

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

2009 APR 15 P 3:22

**OPPOSITION OF ZÜRICH VERSICHERUNG AKTIENGESELLSCHAFT
(DEUTSCHLAND) TO THE ACE COMPANIES' MOTION TO COMPEL
PRODUCTION OF DOCUMENTS ON JURISDICTIONAL GROUNDS ONLY**

NOW COME GERNOT A. WARMUTH, and ZÜRICH VERSICHERUNG AKTIENGESELLSCHAFT (DEUTSCHLAND) (hereinafter collectively "ZÜRICH"), appearing for the limited purpose of opposing the ACE COMPANIES' motion to compel production of documents by ZÜRICH, a non-party to this proceeding, on jurisdictional grounds only. This opposition is filed on the grounds that this Court has no jurisdiction to address ACE's motion and ZÜRICH has neither been effectively served with ACE's discovery request nor with ACE's motion to compel. ZÜRICH has neither waived service nor the right to challenge this Court's jurisdiction. ZÜRICH makes a special appearance in these proceedings for the sole purpose of challenging jurisdiction and defects in service and in no way concedes to the jurisdiction of the Court by filing this opposition.

ZÜRICH reserves the right to oppose the requested discovery on further grounds, if and when it is properly called upon to do so, including but not limited to the grounds that (i) the documents sought are irrelevant to an evaluation of the "necessity, reasonableness, and fairness" of the compromise agreement between the Joint Provisional Liquidator's and the AFIA Cedents ("Proposed Agreement"), (ii) the documents sought are protected by a common-interest privilege, and (iii) the discovery is impermissible under governing German law. ZÜRICH will fully brief these grounds at an appropriate time if so directed by this Court.

BACKGROUND

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

2. ACE's objection to the Proposed Agreement essentially raised two issues: whether the Liquidator had statutory authority to enter into the Proposed 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 Proposed Agreement. *Id.*, at 13-14.

3. On December 9, 2004, ACE mailed to ZÜRICH, a corporation domiciled and licensed as an insurer in Germany, the "First Request for Production of Documents" seeking *seventy-five* categories and subcategories 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 (as amended) (the "Claims Procedures Order"). Many of the requests on their face have nothing to do with the Proposed Agreement or its "necessity, reasonableness, and fairness." Request No. 35 even asked for all documents concerning the personal experience of Gernot Warmuth, ZÜRICH's German counsel, "in advising creditors in filing and pursuing claims in insolvency situations".

4. On February 4, 2005, ZÜRICH, through counsel, sent ACE a voluntary response to its production request raising eleven general objections as well as various specific objections. In particular, ZÜRICH objected to ACE's service of the request per mail and ZÜRICH expressly advised ACE that it was not willing to produce documents that are privileged, particularly not

internal ZÜRICH documents and correspondence exchanged between AFIA Cedents. See ACE Motion, Exhibit C. Nevertheless, ZÜRICH voluntarily produced thirty-seven (37) different documents to ACE which are relevant to the affidavit of Gernot Warmuth of May 31, 2004, but not privileged. Also, ZÜRICH attached to its response a list of documents which it had produced, a copy of which ACE decided not to include with its motion to compel.

5. On February 18, 2005, ACE maintained its position and requested once again production of copies of internal ZÜRICH documents and documents relating to communications with other AFIA Cedents. See ACE Motion, Exhibit D.

6. On February 23, 2005, ZÜRICH explained to ACE in detail why internal ZÜRICH documents fall under the attorney-client privilege as well as the work product doctrine and that any production of documents by ZÜRICH was wholly voluntary and not due to any obligation by ZÜRICH to do so. In addition, ZÜRICH explained that it had already produced all of its documents which it had in its possession, custody or control and which (i) were responsive to ACE's requests, (ii) were prepared within the time frame of the negotiations of the Proposed Agreement, (iii) relate to the Proposed Agreement itself, and (iv) were relevant to Gernot Warmuth's affidavit, except for those documents which ZÜRICH believed to be privileged. The letter expressly stated that none of the objections to the request, including the jurisdictional objections, were being waived and that ZÜRICH would oppose any motion to compel brought by ACE. See ACE Motion, Exhibit E.

