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' JUNE 9, 2005 MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND, IN THE ALTERNATIVE, FOR RECONSIDERATION OF THE JUNE 1, 2005 ORDER

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' latest motion to compel. The Court's June 1, 2005 Order ("June 1 Order") did not require production of privileged documents as the ACE Companies contend. If it did, then the Liquidator moves for reconsideration.

a. Based on new arguments, the ACE Companies seek to compel production of additional privileged documents that were not included in their original March 22, 2005 motion to compel. Their requests for privileged documents and supporting arguments have continued to expand, and the Court should deny their motion.

b. The Court's June 1 Order did not adopt a standard of relevance for "overcoming" privilege. It only held that privilege may be overcome to the extent that an affiant relied on the privileged document in developing his affidavit. This is consistent with N.H. Rule of Evidence 612. If the June 1 Order went beyond this, the Court should reconsider.

c. The ACE Companies now expressly contend that privileged documents must be produced simply because they are relevant; i.e., that relevance trumps privilege. See ACE Motion ¶ 12. This extraordinary proposition is contrary to law and would render meaningless the attorney-client privilege set forth in N.H. Rule of Evidence 502.

d. Contrary to the ACE Companies' assertion (ACE Motion ¶ 2), the evidence adduced to date has not "undermined" the Liquidator's view that cut throughs were a great threat. Indeed, recent deposition testimony and documents show that during 2003 ACE and Equitas actually negotiated over a commutation agreement that included a cut through on AFIA obligations. See Exhibits 3-5.

I. The ACE Companies Present Ever-Expanding Discovery Requests and Arguments.

1. In their motion, the ACE Companies seek to compel production of privileged documents that were not the subject of their original March 22 motion to compel. That motion was limited to the documents specified on its Appendices 1-5. The documents ACE now seeks, while listed on the Liquidator's privilege logs, did not appear on ACE's Appendices 1-5. ACE thus initially accepted that these documents were privileged. The documents first became an issue in ACE's May 27 motion to compel, and then only to the extent ACE incorrectly claimed they had been placed "at issue." The ACE Companies now expand their argument to contend that the June 1 Order directs the production of privileged documents merely because they are relevant. This history demonstrates the need for a clear denial of the ACE Companies' motion. Otherwise, further expensive motion practice appears inevitable.

II. The June 1 Order Did Not Direct Production Of Privileged Documents Based On Relevance.

2. The ACE Companies contend that the June 1 Order made clear that the Liquidator may not resist production of documents based on privilege. ACE Motion ¶¶ 4, 6, 7. However, the Order only granted ACE's motion to the extent of directing that the Liquidator submit the Appendix 4 documents for in camera review by the Referee. June 1 Order at 2. The Liquidator submitted the Appendix 4 documents for in camera review on June 2. The June 1 Order did not require more. (On June 9, 2005, the Referee issued a ruling requiring the production of certain

documents by June 10. The Liquidator objects to the required production of these privileged documents – which for instance include drafts of the motion for approval of the Agreement with AFIA Cedents – as erroneous. The production was accordingly made expressly subject to the provisions of N.H. Rule of Evidence 511 concerning the erroneously compelled production of privileged documents. See Exhibit 1.)

3. The ACE Companies misconstrue the import of the Court's removal of the word "non-privileged" from the discovery guideline. See ACE Motion ¶ 4. The word had only modified the phrase "documents and information relied upon in developing" the Hughes, Williams and Warmuth affidavits. See May 12 Order at 1. Its removal thus affects only documents "relied upon in developing" the affidavits and is consistent with the limited production that might be called for under Rule of Evidence 612. See Reporter's Notes to N.H. Rule 612, citing Federal Advisory Committee Notes to Rule 612. It does not direct production of privileged documents generally. The ACE Companies' reference to the May 12 hearing on this point (ACE Motion ¶¶ 4, 7) is mysterious, as the Court there rejected the ACE Companies' argument that relevant privileged documents should be produced and instead focused on whether the document had been relied upon in developing an affidavit:

> 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) (see Exhibit 2).

4. The ACE Companies also appear to rely on the moving of a sentence from the second to the first paragraph of the guidance. See ACE Motion ¶¶ 4, 7. Compare May 12 Order at 1; June 1 Order at 1. The statement that the parties "should bear in mind" that the rationales of the Liquidator and Joint Provisional Liquidator are "focuses" of the hearing in "considering what documents are privileged" does not, however, direct the production of privileged documents, especially ones that the ACE Companies had not challenged when that language was drafted. The agreement of counsel that, as a result of the Court's guidance, there would be reviews of the Appendix 2-5 documents (May 12 Order at 2 (¶¶ 1, 2)) demonstrates a common understanding that the language did not have the reach ACE now suggests. The June 1 Order does not require production of privileged documents simply because they are relevant.

