

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

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AFFIDAVIT OF  
GARETH HOWARD HUGHES

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I, GARETH HOWARD HUGHES, of 1 More London Place, London SE1 2AF, a licensed insolvency practitioner and a partner in the firm of chartered accountants Ernst & Young LLP ("E&Y") MAKE OATH AND SAYS AS FOLLOWS:

1. I am one of the Joint Provisional Liquidators of The Home Insurance Company ("the Company"), having been appointed by the High Court of Justice in England and Wales on 8 May 2003 pursuant to an order of Mr Justice Pumfrey together with my colleague Margaret Elizabeth Mills ("Ms Mills") (the "Appointment Order"). In this statement, I refer to both myself and Ms Mills as "the Joint Provisional Liquidators".
2. I make this statement with the knowledge and approval of Roger Sevigny ("Mr Sevigny"), who is the liquidator of the Company ("the NH Liquidator"). I make this statement in support of the NH Liquidator's response to the motion to compel directed to the NH Liquidator filed in the Superior Court for Merrimack County in the State of New Hampshire on behalf of Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (the "ACE Motion").
3. The facts and matters set out below are either within my own knowledge gained through my extensive involvement in this matter, in which case I confirm that they are true, or are based on information provided to me by others. Facts and matters set out in this statement which are not within my own knowledge are based on information supplied to me by (a) employees of Ernst & Young LLP who work on this matter under my supervision, (b) my English legal advisers, Clifford Chance Limited Liability

Partnership ("**Clifford Chance**"), and (c) Rackemann Sawyer & Brewster, in their capacity as US legal advisers to the NH Liquidator. Where facts and matters are not within my own knowledge but based on information supplied to me, they are true to the best of my knowledge, information and belief.

4. A bundle of copy documents to which I refer in this statement is exhibited, marked "GHH2". References to page numbers below are to the page numbers of "GHH2".
5. The business of E&Y in London includes the provision of restructuring and insolvency services. I am the head of the E&Y Financial Services Corporate Restructuring team ("**Corporate Restructuring**") in London. The Corporate Restructuring team provides advice and services to troubled companies, including formal insolvency procedures such as provisional liquidations, compulsory liquidations, creditors' and members' voluntary liquidations, administrative receiverships, administrations, company voluntary arrangements and schemes of arrangement. In this Affidavit these proceedings are referred to as "formal insolvency proceedings" (even though schemes of arrangement may be implemented in respect of solvent companies).
6. Margaret Elizabeth Mills is also a member of the E&Y Corporate Restructuring team. Internal arrangements at E&Y are such that, where an E&Y partner takes an appointment in respect of a formal insolvency proceeding, at least two E&Y partners will be appointed on a joint and several basis. One partner will have principal conduct of the proceeding and the second partner is appointed in order to have another person authorised to act in respect of the matter in the event the first partner is unable to do so: I am the lead Joint Provisional Liquidator regarding Home.
7. Where an English company enters into provisional liquidation or liquidation proceedings, its day-to-day affairs will cease to be conducted by its pre-insolvency management board and will instead be conducted by a provisional liquidator or liquidator, as relevant. A provisional liquidator or liquidator must be an individual who is qualified to act as an "insolvency practitioner" in accordance with the Insolvency Act 1986 and legislation derived from it, or, where no such individual has been requested or is available or willing to take the appointment, an officer of the court known as the "Official Receiver".
8. As the Appointment Order indicates, both of the Joint Provisional Liquidators are licensed insolvency practitioners. The Appointment Order also recognises that the Joint Provisional Liquidators are partners of E&Y and appoints them in that capacity (see GHH2, page 1).
9. By the terms of the Appointment Order, the Joint Provisional Liquidators jointly and severally have power to carry out the following functions, namely:
  - 9.1 to locate, protect, secure, take possession of, collect and get in the property and assets (of whatever nature) to which the Company is or appears to be entitled within England and Wales;

- 9.2 to locate, protect, secure, take possession of, collect and get in the books, papers and records of the Company including the accounting and statutory records in England and Wales;
- 9.3 to investigate the affairs of the Company so far as it is necessary to locate, protect, secure, take possession of, collect and get in the assets of the Company within England and Wales; and
- 9.4 to do all such things as may be necessary or expedient for the protection of the Company's property or assets within England and Wales.
10. Without prejudice to the generality of these powers, the Joint Provisional Liquidators also have a number of additional powers, including:
  - 10.1 to carry on the business of the Company in England and Wales to the extent necessary to process and settle claims against the Company and effect reinsurance recoveries;
  - 10.2 to enter into commutations with creditors or debtors of the Company in respect of business carried on by the Company in England and Wales; and
  - 10.3 if thought appropriate to finalise the terms of a scheme of arrangement and explanatory statement to be issued to the Company's creditors or any of them, if reasonably satisfied that such scheme has a reasonable prospect of being approved by the requisite majority of creditors and sanctioned by the English Court and, subject to such approval and sanction, to implement such scheme.
11. Given the breadth of the Joint Provisional Liquidators' powers and responsibilities in respect of the Company under the Appointment Order, the complexity and international nature of the Company's estate and the amount of time required in order to conduct the provisional liquidation effectively, it has not been possible nor indeed desirable for the Joint Provisional Liquidators personally to perform all of the work necessary to the provisional liquidation. The Joint Provisional Liquidators do not have their own staff but, as partners in E&Y, rely on a team of E&Y personnel at different levels to assist in the conduct of the provisional liquidation under the Joint Provisional Liquidators' supervision.
12. The Home provisional liquidation has been staffed principally as follows:
  - 12.1 Gareth Hughes, Partner, Corporate Restructuring (the lead Joint Provisional Liquidator and engagement partner). I have overall responsibility for the provisional liquidation of the Company pursuant to my appointment as Joint Provisional Liquidator in the Appointment Order;
  - 12.2 Sarah Ellis, Assistant Director, Corporate Restructuring (the engagement manager). Ms. Ellis is the person responsible for the day-to-day management of the Company's provisional liquidation and she supervises the work performed by other staff engaged in the administration of the provisional liquidation;

- 12.3 Benjamin Cairns, Senior Executive, Corporate Restructuring. Mr Cairns has had responsibility for the management of certain specific areas within the provisional liquidation, including consideration of the business of the City Insurance Company (a company which was merged into the Company in 1995). Mr Cairns reports to Ms. Ellis. His involvement in the provisional liquidation has declined over time and is currently minimal;
- 12.4 Matthew Harrison, Executive, Corporate Restructuring. Mr Harrison assists Ms. Ellis and Mr Cairns in their duties, carrying out time consuming tasks or recurring case management tasks. For example, Mr Harrison has recently taken responsibility for much of the day-to-day creditor contact and claims determination process. Mr Harrison regularly reports to Ms. Ellis.
13. Whilst Ms. Ellis, Mr. Cairns, and Mr. Harrison are the Joint Provisional Liquidators' principal staff (the "Core Staff"), this team is supplemented by other E&Y staff, as necessary for particular tasks (the "E&Y staff"). The Core Staff had my authority to seek legal advice on my behalf from Clifford Chance with respect to the conduct of the provisional liquidation and indeed have been in regular communication with Clifford Chance in that regard. The Core Staff also had my authority to act on legal advice received from Clifford Chance in respect of the conduct of the provisional liquidation under my supervision.
14. I understand that, in the ACE Motion, the ACE Companies claim that the involvement of the E&Y staff in attorney-client privileged communications or the disclosure to E&Y staff of privileged communications would generally waive the benefit of attorney-client privilege. I understand that the basis for this argument is that the ACE Companies presume that the Joint Provisional Liquidators retained E&Y to provide auditing / accounting services (see GHH2, page 11). This is incorrect for the reasons set out below.
15. The Joint Provisional Liquidators have not 'retained' E&Y to provide auditing, accounting or any other services to the Joint Provisional Liquidators in respect of the Company. To characterise the relationship between the Joint Provisional Liquidators and E&Y as based on a retainer is to misstate it. The Joint Provisional Liquidators are partners at E&Y and, as such, are entitled to use E&Y's premises, services, facilities and staff in the conduct of their appointments. In particular, no charges are levied upon the Joint Provisional Liquidators in respect of any work carried on by the E&Y staff or other services / facilities made available to the Joint Provisional Liquidators.
16. The fees charged by the Joint Provisional Liquidators in respect of their appointment are charged together with the fees incurred by the E&Y staff. By Rule 4.30 of the Insolvency Rules 1986 (the "Rules") (GHH2, page 31), the remuneration of a provisional liquidator must be fixed by the English court from time to time on his application. In fixing his remuneration, the English court must take into account:

