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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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IN THE MATTER OF:

THE LIQUIDATION OF
THE HOME INSURANCE COMPANY

Docket No.: 03-E-106

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HEARING ON MOTIONS

Before:

Hon. Kathleen A. McGuire
Presiding Justice
on Thursday, May 12, 2005
at Concord, New Hampshire

* * * * *

Official Court Reporter: Brenda K. Hancock, CCR, RPR

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APPEARANCES:

Referee:

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Joint Provisional
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Thursday,
May 12, 2005

P R O C E E D I N G S:

IN OPEN COURT, ON THE RECORD:

1 THE COURT: Good morning. The gang is all here. Why don't we
2 start with identifying yourselves, for the record, and the
3 parties you represent.
4

5 MR. BOUFFARD: Good morning, your Honor. I'm Andre Bouffard,
6 representing Benjamin Moore & co.
7

8 MS. WADE: Lisa Wade, representing ACE Companies.
9

10 MR. VAN TOL: Good morning, your Honor. Pieter Van Tol,
11 representing the ACE Companies.
12

13 MR. LEE: Gary Lee, representing the ACE Companies.
14

15 MR. SERELL: Andrew Serell, representing the nonparty Zurich.
16

17 MR. HONIGBERG: Martin Honigberg, representing nonparty
18 Equitas.
19

20 MR. GORDON: Jack Gordon, representing nonparty Equitas,
21 Limited.
22

23 MR. LESLIE: David Leslie, representing the Liquidator and
Gareth Hughes, the Joint Provisional Liquidator.
24

25 MR. SMITH: Eric Smith, representing the Liquidator and the
Joint Provisional Liquidator.
26

27 MR. MCHUGH: Thomas McHugh, representing the Liquidator and the
28

1 Joint Provisional Liquidator.

2 MR. LaGORY: Dennis LaGory, representing nonparty Unionamerica
3 Insurance Company, Limited.

4 MR. CAMPBELL: George Campbell, also representing nonparty
5 Unionamerica.

6 THE COURT: Okay. We're here, mainly, on discovery issues
7 today, but I want to address some other issues, first,
8 before we get to the discovery issues. There's a motion
9 to depose Paula Rogers, who is the Referee in this case.
10 She had been the Insurance Commissioner until sometime in
11 2003, I think. This issue had come up informally during a
12 conference that we held in Jury Deliberation Room I. She
13 stated at that time that she had no objection to being
14 deposed. She maintains, still, that she has no objection
15 to it. I don't really understand how it's relevant, but
16 since she has no objection to it, ACE may depose Attorney
17 Rogers, and you need to find a mutually agreeable time for
18 that.

19 There's a motion, an emergency motion by the ACE
20 Companies, to strike the Liquidator's offer of proof,
21 mainly because I think there were assertions about
22 privilege issues, that there were discussions about
23 compromising the claims and so forth, but I'm not going to

1 -- that's going to just be held in abeyance and I'll take
2 it up at the time whether that evidence is going to be
3 relevant, but, frankly, considering it, it seems as if it
4 will be relevant, because, to the extent that the Joint
5 Provisional Liquidator discussed settlement with ACE
6 Companies as a way of resolving all of this, when we look
7 at the reasonableness of what the Liquidator and the Joint
8 Provisional Liquidator did at the time in entering into
9 the agreement at issue, it seems as if that will be
10 relevant, but, as I said, I'm not going to -- I haven't
11 read the offer of proof yet, but it seems to me that that
12 will be relevant, but we'll take that up at the time. I'm
13 going to hold that in abeyance as to the relevancy of that
14 information.

15 Witness lists, exchange of the witness lists; do
16 we still have a problem with that, Mr. Leslie?

17 MR. LESLIE: Your Honor, the Liquidator has requested of ACE
18 and Benjamin Moore who they intend to call, if anyone, as
19 witnesses. Yesterday we received from ACE an indication
20 they intend to call two expert witnesses, but I don't
21 believe that's complete. I think they reserve the right
22 to call additional witnesses.

23 We feel that, under the circumstances,

1 considering, especially, where we started on October 1,
2 when ACE had identified who they might call, when they had
3 identified the limited scope of production that they would
4 need and only from the Liquidator, they were at a point
5 where we ought to know who's going to be called as a
6 witness so we can get those depositions scheduled during
7 the next couple of months. We have worked, I think,
8 pretty efficiently with ACE to set up the depositions, and
9 we would like to know who they are going to call.

10 THE COURT: What's the story on that, the witness list?

11 MR. VAN TOL: Your Honor, part of it was dependent on what was
12 going to happen with our motion to strike. Now that
13 that's being held in abeyance, we might as well inform the
14 Court and Mr. Leslie that we will need to call rebuttal
15 witnesses on those without-privilege conversations among
16 others, and it will be Michael Durkin, who has submitted
17 an affidavit, and Thomas Waumser from the ACE Companies.

18 THE COURT: And that's all you're calling, those two
19 witnesses?

20 MR. VAN TOL: That's all we intend at the time, your Honor,
21 unless if something comes up at depositions that's
22 unforeseen, but I don't really see that happening, but
23 that's all we have at the moment.

1 THE COURT: Benjamin Moore?

2 MR. BOUFFARD: At this point, your Honor, we don't intend to
3 call any witnesses except an expert and are happy to agree
4 to some reasonable deadline for identifying an expert.