7. On March 1, 2005, ACE indirectly agreed to the time frame of discovery set forth by ZÜRICH in its earlier correspondence. However, ACE reiterated its position that documents containing or relating to communications with other AFIA Cedents are not protected by a

common-interest privilege and that attorney-client privilege as well as work product doctrine do not apply to internal ZÜRICH documents. See ACE Motion, Exhibit F.

8. On March 3, 2005, ZÜRICH disagreed with that position for a second time. It also reiterated its position that ACE had failed to effectively serve a discovery request, that the scope of discovery sought would not be enforceable in either the US or Germany, and that ACE's production request was not reasonably and carefully designed to lead to the production of documents which were relevant to the affidavit of Gernot Warmuth. See ACE Motion, Exhibit G.

9. On March 3, 2005, ACE accepted that documents in ZÜRICH's possession may be subject "to some legitimate privilege", except for correspondence between AFIA Cedents, copies of which are being withheld by ZÜRICH on the assertion that they are subject to a common-interest privilege. ACE and ZÜRICH could not reach an amicable solution on the latter issue. See ACE Motion, Exhibit H and I.

10. On April 7, 2005, ZÜRICH received from the law firm of Rackemann Sawyer & Brewster (Home's counsels) a copy of ACE's motion to compel. That was the first time that ZÜRICH had learned that a motion to compel had been filed by ACE. To date, neither ZÜRICH nor its counsel have been served by ACE or its counsel with a copy of the subject motion to compel. This fact is also evidenced by the service list attached to ACE's motion.

11. On its Motion to compel, ACE is requesting production of communications between and among AFIA Cedents only. No other objections are subject of said motion. Motion to compel, at 6.

DISCUSSION

I. ACE's Motion to Compel Must Be Denied Because ZÜRICH Is Not Subject To The General Jurisdiction Of This Court.

12. ZÜRICH is not subject to the general jurisdiction of this Court. ZÜRICH is a foreign corporation. Gernot A. Warmuth is ZÜRICH's German-based counsel. As admitted by ACE in its motion to compel (at 16), ZÜRICH is a non-party to the pending proceeding.

13. The fact that ZÜRICH is a creditor of the Home would only submit ZÜRICH to the jurisdiction of this Court regarding issues which the Liquidator raises in connection with the allowance or the disallowance of the claim or maybe other contractual matters which are an issue between the Liquidator and ZÜRICH. In other words, this Court's supervision of claim adjudication does not extend to a written request by ACE to obtain documents from ZÜRICH, for use in its separate dispute with the Liquidator over the Liquidator's authority to enter into agreements with third parties. See, e.g., Katchen v. Landy, 382 U.S. 323 (1966); Langenkamp v. Culp, 498 U.S. 42 (1990); Sunshine Development, Inc. v. Federal Deposit Insurance Corporation, 3 F.3d 106 (1st Cir. 1994). Nothing in the Insurers Rehabilitation and Liquidation Act or the Claims Procedures Order suggests otherwise.

14. Also, ZÜRICH has neither expressly nor impliedly waived the right to challenge the jurisdiction of this Court.

15. Last, the Liquidator's submission of the Affidavit of Gernot Warmuth did not constitute an affirmative step by ZÜRICH to avail itself of the Court's jurisdiction. See Druding v. Allen, 122 N.H. 823 (1982), and Lyford v. Trustees of Berwick Academy, 97 N.H. 167 (1951).

16. Accordingly, ACE's motion to compel ZÜRICH to produce documents for use in its own dispute with the Liquidator is a matter outside the jurisdiction of this Court.

II. ACE's Motion to Compel Must Be Denied Because ZÜRICH, A Non-Party, Has Never Been Effectively Served With A Request For Production of Documents.

17. Again, ZÜRICH is a non-party as well as a corporation domiciled in Germany. Accordingly, ACE's attempt to obtain documents by simply mailing to ZÜRICH a request for production of documents under the purported authority of Rule 35 and the Claims Procedures Order, is a legal nullity and has no legal effect whatsoever.

