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' REPLY IN FURTHER SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY THE LIQUIDATOR[1]

The Liquidator has conceded that, at a minimum, the Court should review in camera the documents listed in Appendices 2 and 3 to the ACE Companies' motion to compel the production of the Subject Documents. (Liquidator's Opp'n at ¶ 29.) Because the claim of privilege for the documents in Appendices 4 and 5 is even less supportable than the claim of privilege for the documents in Appendices 2 and 3, the ACE Companies respectfully request that Court review all of the Subject Documents.[2] Following that review, the Court should order the production of the documents in Appendices 2 through 4 because the Liquidator has not met his substantial burden under New Hampshire law of establishing that the E & Y Employees to whom the Subject Documents were disclosed may be considered the client or representatives of the client for purposes of New Hampshire Evidence Rule 502. The Court should also order the production of the documents in Appendix 5 because the communications in those documents (1) were not between a lawyer and a client (or client representative); and (2) were not made for the purpose of facilitating the rendition of legal services.

In further support of their Motion, the ACE Companies respectfully state as follows:

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[1] The capitalized terms below have the same meaning as in the ACE Companies' initial Motion papers. Ms. Ellis, Mr. Harrison and Mr. Cairns from E & Y are referred to as the "E & Y Employees."

Summary

1. In the initial Motion papers, the ACE Companies pointed out that the E & Y Employees cannot be the "client" under Rule 502 because only Gareth Hughes and Margaret Mills were appointed as the JPLs in the U.K. proceedings. The E & Y Employees were engaged to provide services to the JPLs, but that does not make them the "client" (any more than the hiring of any service provider would bring it within the definition of a "client"). The ACE Companies also demonstrated that the E & Y Employees are not "representatives" of the client because they do not satisfy the very restrictive "control group" test adopted by New Hampshire. Under that test, a person is a representative of the client only if he or she has the power to make final decisions, such as accepting or rejecting legal advice, on behalf of the client.

2. The Liquidator avoids the straightforward legal questions raised by the ACE Companies and instead accuses the ACE Companies of misunderstanding the role of the E & Y Employees or trying to cut off all communications between the JPLs and their "staff." The JPLs are free to engage and consult with professionals like the E & Y Employees. The JPLs may not, however, share privileged communications with such professionals unless the latter have the power to make binding decisions on behalf of the JPLs.

3. The Liquidator argues that the E & Y Employees are either the client or representatives of the client because (1) they are members of the JPLs' "staff"; and (2) they worked as a "team," in conjunction with the JPLs, in negotiating the Proposed Agreement. The Liquidator, however, has not pointed to any evidence showing that the E & Y Employees were appointed to act as the JPLs. To the contrary, the Liquidator admits that the U.K. court appointed Mr. Hughes and Ms. Mills in their "personal capacity." (Liquidator's Opp'n at ¶ 20.)

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[2] The Liquidator has argued that in camera review of the documents in Appendix 4 would be "an unnecessary burden" (Liquidator's Opp'n at ¶ 32), but he has also offered to provide those documents for

There is no reference to the E & Y Employees as the JPLs in the U.K. court order or in any other document submitted by the Liquidator. Moreover, it is immaterial for the privilege analysis that the E & Y Employees allegedly worked closely with the JPLs in negotiating the Proposed Agreement. In order to qualify as client representatives under the narrow standard adopted by New Hampshire, the Liquidator must show that the E & Y Employees were within the "control group," *i.e.*, they had the power to accept or reject legal advice for the JPLs. The E & Y Employees clearly lacked the requisite authority to bind the JPLs, so they fall outside of the "control group." Accordingly, the sharing of communications with the E & Y Employees results in a waiver of any privilege that may have originally attached to them.

4. The New Hampshire courts have emphasized that assertions of privilege must be strictly construed because the withholding of documents impedes the opposing party's access to relevant information. The close scrutiny of the Subject Documents is especially critical here because there is — thus far — a marked absence of documents in support of the positions that the Liquidator has taken regarding the Proposed Agreement. As a matter of fundamental due process and fairness, the ACE Companies are entitled to determine whether such documents exist and to have access to any documents that have been improperly withheld.