5 THE COURT: Well, the hearing is scheduled for July 25.

6 MR. BOUFFARD: I understand that, your Honor.

7 THE COURT: So, when are you going to make up your mind about
8 that?

9 MR. BOUFFARD: Well, let's see. It's now May 12. I would be
10 comfortable with the end of May.

11 THE COURT: Is that all right, Mr. Leslie?

12 MR. LESLIE: Your Honor, we really feel that Benjamin Moore
13 ought to be able to make their decision sooner. We have
14 ACE's counsel available. I mean, earlier when we were
15 scheduling the other depositions, we knew who was
16 available and when they are available, and there's a
17 limited window of time to get these depositions
18 completed.

19 We now have between two to four more individuals
20 to depose; two of them are in England. I believe there's
21 one remaining week in the month of June when we can do
22 that, next-to-last month of June, if I recall correctly,
23 your schedule.

1 THE COURT: Okay. May 27.

2 MR. BOUFFARD: Very good, your Honor. The only other caveat to
3 that is that we do have motions to compel that are on the
4 agenda for today, and subject to the resolution of those
5 motions --

6 THE COURT: Yes, I know.

7 MR. BOUFFARD: -- I don't anticipate any other witnesses, but I
8 believe I have to research the rights with respect to
9 those motions.

10 THE COURT: Okay. May 27.

11 MR. LESLIE: Your Honor, apropos to the expert witnesses, when
12 might we expect that expert disclosure on those witnesses?

13 THE COURT: May 27.

14 MR. LESLIE: Thank you.

15 THE COURT: Okay. Now, the discovery motions; the pleadings
16 are numerous. These are just the discovery motions on for
17 today and the documents that have been filed in support of
18 the motions, and it's really a little out of control.
19 Obviously, there are many smart, very well-paid lawyers
20 involved in this case, and this case shouldn't be in the
21 posture that it is in right now.

22 All of the persons or entities from whom -- and
23 most of these are ACE's motions -- from whom ACE is

1 seeking discovery, except for the Liquidator, are
2 contesting the jurisdiction of the Court, but all have
3 voluntarily agreed to cooperate in the discovery, to the
4 extent that they agree to provide unprivileged discovery
5 relevant to the necessity, reasonableness and fairness of
6 the proposed agreement, but issues have been raised as to
7 what documents are privileged and what documents are
8 relevant to the necessity, reasonableness and fairness of
9 the agreement.

10 Now, depositions are scheduled in the United
11 Kingdom and the U.S. beginning on May 24. That's less
12 than two weeks from now. So, we need to resolve all of
13 the discovery issues today, while we're all here.

14 We are going to do this. I'm going to give to
15 you right now some guidance for you to do this. I'll give
16 you a chance to look at it and read them and answer any
17 questions that you may have, each sentence, and it has
18 meaning. So, I want you to look at it. Then, what we are
19 going to do is, I'm going to leave the bench, and Paula
20 Rogers will be the point person for you to then resolve
21 the discovery issues. Okay?

22 We've made available the whole second floor of
23 the courthouse, if you need space. Courtroom II is

1 available, the jury deliberation rooms and the conference
2 rooms out here, but I want them all resolved today.

3 Wayne, could you pass these out?

4 (Documents handed to attorneys by baiiff)

5 THE COURT: I'll read them with you. "The purpose of the July
6 25, 2005 hearing is to present relevant evidence regarding
7 whether the proposed agreement and compromise dated April
8 2, 2004 between the Liquidator and the AFIA cedents is
9 necessary, fair and reasonable. Accordingly, discovery is
10 limited to evidence relevant to that issue. Discovery is
11 further limited to information to which the Liquidator and
12 Joint Provisional Liquidator were privy in reaching and/or
13 approving the agreement. ACE Companies are entitled to
14 production of all non-privileged documents and information
15 relied upon in developing the affidavits filed by Gareth
16 Howard Hughes, Rhydian Williams and Germot Warmuth in
17 support of the agreement. When considering what documents
18 are privileged, the parties should bear in mind that the
19 rationales of the Joint Provisional Liquidator and
20 Liquidator in reaching and/or approving the agreement are
21 focuses of the July 25 hearing." Okay?

22 So, as I said, Paula Rogers -- I'm going to leave
23 the bench. Paula Rogers is the point person for

1 organizing your discussions, and if you have some general
2 questions that she can't answer, she can bring those to me
3 as well.

4 (Discussions between counsel held off the record)

5 IN OPEN COURT, ON THE RECORD:

6 THE COURT: Okay. Apparently, ACE and the Liquidator are
7 disagreeing as to whether the affiant, the JPL, who was
8 the affiant in support of the agreement, has to share
9 documents, documents that he shared among members of his
10 firm, and I wrote an order that said, yes, so long as
11 those documents comply with or are within the scope of the
12 discovery guideline that I gave you earlier.

13 What's the problem, Mr. Leslie?

14 MR. LESLIE: Your Honor, we wanted to confirm the Court's
15 intention on this issue. Gareth Hughes is the Joint --
16 the Lead Joint Provisional Liquidator. His hourly rate
17 exceeds \$1,000 an hour. It's literally impossible for
18 him, as one person, to deal with all the legal issues in
19 this proceeding.

20 The Home liquidation, the U.K. proceeding, are
21 judicial proceedings; they are not corporations.
22 Everything we do relates to this proceeding here or in the
23 U.K. The effect of the Court's order is to eliminate a

1 privilege as to any communication from counsel which Mr.
2 Hughes shares with any other member of his staff. It's
3 equivalent to, and I'm concerned about its impact on Roger
4 Sevigny sharing my advice with Alex Feldvebel. It's
5 impossible for Commissioner Sevigny to personally
6 supervise The Home's proceeding and to, by himself, accept
7 legal advice, evaluate that legal advice and act on that
8 legal advice without consulting with his staff.

