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

LIQUIDATOR'S OPPOSITION TO ACE COMPANIES' MAY 27, 2005 MOTION FOR ORDER COMPELLING PRODUCTION

Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), opposes the ACE Companies' most recent motion for an order compelling production.

a. The Court's Order of May 12, 2005 (the "May 12 Order") directed the Liquidator to review the privileged documents listed on Appendix 4 to identify any that were relied on in developing affidavits. The Liquidator has done so, and there are none. The ACE Companies now attempt to reinterpret the May 12 Order to require production of the Appendix 4 documents on grounds of relevance. This bears no relation to the language of the May 12 Order and disregards both the colloquy with the Court concerning the review of Appendix 4 documents at the May 12, 2005 hearing (found at pages 12-17 of the hearing transcript) and the agreement of counsel reflected in the May 12 Order (at page 2). The motion is in actuality a request for reconsideration of the May 12 Order and the Court's rejection of ACE's position at the May 12, 2005 hearing. It should be denied.

b. The ACE Companies' newly raised "at issue" argument does not reflect the "at issue" waiver principle as accepted by the New Hampshire Supreme Court. The question is not whether a party has received legal advice on a topic relevant to the pending proceeding, but whether the party has injected the legal advice itself into the proceeding. (ACE's view would mean that the privilege does not afford protection whenever the topic of the legal advice is

relevant, which would mean that the privilege does not apply just when the purpose of providing for candid communication is most important.) The Liquidator has not injected any legal advice received on cut throughs or ring fencing into this matter, and ACE's new argument should be rejected.

I. The Appendix 4 Documents Are Not Subject To Production Under The May 12 Order.

A. The May 12 Order required production of privileged documents only where they were "relied on in developing" affidavits, not based on mere relevance.

1. In their motion, the ACE Companies mischaracterize the Court's May 12 orders and ignore the May 12 proceedings themselves. The motion concerns documents from the Liquidator's privilege log listed on Appendix 4 to the ACE Companies' motion to compel directed to the Liquidator. That Appendix identified documents as to which ACE contended that the attorney-client privilege had been waived by the involvement of members of the Joint Provisional Liquidator's team. The Liquidator opposed that motion, noting that ACE's waiver theory, if accepted, would mean that the Joint Provisional Liquidator could not involve his staff in privileged communications and would have to conduct all privileged matters in the provisional liquidation himself. This would be analogous to the Commissioner of Insurance as Liquidator being unable to discuss privileged matters with the Deputy Commissioner.

2. This question was raised at the May 12 hearing, and the Court initially issued a one sentence order. ACE Ex. 1. At the request of the Liquidator, the Court then addressed the issue with counsel. During the colloquy, the Court made clear that (a) it had not reached the waiver issue in the first order, and (b) it directed the production of documents that had been relied upon in developing affidavits submitted to it, regardless of whether they otherwise would

be considered privileged. Transcript of May 12, 2005 Hearing on Motions ("May 12 Tr.") at 12-17 (attached as Exhibit A). The Court expressly addressed these points :

> THE COURT: Look, here's what I'm saying. I'm not even saying whether he's waived or not. If there's a document in there that he relied upon in forming his affidavit, then its discoverable, okay?
>
> MR. LESLIE: Yes, your Honor.
>
> THE COURT: That's what it [the first order] says.
>
> MR. LESLIE: That, we, of course, are quite comfortable with. I think the issue here is whether the Court's most recent order was intended – as I have just heard the Court explain it, it was not intended as a ruling on the waiver question, but it is an order that directs the Liquidator and the Joint Provisional Liquidator to produce documents that were utilized by the JPL in putting together the affidavit –
>
> THE COURT: Yes, correct.
>
> MR. LESLIE: -- and that are not, otherwise, privileged.
>
> MR. VAN TOL: Well, your Honor --
>
> THE COURT: Well no. Any document – I don't say it's privileged, therefore – I mean, if he relied upon those documents, if it's a document he relied on, then he produces it, it's discoverable. I'm not even going to whether he has waived it. If there was a waiver or not, and if there is a privilege, it's overcome, okay?
>
> MR. LESLIE: To the extent he relied on it for purposes of the affidavit.
>
> THE COURT: Exactly. Is everything clear?

May 12 Tr. at 15-16 (emphasis added).

3. These directions were reflected in the May 12 Order. In light of the Court's Guidance (which directed production of "nonprivileged" documents and information "relied upon in developing the affidavits filed by Gareth Howard Hughes, Rhydian Williams and Gernot Warmuth") and the colloquy concerning the first order, counsel for the Liquidator and the ACE Companies agreed on a resolution of the Appendix 4 dispute which was recited in open Court:

> MR. LESLIE: There were also disputes over Appendix 4 documents. The Liquidator will review the Appendix 4 documents to identify any that were relied upon in developing the affidavits and, if so, they will be produced.

May 12 Tr. at 37 (included in Exhibit A). The Court incorporated this agreement into the May 12 Order:

> Counsel have resolved most discovery issues as follows: . . .
>
> 2. The Liquidator will review Appendix 4 documents to identify any that were relied upon in developing affidavits and, if such documents exist, they will be produced.