Argument

I. Any Privilege That Originally Attached To The Subject Documents Was Waived Because Of E & Y's Involvement

A. The E & Y Employees Are Not The "Client" Under Rule 502(a)(1)

5. The facts of this case and the applicable law provide no support for the Liquidator's assertion that the E & Y Employees may be considered the "client" for purposes of Rule 502 because they are part of the JPLs' "staff." (*See* Liquidator's Opp'n at ¶¶ 17-18.)

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the Court's examination.

6. First, the evidence shows that Mr. Hughes and Ms. Mills, and no one else, are the clients receiving legal advice. According to the privilege log legend provided by the Liquidator (*see* Ex. B to the Liquidator's Opp'n), Clifford Chance acts as counsel to the JPLs, not to E & Y or the E & Y Employees. In turn, it is clear that the only JPLs are Gareth Hughes and Margaret Mills, who were appointed by the U.K. court as individuals. The Liquidator has admitted that the court appointed Mr. Hughes and Ms. Mills in their "personal capacity." (Liquidator's Opp'n at ¶ 20.) The May 2003 Order appointing the JPLs, which is annexed to the Gareth Hughes Affidavit (*see* Ex. C to the Liquidator's Opp'n), refers to Mr. Hughes and Ms. Mills, but not the E & Y Employees. (*See* Exhibit GHH2 to Hughes Aff. at 1.)[3]

7. The Liquidator argues that the appointment of Mr. Hughes and Ms. Mills necessarily included the "staff" at E & Y because the JPLs are E & Y partners. The May 2003 Order, however, does not define the JPLs to include E & Y Employees, which it easily could have done. Rather than saying that E & Y Employees would be assisting the JPLs, the May 2003 Order states that the JPLs have the power to "engage and retain and/or employ any solicitors, counsel, lawyers, accountants, investment advisors, actuaries, run-off and claims consultants, loss adjusters, surveyors, and/or other qualified persons to assist them in the performance of their duties and functions." (*Id.* at 3.) Thus, the JPLs could have chosen any firm, such as Deloitte or PwC, to assist them in this case, but the use of Deloitte or PwC employees as "staff" would not grant them "client" status under Rule 502. By the same token, the fact that the JPLs chose to use the E & Y Employees as members of their "staff" does not make those employees the "client."[4]

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[3] The privilege log legend erroneously identifies the E & Y Employees as employees of "Ernst & Young (UK), Joint Provisional Liquidators." The U.K. court did not appoint the firm of E & Y as the JPL, and the Liquidator nowhere suggests that E & Y acted in that capacity.

[4] It does not matter that, according to Mr. Hughes, the E & Y Employees do not have a retainer agreement and do not submit separate fee applications. Mr. Hughes and the Liquidator admit that the E & Y Employees are compensated for their insolvency-related work under the U.K. rules. (*See* Liquidator's

8. Second, classifying the E & Y Employees as the "client" would stretch the scope of privilege much farther than is contemplated under New Hampshire law. Under the Liquidator's expansive interpretation, an individual could claim that any "staff" member (no matter how minor his or her role or involvement) is covered by the privilege. As the ACE Companies pointed out in their initial Motion papers, the statutory privilege must be construed narrowly under New Hampshire law and cannot be as broad as the Liquidator suggests.[5]

9. Thus, the Court should reject the Liquidator's unsupported argument that there is no waiver because the E & Y Employees are the "client."

B. The E & Y Employees Are Not The Client's "Representatives" Under Rule 502(a)(2)

10. The Liquidator asserts that the "control group" approach for determining the scope of privilege does not apply here and that, even if it did, the E & Y Employees are within the "control group" because they and Mr. Hughes "acted as a team with respect to dealings with the AFIA Cedents and the Agreement." (Liquidator's Opp'n at ¶¶ 25-26.)

11. The Liquidator contends that the "professional team" structure in a provisional liquidation precludes the application of a "control group" test (*see id.* at ¶ 25), but he cannot deny that within the "team" there is still a hierarchy of decision-making, nor does he suggest that the E & Y employees had the authority to make final decisions on behalf of the JPLs. Moreover, New Hampshire has determined that within any "corporation, association or other organization or entity," N.H. R. EVID. 502(a)(1), the restrictive "control group" approach embodied in Rule 502 is the best means of demarcating the boundaries of the attorney-client privilege. *See*

Opp'n at 10.) As such, they are no different from Clifford Chance, which was also engaged by the JPLs under the May 2003 Order in order to render professional services.