9 So, too, it is impossible for Mr. Hughes to
10 fulfill his functions if he must personally perform every
11 function that involves any legal issue. Mr. Steinberg,
12 his counsel, is present from Clifford Chance. The effect
13 of this order is to cause a waiver, as is the case with
14 some of these documents. Mr. Steinberg gave advice to Mr.
15 Hughes, which he then shared with his right-hand person,
16 Sarah Ellis, which is akin to Mr. Feldvebel --

17 THE COURT: Well, I had previously said to you that the ACE
18 Companies are entitled to production of all non-privileged
19 documents and information relied upon in developing his
20 affidavit.

21 MR. VAN TOL: Your Honor, may I add just one point? This is,
22 as I take it, effectively, a motion for reconsideration.
23 The standard for that is, as you're well aware of, is have

1 you overlooked anything in the pleadings. Mr. Leslie
2 didn't even bother to identify one, and your order says,
3 "based upon the pleadings..."

4 THE COURT: I read the pleadings yesterday.

5 MR. VAN TOL: So, there's nothing. If Mr. Leslie does not like
6 the consequences, your Honor, I respectfully submit he
7 should go appeal your order, rather than burdening the
8 Court right now, because we want to get through this day.

9 THE COURT: No. We are here to resolve this today.

10 I still don't understand what your problem is,
11 Mr. Leslie.

12 MR. LESLIE: Your Honor, my concern with the order is, it's an
13 order of the Court supervising The Home liquidation that
14 construes the attorney-client privilege as being waived in
15 an instance in which either the judicial appointee, the
16 Liquidator, the Special Deputy Liquidator, or in an
17 English proceeding, the Joint Provisional Liquidator,
18 shares privileged information with someone on his staff.

19 THE COURT: I'll read it one more time, okay? "ACE Companies
20 are entitled to production of all nonprivileged documents
21 and information relied upon in developing the affidavits
22 by Gareth Howard Hughes."

23 MR. LESLIE: Your Honor, I'm referring to the order that the

1 Court most recently entered, that, based upon the
2 pleadings, the Court finds that the documents shared need
3 to be -- that the issue, as presented, was the issue of
4 the applicability of whether the privilege was waived as
5 to the subject documents.

6 THE COURT: Right. I said they are discoverable, so long as
7 these documents are relevant, as provided in the Court's
8 "Guidance Regarding the Scope of Discovery".

9 MR. VAN TOL: Your Honor, as you know, this is a very narrow
10 order. It is not going to have the consequences that Mr.
11 Leslie says. If JPL's in the future don't want to effect
12 a waiver by sharing privileged documents, they should get
13 their whole staff appointed. That's point one.

14 Point two, we are not trying at all to interfere
15 with Mr. Hughes' ability to consult with his staff. We
16 acknowledge that. What he cannot do is take a privileged
17 communication between himself and his lawyer and share it
18 with a third party. If he does, it's a waiver, and you so
19 found.

20 THE COURT: Look, here's what I'm saying. I'm not even saying
21 whether he's waived or not. If there's a document in
22 there that he relied upon in forming his affidavit, then
23 it's discoverable, okay?

1 MR. LESLIE: Yes, your Honor.

2 THE COURT: That's what it says.

3 MR. LESLIE: That, we, of course, are quite comfortable with.

4 I think the issue here is whether the Court's most recent
5 order was intended -- as I have just heard the Court
6 explain it, it was not intended as a ruling on the waiver
7 question, but it is an order that directs the Liquidator
8 and the Joint Provisional Liquidator to produce documents
9 that were utilized by the JPL in putting together the
10 affidavit --

11 THE COURT: Yes, correct.

12 MR. LESLIE: -- and that are not, otherwise, privileged.

13 MR. VAN TOL: Well, your Honor --

14 THE COURT: Well, no. Any document -- I don't say it's
15 privileged, therefore -- I mean, if he relied upon those
16 documents, if it's a document he relied on, then he
17 produces it, it's discoverable. I'm not even going to
18 whether he has waived it. If there was a waiver or not,
19 and if there is a privilege, it's overcome, okay?

20 MR. LESLIE: To the extent he relied on it for purposes of the
21 affidavit.

22 THE COURT: Exactly. Is everything clear?

23 MR. LEE: Yes, your Honor. I just wanted to clarify that that

1 relates to the documents that are encompassed by Appendix
2 4, and what we don't want to see is the Liquidator posture
3 with those documents and decide which ones they do or
4 don't want to produce. Our view is that all of those
5 documents are relevant. They were all identified as being
6 responsive to the document requests of the ACE Companies,
7 and they are not privileged ipso facto. They are relevant
8 to the issues before the Court.

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

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

18 THE COURT: Relied upon, exactly.

19 MR. LESLIE: Okay.

20 THE COURT: Exactly, exactly.

21 MR. LEE: Thank you, your Honor.

22 MR. LESLIE: Thank you, your Honor.

23 (Discussion between counsel held off the record)

1 (Lunch recess taken)

2 IN OPEN COURT, ON THE RECORD:

3 THE COURT: All right. This is an issue with Equitas. Mr.
4 Honigberg.

5 MR. HONIGBERG: Mr. Gordon will be representing for Equitas.

6 THE COURT: Mr. Gordon.

7 MR. GORDON: Thank you, your Honor. This is a prefatory
8 remark. I understand that we are trying to reach a
9 voluntary agreement.