III. The ACE Companies' "Relevance Trumps Privilege" Argument Should Be Summarily Rejected, And If The June 1 Order Directs Production Of Privileged Documents Based On Relevance It Should Be Reconsidered.

5. The ACE Companies finally contend that the Court should order production of the privileged documents on the grounds that they are purportedly "at issue" and that, even if they were not, their relevance "overcomes" the privilege. ACE Motion ¶¶ 11-12. This is wrong as a matter of law, and if the Court intended the June 1 Order to direct such production the Order should be reconsidered.

A. The "At Issue" Doctrine Has No Application Here.

6. The ACE Companies first renew their contention that legal opinions regarding the validity of "cut throughs" and "ring fencing" are discoverable based on the principle of "at issue" waiver. ACE Motion ¶ 11. (The direct dealing issue raised by the ACE Companies in their present motion is just a variant of the cut-through issue.) The "at issue" argument was raised in ACE's May 27 motion, and the Court implicitly declined to direct production on this ground. See June 1 Order at 2. This was correct. As explained in the Liquidator's opposition to the May 27 motion, "at issue" waiver does not apply merely because a 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 privilege-holder. Aranson v. Schroeder, 140 N.H. 359, 370 (1995). Accord Bennett v. ITT Hartford Group, Inc., 150 N.H. 753, 761 (2004); Petition of Dean, 142 N.H. 889, 889 (1998).

7. The Liquidator has not injected advice concerning cut throughs (direct dealing) or ring fencing into this case. With respect to cut throughs, the Liquidator (and Joint Provisional Liquidator) believed they were a significant threat for reasons summarized in the Liquidator's Offer of Proof at ¶¶ 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). Indeed, contrary to ACE's assertion (ACE Motion ¶ 2), the evidence recently adduced has confirmed the seriousness of the threat by demonstrating actual cut through negotiations: During 2003, ACE and Equitas engaged in discussions over a commutation that included a cut through with respect to the AFIA obligations. See Exhibit 3 (August 8, 2003 email between Equitas and ACE); 4 (Equitas note of

July 30, 2003 meeting); 5 (excerpt of Rhydian Williams deposition). While the cut through threat is an element of the Liquidator's motion for approval, however, legal advice on that topic has not been injected into the matter.

8. With respect to ring fencing, the ACE Companies are attempting to create a controversy where one does not exist. Ring fencing is such a subsidiary matter that it is not even included in the Offer of Proof. Legal advice received on ring fencing certainly has not been injected into this matter. Further, the ACE Companies agree with the Liquidator's view of the law. In the original motion for approval of the Agreement with AFIA Cedents, the Liquidator stated his position that ring fencing (or "walling off") had no legal merit. The Liquidator has produced English counsels' Note of Advice on the issue (as it had been provided to the AFIA Cedents), and recent discovery has merely confirmed that ACE's English law expert agrees with this advice. See Exhibit 6 (excerpts from Richard Hacker deposition).

B. Relevance Is Not The Standard For Production Of Privileged Documents.

9. If, as ACE contends (ACE Motion ¶ 12), "relevance" were the standard for producing privileged documents, then the attorney-client privilege would be rendered meaningless. The attorney-client privilege serves to encourage frank discussion (or "unreserved communication") by protecting communications from compelled disclosure. See Reporter's Notes on N.H. Rule of Evidence 502; Riddle Spring Realty Co. v. State, 107 N.H. 271, 273-74 (1966); Brown v. Payson, 6 N.H. 443, 444 (1833). If the relevance of a privileged communication were sufficient grounds for production, then the policy of encouraging open communication by ensuring confidentiality would be negated. A privilege that does not protect relevant communications from production 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.") (emphasis added); Superior Court Rule 35 (providing for discovery of relevant matter, "not privileged"). There is no legal basis for the ACE argument that privileged documents should be produced simply because they are "relevant."

CONCLUSION

For the reasons stated above, the Court should deny the ACE Companies' motion. If the June 1 Order did require production of privileged documents simply because they are relevant, the Court should reconsider the order.

Respectfully submitted,

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

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June 13, 2005

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Opposition to ACE Companies' June 9, 2005 Motion to Compel Production of Documents and, in the Alternative, for Reconsideration of the June 1, 2005 Order was sent, this 13th day of June, 2005, by first class mail, postage prepaid to all persons on the attached service list.

Suzanne M. Gorman

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

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