May 12 Order at 2 (ACE Ex. 2).

B. The ACE Companies' motion seeks to recast the Court's direction in terms of relevance, contrary to the Court's direction at the hearing and the agreed language of the May 12 Order, which is consistent with Rule of Evidence 612.

4. The ACE Companies now seek to change the agreed "relied on in developing affidavits" scope of review and production of Appendix 4 privileged documents to a "relevance" standard. See ACE Motion ¶ 1 (Appendix 4 documents must be produced because they "specifically relate to one of the main issues in this proceeding"); ¶ 4 (documents must be produced "if they bear on the basis for, and the negotiation of," the Agreement); ¶ 5 (order must be read to "encompass any document that touches on the statements made" in the affidavits). Indeed, the ACE Companies baldly assert that the Appendix 4 documents should be produced "even if they do not fit the definition of 'relied upon,' because they relate to the rationale for" the Agreement. Id. ¶¶ 5 n.3, 10.

5. The Court expressly rejected ACE's position at the May 12 hearing. Immediately after the colloquy quoted in paragraph 2 above, ACE's counsel argued that all documents on Appendix 4 should be produced because they were "relevant":

> MR. LEE: Yes, your Honor. I just wanted to clarify that that relates to the documents that are encompassed by Appendix 4, and what we don't want to see is

the Liquidator posture with those documents and decide which ones they do or don't want to produce. Our view is that all of those documents are relevant. They were all identified as being responsive to the document requests of the ACE Companies, and they are not privileged ipso facto. They are relevant to the issues before the Court.

THE COURT: Well, I don't know what is in them. I've given you the guidelines. That's the order that I've made, that if they are within the scope of discovery, as I've given that to you earlier, that is to say, that the information was relied upon, and, I guess, if the privilege wasn't waived, if they are privileged, the privilege is overcome, and I'm not even going as to whether or not they are waived.

MR. LESLIE: To the extent those documents were used by the JPL in putting together the affidavit.

THE COURT: Relied upon, exactly.

MR. LESLIE: Okay.

THE COURT: Exactly, exactly.

May 12 Tr. at 16-17 (emphasis added) (included in Ex. A).

6. The ACE Companies essentially seek reconsideration of the May 12 Order to remove the element of reliance ("relied upon in developing" affidavits) required to be present before a privileged document needs to be produced. This limitation was both directed by the Court and agreed on by counsel for ACE at the May 12 hearing as demonstrated by the May 12 Order at 2 (par. 2). There would have been no reason for the ACE Companies to agree that the Liquidator would review Appendix 4 documents "to identify any that were relied upon in developing affidavits" unless counsel understood at the hearing that this was the Court's intent and reliance, not relevance, was the issue during that review. This makes sense, as the Court had rejected the ACE Companies' attempt to introduce a "relevance" standard. May 12 Tr. at 16-17.

7. The Court properly rejected a "relevance" standard for production of privileged documents. If relevance were sufficient grounds for production of privileged material, then the

attorney-client privilege would have no meaningful application. A privilege that does not protect against production when the material is relevant is no privilege at all. See Rhone-Poulenc Rorer Inc. v. The Home Indemnity Co., 32 F.3d 851, 864 (3d Cir. 1994) ("Relevance is not the standard for determining whether or not evidence should be protected as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue."). The "relied on in developing affidavits" standard, by contrast, is analogous to the rule of evidence that permits inspection of documents used to refresh a witnesses' recollection even if they are privileged. See New Hampshire Rule of Evidence 612. Rule 612(a) provides that "If, while testifying, a witness uses a writing . . . to refresh his or her memory, an adverse party is entitled to have the writing . . . produced at the trial, hearing, or deposition in which the witness is testifying." Rule 612(b) provides that "If, before testifying, a witness uses a writing . . . to refresh his or her memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing . . . produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying." See Exhibit B.

8. The "overriding" of privilege referred to by the Court during the hearing is consistent with Rule 612 analysis. See 28 Wright & Gold, Federal Practice & Procedure: Evidence § 6188 (1993) (concerning the essentially identical Federal Rule of Evidence 612). However, given the strong policies underlying the attorney-client privilege, any production of privileged documents (such as those on Appendix 4) is properly limited to documents that were actually reviewed in connection with the testimony and actually affected the testimony. See 4 Weinstein's Federal Evidence § 612.4 (2d ed. 2005). The extent of production of privileged material under Rule 612 is narrow. The reporter's notes state that the use of the phrase "for the

purpose of testifying" in Rule 612(b) "is to safeguard against using the Rule as a pretext for wholesale exploration of an opposing party's files and to assure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness." Reporter's Notes to New Hampshire Rule 612, citing Federal Advisory Committee Notes to Rule 612. Cf. Derderian v. Polaroid Corp., 121 F.R.D. 13, 17 (D. Mass. 1988) ("Rule 612, F.R. Evid., is a rule of *evidence*, not a rule of *discovery*.").