*"the time properly given by him (as provisional liquidator) and his staff in attending to the company's affairs" [emphasis added].*

To date, the Joint Provisional Liquidators have made three applications to the English court to seek approval of their fees. Such fees have consisted not only of the Joint Provisional Liquidators' time charges but also the time charges of all E&Y staff who have billed time to the Company's provisional liquidation. On no occasion has the English court queried the inclusion of the fees incurred by the E&Y staff in such applications.

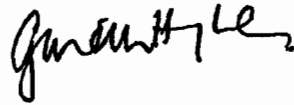
17. Any remuneration approved by the English Court is not paid to the Joint Provisional Liquidators in their personal capacity, but to E&Y as a firm. The Joint Provisional Liquidators are remunerated in respect of their position as partners of E&Y by way of drawings based upon E&Y's overall profits.
18. The allegation that the Joint Provisional Liquidators have 'retained' E&Y suggests that the Joint Provisional Liquidators would be free to seek the services provided by E&Y staff from other accountancy firms. The Joint Provisional Liquidators are partners at E&Y and as such seek, where appropriate, to involve E&Y staff in the conduct of the matters in respect of which they have been appointed. I believe that it is within the contemplation of clients who seek the appointment of an E&Y partner as an insolvency practitioner that it will be E&Y staff that would be primarily engaged in the relevant matter.
19. There appears to be some recognition in the Rules that most insolvency practitioners are members of a firm and that they themselves or their firm have employees who will carry out many of the tasks involved in certain insolvency proceedings. As such, the Rules give specific authorisation for acts to be carried out by employees of the insolvency practitioner or his firm in particular instances (GHH2, page 33-42).
20. Finally, I have been a partner at E&Y (and its predecessor) since 1988. I am also the President of the Association of Business Recovery Professionals (known by the brand name "R3"), which is the leading professional association for insolvency, business recovery and turnaround specialists in the UK. In my experience it is commonplace for insolvency practitioners who are members of an accountancy firm to use the staff, premises, facilities and services available from that firm as if the service is being provided by that firm itself, notwithstanding that they have been appointed in their personal capacity.
21. For the reasons stated above, I believe that there is an inextricable link between the Joint Provisional Liquidators and the E&Y staff and that treating them as separate for purposes of the attorney-client privilege would be artificial and run contrary to UK market practice. In dealing with complex issues in a large provisional liquidation, the Joint Provisional Liquidators need to involve staff as a team in matters requiring legal advice.
22. The negotiations with AFIA Cedents regarding the letter agreement dated 22 January 2004 were a joint effort involving teams for both the NH Liquidator and the Joint Provisional Liquidators in dealing with AFIA Cedents. The Joint Provisional Liquidators' team consisted of myself, Ms. Ellis, Mr. Cairns and Mr. Harrison,

advised by counsel from Clifford Chance (David Steinberg, Philip Hertz and Jeanette Best).

Sworn this ( day of April 2005 )

Before me  )

Practising Solicitor REBECCA JONES.



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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

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**EXHIBIT "GHH2" TO THE AFFIDAVIT OF  
GARETH HOWARD HUGHES**

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This is the exhibit "GHH2" referred to in my Affidavit dated April 2005. The copy documents in this exhibit are listed below.

<b>Description</b>	<b>Page</b>
(1) 8 May 2003 Appointment Order	1
(2) ACE Companies' Motion To Compel	7
(3) Insolvency Rules 1986, Rule 4.30	31
(4) Extracts from the Insolvency Rules 1986	
(i) Rule 1.14 (Company Voluntary Arrangements; Meetings of company's creditors and members; The chairman at meetings)	33
(ii) Rule 2.36 (Administration procedure; Creditors' meetings; The chairman at meetings)	34
(iii) Rule 2.49 (Administration procedure; Company meetings; Venue and conduct of meeting)	35
(iv) Rule 2.53 (Administration procedure; The creditors' committee; The chairman at meetings)	36
(v) Rule 3.19 (Administrative receivership; The creditors' committee; The chairman at meetings)	37

(vi)	Rule 4.55 (Companies winding up; Rules of general application; The chairman at meetings)	38
(vii)	Rule 4.56 (Companies winding up; Rules of general application; The chairman at meetings (CVL))	39
(viii)	Rule 4.63 (Companies winding up; Rules of general application; Resolutions)	40
(ix)	Rule 4.157 (Companies winding up; The Liquidation Committee; The chairman at meetings)	42

Sworn at

This 1 day of April 2005

Before me,



REBECCA JONES

Practising Solicitor

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IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION  
COMPANIES COURT

MR JUSTICE PUMFREY

The 8th day of May 2003



IN THE MATTER OF THE HOME INSURANCE COMPANY  
AND  
IN THE MATTER OF THE INSOLVENCY ACT 1986

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MINUTE OF ORDER

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UPON the Application of The Home Insurance Company ("the Company") acting by its Rehabilitator Paula Taft Rogers, as appointed by the Superior Court of the State of New Hampshire on 5 March 2003 ("the Applicant")

AND UPON HEARING Counsel for the Applicant

AND UPON READING a copy of a Petition to wind-up the Company ("the Petition") and the witness statement of Paula Taft Rogers dated 7 May 2003



AND UPON the Applicant through its Counsel undertaking *as soon as practicable*

- (i) to present the Petition for the winding-up of the Company before the Court;
- (ii) to have filed the witness statement of Paula Taft Rogers; and
- (iii) to ~~forthwith~~ issue an Ordinary Application in the form of a draft Ordinary Application presented to the Court

IT IS ORDERED THAT Gareth Howard Hughes and Margaret Elizabeth Mills both Chartered Accountants and Licensed Insolvency Practitioners of Ernst & Young LLP of Becket House, 1 Lambeth Palace Road, London SE1 7EU be appointed joint provisional liquidators of the Company (the "Joint Provisional Liquidators") and that any act required or authorised to be done by a provisional liquidator be done by either or both of the above mentioned Joint Provisional Liquidators