[5] To the extent the Liquidator proposes to limit the "staff" covered by the privilege to the more senior E & Y employees with alleged decision-making power, such a limitation would bring the "control group" analysis into play (which is discussed below).

Reporter's Notes to N.H. R. EVID. 502(a)(2), *quoted in* 1 N.H. EVID. MANUAL § 502.02[7]. Therefore, the "control group" test should be applied here.

12. The Liquidator has not met his burden of establishing that the E & Y Employees are within the "control group" of the JPL "team." As the Texas Supreme Court noted in *National Tank Co. v. The 30th Judicial Dist. Ct. ("NATCO")*, 851 S.W.2d 193 (Tex. 1993), which involved the interpretation of a statutory provision identical to Rule 502(a)(2), "[t]he control group test reflects the distinction between the corporate entity and the individual employee and is based on the premise that only an employee who controls the actions of the corporation can personify the corporation." *Id.* at 197 (emphasis added). In the context of attorney-client communications, this means that the employee must have "discretion to either accept or reject the legal advice." *Id.* at 199. *See also Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. Ct. App. 1997) ("Communications with underlings who may make internal recommendations to their superiors but who are not themselves authorized to make the final decision will remain unprivileged.") (quotation omitted). This formulation of the "control group" test fits with the intent of the New Hampshire legislature in adopting the "most restricted position" on what constitutes a client representative. Reporter's Notes to N.H. R. EVID. 502(a)(2), *quoted in* 1 N.H. EVID. MANUAL § 502.02[7].[6]

13. The Liquidator has not even attempted to show that the E & Y Employees meet the standard set forth in *NATCO*. Instead, the Liquidator claims that the E & Y Employees were

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[6] The *NATCO* and *Osborne* decisions involved a prior version of the Texas statute that had the same language as Rule 502(a)(2). In 1998, Texas amended the statute and defined a representative of the client to include "any person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client." *National Converting & Fulfillment Corp. v. Bankers Trust Corp.*, 134 F. Supp. 2d 804, 805, 806 n.1 (N.D. Tex. 2001). Under this less restrictive test, which is known as the "subject matter" test, the attorney-client privilege may apply to communications between attorneys and employees who are not in the "control group." *See NATCO*, 851 S.W.2d at 198. It is significant that New Hampshire has not chosen to amend its evidentiary rules in a similar manner.

members of the "team" negotiating the Proposed Agreement and "[a]s members of that team, they were authorized to obtain legal services or to act on advice received in furtherance of those efforts." (Liquidator's Opp'n at ¶ 24.) As discussed above, the key to the "control group" test is that the individual must have the authority to accept or reject the legal advice on behalf of the organizational client. The Liquidator has not argued — and cannot seriously suggest — that Mr. Cairns or Mr. Harrison or even Ms. Ellis had the power to bind the JPLs to a decision on a legal matter without consulting Mr. Hughes or Ms. Mills. In the absence of such authority, the Liquidator's emphasis on the "team" approach is beside the point.

14. Furthermore, the privilege logs themselves fatally undercut the Liquidator's argument that the E & Y Employees were integrally involved in the discussions that are reflected in the Subject Documents. On 367 documents, which represent two-thirds of the total number of Subject Documents, the E & Y Employees are merely "cc's" or one of multiple recipients. (*See* entries listed on Appendix 4 to Motion.)[7] And, for the majority of those documents, the E & Y Employees are listed as "cc's" only. (*See id.*) Clearly, the E & Y Employees were receiving the communications for informational purposes, not so they could make final and binding decisions on behalf of the JPLs.

15. The main case that the Liquidator cites in support of his argument, *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), is inapplicable here. Although *Westinghouse* was the first articulation of the "control group" test, it did not involve an interpretation of the New Hampshire Evidence Rule 502 or its analog. *NATCO*, by contrast, was interpreting the same definition of client representative that is contained in Rule 502(a)(2). Moreover, in stating the "control group" includes employees who take "a substantial

[7] The ACE Companies have defined "multiple recipient" to mean more than four recipients.

part" in the decision relating to the legal advice, 210 F. Supp. at 485, the *Westinghouse* court was more in line with the "subject matter" approach that New Hampshire has rejected.