C. The Appendix 4 documents were not relied upon in developing the affidavits.

9. After the May 12 hearing, the Liquidator reviewed the Appendix 4 documents and advised the ACE Companies that none of those documents were relied upon in developing affidavits. See Exhibits C, D.

10. That the Appendix 4 documents were not relied on in developing the affidavits is not surprising. The affidavits principally concern the communications with AFIA Cedents that led the Liquidator and Joint Provisional Liquidators to conclude that an agreement with the AFIA Cedents was necessary to collect on ACE's obligations. The bulk of the Appendix 4 documents concern the negotiations over the terms of the agreement. (For instance, all the documents specifically identified on pages 4 and 5 of the ACE Motion are from the late November and December 2003 period and concern negotiations over the terms of the letter agreement.) The affidavits only briefly refer to the fact of such negotiations. See ACE Ex. 3, ¶ 4; ACE Ex. 6 ¶¶ 9-10.

11. In sum, the ACE motion requests reconsideration of a point raised and rejected at the May 12 hearing and inconsistent with the express, agreed terms of the May 12 Order. There is no legal basis for the ACE argument that privileged documents should be produced merely

because they are "relevant." The Liquidator has complied with the May 12 Order as to Appendix 4.

II. The "At Issue" Doctrine Does Not Require Production Of Legal Advice Concerning "Cut Throughs" Or "Ring Fencing."

12. The ACE Companies base their motion for production of legal opinions regarding the validity of "cut throughs" (agreements directly between AFIA Cedents and ACE) and "ring fencing" (keeping English assets in the UK for benefit of UK creditors) on the principle of "at issue" waiver. ACE Motion ¶ 14. However, they do not attempt to describe that principle, and as applied by the New Hampshire Supreme Court it does not support their request.

13. The "at issue" waiver principle does not simply require production of privileged material whenever the subject on which advice was given is at issue in a proceeding. Instead, it applies only when the advice itself has been injected into the case by the party asserting the privilege. The Supreme Court recognized this distinction in Aranson v. Schroeder, 140 N.H. 359 (1995). The defendant there had suggested that an implied waiver of privilege occurs whenever assertion of the privilege resulted from an affirmative act, such as filing suit. Id. at 369-70. The Supreme Court found merit to criticisms that the proposed test neglected fairness and the systemic importance of the attorney-client privilege. Id. at 370. The Court concluded that it would "limit the extent of an at-issue waiver of the attorney-client privilege to circumstances 'in which the privilege-holder injects the privileged material itself into the case.'" Id., quoting Marcus, The Perils of the Privilege: Waiver and the Litigator, 84 Mich L. Rev. 1605, 1633 (1986) (emphasis added). It is thus not enough that the privileged advice concern an issue in the case, the advice itself must have been injected into the case by the privilege-holder. Accord Bennett v. ITT Hartford Group, Inc., 150 N.H. 753, 761 (2004); Petition of Dean, 142 N.H. 889, 889 (1998).

14. The Liquidator has not injected advice concerning cut throughs or ring fencing into this case. With respect to cut throughs, the Liquidator (and Joint Provisional Liquidator) believed they were a significant threat. The reasons for that belief are summarized in the Liquidator's Offer of Proof. See Offer of Proof ¶¶ 22-34, 42-43, 45 (One AFIA Cedent had withdrawn claims and would not explain why; certain AFIA Cedents said they were considering direct agreements; ACE had said such agreements were legal, citing the NEMGIA case and its counsel's views, and did not respond to a demand that it not enter them; finding out about such agreements would be very difficult if possible at all; and challenging them might not be successful). These reasons will be explained by Mr. Bengelsdorf, Mr. Rosen and Mr. Hughes during depositions (if they are asked). While the issue of cut throughs is an element of the Liquidator's motion for approval of the Agreement with AFIA Cedents, however, any legal advice on that topic has not itself been injected into the matter. The ACE Companies' citation of Aranson on this issue ignores the actual holding of the case.

15. The ACE Companies' position on ring fencing seeks to create an issue where there is none. The Liquidator stated his position was that ring fencing (or "walling off") had no legal merit in his original motion. See ACE Ex. 6, ¶ 8. The point was that litigation over the issue could take time and expense. As it is such a subsidiary matter, ring fencing was not included in the Offer of Proof. Legal advice received on ring fencing has never been injected into this matter, and the "at issue" waiver principle does not apply.[1]

[1] The Note of Advice from leading English counsel on this point referred to at ACE Motion ¶ 13 was produced because it was provided to the Informal Creditors Committee and therefore is not privileged. Contrary to ACE's suggestion, the Note of Advice (ACE Ex. 7) is perfectly consistent with the Liquidator's position that ring fencing has no legal merit.

CONCLUSION

For the reasons stated above, the Court should deny the ACE Companies' motion.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, AS LIQUIDATOR OF THE HOME INSURANCE COMPANY

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May 31, 2005

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Opposition to ACE Companies' May 27, 2005 Motion for Order Compelling Production was sent, this 31st day of May, 2005, by first class mail, postage prepaid to all persons on the attached service list.

Suzanne M. Gorman

THE STATE OF NEW HAMPSHIRE

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