

THE STATE OF NEW HAMPSHIRE

MERRIMACK,SS.

2005 MAR 18 A 11: 46
SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

NH SUPERIOR COURT
MERRIMACK COUNTY
CONCORD, NH

**EQUITAS LIMITED'S OBJECTION TO THE ACE COMPANIES'
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

NOW COMES Equitas Limited ("Equitas"), appearing specially, for the limited purpose of opposing the Ace Companies' motion to compel production of documents by Equitas, a non-party to this proceeding, on the grounds that Equitas has never been served with a subpoena for the requested documents and Equitas has not waived service. Moreover, the motion to compel has not been properly served upon Equitas. Accordingly, the motion to compel is jurisdictionally baseless and must be denied.

Equitas reserves the right to oppose the requested discovery on the further grounds that: (i) the documents sought are not relevant to an evaluation of the "necessity, reasonableness, and fairness" of the compromise agreement between the Joint Provisional Liquidators and the AFIA Cedents (the "Agreement");¹ (ii) the documents sought are privileged; (iii) production would be oppressive; and (iv) Ace is estopped from seeking certain documents.²

BACKGROUND

1. On February 22, 2004, the Liquidator filed a motion seeking this Court's review and approval of the Agreement. Ace intervened and objected to the Agreement.

¹ Equitas is the run-off manager of certain of the AFIA Cedents referred to as "Certain Underwriters at Lloyds, London."

² To avoid any argument by Ace that Equitas has waived service, Equitas does not seek a ruling on the alternative grounds at this time. See Ace's Motion to Compel (hereinafter "Ace Motion") at 4 n.2, citing *Druding v. Allen*, 122 N.H. 823 (1982); *Lyford v. Trustees of Berwick Academy*, 97 N.H. 167 (1951). If properly called upon, Equitas will fully brief these grounds at an appropriate time.

2. Ace's objection to the Agreement essentially raised two issues: whether the Liquidator had statutory authority to enter the Agreement, and whether the Liquidator "abused his discretion in endorsing the agreement, i.e., whether the agreement was reasonable." See Order on Remand, October 18, 2004, at 2-3. The Court permitted Ace to conduct discovery over the latter issue -- "limited to the necessity, reasonableness, and fairness" of the Agreement. *Id.* at 13-14.

3. On November 8, 2004, Ace mailed to Equitas, in England, a "First Request for Production of Documents" seeking *sixty-two* categories and sub-categories of documents. The request purportedly was made under the authority of Rule 35 of the Superior Court and the Order Establishing Procedures Regarding Claims Filed with the Home Insurance Company entered on December 19, 2003 (the "Claims Procedures Order"). Many of the requests on their face have nothing to do with the Agreement or its "necessity, reasonableness, and fairness." Request No. 43 even asked for all documents "regarding your view of the scope of discovery under the procedures established by" the Claims Procedures Order! Ace Motion, Exhibit C at 16.

4. On December 28, 2004, Equitas, through counsel, sent Ace a letter questioning the validity of the document request to the extent it purported to impose any obligation upon Equitas to respond. See Ace Motion, Exhibit D. The letter further stated that the requests were extremely overbroad and well beyond the scope of authorized discovery. Nevertheless, Equitas proposed a voluntary production of documents reflecting communications with the Liquidators and Joint Provisional Liquidators concerning the Agreement and certain other requested topics identified in paragraph 2 of the letter. The letter expressly stated that Equitas' proposal should not be construed as a consent to jurisdiction or as a waiver of any objection to the request, including objections to the validity of the request, the manner and effectiveness of service, and the scope of the request. *Id.*

5. In the same letter, Equitas also expressly advised Ace that it was not willing to produce documents reflecting internal communications or communications between or among the AFIA Cedents, because such documents are not relevant to an evaluation of the necessity,

reasonableness, or fairness of the Agreement and, in whole or in part, are privileged and confidential. ACE Motion, Exhibit D. In addition, in paragraph 4, Equitas stated that it would not produce documents concerning (i) the proof of claim filed in the proceeding; (ii) the quantification of contingent liabilities; (iii) claims against Home, the validity of such claims, or the reinsurance contracts giving rise to such claims; (iv) the commutation agreement; and (v) the set-off. *Id.*

6. On January 7, 2005, Ace agreed to Equitas' proposed voluntary production, including the limitations set forth in paragraph 4 of Equitas' December 28 letter, but not to the proposed limitation regarding internal communications and communications with other AFIA Cedents. Ace Motion, Exhibit E. Ace also reserved its rights.