10 THE COURT: Yes.

11 MR. GORDON: And that participation -- this isn't waiving our
12 jurisdictional points.

13 THE COURT: Well, I guess I'm not addressing that today, to the
14 extent that I'm just wondering what other context will it
15 come up in.

16 MR. GORDON: My only concern is that there were cases cited in
17 ACE's motion that seem to suggest that if a party starts
18 addressing issues beyond the jurisdictional issue, then
19 they've waived it. I don't want to be in the possession
20 of having waived it by participating in this process.

21 THE COURT: Well, I guess I would say, in that regard, that
22 you're in the same -- I would consider that you're in the
23 same position as you were before we started the hearing

1 today. ACE was making those arguments, I suppose they
2 will continue to, and, for the record, you haven't waived
3 your jurisdictional arguments.

4 MR. GORDON: Let me just address this issue, then, in terms of
5 the guidance. What we are talking about are internal
6 documents within Equitas that reflect Equitas's
7 consideration of alternatives to the agreement with the
8 Liquidator. The affidavit merely recites the fact that,
9 prior to reaching the agreement, Equitas considered
10 alternatives. Now, the affidavit doesn't discuss what
11 Equitas's evaluation was of those alternatives. It
12 doesn't reveal any legal advice that they may have
13 obtained with respect to those alternatives. It merely
14 states the fact that alternatives were considered.

15 On top of that, none of those documents that
16 might reflect the evaluation or might reflect the legal
17 advice were actually reviewed by Mr. Williams when he
18 prepared the affidavit. He did not rely upon them, in my
19 understanding of that term, he didn't review them. He
20 merely made a statement of fact based on his own
21 recollection of what he did.

22 I find it difficult to think that that mere
23 assertion of fact would open up the door to ACE's right to

1 get all of the underlying documents that might reflect
2 legal advice or the actual consideration of alternatives
3 which we would claim as privileged, in any event.

4 THE COURT: Well, he said in his affidavit that he considered
5 alternatives. If he relied on any documents in that, then
6 they are to be produced. If he didn't, and it was just,
7 you know, he mulled it over in his mind and that's the
8 extent that he considered alternatives, then I guess he
9 can explain that in his deposition.

10 MR. GORDON: When you say relied upon, you mean relied upon in
11 procuring the affidavit?

12 THE COURT: Yes.

13 MR. GORDON: So, if Equitas got legal advice on one of these
14 alternatives, and it's in a document, I take it, your
15 Honor is not suggesting that we have to turn over that
16 legal advice, merely because Mr. Williams said that he
17 considered an alternative.

18 THE COURT: Yes, I am suggesting that.

19 MR. GORDON: That that would have to be turned over?

20 THE COURT: Yes. Any documents that he relied on in saying
21 that he considered alternatives and rejected those
22 alternatives, presumably.

23 MR. GORDON: Well, it doesn't say that. It says, if the

1 agreement is not reached, we are going to take up the
2 alternatives again.

3 THE COURT: Okay. But at that point, he's rejected the
4 alternatives and is saying that this agreement is the
5 better course.

6 MR. GORDON: These are documents and evaluations that were
7 never shared with the Liquidator. The Liquidator,
8 presumably, did his own evaluation of these issues. And
9 in terms of relevancy, Equitas's internal-evaluation
10 analysis won't ever be relevant to the Liquidator's
11 analysis in determining whether to enter into the
12 agreement, for example, whether there could be a
13 cut-through arrangement. Equitas did its own analysis,
14 hypothetically, of that issue, the Liquidators did their
15 analysis, and each party's determination of whether to
16 enter into the agreement, they balanced their ability
17 based on advice they received or whatever, cost benefits,
18 whatever, on that issue, and we had our internal analysis
19 of that issue, the Liquidator had their internal analysis,
20 they relied on theirs, they never saw ours, because it's
21 privileged.

22 THE COURT: But the reason that I ordered any documents relied
23 on, the affidavits were submitted by the Liquidator in

1 support of the agreement, and to that extent, you're
2 asking the Court -- you, the Liquidators, asked the Court
3 also to rely on those affidavits, and I think ACE is
4 entitled to explore what exactly it is as far as
5 alternatives and what exactly you relied on.

6 MR. GORDON: Are they entitled to know our evaluation of those
7 alternatives which is not reflected in the affidavit? In
8 other words, the affidavit just says we considered
9 alternatives. It doesn't say where we came out on it.

10 THE COURT: Well, certainly --

11 MR. GORDON: I don't see how you can parse the documents.

12 THE COURT: I say, certainly, the implication is that this is
13 better than the alternatives considered. I mean, that
14 would be the inference you would want the Court to draw
15 from that, or the Liquidator would want the Court to draw
16 and, apparently, that the affiant would want the Court to
17 draw.

18 MR. GORDON: What about in terms of offer of proof, which I
19 think merely restates now that we told the Liquidators we
20 were considering these issues, which is slightly
21 different? Because it seems to me that all that's really
22 relevant to the fairness of it is what was in the
23 Liquidator's mind and the two parties that are on the

1 opposite side of the negotiations table.

2 THE COURT: Okay. I didn't bring the affidavit out with me.

3 Why don't you give it to the bailiff and let him give it
4 to me and let me see it.

5 (Document handed to the Court)

6 MR. GORDON: Parties assert positions in negotiations all the
7 time, and the other side has to do their own evaluation of
8 risk.