**AND IT IS FURTHER ORDERED THAT**

1. the Joint Provisional Liquidators shall jointly and severally have power to carry out the following functions namely:
  - (1) to locate, protect, secure, take possession of, collect and get in the property and assets (of whatever nature) to which the Company is or appears to be entitled within England and Wales;
  - (2) to locate, protect, secure, take possession of, collect and get in the books, papers and records of the Company including the accounting and statutory records in England and Wales;
  - (3) to investigate the affairs of the Company so far as it is necessary to locate, protect, secure, take possession of, collect and get in the assets of the Company within England and Wales;
  - (4) to do all such things as may be necessary or expedient for the protection of the Company's property or assets within England and Wales.
2. Without prejudice to the generality of the powers set forth in paragraph 1 above, the Joint Provisional Liquidators do have the following powers:
  - (1) to carry on the business of the Company in England and Wales to the extent necessary to process and settle claims against the Company and effect reinsurance recoveries (including but not limited to paying reinstatement premiums);
  - (2) to enter into commutations with any creditors or debtors of the Company in respect of business carried on by the Company in England and Wales;
  - (3) to consider whether it would be desirable to implement a scheme of arrangement pursuant to Section 425 of the Companies Act 1985 between the Company and its creditors or any of them and, if so, to develop proposals for such a scheme of arrangement;
  - (4) if they see fit, to nominate an informal creditors' committee from among the members of the general body of creditors of the Company, such informal creditors' committee to assist the Joint Provisional Liquidators in the discharge of their duties;
  - (5) if thought appropriate, to finalise the terms of a scheme of arrangement and explanatory statement to be issued to the Company's creditors, or any of them, if reasonably satisfied that such scheme has a reasonable prospect of being approved by the requisite majority of creditors and sanctioned by the Court and, subject to such approval and sanction, to implement such scheme;
  - (6) to investigate the affairs of the Company and obtain such information as is necessary to locate, protect, secure, take possession of, collect and get in the assets of the Company within England and Wales;

- (7) to employ any employees of the Company in England and Wales, to pay such employees of the Company or of any other company or entity providing the services of its employees to the Company or concerned in the business of the Company within England and Wales, and to dismiss any such employees of the Company;
- (8) to continue to operate the existing bank accounts of the Company within England and Wales and to open and operate new bank accounts within England and Wales as appropriate and to pay monies into such accounts and authorise payments from such accounts;
- (9) to discharge rent on behalf of the Company and other current expense of the Company within England and Wales;
- (10) to incur and pay out of the assets of the Company within England and Wales the normal administrative expenses of the Company and any other payment which they are empowered to make pursuant to this Order which are necessary or incidental to the performance of the Joint Provisional Liquidators' duties and functions;
- (11) to terminate, complete, or perfect, any contracts or transactions relating to the business of the Company within England and Wales;
- (12) to bring or defend any action or other legal proceedings in the name and on behalf of the Company within England and Wales;
- (13) to effect and maintain insurances in respect of the business and property and assets of the Company within England and Wales as they see fit;
- (14) to do all acts and to execute in the name and on behalf of the Company, all deeds, receipts or other documents (and for that purpose using, where necessary, the Company's seal) pursuant to the powers conferred herein;
- (15) to engage and retain and/or employ any solicitors, counsel, lawyers, accountants, investment advisors, actuaries, run-off and claims consultants, loss adjusters, surveyors, and/or other qualified persons to assist them in the performance of their duties and functions;
- (16) to grant or accept a surrender of a lease or tenancy of any of the property of the Company within England and Wales, and to take a lease or tenancy of any property required or convenient for the business of the Company within England and Wales;
- (17) to rank and claim in the bankruptcy, liquidation or insolvency of any person (including but not limited to any body corporate) indebted to the Company and to receive dividends, and to accede to trust deeds for the creditors of any such person;
- (18) to change the situation of the Company's registered office in England and Wales;
- (19) to pay premiums due or to become due under contracts of reinsurance entered into by the Company in England and Wales and to enter into new and/or replacement contracts of reinsurance for the protection of the Company in relation to liabilities of the

Company under current policies of insurance or reinsurance issued by the Company within England and Wales;

- (20) to enter into agreements with third parties for the provision of run-off and related services to the Company in relation to the Company's insurance and reinsurance business within England and Wales;
- (21) to sell or otherwise dispose of the property of the Company within England and Wales by public auction or private treaty;
- (22) to enter into a protocol, memorandum of understanding or other similar arrangement with the US Liquidator (as hereinafter defined) and/or insolvency officeholders appointed in other jurisdictions in respect of the Company for the purposes of co-ordinating the management and administration of the liquidation and affairs of the Company worldwide in the best interests of creditors; and
- (23) to do all other things incidental to the exercise of the foregoing powers.

**AND IT IS FURTHER DIRECTED THAT**

1. The Joint Provisional Liquidators:
  - (1) shall exercise their powers under paragraphs 1 and 2 above after consultation with the Rehabilitator of the Company, save where this Court shall otherwise direct and save where to do so would cause them to contravene English law, until such time as a liquidator of the Company is appointed by order of the Superior Court of the State of New Hampshire ("the US Liquidator"); and
  - (2) following the appointment of the US Liquidator shall exercise their powers under paragraphs 1 and 2 above as requested and approved by the US Liquidator, save where this Court shall otherwise direct and save where to do so would cause them to contravene English law.
2. No disposition of the Company's property by or with the authority of the Joint Provisional Liquidators in either case in the carrying out of their duties and functions and the exercise of their powers under this Order shall be avoided by virtue of the provision of Section 127 of the Insolvency Act 1986.
3. The costs of the Company in this application and in its petitioning to wind the Company up be paid as costs in the Petition.
4. There shall be liberty to apply to the Court for such further orders or directions whether in relation to the exercise of the above powers or otherwise as may appear to the Joint Provisional Liquidators to be necessary or appropriate.

M or LD

**NOTICE TO OFFICERS OF THE COMPANY**

You are required by Section 235 of the Insolvency Act 1986 to give the Joint Provisional Liquidators all of the information as they may reasonably require relating to the Company's property and affairs and to attend upon their instructions as they may reasonably require.

Dated: 8 May 2003

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

**ACE COMPANIES' MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS BY THE LIQUIDATOR**

The Liquidator has impeded discovery in this case by withholding several hundred critical documents that — based on the information provided in the Liquidator's privilege logs and follow-up correspondence— are not protected by any privilege. The documents at issue (the "Subject Documents") make up nearly three-quarters of the total number of documents that the Liquidator has withheld on privilege grounds.<sup>1</sup> Accordingly, respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, the "ACE Companies"), by their attorneys, Orr & Reno P.A., move this Court for an order compelling Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as liquidator (the "Liquidator") of The Home Insurance Company ("Home"), to produce the Subject Documents. In support of the Motion, the ACE Companies respectfully state as follows:

**Introduction**

1. The majority of the Subject Documents should be produced because any privilege that may have originally attached to them was waived when the Liquidator shared the documents

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<sup>1</sup> The ACE Companies have annexed, as Exhibits 1 and 2, the versions of the Liquidator's privilege logs that were provided on February 14, 2005. A listing of the Subject Documents, which are 550 in number, is attached to this Motion at Appendix 1.

with third parties outside of the attorney-client relationship between the Liquidator and his counsel. The relevant provisions in Rule 502(b) of the New Hampshire Rules of Evidence generally restrict the attorney-client privilege to communications between or among the client (or the client's representatives) and the lawyer (or the lawyer's representatives). The Liquidator waived any applicable attorney-client privilege by sharing documents and information with employees of Ernst & Young LLP ("E & Y"), which cannot be considered the "lawyer," a "client," a "representative of the lawyer" or a "representative of a client" under Rule 502(b).

2. The Liquidator has claimed that a small number of the Subject Documents are also protected under the attorney work-product doctrine. However, the sharing of such documents with a third party caused a waiver of any work-product protection as well.

3. The balance of the Subject Documents were not privileged in the first instance and must be produced because they do not constitute communications between the Liquidator and his counsel (or between representatives of the Liquidator) that were "made for the purpose of facilitating the rendition of professional legal services" to the Liquidator.