18. Nothing in Rule 35 even purports to authorize ACE to command the production of documents by ZÜRICH, a non-party, without complying with local and/or cross-border legal requirements for such a demand. Nor does the Claims Procedures Order, which governs "claims proceedings", provide any authority whatsoever for discovery concerning the Proposed Agreement or ACE's document request.

19. ACE should have complied with the legal formalities set forth in both the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, November 15, 1965, 20 U.S.T. 361 ("Hague Service Convention") as well as the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, reprinted in 28 U.S.C.A. § 1781 (West Supp. 1995) ("Hague Evidence Convention"). Both conventions apply in insolvency matters and related proceedings. See Clark, *AmJCompL* 42 (Suppl) (1994) p.23, 30. The United States and Germany are both parties to said conventions.

20. The Hague Evidence Convention requires American courts to "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522, 546 (1987). In determining whether to require litigants to employ the Hague Evidence Convention

procedures, the court must weigh considerations of comity, the relative interests of the parties including the interest in avoiding abusive discovery, and the ease of efficiency of alternative formats for discovery. Tulip Computers Intern'l B.V. v. Dell Computer Corp., 254 F. Supp. 2d 469, 474 (D. Del. 2003) (citations omitted).

21. Where, as here, the entity from which discovery is sought is a non-party, the balance tips decidedly in favor of requiring the party seeking discovery to first pursue discovery by means of a Letter of Request in accordance with the Hague Evidence Convention. See, e.g. Orlich vs. Helm Brothers, Inc., 560 N.Y.S. 2d 10, 14-15 (N.Y. App. Div. 1990). (“When discovery is sought from a non-party in a foreign jurisdiction, application of the Hague Convention, which encompasses principles of international comity, is virtually compulsory”). ACE did not even seek, much less obtain, a Letter of Request from this Court.

22. Had ACE obtained a Letter of Request, such document would have had to be served according to the Hague Service Convention. Pursuant to Article 1 of the Hague Service Convention, the Convention “shall apply in all cases, in civil and commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.” A service abroad of judicial or extrajudicial documents outside the Convention would be in violation of the sovereignty of the foreign state to which the documents are being sent.

23. Of secondary interest is the fact that ACE decided against the issuance of a subpoena to ZÜRICH. As a general rule, a non-party cannot be compelled to produce documents at the request of a party to a proceeding unless the non-party has been duly subpoenaed. 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.”). However, a further general rule is that a foreign

witness is beyond the subpoena powers of the U.S. courts. Moore v. Conifer Corporation, 130 N. H. 795, 800 (1988).

24. ACE does not suggest that ZÜRICH has waived its objections to defects of service and ZÜRICH has clearly not done so.

25. Under these circumstances, ZÜRICH cannot be compelled to produce documents for lack of service of the production request. ZÜRICH's production of documents has been made voluntarily by agreement without waiving any objections, including objections to the jurisdiction of this Court, relative to ACE's request for production.

III. ACE's Motion to Compel Must Be Denied Because ZÜRICH, A Non-Party, Has Never Been Effectively Served With The Motion To Compel.

26. ACE's attempt to obtain documents by filing a motion to compel against ZÜRICH without serving the motion on ZÜRICH is also a legal nullity and has no legal effect whatsoever.

27. ACE should have served its motion in compliance with the Hague Service Convention. However, ACE not only failed to comply with the Hague Service Convention but also completely failed to inform ZÜRICH of its motion to compel. ACE has not even mailed a copy to ZÜRICH or its counsel in Germany as of today.

28. In sum, ACE's motion is completely baseless for lack of jurisdiction of this Court and defects in service of both, the production request and the motion to compel. ACE's motion must therefore be denied.

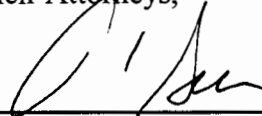
WHEREFORE, ZÜRICH respectfully requests that this Court enter and order:

- A. Denying the ACE Companies' motion to compel in its entirety;
- B. Awarding ZÜRICH 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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AND
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Date:

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2005, a copy of this Opposition 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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