9 THE COURT: Well, I don't see here where it says that you just
10 told the Liquidator that.

11 MR. GORDON: That's in the offer of proof, which I believe,
12 essentially, supersedes these affidavits.

13 THE COURT: Oh, the offer of proof from the Liquidator?

14 MR. GORDON: Right. When you focus on the relevancy issue,
15 it's really what's going on in the Liquidator's mind. The
16 party on the other side of the table is taking positions.
17 You know, if we don't reach agreement with you, we're
18 going to do X, Y and Z. The Liquidator says, You can't do
19 that; it's illegal. Well, we don't agree. It's part of
20 give and take of negotiation.

21 And just as we are not entitled to the
22 Liquidator's analysis of those issues when we are
23 negotiating, ACE has probably done their own analysis of

1 these issues. They are not willing to give us their
2 privileged memos analyzing these kind of issues, and
3 there's no reason why either side -- I'm not just talking
4 about ACE. There is no reason why the Liquidator should
5 have access to our internal analysis of issues that we
6 have negotiated.

7 THE COURT: Well, let me hear from Mr. Lee.

8 MR. LEE: As I understand it, your Honor, and I think this is
9 quite remarkable, the facts as they were before the Court
10 when the original motion was made are, apparently, no
11 longer the facts today at trial. That's the most
12 remarkable concession I think I've ever heard. Your Honor
13 is considering whether or not to approve the agreement
14 that was filed as part of the motion, and that is our
15 starting point and that is our finishing point, and if the
16 Liquidator wants to prove some of those facts but not all
17 of those facts, I guess that's the Liquidator's business.
18 But I just find that an absolutely remarkable statement.

19 It is part of our case, and will be part of our
20 case, and has been part of our case from the day we filed
21 our first pleadings, that the critical issue, one of the
22 critical issues is whether or not there was a credible
23 threat of any of these things. We believe that Equitas,

1 which is the biggest claimant in this entire estate, who
2 filed a proof of claim for \$123,000,000, is a very
3 financially interested party in these proceedings.
4 Whether or not they considered that threat -- sorry.
5 Whether or not that threat was indeed credible is
6 absolutely critical to our ability to try this case, and I
7 think it's equally critical to this Court's ability to
8 assess, as a quasi inquisitor, the role that Equitas
9 played here in their negotiations with the Liquidator.

10 MR. GORDON: If I could respond?

11 THE COURT: Wait one second. So, if Equitas simply said to the
12 Liquidator, we've looked at alternatives, like cut-through
13 arrangements and so forth, and we think this is the best
14 way to go, if that's all that the Liquidator knew at the
15 time as far as what Equitas knew about alternatives, why
16 would you, then, be entitled to the underlying documents,
17 then?

18 MR. LEE: I'm not entirely sure that's actually the case, your
19 Honor. I think that there are a number of negotiations --

20 THE COURT: Well, let's just say hypotheticalaly.

21 MR. LEE: Hypothetically, if that was the only conversation
22 during negotiations between the Liquidator and Equitas,
23 was, We considered these issues, and that's all it took

1 for the Liquidator to enter into this agreement, I would
2 be very happy to hear that at trial, your Honor, because
3 that, effectively, negates any prospect whatsoever that
4 anybody's going to be able to demonstrate that this was a
5 fair and reasonable agreement, if that's the sole
6 conversation that takes place. Then, effectively, they've
7 set up a straw man with ring fencing.

8 THE COURT: Well, let me ask the Liquidator. Are you prepared
9 to answer that question, Mr. Leslie, as to what you knew
10 about what alternatives Equitas had pursued or looked
11 into?

12 MR. LESLIE: Your Honor, I think the fact that matters is that
13 Equitas told the Liquidator what it would do, and we
14 believed it. What process Equitas went through in coming
15 to that position --

16 THE COURT: Well, I guess what I'm asking about is, did Equitas
17 tell the Liquidator any more than, We've looked at
18 alternatives, these three alternatives, and we think this
19 is a better way to go, this agreement?

20 MR. LESLIE: And what Mr. Gordon is alluding to is what we've
21 outlined in our offer of proof. What Equitas told us, and
22 told us in the presence of the other members of the
23 Informal Creditors Committee and in direct communications

1 with representatives of the Liquidator and Joint
2 Provisional Liquidator, was that they would not pursue a
3 proof of claim beyond their offset rights, because it
4 wasn't in their economic interests to do so. We then
5 evaluated that and made judgments about what options were
6 available to us, which ultimately led us to the
7 negotiation of the settlement agreement. The settlement
8 agreement itself was then the subject, I would argue, of
9 that first round of analysis that goes to the question of
10 necessity. Equitas is one piece of the puzzle. ACE is
11 another important piece of the puzzle. Unionamerica,
12 Aggripina, Zurich, all of those issues coming together
13 formed the Liquidator's judgment that a settlement was
14 necessary.

15 The fairness and reasonableness questions, I
16 would maintain, are to be evaluated within the context of
17 the negotiations themselves and an evaluation of the
18 overall settlement as to whether it's fair and reasonable
19 from the perspective not of ACE and Benjamin Moore but
20 from the perspective of policyholders and creditors of the
21 company, and I believe that's the role of the Court, to
22 independently and rigorously examine the settlement as
23 fair and reasonable from the perspective of those

1 creditors.