4. In sum, the Liquidator has withheld documents that are clearly relevant to the subject matter of this dispute, but has failed to carry his burden of demonstrating that the strict requirements for privilege are satisfied. Therefore, the ACE Companies respectfully request that the Court order the production of the Subject Documents.<sup>2</sup>

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<sup>2</sup> As discussed below, the information provided in the privilege logs demonstrates that the majority of the Subject Documents are not privileged and should be produced without any need for an in camera review. The Liquidator also appears to have waived the privilege with respect to other documents that are identified below in Paragraph 24, but the ACE Companies respectfully request that the Court review those documents in camera to confirm that they are not privileged.

### Background

5. On the day of the October 4, 2004 status conference with the Court and in keeping with the Supreme Court's broad mandate in its September 13, 2004 Order, the ACE Companies served their First Set of Interrogatories to Liquidator and First Request for Production of Documents by Liquidator (collectively, the "Discovery Requests"). The Discovery Requests track the allegations in the Liquidator's Motion for Approval of the Proposed Agreement.

6. The Liquidator provided a privilege log on December 21, 2004 and a supplemental privilege log on January 5, 2005 for the documents withheld from production. (Copies of these privilege logs are attached as Exhibits 3 and 4, respectively.) The privilege logs are 82-pages long and contain 442 separate entries. Also, many of the 442 entries have multiple sub-entries for e-mails or attachments, which are considered separate documents. In total, the two logs listed 784 documents. Thus, the number of documents withheld may equal or exceed the number of documents produced.<sup>3</sup>

7. The December 21 log included a "legend" identifying the initials used on the log. The E & Y employees listed on the legend are Benjamin Cairns ("BC"), Matthew Harrison ("MH") and Sarah Ellis ("SE"). (See Ex. 3.)

8. Following receipt of the privilege logs, the ACE Companies, as required under New Hampshire law, attempted to "meet and confer" by addressing the deficiencies in the Liquidator's privilege logs in a letter dated January 19, 2005. (A copy of the letter is attached hereto as Exhibit 5.) Among other things, counsel for the ACE Companies pointed out to counsel for the Liquidator that under New Hampshire law the attorney-client privilege is limited

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<sup>3</sup> In order to keep track of the documents, the parties have adopted the practice of using parentheses to refer to the sub-entries. For example, item number 13 in Exhibit 3 has two entries, a December 18,



by Rule 502(b) and that the Liquidator has the burden of proving that the documents listed on the privilege logs were shared only with the individuals covered under Rule 502(b). (*See id.* at 1-2.) Counsel for the ACE Companies also noted that the Liquidator had not established the link to an attorney or legal advice with respect to certain enumerated documents. (*Id.* at 2.)

9. Counsel for the Liquidator took nearly one month, until February 14, 2005, to respond to the ACE Companies' letter. In the February 14 letter (a copy of which is attached hereto as Exhibit 6), counsel for the Liquidator clarified some of the privilege claims, but not others. The Liquidator also produced about 152 pages of documents that had been withheld before, implicitly acknowledging that his previous assertions of privilege were unfounded. (*See id.* at 1-2.) The Liquidator, however, did not address the fundamental issue of waiver, nor did he provide any basis for claiming privilege as to documents that were sent to third parties.<sup>4</sup>

10. By letter dated February 18, 2005 (just four days after the Liquidator's service of the revised privilege logs), counsel for the ACE Companies noted that "[w]e continue to be troubled by the positions that the Liquidator has taken" on privilege issues. (February 18 letter, a copy of which is attached as Exhibit 7, at 1.) However, the February 18 letter focused on certain areas where the ACE Companies hoped the parties could reach a compromise and avoid Court intervention. Among other things, the counsel for the ACE Companies pointed out that the Liquidator still had not provided a basis for his assertion of attorney-client privilege regarding documents that were not authored or received by an attorney. (*See id.*)

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2003 e-mail and an e-mail attachment also dated December 18, 2003. The parties have referred to the first entry as 13(1) and the one below it as 13(2). This Motion follows the same convention.

<sup>4</sup> The Liquidator also enclosed the revised privileged logs that are attached as Exhibits 1 and 2 to the Motion. The revised logs have 443 entries and list 764 documents.

11. Nearly a month later, counsel for the Liquidator responded to the ACE Companies' February 18 letter. (See March 11, 2005 letter attached as Exhibit 8.) The Liquidator produced a few documents, again acknowledging that his earlier assertion of privilege was improper, but the March 11 letter did not adequately address the issue of documents that were not authored or received by an attorney. (See *id.* at 1-4.)

12. On March 21, 2005, counsel for the ACE Companies noted that the parties had reached an impasse on this issue as well as the Liquidator's failure to justify a claim of privilege regarding documents that were disclosed to third parties. (See March 21 e-mail, a copy of which is attached as Exhibit 9.)

### **Request for Relief**

#### **I. New Hampshire Law On Privilege**

13. The Liquidator has the burden, as the party resisting discovery, to demonstrate that any communication or document withheld from production is actually privileged and, if so, that the privilege has not been waived. See, e.g., *State v. Gordon*, 141 N.H. 703, 705, 692 A.2d 505, 506 (1997); *Moore v. Medeva Pharmaceuticals, Inc.*, No. Civ. 01-311-M, 2003 WL 1856422, at \*2 (D.N.H. Apr. 9, 2003) (applying New Hampshire law). The attorney-client privilege in New Hampshire is statutory and, as such, it "must be strictly construed." *State v. LaRoche*, 122 N.H. 231, 233, 442 A.2d 602, 603 (1982).

#### **II. Communications Involving E & Y Are Not Privileged and Must Be Produced**

14. Rule 502(b) states that a party may withhold "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client," but only if the communications are (1) between the client (or the client's representative) and the lawyer (or the lawyer's representative); (2) between the client or the lawyer (or their representatives)

and a lawyer (or the lawyer's representative) representing another party in a pending action concerning a matter of common interest; (3) between representatives of the client or between the client and a representative of the client; or (4) among lawyers and their representatives representing the same client. N.H. R. EVID. 502(B).

15. In other words, the Subject Documents must be produced unless the Liquidator proves that the E & Y employees are "representatives," under Rule 502(b), of either the client's lawyers (*i.e.*, the New Hampshire Attorney General's Office, Rackemann, Sawyer & Brewster, or Clifford Chance) or the client (*i.e.*, the Liquidator, Home or the Joint Provisional Liquidators ("JPLs")).<sup>5</sup> As demonstrated below, the Liquidator cannot carry that burden.<sup>6</sup>

**A. E & Y Is Not A "Representative Of The Lawyer" Under Rule 502**

16. Under Rule 502(a), a representative of the lawyer is "one employed by the lawyer to assist the lawyer in the rendition of professional legal services." N.H. R. EVID. 502(A)(4). There is no evidence in this case that E & Y was employed by the lawyers involved in the Home liquidations to assist in the "rendition of professional legal services." E & Y is primarily an auditing and accounting firm and was presumably engaged by the "client" (either the Liquidator,

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<sup>5</sup> E & Y cannot be considered a "lawyer" for purposes of Rule 502(b) because it was not providing legal services in this matter, and it is not the "client" because the client is defined as an entity that "is rendered professional services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." N.H. R. EVID. 502(A)(1). E & Y is a service provider rather than the recipient of legal advice from the various lawyers involved here. The Liquidator may argue that the E & Y employees listed on the privilege logs are effectively the "client" because the JPLs are also E & Y employees. That argument, however, would be unavailing because the U.K. court appointed Gareth Hughes and Margaret Mills, individually, and did not appoint E & Y as the JPLs. E & Y is a third party engaged by Mr. Hughes and Ms. Mills as the JPLs.