16. The Liquidator also relies on *National Converting & Fulfillment Corp. v. Bankers Trust Corp.*, 134 F. Supp. 2d 804 (N.D. Tex. 2001), but that case supports the ACE Companies' motion to compel. The *National Converting* court discussed *NATCO*, and noted that the communications with the employees in *NATCO* were not privileged because those employees did not "control the actions of the corporation." *Id.* at 806 (emphasis in original). By the same token, the E & Y Employees do not control the actions of the JPLs.[8]

17. In sum, the Liquidator has failed to satisfy his burden under New Hampshire law of demonstrating that any attorney-client privilege was not waived when the Subject Documents were shared with the E&Y Employees.

II. The Liquidator Has Not Established That The Documents In Appendix 5 Are Privileged

18. The Liquidator contends that the documents in Appendix 5 are privileged, even though they involve non-lawyers, because they were exchanged "among the client group" and "generally concern or convey the substance of legal advice." (Liquidator's Opp'n at ¶ 33.) That is not the standard under Rule 502 and the Liquidator has not cited any New Hampshire case

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[8] Although the *National Converting* court held that the non-employee (the son of corporation's owner) was within the control group, the opinion does not provide any basis for the conclusion that the son controlled the corporation's decisions. *National Converting* has also been the subject of criticism by commentators:

> Randall [the son] merely had authority to relate the legal advice back to his father[,] who was the person with actual authority. ... Randall was not an employee, and to the extent he could shape any action based upon legal advice, it was simply as his father's advisor. It was the father who controlled the actions of the corporation. In reality, [the court] recognized a new privilege in Texas — the "my-son-the-CPA" privilege.

supporting his theory that documents reflecting legal advice are privileged. Rule 502 recognizes that communications between client representatives or between the client and a representative may be privileged, but only if they were "made for the purpose of facilitating the rendition of professional legal services to the client." N.H. R. EVID. 502(b). The Liquidator has not shown how the documents that allegedly reflect legal advice facilitated the rendition of legal services.

19. There are two other problems with the Liquidator's assertion of privilege regarding the documents in Appendix 5. First, some of the documents — numbers 94 and 203(2) on the December 21 log — involve Ms. Ellis, who is neither a client nor a client representative.

20. Second, with regard to the documents that do not allegedly reflect legal advice, the Liquidator has not demonstrated that the communications were expressly made for the purpose of facilitating the rendition of legal advice. For example, the fact that a document was ultimately shared with counsel (*see, e.g.*, document numbers 93 and 94 on the December 21 log) does not cloak the document with privilege. Similarly, documents that are shared with counsel for informational purposes only (*see* document number 203(1) on the December 21 log) cannot be described as privileged. The Liquidator tries to rely on a federal case, *Pacamor Bearings, Inc. v. Mineba Co., Ltd.*, 918 F. Supp 491 (D.N.H. 1996), for the proposition that a document relayed to counsel for information could embody an implied request for advice. Even assuming that *Pacamor* represents the New Hampshire law (and there is no evidence that it does), the Liquidator has not tied the alleged request to any advice that was given.

21. Therefore, the Liquidator's privilege claim regarding the documents in Appendix 5 must also fail because the documents do not meet the requirements of Rule 502(b).

Michael W. Shore and Kenneth E. Shore, *Article: Civil Evidence*, 55 S.M.U. L. REV. 719, 741 (2002). Finally, to the extent that *National Converting* conflicts with *NATCO*, the latter prevails because it is the interpretation of state law by the highest court in Texas.

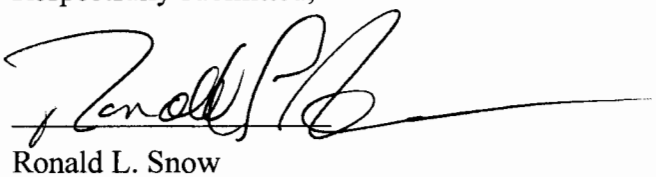
WHEREFORE, the ACE Companies respectfully request that the Court:

A. Enter an Order compelling the Liquidator to produce the Subject Documents to the Court for in camera review;

B. Enter, following in camera review, an Order compelling the Liquidator to produce the Subject Documents to the ACE Companies; 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 their Motion.

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 April 8, 2005:

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