

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

2005 JUN 20 P 3: 57

Docket No. 03-E-0106

**In the Matter of the Liquidation of
The Home Insurance Company**

**EQUITAS' RESPONSE TO ACE COMPANIES' MOTION TO STRIKE AFFIDAVIT
AND VERIFICATION OF RHYDIAN WILLIAMS OR, IN THE ALTERNATIVE,
COMPEL PRODUCTION OF DOCUMENTS BY EQUITAS**

Equitas Limited hereby responds to the ACE Companies' motion to strike the affidavit and verification of Rhydian Williams or, in the alternative, compel production of documents by Equitas.

INTRODUCTION

1. ACE asserts that the Court's May 12 Guidelines and clarification authorized "broad" discovery, but ACE's characterization of the Guidelines is belied by the record. In fact, ACE's motion to strike is tantamount to a request for reconsideration of the discovery limitations set forth in the May 12 Guidelines.

2. The Court issued the Guidelines in response to ACE's March 3 motion to compel Equitas to produce all internal communications and communications between or among AFIA Cedents concerning the Proposed Agreement. Without reaching Equitas' jurisdiction objections, the Court said that voluntary production could be limited to: (a) information to which the Liquidator and Joint Provisional Liquidator were privy in reaching and/or approving the Proposed Agreement; and (b) documents relied upon in developing the affidavit filed by Mr. Rhydian Williams.

3. ACE now asserts once again that Equitas should be required to produce all internal communications and communications with other AFIA Cedents concerning the Proposed Agreement. The Court properly denied ACE's request for such discovery previously, because the documents sought are irrelevant. As ACE previously acknowledged, the function of the court is to review "*the receiver's evaluation*" of the relevant factors. The Court needs to be provided "with the information on which the receiver's decision to settle was based."¹ The Liquidator and Joint Provisional Liquidator did not have access to such documents and ACE is not entitled to such documents either unless, under the Guidelines, Mr. Williams relied upon the documents in preparing his affidavit.

4. All internal communications and communications with other AFIA Cedents within the scope of the Guideline have been produced, including previously withheld privileged documents. The production included all documents relied upon by Mr. Williams in preparing his affidavit. ACE does not and cannot establish that discoverable documents have been withheld.

5. ACE also seek other categories of documents that are beyond the scope of the Guidelines, including documents concerning commutation and set-off negotiations between Home and Equitas to which Mr. Williams was not a party. Mr. Williams testified that he was unaware of any such documents. Obviously, he could not have relied upon them in preparing his affidavit. Moreover, ACE expressly agreed as a condition to Equitas' initial voluntary production that documents concerning the commutation agreement and set-off need not be produced. Nor were such documents included within the scope of its motion to compel. It is too

¹ 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).

late in the day for ACE to argue that such documents are within the scope of the May 12 Guidelines, or that it is otherwise entitled to the production of such documents.

DISCUSSION

I. Equitas Has Produced All Documents Required Under The Guidelines.

A. Documents Reflecting Communications with AFIA Cedents.

6. ACE asserts that Equitas has not produced “documents regarding certain meetings and/or discussions among AFIA Cedents.” ACE’s assertion is false as Equitas has produced all meeting notes and documents and other communications reflecting consideration among the AFIA Cedents of the matters discussed in Mr. Williams’ affidavit. To the extent ACE is seeking *all* notes of AFIA Cedent meetings, its request is beyond the scope of the Guidelines.

B. Drafts of the Williams’ Affidavit.

7. Although ACE has corresponded extensively with Equitas regarding the scope of Equitas’ production, and ACE filed two prior motions, ACE has never before raised a question about the absence of draft affidavits from Equitas’ production. Presumably, ACE recognizes that such drafts generally constitute non-discoverable work-product and never considered such drafts as falling within the scope of the Guidelines. Nor does it assert now that they do. Rather, ACE asserts that drafts of the Williams affidavit are “relevant” and should now be produced.

8. Insofar as such drafts were not within the scope of ACE’s original motion to compel, they likewise were not within the scope of the Guidelines. Mr. Williams has already testified concerning the preparation of his affidavit and no further production is necessary or warranted in order for the Court to evaluate the reasonableness of the Proposed Agreement.