<sup>6</sup> Any work-product protection attaching to the Subject Documents would also be waived if the Court were to hold that the E & Y employees are third parties. *See State v. Dedrick*, 135 N.H. 502, 507-08, 607 A.2d 127, 130-31 (1992) (holding that work-product had been waived through disclosure); *State v. Settle*, 124 N.H. 832, 836, 480 A.2d 6, 8 (1984) (same). *See generally U.S. v. Nobles*, 422 U.S. 225, 239 (1975) ("Like other qualified privileges, [the work-product privilege] may be waived.").

Home or the JPLs) to provide those types of services. Therefore, E & Y employees do not meet the definition of a “representative of the lawyer” under Rule 502(a).

17. The First Circuit dealt with a similar situation in *Cavallaro v. U.S.*, 284 F.3d 236 (1<sup>st</sup> Cir. 2002), and held that a client had waived the attorney-client by sharing documents with its accountant, E & Y. As noted in *Cavallaro*, the general rule is that “disclosing attorney-client communications to a third party undermines the privilege.” *Id.* at 246-47. “An exception to this general rule exists for the third parties employed to assist a lawyer in rendering legal advice.” *Id.* at 247. That exception, however, is limited to cases where “[t]he involvement of the third party [is] nearly indispensable[,] or serve[s] some specialized purpose[,] in facilitating the attorney-client communications.” *Id.* at 249. The *Cavallaro* court found that the privilege was waived because E & Y was not employed to assist the lawyer in rendering legal advice to the client and was instead acting in its capacity as an accounting firm.

18. The Court should reach the same conclusion here because a closer examination of the Liquidator’s privilege logs confirms that the E & Y employees were not engaged to assist in the rendering of legal advice to the clients.

**1. Documents Where E & Y Employees Are The Author, Sole Recipient Or One Of A Limited Number Of Recipients**

19. E & Y employees are listed as the author, sole recipient or one of a limited number of recipients on only 165 of the Subject Documents, which is about 30 percent of the total number of Subject Documents. Even from the sparse descriptions provided in the logs, it is clear that many of those communications do not meet the threshold requirement for the assertion of attorney-client privilege, which is that they must relate to the rendering of legal advice. For example, document numbers 19(1) and 19(2) on the December 21 log are described as e-mails between the Special Deputy Liquidator, Peter Bengelsdorf, and Sarah Ellis of E & Y regarding

“RW’s View of Actuarial Model.” (“RW” is Rhydian Williams of Equitas, Ltd., who has submitted an affidavit to this Court in support of the Proposed Agreement.) These e-mails between a representative of the client and a third party touch on actuarial issues, not legal issues, raised by another third party. Two Clifford Chance attorneys are listed as “cc’s,” but it is well established that the mere copying of an attorney on a non-legal matter does not make the communication privileged. See *Pacamor Bearings, Inc. v. Minebea Co., Ltd.*, 918 F. Supp. 491, 511 (D.N.H. 1996) (“[D]ocuments prepared by non-attorneys and addressed to non-attorneys with copies routed to counsel are generally not privileged ...”).

20. Moreover, even if the Liquidator could carry his burden of showing that the communications were made for the purpose of providing legal advice, there is no indication that Mr. Bengelsdorf was communicating with Ms. Ellis so that E & Y could lend “indispensable” or “specialized” assistance in the rendering of legal advice. To the contrary, it is clear that Ms. Ellis was being consulted on an actuarial matter, which is in keeping with E & Y’s expertise.<sup>7</sup>

21. In Appendix 2 to this Motion, the ACE Companies have listed all the documents that — as with the documents discussed above — should be produced because they do not involve the rendering of legal advice or, at the very least, do not reflect that E & Y assisted in the rendering of legal advice. Many of the documents discuss actuarial or accounting issues and simply list attorneys as “cc’s.” For example, document number 92(2) on the December 21 log is an e-mail from Matthew Harrison of E & Y to Gareth Hughes, one of the JPLs, regarding “OSLR Figures.” “OSLR” refers to “outstanding loss reserves,” which is a figure that accountants or actuaries will often calculate for reinsurers. Although two Clifford Chance

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<sup>7</sup> Document numbers 132(1), 132(2), 133, 221(1), 221(2), 222 and 306(2) on the December 21 log and 8(2) on the January 5 log appear to be duplicates of 19(1) and 19(2).

attorneys were copied on the e-mail, it is clear from the context that this was for informational purposes and that no legal advice was being sought. *See Pacamor*, 918 F. Supp. at 511.

22. Document numbers 13(2), 20, 127(1), 127(2), 146, 197, 202, 207(1) and 207(2) on the December 21 log and document number 46 on the January 5 log similarly involve accounting or actuarial issues. At least one of the documents, document number 197 on the December 21 log, apparently discusses how much of a distribution the AFIA Cedents will receive, which is a key issue in determining the fairness and reasonableness of the Proposed Agreement.<sup>8</sup>

23. In sum, the ACE Companies respectfully request that the Court order the immediate production of the documents listed in Appendix 2 because the Liquidator's privilege logs demonstrate that (a) there was no legal advice being provided in those documents; and (b) even assuming the lawyers were rendering legal advice, the third-party E & Y employees were consulted for the purpose of advising on accounting or actuarial issues, not for the purpose of providing "indispensable" or specialized assistance to the lawyers rendering legal advice.

24. Appendix 3 to this Motion lists the balance of the 165 documents where E & Y employees are the author, sole recipient or one of a limited number of recipients. Given that the E & Y employees were clearly not assisting the lawyers in rendering legal advice with respect to the documents in Appendix 2, it is likely that the Liquidator also waived the attorney-client privilege for the documents in Appendix 3 (which involve many of the same individuals and subjects). Because the ACE Companies have shown a "reasonable probability" that these

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<sup>8</sup> The rest of the documents in Appendix 2 are described as "discussions with Mike Durkin" or "discussions with Rhydian Williams." The Liquidator may not attempt to hide the contents of discussions that E & Y employees had with third parties by relying on the fact that the documents relating to those conversations were circulated to attorneys.

communications are not privileged, an in camera review is necessary. See *Bennett v. ITT Hartford Group, Inc.*, 150 N.H. 753, 846 A.2d 560, 567 (2004).

**2. Documents Where E & Y Employees Are Shown On The Privilege Logs As "CC's" Or One Of Multiple Recipients**

25. The privilege logs also reveal that E & Y employees often received the communications for informational purposes only. E & Y employees are shown on the logs as "cc's" or one of multiple recipients on 367 of the Subject Documents (*i.e.*, two-thirds of the total number of Subject Documents).<sup>9</sup> As discussed above, a third party will be deemed to assist a lawyer in rendering legal advice in very limited circumstances where the third party's involvement is "nearly indispensable" or "serve[s] some specialized purpose" in facilitating attorney-client communications. *Cavallaro*, 284 F.3d at 249. Even assuming, for the sake of argument, that the documents in Appendix 4 relate to the rendering of legal advice, it cannot be said that the E & Y employees were "indispensable" or served a "specialized purpose" because it is obvious that they received the communications simply for their information.

26. For example, document number 12(1) on the December 21 log, which is an e-mail regarding "discussions with Richard Leedham," was sent by a Clifford Chance attorney to seven people, including Sarah Ellis of E & Y. A related e-mail, document number 12(2), was sent by Jonathan Rosen to Gareth Hughes, with a "cc" to six people, including Ms. Ellis. There is no suggestion that Ms. Ellis was acting on the e-mail or lending "indispensable" assistance on legal matters, and the context proves otherwise. Document numbers 12(1) and 12(2) are illustrative of the hundreds of other documents in Appendix 4, all of which should have been produced by the Liquidator.

