delay is even more egregious because the ACE Companies had agreed to limit the scope of the discovery sought from Equitas.

15. In addition to delaying the production of documents unnecessarily, both Zürich and Equitas have refused to produce other documents based on relevance, undue burden and

privilege grounds. The ACE Companies will demonstrate for the Court that there is no legitimate basis for Zürich and Equitas to withhold production of those documents.

C. Discovery Served On The Other AFIA Cedents

16. In light of the resistance from the Liquidator, Zürich and Equitas, the ACE Companies served document requests on the Other AFIA Cedents on January 13, 2005. The Other AFIA Cedents, however, have uniformly stated that they are beyond the Court's jurisdiction and therefore are not required to produce documents. The Other AFIA Cedents are ignoring the fact that they signed the Proposed Agreement that is before the Court. The Other AFIA Cedents stand to gain if the Proposed Agreement is approved, yet they are refusing to provide documentation directly relating to the Agreement. Furthermore, the Other AFIA Cedents have submitted to this Court's jurisdiction, even for discovery purposes, by filing a Proof of Claim in Home's liquidation. RSA 402-C:38, for example, states that "[a]t any time the liquidator may request the claimant to present information or evidence supplementary to that required under paragraph I [for proofs 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.

17. The documents produced by the Liquidator clearly demonstrate that there are relevant documents in the Other AFIA Cedents' possession. For instance, several of the Other AFIA Cedents participated in meetings with the Liquidator and his representatives, such as the October 21, 2003 meeting of the Informal Creditors Committee in Home's U.K. scheme of arrangement (*see* Ex. C annexed hereto), which suggests that they have documents relating to the Proposed Agreement.

18. The ACE Companies' requests are narrow and are limited to the factual underpinnings of the Proposed Agreement. The ACE Companies are seeking documents on: (a)

whether the Other AFIA Cedents would have filed proofs of claim in the absence of the Proposed Agreement; (b) whether, as a matter of course, the Other AFIA Cedents file proofs of claims in liquidations; (c) whether the Other AFIA Cedents are aware of the amount of their set-off claims against Home and, if so, when they determined the amount; and (d) any communications the Other AFIA Cedents had regarding the “ring-fencing” of assets in the UK and whether that strategy was viable under UK law.⁵

Proposed Schedule

19. Even though it has been five and a half months since the Supreme Court’s September 13 Order and despite the ACE Companies’ continued efforts to obtain discovery from the interested parties, the net result has been the production of a total of one box of documents by the Liquidator (as well as a small number of documents Zürich and Equitas) and interrogatory responses from the Liquidator. The strategy of the Liquidator and the AFIA Cedents is clear. They are seeking to avoid their discovery obligations and, at the same time, force the scheduling of an early evidentiary hearing, all in an effort to hamstring the ACE Companies’ ability to present their case to the Court at the hearing.

20. The ACE Companies, therefore, respectfully request that the Court schedule the hearing for a date that would give the ACE Companies a sufficient opportunity to collect the requested documents and information as well as take the depositions of relevant witnesses. The schedule should take into account the time needed to brief the discovery issues that have arisen and to resolve any other disputes.

⁵ The ACE Companies have not yet determined if they will seek depositions of the Other AFIA Cedents, but they reserve their right to do so.

21. The Liquidator should not be heard to complain that he is under a deadline to gain approval of the Proposed Agreement. On several occasions, the Liquidator and the AFIA Cedents have extended the date for obtaining such approval (this time to September 2005), and they have shown a willingness to adjust the date whenever it suits their needs.

22. To that end, the ACE Companies (with the assent of Benjamin Moore) propose the following schedule:

Completion of written discovery (interrogatory responses and the production of documents) and any related motion practice by April 15, 2005.

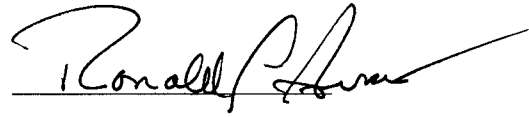
Completion of depositions by June 15, 2005;

Submission of pre-hearing briefs by July 1, 2005; and

Evidentiary hearing in mid-July 2005.

WHEREFORE, the ACE Companies respectfully request that the Court endorse the schedule proposed above.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that I served a copy of the foregoing on the following counsel via First Class mail on March 3, 2005

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