2 So, Equitas's communications with the Liquidator
3 in this regard, Mr. Williams, as a leading member of the
4 Informal Creditor's Committee at the first meeting, as is
5 outlined in our offer of proof, made a specific statement
6 about, which we viewed to be self-evident, and we don't
7 think this requires a Nobel Laureate's expert opinion,
8 folks do not spend money unless it's in their economic
9 interest to do so, and he said, I don't understand why we
10 would prosecute a claim beyond our offset rights if there
11 isn't an economic incentive for us to do that. He was not
12 alone. That's the fact. Now, what ACE wants to do is,
13 they want to evaluate the bonafides of that position, and
14 that's where I think we go off track.

15 THE COURT: Well, the reason this comes up is because of the
16 fact that, in the affidavit that the Liquidator submitted
17 to the Court in support of the agreement, in that
18 affidavit Equitas makes this representation that it
19 considered other alternatives, it sets forth the three
20 alternatives that it considered and then decided that this
21 agreement, apparently, was in the best interest of
22 Equitas.

23 I guess one thing I'm thinking of, Mr. Lee, is

1 for you to go ahead and do your depositions and find out
2 what exactly was conveyed to the Liquidator, any documents
3 that Equitas had that were given to the Liquidator, and
4 then, as you said, if the Liquidator knew none of this,
5 inquired no further, then you'll make the argument that
6 that in and of itself is not reasonable and so forth, and
7 if they did, then if Equitas did give over documents or
8 did discuss specifically what it was that they had
9 considered and why they rejected these alternatives, then
10 they need to provide those documents.

11 MR. LEE: Your Honor, we've just added a number of depositions
12 to the schedule, and the time is going to be very tight.
13 Mr. Williams, who's going to appear in front of this
14 Court, is going to have his credibility tested by this
15 Court as a finder of fact. I think that it's important
16 for us to have the opportunity to test that, and it seems
17 to me that if Equitas had concluded that none of these
18 were credible or viable alternatives, that that's
19 something that we would be entitled to explore, and I
20 think the documents will bear directly on that issue, and
21 for us to go into a deposition, effectively, only to find
22 that out, and then for your Honor to revert to the ruling
23 that I think we had started with and then have to go back

1 to London and take another deposition, is not a good use
2 of anybody's time.

3 THE COURT: Well, there is that issue, too, as to the testing
4 the credibility of the affiant as well.

5 MR. GORDON: Just for the record, all documents that we gave to
6 the Liquidator we've produced. We've produced all
7 communications. There are minutes of these meetings with
8 the Liquidator of what was said; it's all written down.
9 What they are trying to get is Equitas's analysis of
10 issues. And, really, just so it's clear, these
11 alternatives are not alternatives that Equitas would
12 pursue with the Liquidator. These are threats to the
13 Liquidator. We have this alternative, this alternative
14 and that alternative, and even if we decided these
15 alternatives weren't very fruitfull, it's really not
16 relevant. What's relevant is the Liquidator's evaluation
17 of those alternatives and whether the Liquidator thought
18 they were credible threats, because that's the way
19 negotiations work.

20 THE COURT: Well, you know what? There was an affidavit filed
21 with the Court that made certain representations.

22 MR. GORDON: Certainly, that we considered alternatives.

23 THE COURT: Now, the affiant is going to be questioned about

1 what -- going to be questioned about the statement in
2 there, and he's going to have to provide the documents
3 that he relied on in making those statements, if any, and
4 at deposition, he will be asked, if there are no
5 documents, well, what are you talking about here, and I
6 think that it is relevant. It's certainly relevant to his
7 credibility, and I think it's relevant to the ultimate
8 issues in the case. So, that's going to be the Court's
9 ruling. I'll make up an order, if you want.

10 MR. LEE: Could I just clarify one thing in relation to
11 Equitas? We are moving quickly, I know. The second part
12 of the Court's ruling was, if the affiant relied on
13 documents that were shared with the other AFIA cedents,
14 they are also discoverable, as I understood it. I just
15 want to make sure that that's covered.

16 THE COURT: Well, to the extent that Mr. -- what's his name --
17 the affiant here, relied on such a document, yes, they are
18 discoverable.

19 MR. LEE: Thank you, your Honor.

20 MR. SERELL: Just one thing, briefly, your Honor. I just
21 confirmed with counsel for ACE that the same issue that
22 they have with Equitas, the same documents they want from
23 Equitas, they are also receiving from my client Zurich, so

1 just to save the Court time, I will just adopt all the
2 arguments that Attorney Gordon just made and state, for
3 the record, that my client takes the same position, that
4 the fact that we produced an affidavit that said we were
5 considering alternatives in our view does not open up full
6 discovery as to internal documents concerning substance of
7 those considerations, and by making that statement, I'm
8 also not -- I understand the Court recognizes that I'm not
9 waiving our jurisdictional defense. Thank you.

10 THE COURT: Okay. Now, as I understand it, what you'd like to
11 do is come back and put on the record, after you've
12 finished ironing out the discovery disputes, you want to
13 come back and put on the record what you have accomplished
14 today.

15 MR. LEE: I think we've, actually, covered all of our discovery
16 disputes.

17 MR. LESLIE: Why don't I just summarize.

18 THE COURT: All right. Why don't you go ahead and put it on
19 the record, and I'll have it typed up and have you sign it
20 before you go today.

21 MR. LEE: And if your Honor could do the last two paragraphs
22 which relate to Equitas and Zurich.

23 MR. LESLIE: Your Honor, I'm not sure that Equitas and Zurich

1 are going to voluntarily agree to those last two points,
2 so we'll leave those aside.