C. Internal Communications Regarding the Proposed Agreement.

9. ACE asserts that Equitas has not produced “internal Equitas communications regarding the negotiation of the Proposed Agreement.” As discussed above, however, ACE’s

broad request for internal communications regarding the Proposed Agreement is beyond the scope of the Guidelines, which implicitly denied ACE's prior request for the very same documents. The Court properly limited production to documents and information to which the Liquidator or Joint Provisional Liquidator were privy. By definition, they were not privy to Equitas' internal communications. To the extent internal communications were relied upon by Mr. Williams in developing his affidavit, they have been produced.

10. ACE points to testimony indicating that Mr. Williams had *discussions* with other Equitas employees concerning consideration of alternatives to the Proposed Agreement and the cost of filing and prosecuting a claim in the Home estate. ACE cites no testimony indicating that documents reflecting such discussions either exist or that they have been withheld. Equitas has produced internal documents reflecting consideration of the alternatives discussed in Mr. Williams' affidavit. Documents reflecting discussions of the cost of filing and prosecuting a claim have been produced to the extent they exist.

C. Documents Created By Karen Amos.

11. ACE also seeks documents "created by a colleague of Mr. Williams, Karen Amos, in connection with the Proposed Agreement." Ms. Amos did not create any documents in connection with the Proposed Agreement. If she had, such internal Equitas documents would be beyond the scope of the Guidelines unless they were relied upon by Mr. Williams in preparing his affidavit.

12. ACE argues that Equitas should be required to produce Ms. Amos' documents regarding the calculation of Equitas' set-off position because Mr. Williams asserts in his affidavit that Equitas would not likely file a claim in the Home estate "beyond that which may be required to realize any applicable set-off." Ms. Amos was involved in commutation negotiations with the Home that dealt with, among other things, Equitas' set-off position.

13. Mr. Williams was thoroughly examined during his deposition regarding his knowledge of the set-off and commutation. He was not involved in the negotiations with Home and has not seen any documents reflecting those negotiations. Accordingly, he could not have relied (in any sense) upon such documents when he prepared his affidavit. Nor are documents concerning negotiation of the set-off even relevant to Mr. Williams' affidavit because his assertion that Equitas would not likely file a claim beyond that required to realize "any applicable set-off" is wholly unqualified as to the amount of the set-off. Mr. Williams did not even know what Equitas' set-off position was at the time Equitas executed the Proposed Agreement. Negotiations over the amount of the set-off, of which Mr. Williams had only peripheral knowledge, are irrelevant.

14. In all events, ACE is not entitled to documents concerning the commutation and set-off because the parties agreed, in early correspondence, that such documents would not be produced. On December 28, 2004, Equitas responded to ACE's document requests by proposing a voluntary production of certain documents. (See Exhibit A attached hereto.) In paragraph 4 of the letter, Equitas expressly advised ACE that it would not produce documents concerning the commutation agreement or the set-off. On January 7, 2005, ACE expressly agreed to the limitations set forth in paragraph 4 of the December 28 letter. (See Exhibit B attached hereto.) ACE is now estopped. Such documents are not even within the scope of ACE's March 3 motion to compel. Insofar as the Guidelines were issued in response to that motion, ACE's contention that Equitas was required to produce documents concerning the set-off makes absolutely no sense.

15. ACE also seeks documents reflecting discussions with ACE regarding a potential cut-through arrangement. Mr. Williams testified regarding his knowledge of those discussions,

to which he was not party. Mr. Williams became aware of documents reflecting those discussions only recently. Such documents were produced to ACE and Mr. Williams was questioned regarding their contents. Insofar as Mr. Williams did not rely upon documents reflecting discussions with ACE when he executed his affidavit, such documents are beyond the scope of the Guideline.

D. Documents Created By Mr. Heap.

16. ACE likewise seeks documents “created by Mr. Heap in connection with the negotiation of the Proposed Agreement and preparation of Mr. Williams’ affidavit.” As discussed above, documents that may have been created by Mr. Heap in connection with the negotiation of the Proposed Agreement, like other internal Equitas documents concerning the Proposed Agreement, generally fall outside the Guidelines. ACE is not entitled to such documents.