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<sup>9</sup> These documents are set forth in Appendix 4 to the Motion.

**B. E & Y Is Not A “Representative Of A Client” Under Rule 502**

27. Rule 502 states that “a representative of a client” is “one having authority to obtain professional legal services, or to act on advice pursuant thereto, on behalf of a client.” N.H. R. EVID. 502(A)(2). The New Hampshire Evidence Manual notes that Rule 502(a)(2) reflects the “most restricted position” regarding the definition of a client representative, which is the “control group” test. 1 N.H. EVID. MANUAL § 502.02[7]. *See also National Tank Co. v. The 30th Judicial Dist. Ct. (“NATCO”),* 851 S.W.2d 193, 197 (Tex. 1993) (noting that the definition of a client representative in the Texas statute, which is the same as Rule 502(a)(2), “adopts the ‘control group’ test previously recognized by many federal courts”).

28. The “control group” test “generally protect[s] only statements made by the upper echelon of corporate management.” *Id.* There are sound public policy reasons for narrowly defining which employees may be considered client representatives:

The “control group” test is preferable to the principal alternative, which is that the privilege cover[s] any employee communication to counsel directed by the employer and referring to the performance of his duties. This approach would permit a corporation to insulate all of its normal fact gathering about a matter by using the medium of communication with counsel for it.

1 N.H. EVID. MANUAL § 502.02[7].

29. In this case, the E & Y employees cannot be considered the “upper echelon” of the client because they are not even employees of the client. *See Langdon v. Champion,* 752 P.2d 999, 1002 (Alaska 1988) (holding, without further consideration, that the “control group” definition cannot apply to third parties). Some courts have gone beyond the holding in *Langdon* by examining whether employees of a third party may be client representatives, but they have also required express instructions from the client providing the third party “with discretion to either accept or reject the legal advice.” *NATCO*, 851 S.W.2d at 199. Even if this Court were to



hold that the “control group” test applies to third parties, there is no evidence that the E & Y employees were provided with the requisite authority.

30. Accordingly, the Liquidator cannot rely on Section 502(a)(2) to argue that the privileged was maintained when communications were shared with E & Y employees.

**III. Another Group Of Documents Withheld  
By The Liquidator Were Never Privileged**

31. In addition to the documents for which any arguable privilege was waived, the Liquidator has withheld fifteen documents that were never privileged at all because there is no indication in the privilege logs that they were communications between the lawyer and the client (or the client’s representatives) “made for the purpose of facilitating the rendition of professional legal services to the client.” N.H. R. EVID. 502(B).<sup>10</sup>

32. The main flaw in the Liquidator’s assertion of privilege is that the documents in Appendix 5 involve only non-lawyers. The Liquidator may try to argue that the communications are “between representatives of the client” under Rule 502(b), but there are several problems with such an argument. First, several of the documents — document numbers 22(3), 94 and 203(2) on the December 21 log and 25(3) and 25(4) on the January 5 log — were also sent to Sarah Ellis of E & Y, who is demonstrably not a client representative. Second, the Liquidator has not shown how the communications in Appendix 5 were expressly “made for the purpose of facilitating the rendition of professional legal services to the client.” N.H. R. EVID. 502(B). This is an essential component of the statute; otherwise, a client could cloak all the communications of its employees under the mantle of attorney-client privilege.

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<sup>10</sup> The documents are listed in Appendix 5 to this Motion.

33. When the ACE Companies brought some of these and other documents to the Liquidator's attention, his counsel purported to address the ACE Companies' concerns in the March 11 letter. The letter, however, only confirms that documents were withheld improperly.

34. Counsel for the Liquidator admitted in the March 11 letter that two e-mails (document numbers 24(1) and 24(2) on the January 5 log) should have been produced and enclosed them with the letter. (The e-mails are annexed to this Motion as Exhibit 10.) A review of the two e-mails shows that the Liquidator lacked any basis for withholding the documents originally and it raises suspicion about the Liquidator's other claims of privilege.

35. The Liquidator's attempted justification in the March 11 letter for withholding other documents in Appendix 5 falls far short and instead supports the ACE Companies' assertions. For example, counsel for the Liquidator claimed that document number 203(2) on the December 21 log was properly withheld because document numbers 203(1) and 203(2) "comprise essentially one email sent to counsel." (Ex. 8 at 2.) However, counsel for the Liquidator also admitted that document number 203(2) was forwarded to counsel "for information" in document number 203(1). (*Id.*) The mere forwarding of an unprivileged e-mail to counsel "for information" does not make the underlying e-mail a communication for the purpose of legal advice. It also provides another reason for holding that document number 203(1) is not privileged, since clearly no legal advice was being sought.<sup>11</sup>

36. In the March 11 letter, counsel for the Liquidator also tried to portray other documents — namely, document numbers 136(1), 179(1) and 301(1) on the December 21 log and document numbers 84(1) on the January 5 log — as privileged because they related to allegedly privileged communications. (Ex. 8 at 2.) Those documents, however, cannot be

characterized as facilitating the rendition of any legal services by the Liquidator's counsel because they were after the alleged rendition of legal services on which the Liquidator relies.<sup>12</sup>

37. Finally, in the March 11 letter, counsel for the Liquidator stated that document numbers 25(3) and 25(4) on the January 5 log were properly withheld because they are e-mails "addressed to counsel." (Ex. 8 at 2.) However, the descriptions for document numbers 25(3) and 25(4) list only Jonathan Rosen, Gareth Hughes, Sarah Ellis and Matthew Harrison as senders or recipients. None of those individuals is a "lawyer" for purposes of Rule 502(b).

WHEREFORE, the ACE Companies respectfully request that the Court:

- A. Enter an Order compelling the Liquidator to produce to the ACE Companies the documents listed in Appendices 2, 4 and 5;
- B. Enter an Order compelling the Liquidator to produce to the Court, for in camera review, the documents listed in Appendix 3; and
- C. Grant such other and further relief as this Court deems just and proper, including, but not limited to, the fees and costs incurred by the ACE Companies in bringing this Motion.

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<sup>11</sup> The ACE Companies have moved for the production of document number 203(1) on the separate and independent ground that any applicable privilege was waived.

<sup>12</sup> The ACE Companies do not concede that the underlying documents are privileged. For example, any privilege attaching to document numbers 179(4) and 301(2) on the December 21 log was waived because they were sent to E & Y employees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that I served a copy of the foregoing on Roger A. Seigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via facsimile and First Class mail on March 22, 2005

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**APPENDIX 1**

**SUBJECT DOCUMENTS**

<b>December 21 Log</b>				
11	12(1)	12(2)	13(1)	13(2)
14(1)	14(2)	15	17(1)	17(2)
17(3)	17(4)	17(5)	18(1)	18(2)
18(3)	18(4)	19(1)	19(2)	20
21(1)	21(2)	22(1)	22(2)	22(3)
23(2)	24(1)	25(1)	25(2)	26(1)
27	29	30	33(1)	33(2)
33(3)	34(1)	34(2)	36(1)	36(2)
38(1)	38(2)	38(3)	39(1)	39(3)
40(1)	40(2)	42	43	48
49	51	52(1)	52(2)	52(3)
53	58	59	60	62(1)
62(2)	62(3)	63	64(1)	64(2)
65	68(1)	68(2)	68(3)	71(1)
71(2)	71(3)	71(4)	71(5)	72
76(1)	76(2)	77(1)	77(2)	78(1)
78(2)	79	86	90(1)	90(2)
90(3)	92(2)	93	94	96(1)
96(2)	111	112(1)	112(2)	112(3)
113	116	120(1)	120(2)	122
123	124	125(1)	125(2)	125(3)
126(1)	126(2)	127(1)	127(2)	128(1)
128(2)	128(3)	128(4)	129(1)	129(2)
129(3)	129(4)	130(1)	130(2)	130(3)
130(4)	130(5)	131(1)	131(2)	131(3)
132(1)	132(2)	133	134(1)	134(2)
135(1)	136(1)	136(2)	138(1)	138(2)
139	140(1)	142(1)	142(2)	144
145(1)	145(2)	146	147	148
150(1)	150(2)	150(3)	152	153
154	155	156	157(1)	157(2)
157(3)	160	162	164(1)	164(3)
165(1)	165(2)	165(3)	166(1)	166(2)
166(4)	169	170(1)	170(2)	174
176(1)	176(2)	177(3)	178(2)	179(1)
179(2)	179(4)	182(1)	182(2)	183(2)
185	186	187(2)	187(3)	189(1)
189(2)	190	191(1)	191(2)	192(1)
193	194	195(1)	195(2)	195(3)