3 THE COURT: Right.

4 MR. LESLIE: As to the Liquidator, and as to the Joint
5 Provisional Liquidator, and as to Benjamin Moore and ACE,
6 let me offer the following, and also as to Unionamerica.

7 MR. LEE: Yes.

8 MR. LESLIE: The Liquidator will provide Appendeces 2, 3 and 5
9 for in camera review tomorrow.

10 THE COURT: Wait a minute. What do you mean "in camera
11 review"? What's this about, now?

12 MR. LESLIE: Both ACE and the Liquidator, in their motion to
13 compel and in our response, proposed that the Court review
14 these documents to determine if, in fact, they constitute
15 whether there was -- whether they are attorney-client
16 privileged documents or not.

17 THE COURT: Well, you know, one thing, I leave tomorrow morning
18 at 5:30, and I go to Russia. I'm not back until the 26th
19 of May. So, I don't see how I could do that. Second of
20 all, what is it that you want me to determine, just
21 attorney-client privilege?

22 MR. LESLIE: Yes, your Honor.

23 THE COURT: I still won't know whether it's overcome -- if

1 there is the privilege, is it overcome by other factors.

2 MR. LESLIE: Your Honor, there's no disagreement with ACE and
3 Benjamin Moore about this issue. If these documents are
4 deemed to be attorney-client privileged, then they're
5 privileged.

6 THE COURT: Well, the only thing I can think of to do is to ask
7 the Referee to look at them, in the first instance, and
8 make a recommendation to the Court, but I'm really not
9 comfortable with that at all, because aren't there a
10 couple of documents that are representative of the types
11 of documents that are in the file, so that you could even
12 argue to me and let me know the circumstances of it? It's
13 very difficult to go through documents like that and sort
14 them out.

15 MR. LESLIE: Right. We've outlined in our papers where these
16 documents fall, as far as types are concerned.
17 Essentially, there are several categories. Some of them
18 are communications in which a lawyer was not the
19 recipient, a nonlawyer sent as communication to a
20 nonlawyer, but a portion of that communication was
21 redacted, we say, because that nonlawyer was conveying to
22 the other nonlawyer the legal advice, a particular element
23 of legal advice. David Leslie said X, Y, Z about this.

1 Will you please look into this question, for example. ACE
2 doesn't know whether we redacted that properly or not.
3 We, of course, believe we did.

4 We believe that is still privileged
5 communication, even though it's being conveyed between two
6 members of the organization, and, so, that's an example of
7 a nonlawyer-to-nonlawyer communication that we believe is
8 privileged and ACE questions, and, so, while that's a
9 category, it isn't feasible for the Court to rule on it.
10 It's dependent upon an actual looking at the document.

11 THE COURT: Well, when do you need an order on these?

12 MR. VAN TOL: Well, your Honor, we have Mr. Bengelsdorf's
13 deposition coming up on the 24th of May. I'm not sure off
14 the top of my head to what extent the documents are
15 involved with Mr. Bengelsdorf, but it would be nice to
16 have those in hand, if they are not privileged, before his
17 deposition.

18 MR. LESLIE: I would suggest that, to the extent, after review,
19 it's deemed that these documents ought to be produced to
20 ACE, and if that requires further examination of Mr.
21 Bengelsdorf, we'll make him available for further
22 deposition. The deposition schedule is such that Mr.
23 Bengelsdorf is first on May the 24th. Then, as things

1 presently stand, Rhydian Williams is scheduled for
2 deposition on the 3rd of June.

3 THE COURT: Will these documents only be relevant for Mr.
4 Bengelsdorf's deposition?

5 MR. LESLIE: I believe so, yes, and Mr. Williams'.

6 MR. VAN TOL: And Mr. Williams'. Your Honor, there's two
7 possibilities. One, we are willing to accept that review
8 of the documents and the recommendation of the Referee.
9 Secondly, if your Honor would like to have the Referee
10 present at the depositions to rule on any attorney-client
11 issues that come up, we're willing to go down that road as
12 well. We're just trying to move things along, your Honor.

13 THE COURT: Yeah, yeah. You really need to.

14 MR. LESLIE: I'm sorry, your Honor. Mr. Smith was talking to
15 me.

16 THE COURT: Did you hear the suggestion of counsel?

17 MR. LESLIE: I apologize.

18 MR. VAN TOL: My suggestion, Mr. Leslie, was to have -- we
19 would accept a recommendation of the Referee on privilege
20 issues or, as an alternative, or in addition, have the
21 Referee either present at the deposition to make rulings
22 on attorney-client issues or be available by phone.

23 MR. LESLIE: That would be acceptable to us.

1 THE COURT: All right. We'll work that out, then. Can you do
2 that, Attorney Rogers?

3 MS. ROGERS: Yes, as long as, you know, I have some idea of
4 what the schedule is and how quickly the documents will be
5 turned over.

6 MR. LESLIE: The documents will be delivered tomorrow morning,
7 unless you prefer to have them first reviewed. I would
8 assume it would be advantageous to deliver them as soon as
9 possible.

10 MS. ROGERS: The sooner the better, and I do have the
11 deposition schedule. Yup, that's fine.

12 THE COURT: So, you can discuss that afterwards, and that will
13 solve that problem.

14 MR. LESLIE: We will deliver the documents tomorrow.

15 MR. VAN TOL: Yes, your Honor.

16 THE COURT: Okay. Take it from tomorrow, then.

17 MR. LESLIE: There were also disputes over Appendix 4
18 documents. The Liquidator will review the Appendix 4
19 documents to identify any that were relied upon in
20 developing the affidavits and, if so, they will be
21 produced. As to Benjamin Moore, the Liquidator will
22 supplement answers to the interrogatories, as we
23 discussed, and we have a general understanding of what we

1 need to do.