7. On January 26, 2005, Equitas sought Ace's confirmation that its reservation of rights did not extend to paragraph 4 of the December 28 letter. Ace Motion, Exhibit F. Equitas also reiterated its position that: (i) internal communications and communications between and among the AFIA Cedents are irrelevant to an evaluation of the necessity, fairness and reasonableness of the Agreement;³ (ii) the documents sought are privileged work-product and, to

³ Equitas would demonstrate that an evaluation of the "necessity, reasonableness, and fairness" of the Agreement must be based upon the information that was available to the Liquidator and Joint Provisional Liquidator. As Ace recently acknowledged, the function of the court is to review "*the receiver's evaluation*" of the relevant factors. Ace Companies' Status Report and Proposed Schedule for Discovery and Evidentiary Hearing, filed March 3, 2005, citing *In re Liquidation of American Mut. Liab. Ins. Co.*, 632 N.E.2d 1209, 1216-17 (Mass. 1994) (emphasis added). The Court needs to be provided "with the information on which the receiver's decision to settle was based." *Id.* The Liquidator and Joint Provisional Liquidator did not have access to Equitas' internal communications or communications with other AFIA Cedents. Ace is not entitled to such communications either.

Ace argues that the documents "may shed light" on "the true purpose of the Proposed Agreement" and its impact upon various classes of creditors, Ace Motion at 3, but the purpose of the Agreement (to induce the AFIA Cedents to file claims) has never been disputed, even by Ace. Whether the Agreement was "necessary" to achieve that purpose turns upon an evaluation of the various risks by the Liquidator and Joint Provisional Liquidator. The impact of the Agreement upon other creditors can be determined from the Agreement itself and the Liquidator's evaluation of its necessity.

Nor do the subject document requests "track, line by line, the factual assertions made" in the Williams Affidavit. Ace Motion at 6. They do not "track" the Williams Affidavit at all. Ace's due process rights, if any, are protected by its opportunity to submit written comments and participate in oral argument regarding the propriety of the settlement. *American Mut. Liab. Ins. Co.*, 632 N.E.2d at 1217 n.12, citing *Matter of the Liquidation of Integrity Ins. Co.*, 240 N.J. Super. 480, 497-98, 573 A.2d 928 (1990).

the extent they include legal advice, attorney-client communications;⁴ and (iii) the disclosure of confidential thoughts regarding the negotiation would be oppressive.⁵

8. Following a further exchange of letters and e-mails, on January 27, Ace confirmed that its disagreement was limited to internal documents and communications with other AFIA Cedents regarding the subjects in paragraphs 1 and 2 of the December 28 letter. Ace Motion, Exhibits G & H.

9. On February 7, 2005, Equitas confirmed that it would produce documents in accordance with its December 28 letter and Ace confirmed that “we will have to agree to disagree” with respect to Equitas’ relevance and privilege issues. Ace Motion, Exhibit H.⁶

⁴ Ace contends that the work-product privilege is inapplicable because Equitas is a non-party. Ace Motion at 12. But the documents sought by Ace “were created when the event of litigation . . . was foreseeable enough that the documents were prepared in anticipation of litigation or of settlement.” *Western Trails, Inc. v. Camp Coast To Coast, Inc.*, 139 F.R.D. 4, 14-15 (D.D.C. 1994). Prior to and during negotiation of the Agreement there were disputes concerning the handling and payment of the AFIA Cedents’ claims, as well as threats of litigation. See Affidavit of Peter A. Bengelsdorf, Special Deputy Liquidator, In Support of Liquidator’s Motion for Approval of Agreement and Compromise With AFIA Cedents at ¶ 8. The documents reflect the sort of information “clearly immune from discovery under the work product doctrine.” *Nationwide Mutual Insurance Co., v. LaFarge Corporation*, 1994 U.S. Dist. LEXIS 3851 *29-30 (D. Md. 1994).