17. ACE asserts that Mr. Williams and Mr. Heap discussed the cost and difficulty of filing and prosecuting a claim, that Mr. Heap was involved in discussions with ACE regarding a potential cut-through arrangement, and that Mr. Williams discussed the contents of his affidavit with Mr. Heap before signing it. ACE cites no testimony from Mr. Williams indicating that any such discussions were documented or withheld.

18. If there are any documents that reflect discussions between Mr. Heap and Mr. Williams about the cost and difficulty of filing and prosecuting a claim, they have been produced. Likewise, all documents reflecting Mr. Heap’s communications with ACE regarding cut-through arrangements have been produced. Internal work-product relating to the preparation of Mr. Williams’ affidavit -- prepared after the Liquidator filed the Proposed Agreement with the Court and ACE filed its objections thereto -- are beyond the scope of the Guidelines and not otherwise discoverable.

E. Documents Created By Mr. Fleming.

19. ACE seeks documents “created by in-house counsel for Equitas, Robert Fleming, in connection with negotiation of the Proposed Agreement.” According to ACE, Mr. Fleming was involved in drafting and reviewing counterproposals set forth by Equitas in its negotiations with Home over the Proposed Agreement. Internal documents concerning counterproposals over the Proposed Agreement are irrelevant to an evaluation of the reasonableness of the Proposed Agreement.

20. Likewise, such documents are beyond the scope of the Guideline. Mr. Williams’ affidavit does not discuss the drafting of counterproposals. Mr. Williams’ affidavit also makes no mention whatsoever of Mr. Fleming. In preparing his affidavit, Mr. Williams did not rely upon any documents prepared by Mr. Fleming in connection with negotiation of the Proposed Agreement. To the extent Mr. Fleming has documents that were even arguably relied upon by Mr. Williams in preparing his affidavit (*i.e.*, a memo reflecting a discussion with outside counsel), they have been produced.

F. Equitas Has Not Made Any Unwarranted Redactions.

21. ACE’s assertion that Equitas made unwarranted redactions in four documents is baseless. Redactions to the document titled “Draft Counter Proposal” do not contain information relied upon by Mr. Williams in preparing his affidavit. The relevant portion of the document, reflecting consideration of the alternatives discussed in Mr. Williams’ affidavit, were produced without redaction. The redacted portion of the memo does not reflect consideration of those alternatives or any other matter discussed in Mr. Williams’ affidavit. Internal documents concerning the negotiation of the Proposed Agreement with Home, including the redacted portions of the “Draft Counter Proposal,” are irrelevant and beyond the scope of the Guidelines.

22. ACE also complains that notes of privileged communications were redacted. These redactions also were appropriate. Mr. Williams has testified that all responsive portions of these documents have been produced. Moreover, Equitas submits that there was no basis for requiring Equitas to produce privileged documents in the first instance. Mr. Williams did not review these documents in connection with the preparation of his affidavit. Nothing in his affidavit discusses legal advice, or even asserts that legal advice was obtained. There certainly is no basis for further intrusion into Equitas' privileged communications, whether by way of in camera review or otherwise.

CONCLUSION

23. ACE's motion appears to be a desperate attempt to keep Rhydian Williams from testifying. Whatever ACE's motive, it is not driven by an inability to cross-examine Mr. Williams or a need for additional documents. Equitas has produced all documents called for by the Guidelines. ACE has had a full and fair opportunity to examine Mr. Williams concerning such documents and all other matters set forth in his affidavit. ACE's motion should be denied in its entirety.²

² To the extent ACE seeks an order "compelling" the production of documents, Equitas renews its prior objections that it has never been and cannot be properly served with a subpoena.

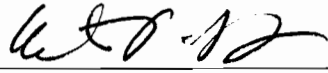
Respectfully submitted,

EQUITAS LIMITED

By its attorneys,

SULLOWAY & HOLLIS

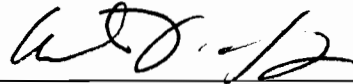
Dated: June 20, 2005

By  _____

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2005, a copy of this Response 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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