195(4)	195(5)	196	197	198(1)
198(2)	200	201	202	203(1)
203(2)	204	205(2)	205(3)	206(1)
206(2)	207(1)	207(2)	208	209(1)
209(2)	209(3)	209(4)	210(2)	210(3)
211(2)	211(3)	212	213	214
215	216	217(1)	217(2)	217(3)
218	219(1)	219(2)	219(3)	219(4)
219(5)	220(1)	220(2)	220(3)	220(4)
220(5)	221(1)	221(2)	222	223(1)
223(2)	224(1)	225(3)	226(1)	226(2)
226(3)	227	228(1)	228(2)	229
230	231	232	233	235(1)
235(2)	236	237(1)	237(2)	238(1)
238(2)	238(3)	239(1)	239(2)	239(3)
239(4)	239(5)	240(1)	240(2)	241
242	244	245(1)	245(2)	245(3)
245(4)	246	248(1)	248(2)	248(3)
249	252(1)	252(2)	252(3)	253
254(1)	254(2)	254(3)	255(2)	255(3)
255(4)	256(2)	256(3)	257(2)	259
260	262(1)	262(2)	262(3)	262(5)
263(1)	263(3)	264(1)	264(2)	264(3)
265	268	270	273(1)	273(2)
273(3)	273(4)	273(5)	276(1)	276(2)
276(3)	277(1)	277(2)	278	279
281	284(2)	286(1)	286(2)	286(3)
286(4)	287	288	293(1)	293(2)
293(3)	293(4)	294(1)	294(2)	294(3)
295(1)	295(2)	296(1)	296(2)	297(1)
297(2)	298	299	301(1)	301(2)
302(1)	302(2)	302(3)	303(1)	303(2)
303(3)	303(4)	304(1)	304(2)	304(3)
304(4)	304(5)	305(2)	306(2)	307(2)
309	310	311(1)	311(2)	311(3)
312(1)	312(2)	313(1)	313(2)	314
315	316(1)	316(2)	317(1)	317(2)
318(1)	319(1)	319(2)	319(3)	319(4)
319(5)	320	323(1)	323(2)	323(3)
323(4)	324(2)	324(3)	324(4)	325(1)
325(2)	325(3)	326(1)	326(2)	328
329	330	332	333	334(1)
334(2)	335(1)	335(2)	336(1)	336(2)
336(3)	337(2)	337(3)	337(4)	340(2)
341(2)	342(2)	342(3)	343(1)	343(2)



344	346	352(1)	352(2)	353
354	359			

January 5 Log				
1(1)	1(2)	2(1)	2(2)	2(3)
3	4(1)	4(2)	5(2)	6(2)
8(2)	11(1)	11(2)	12	13(1)
13(2)	13(3)	14(1)	14(2)	14(3)
14(4)	14(5)	15(3)	15(4)	15(5)
16(1)	16(2)	17(1)	17(2)	17(3)
17(4)	18	19	20	21
22	23(2)	24(3)	25(1)	25(2)
25(3)	25(4)	25(5)	26(1)	26(2)
27	28(1)	28(2)	29(1)	29(2)
29(3)	30	32(4)	32(5)	32(6)
33(1)	33(2)	34(1)	34(2)	34(3)
38	39(1)	39(2)	40	41
42(2)	42(3)	43(1)	43(2)	44(1)
44(2)	45	46	51(1)	52(1)
52(2)	53(1)	53(2)	54(1)	54(2)
54(3)	54(4)	55(1)	55(2)	56(1)
56(2)	57(1)	57(2)	57(3)	58(1)
58(2)	58(3)	58(4)	59(3)	59(4)
59(5)	60(4)	60(5)	60(6)	62(1)
63(1)	65	66	68	69(1)
69(2)	70	74	75	76(2)
77(1)	77(2)	78(2)	78(3)	78(4)
79	80(1)	80(2)	81(1)	81(2)
83	84(1)	84(2)		

**APPENDIX 2**

**WAIVER WHERE E & Y EMPLOYEES ARE AUTHOR,  
SOLE RECIPIENT OR ONE OF LIMITED NUMBER OF RECIPIENTS**

<b>December 21 Log</b>				
13(2)	19(1)	19(2)	20	68(1)
68(2)	68(3)	92(2)	127(1)	127(2)
132(1)	132(2)	133	146	176(1)
176(2)	197	202	207(1)	207(2)
221(1)	221(2)	222	233	244
264(1)	264(2)	264(3)	306(2)	342(2)
342(3)				

<b>January 5 Log</b>				
1(1)	1(2)	2(1)	2(2)	2(3)
8(2)	46			

**APPENDIX 3**

**IN CAMERA REVIEW OF DOCUMENTS WHERE  
E & Y EMPLOYEES ARE AUTHOR, SOLE  
RECIPIENT OR ONE OF LIMITED NUMBER OF RECIPIENTS**

<b>December 21 Log</b>				
22(1)	22(2)	23(2)	24(1)	25(1)
25(2)	27	38(1)	39(1)	40(1)
40(2)	43	59	60(1)	62(2)
62(3)	63	64(1)	64(2)	71(5)
72	76(2)	96(2)	120(2)	134(1)
134(2)	135(1)	138(1)	138(2)	139
142(1)	142(2)	154	164(1)	166(1)
166(2)	169	177(3)	178(2)	179(4)
182(1)	182(2)	187(3)	189(1)	189(2)
192(1)	195(1)	201	203(1)	206(2)
218	223(1)	223(2)	224(1)	225(3)
226(2)	226(3)	228(1)	228(2)	229(1)
236	237(1)	238(1)	238(2)	238(3)
239(1)	239(2)	239(3)	239(4)	239(5)
240(1)	242	245(4)	252(1)	252(2)
262(1)	262(2)	262(3)	263(1)	273(5)
276(1)	276(2)	277(1)	286(4)	287
301(2)	305(2)	307(2)	317(1)	337(2)

<b>January 5 Log</b>				
5(2)	6(2)	11(1)	11(2)	14(1)
14(2)	16(1)	16(2)	17(1)	17(2)
17(3)	17(4)	18	25(1)	25(2)
27	32(4)	32(5)	32(6)	44(1)
44(2)	45	53(1)	53(2)	59(3)
59(4)	59(4)	60(4)	60(5)	60(6)
63(1)	66	68	69(1)	69(2)
70	83			