Ace’s reliance upon *Gomez v. City of Nashua, New Hampshire*, 126 F.R.D. 432, 434 n.2 (D.N.H. 1989), is misplaced. In *Gomez*, the State asserted work-product privilege over documents unrelated to any actual or threatened litigation against the State. Moreover, work-product prepared in connection with one threatened litigation is protected from discovery in subsequent litigations. See generally *F.T.C. v. Grolier Inc.*, 462 U.S. 19, 27 (1983); *Walsh v. Seaboard Surety Co.*, 184 F.R.D. 494, 497 (D.C. Conn. 1999).

Communications between the AFIA Cedents are also protected by a common-interest privilege. *Federal Deposit Insurance Corp. v. Nash*, 1998 U.S. Dist. LEXIS 23520 (D.N.H. 1998). Ace’s contention that the “common interest” privilege applies only to communications directed “solely” to an attorney or attorney representative mistakenly relies upon N.H. R. Evid. 502, which concerns the attorney-client privilege, not work-product.

⁵ The documents sought by Ace reflect thoughts and strategies of the AFIA Cedents regarding the negotiation, alternative means of recovery, and the validity of claims. The compelled disclosure of such documents would be oppressive particularly insofar as Ace is under no similar compulsion to produce its own documents concerning its potential exposure and liability with respect to such claims. Nor is the Liquidator entitled to the documents sought by Ace.

⁶ Equitas also properly declined Ace’s request to undertake the burden of preparing a privilege log, given that the documents sought are not relevant, nor have they been properly subpoenaed.

10. On March 2, 2005, Equitas voluntarily produced the documents identified in paragraphs 1 & 2 of its December 28 letter. The very next day, Ace filed its motion to compel. Ace delayed until March 3 even though, as reflected in Ace's Exhibit H, Ace has known of Equitas' position since no later than February 7.

11. Ace's motion seeks the production not only of internal communications and communications between and among the AFIA Cedents,⁷ but also of certain documents expressly within the scope of paragraph 4 of the December 28 letter – requests that Ace expressly waived as a condition to Equitas' voluntary production.⁸

12. Ace purported to “serve” the motion to compel upon Equitas by sending a copy to its counsel by e-mail. Neither Equitas nor its counsel is aware of any other attempts at service.

DISCUSSION

I. Ace's Motion to Compel Must Be Denied Because Equitas, A Non-Party, Has Never Been Subpoenaed or Otherwise Served.

13. Ace admits in its motion to compel (at 12) that Equitas is a non-party. Accordingly, Ace's attempt to obtain documents by mailing to Equitas a request for documents under the purported authority of Rule 35 and the Claims Procedures Order, as well as Ace's purported motion to compel, are legal nullities.

14. Nothing in Rule 35 even purports to authorize Ace to command the production of documents by Equitas without a subpoena. Nor does the Claims Procedures Order, which

⁷ Ace seeks to compel the production of documents in response to Requests 1, 2, 6, 7(d), 9(c), 10, 21(e) and 22. Requests 1, 2, 6, 7(d), 9(c) and 10 seek internal communications and communications with AFIA Cedents concerning the Agreement and its negotiation, alternative means of recovery under the AFIA Treaties, the potential “walling off” of UK assets, and the UK Scheme of Arrangement.

⁸ Requests 21(e) and 22, however, seek documents “concerning the validity of [Equitas' and any other AFIA Cedent's] claim(s) against Home,” fall squarely within paragraph 4 of the December 28 letter. Hence, the basis for Equitas' reserved “estoppel” defense.

governs “claims proceedings,” provide any authority whatsoever for discovery concerning the Agreement or Ace’s document request.⁹

15. Equitas cannot be compelled to produce documents at the request of Ace unless it has been duly subpoenaed. *Cf. Cheever v. Scott*, 38 N.H. 32 (1859) (“Before . . . a party would be bound to appear and testify as a witness before a commissioner, at the request of his adversary . . . , he must be properly summoned by competent authority.”). Ace has never sought to subpoena Equitas. Moreover, Equitas, located in England, is an out-of-state witness “beyond the subpoena powers of the State courts.” *Moore v. Conifer Corporation*, 130 N.H. 795, 800 (1988).