2 As to Interrogatories 3, 4, 5, 7 and 8, we will
3 provide a list of inwards reinsurance proof of claims to
4 Benjamin Moore and ACE, and we'll produce proofs of claim
5 where Home did not cede to risk to the reinsurer, and
6 Benjamin Moore's agreed to drop Interrogatory Number 6,
7 which related to legal fees and the like. Correct?

8 MR. BOUFFARD: That's correct.

9 MR. LESLIE: Thank you. As to the Joint Provisional
10 Liquidator, the Joint Provisional Liquidator will confirm
11 in writing that the scope of production made by the Joint
12 Provisional Liquidator is congruent with the Liquidator's
13 production, and, 2, that privileged documents were not
14 withheld from that production to the Liquidator, which is,
15 in fact, the case. The Joint Provisional Liquidator will
16 identify any documents relied upon in developing the
17 Hughes affidavit and will supplement production
18 appropriately.

19 THE COURT: Okay.

20 MR. VAN TOL: Your Honor, if I may, just for the benefit of the
21 Court and Ms. Rogers, some of the documents in Appendix 2,
22 I know, and Appendix 5 were shared with Ernst & Young, and
23 I believe we have a ruling from your Honor on that issue,

1 so that we would respectfully submit that that should be
2 factored in the analysis of whether or not these documents
3 are privileged; not just whether they constitute
4 attorney-client privilege in the first instance, but
5 whether that privilege was somehow overcome or waived by
6 sharing it with Ernst & Young.

7 MR. LESLIE: I believe the Court has ruled that, to the extent
8 that document was relied upon in the affidavit, the
9 privilege was waived but not otherwise waived.

10 MR. VAN TOL: I make that comment subject to everything else
11 that's happened today.

12 THE COURT: I'll try to make an order that encompasses all of
13 these issues, including Equitas's and Zurich's position
14 that they haven't waived jurisdiction, and that I agree
15 with that and so forth.

16 MR. GORDON: Your Honor, are you ordering the production? I
17 understood you to say that it would be voluntary. I
18 understand if we have documents that we don't want to
19 produce, it might go to his credibility, but I don't
20 understand that we are going to be subject to any kind of
21 compulsion.

22 THE COURT: Well, we are kind of in an awkward situation here.
23 I wanted you to voluntarily turn over certain documents

1 and avoid this whole jurisdictional issue, particularly
2 where you were volunteering to turn over some documents.
3 I guess, without deciding the jurisdictional issue, I
4 can't really order you to do that.

5 MR. GORDON: Because I'm really in a difficult position,
6 because if I have a legal-advice document, if this
7 agreement falls apart, we may be pursuing these
8 alternatives, and you've ordered me to produce my work
9 product on these alternatives, and I can't do that.

10 THE COURT: I don't really think I can. Since you're not a
11 party to the proceedings, and I have not decided the
12 jurisdictional issues, I guess I can't really do that.

13 MR. LEE: Your Honor, there is a sanction for the failure to do
14 this voluntarily. In other words, if your Honor has
15 decided that these are the documents that they are
16 required to produce and they don't produce them, the
17 sanction is to strike the affidavit.

18 THE COURT: Well, that might be, when we come to the final
19 hearing, that the affidavit will be stricken or, you know,
20 any reliance on that will be stricken.

21 MR. LEE: We could forego deposing Mr. Williams, if they're not
22 going to voluntarily produce these documents, because, as
23 a practical matter, we will effectively have no

1 opportunity to test his credibility. If they have not
2 produced any documents, there will be no evidence in front
3 of the Court.

4 THE COURT: Well, I guess you've heard what I think.

5 MR. LEE: Yes, your Honor.

6 THE COURT: That what I think, that if they were subject to the
7 jurisdiction of the Court, what I would order. I haven't
8 made a ruling on that and, frankly, it's kind of late in
9 the day, and I'm probably not going to, so, that if
10 Equitas or Zurich, right, Mr. Serell --

11 MR. SERELL: Yes, your Honor.

12 THE COURT: -- don't turn over the documents, then, certainly,
13 the Liquidator is in the situation where, since the
14 Liquidator is the one who said that, you know, I mean,
15 we're relying on that document and gave it to the Court
16 in support of the agreement, then I guess then it would be
17 stricken.

18 MR. LEE: Thank you, your Honor.

19 THE COURT: Okay.

20 MR. LaGORY: Your Honor, if I may address the Court? It's my
21 understanding that nonparty Unionamerica Insurance Company
22 Limited shall not be required to produce documents
23 requested in the ACE Companies' first request for the

1 production of documents.

2 THE COURT: I don't know. Was there some agreement on that?

3 MR. LESLIE: There was, your Honor.

4 MR. LEE: Yes, your Honor.

5 MR. LaGORY: Thank you.

6 (End of proceedings/End of transcript)

7

8 C E R T I F I C A T E

9 I, Brenda K. Hancock, Certified Court Reporter of the
10 State of New Hampshire and Official Court Reporter for the
11 within proceedings, do hereby certify that the foregoing
12 transcript is a true and accurate record of my
13 stenographic notes to the best of my ability, skill,
14 knowledge and belief.

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Dated: 5/24/05

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Brenda K. Hancock
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Official Court Reporter
New Hampshire Superior Court

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