16. Ace could have sought to compel production under the Convention on Taking Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444, reprinted in 28 U.S.C.A. § 1781 (West Supp. 1995) (the “Hague Convention”). Ace chose not to do so.¹⁰

17. Ace’s suggestion that Equitas “appears to have waived its objections to the jurisdiction of the Court and service under the Hague Convention” by having volunteered to produce certain documents, is frivolous. Ace Motion at 4 n.2. Equitas expressly reserved all of its rights when it offered to produce documents voluntarily and Ace accepted that offer without ever asserting that such production would, in Ace’s view, constitute a waiver by Equitas of any of its objections. Nor has Ace cited any authority to support its argument of “waiver” by a partial voluntary production.

18. Nor did the submission of the Affidavit of Rhydian Williams obviate Ace’s need to procure a subpoena or letter of request (under the Hague Convention) if it wanted to compel a

⁹ Discovery under the Claims Procedures Order is available only with respect to a “Disputed Claim” (defined as a “claim which has been disallowed in whole or in part or classified as to priority by the Liquidator’s Notice of Determination.” Claims Procedures Order at 5, 16-17.

¹⁰ Ace’s requests likely are unenforceable under the Hague Convention. The United Kingdom will not enforce requests for pre-trial discovery, including any request for documents “other than particular documents specified in the Letter of Request.” Hague Convention, “Notification of [the United Kingdom] in Conformity with Article 22, under a and e, of the Convention.”

production of documents by Equitas. Because the Williams Affidavit did not change Equitas' admitted status as a non-party, did not constitute the submission of any question by Equitas to the Court, and did not constitute any other affirmative step by Equitas to avail itself of the Court's jurisdiction, Equitas did not waive service. See *Druding v. Allen*, 122 N.H. 823 (1982), and *Lyford v. Trustees of Berwick Academy*, 97 N.H. 167 (1951). Ace's reliance upon these cases (Ace Motion at 4 n.2) is entirely misplaced.

19. Equitas' alleged filing of a claim in the liquidation proceeding also did not excuse Ace from procuring a subpoena or letter of request for documents relating to the Agreement. By filing a claim, Equitas, at most, submitted itself to the process of allowance and disallowance of claims. *Sunshine Development, Inc. v. Federal Deposit Insurance Corporation*, 33 F.3d 106 (1st Cir. 1994). The discovery authorized by the Court with respect to the Agreement, and purportedly sought by Ace, has nothing to do with any claim proceeding.

20. Ace purports to reserve the right to "address in greater detail in [its] reply papers" Equitas' objections based upon the absence of proper service. Ace Motion at 4 n.2. The Court should not countenance such sandbagging by Ace. Based upon the prior correspondence, Ace clearly was on notice of Equitas' objections. If Ace has answers to those objections, it should have spelled them out in the motion. It should not, in fairness, be permitted to do so for the first time in a reply.

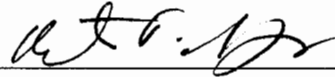
21. In sum, because Equitas has never been served with a subpoena, Ace's motion to compel must be denied. Cf. 4 R. Wiebusch, *New Hampshire Practice, Civil Practice and Procedure* § 27.06 (Matthew Bender & Co. 2004) ("When depositions are arranged by agreement, it is not necessary to serve a notice or subpoena upon parties or witnesses. The superior court generally takes the position, however, that Motions to Compel may not be filed in connection with depositions taken by agreement.").

22. As indicated at the outset, Equitas reserves the right to oppose the requested discovery on further grounds, including relevance, privilege, oppression, and estoppel, if and when it is properly called upon to do so.

WHEREFORE, Equitas respectfully requests that this Court enter an order:

- A. Denying the Ace Companies' motion to compel in its entirety;
- B. Awarding Equitas the fees (including attorney fees) and costs incurred in opposing the motion to compel; and
- C. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted,



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March 18, 2005

CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2005, a copy of this Objection was delivered by hand (if noted on the service list) or sent by first-class mail, postage prepaid, to those on the attached service list.



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