**APPENDIX 4**

**WAIVER WHERE E & Y EMPLOYEES ARE SHOWN  
AS "CC'S" OR ONE OF MULTIPLE RECIPIENTS**

<b>December 21 Log</b>				
11	12(1)	12(2)	14(1)	14(2)
15	17(1)	17(2)	17(3)	17(4)
17(5)	18(1)	18(2)	18(3)	18(4)
21(1)	21(2)	26(1)	29	30
33(1)	33(2)	33(3)	34(1)	34(2)
36(1)	36(2)	38(2)	38(3)	39(3)
42	48	49	51	52(1)
52(2)	52(3)	53	58	62(1)
65	71(1)	71(2)	71(3)	71(4)
76(1)	77(1)	77(2)	78(1)	78(2)
79	86	90(1)	90(2)	90(3)
96(1)	111	112(1)	112(2)	112(3)
113	116	120(1)	122	123
124	125(1)	125(2)	125(3)	126(1)
126(2)	128(1)	128(2)	128(3)	128(4)
129(1)	129(2)	129(3)	129(4)	130(1)
130(2)	130(3)	130(4)	130(5)	131(1)
131(2)	131(3)	140(1)	144	145(1)
145(2)	147	148	150(1)	150(2)
150(3)	152	153	155	156
157(1)	157(2)	157(3)	160	162
164(3)	165(1)	165(2)	165(3)	166(4)
170(1)	170(2)	174	183(2)	185
186	187(2)	190	191(1)	191(2)
193	194	195(2)	195(3)	195(4)
195(5)	196	198(1)	198(2)	200
204	205(2)	205(3)	206(1)	208
209(1)	209(2)	209(3)	209(4)	210(2)
210(3)	211(2)	211(3)	212	213
214	215	216	217(1)	217(2)
217(3)	219(1)	219(2)	219(3)	219(4)
219(5)	220(1)	220(2)	220(3)	220(4)
220(5)	226(1)	227	230	231
232	235(1)	235(2)	237(2)	240(2)
241	245(1)	245(2)	245(3)	246
248(1)	248(2)	248(3)	249	252(3)
253	254(1)	254(2)	254(3)	255(2)
255(3)	255(4)	256(2)	256(3)	257(2)

259	260	262(5)	263(3)	273(1)
273(2)	273(3)	273(4)	276(3)	277(2)
278	279	281	284(2)	286(1)
286(2)	286(3)	288	293(1)	293(2)
293(3)	293(4)	294(1)	294(2)	294(3)
295(1)	295(2)	296(1)	296(2)	297(1)
297(2)	298	299	302(1)	302(2)
302(3)	303(1)	303(2)	303(3)	303(4)
304(1)	304(2)	304(3)	304(4)	304(5)
309	310	311(1)	311(2)	311(3)
312(1)	312(2)	313(1)	313(2)	314
315	316(1)	316(2)	317(2)	318(1)
319(1)	319(2)	319(3)	319(4)	319(5)
320	323(1)	323(2)	323(3)	323(4)
324(2)	324(3)	324(4)	325(1)	325(2)
325(3)	326(1)	326(2)	328	329
330	332	333	334(1)	334(2)
335(1)	335(2)	336(1)	336(2)	336(3)
337(3)	337(4)	340(2)	341(2)	343(1)
343(2)	344	346	352(1)	352(2)
353	354	359		

<b>January 5 Log</b>				
3	4(1)	4(2)	12	13(1)
13(2)	13(3)	14(3)	14(4)	14(5)
15(3)	15(4)	15(5)	19	20
21	22	23(2)	24(3)	25(5)
26(1)	26(2)	28(1)	28(2)	29(1)
29(2)	29(3)	30	33(2)	34(1)
34(2)	34(3)	38	39(1)	39(2)
40	41	42(2)	42(3)	43(1)
43(2)	51(1)	52(1)	52(2)	54(1)
54(2)	54(3)	54(4)	55(1)	55(2)
56(1)	56(2)	57(1)	57(2)	57(3)
58(1)	58(2)	58(3)	58(4)	62(1)
65	74	75	76(2)	77(1)
77(2)	78(2)	78(3)	78(4)	79
80(1)	80(2)	81(1)	81(2)	

**APPENDIX 5**

**NO PRIVILEGE ESTABLISHED**

<b>December 21 Log</b>				
13(1)	22(3)	93	94	136(1)
136(2)	179(1)	179(2)	203(2)	301(1)

<b>January 5 Log</b>				
25(3)	25(4)	33(1)	84(1)	84(2)

4.27(3) [Repayment of deposit etc.] If a winding-up order is made after a provisional liquidator has been appointed, any money deposited under this Rule shall (unless it is required by reason of insufficiency of assets for payment of remuneration and expenses of the provisional liquidator) be repaid to the person depositing it (or as that person may direct) out of the assets, in the prescribed order of priority.

(See General Note after r. 4.31.)

4.28 Security

4.28(1) [Application of Rule] The following applies where an insolvency practitioner is appointed to be provisional liquidator under section 135.

4.28(2) [Cost of providing security] The cost of providing the security required under the Act shall be paid in the first instance by the provisional liquidator; but-

- (a) if a winding-up order is not made, the person so appointed is entitled to be reimbursed out of the property of the company, and the court may make an order on the company accordingly, and
(b) if a winding-up order is made, he is entitled to be reimbursed out of the assets in the prescribed order of priority.

(See General Note after r. 4.31.)

4.29 Failure to give or keep up security

4.29(1) [Powers of court] If the provisional liquidator fails to give or keep up his security, the court may remove him, and make such order as it thinks fit as to costs.

4.29(2) [Directions for replacement] If an order is made under this Rule removing the provisional liquidator, or discharging the order appointing him, the court shall give directions as to whether any, and if so what, steps should be taken for the appointment of another person in his place.

(See General Note after r. 4.31.)

4.30 Remuneration

4.30(1) [To be fixed by court] The remuneration of the provisional liquidator (other than the official receiver) shall be fixed by the court from time to time on his application.

4.30(2) [Matters to be taken into account] In fixing his remuneration, the court shall take into account-

- (a) the time properly given by him (as provisional liquidator) and his staff in attending to the company's affairs;
(b) the complexity (or otherwise) of the case;
(c) any respects in which, in connection with the company's affairs, there falls on the provisional liquidator any responsibility of an exceptional kind or degree;
(d) the effectiveness with which the provisional liquidator appears to be carrying out, or to have carried out, his duties; and
(e) the value and nature of the property with which he has to deal.

4.30(3) [Source of payment of remuneration etc.] Without prejudice to any order the court may make as to costs, the provisional liquidator's remuneration (whether the official receiver or another) shall be paid to him, and the amount of any expenses incurred by him (including the remuneration and expenses of any special manager appointed under section 177) reimbursed-

- (a) if a winding-up order is not made, out of the property of the company; and
(b) if a winding-up order is made, out of the assets, in the prescribed order of priority,

or, in either case (the relevant funds being insufficient), out of the deposit under Rule 4.27.

**4.30(3A) [Power of retention]** Unless the court otherwise directs, in a case falling within paragraph (3)(a) above the provisional liquidator may retain out of the company's property such sums or property as are or may be required for meeting his remuneration and expenses.

**4.30(4) [Provisional liquidator other than official receiver]** Where a person other than the official receiver has been appointed provisional liquidator, and the official receiver has taken any steps for the purpose of obtaining a statement of affairs or has performed any other duty under the Rules, he shall pay the official receiver such sum (if any) as the court may direct.

(See General Note after r. 4.31.)

#### 4.31 Termination of appointment

**4.31(1) [Termination by court]** The appointment of the provisional liquidator may be terminated by the court on his application, or on that of any of the persons specified in Rule 4.25(1).

**4.31(2) [Directions on termination]** If the provisional liquidator's appointment terminates, in consequence of the dismissal of the winding-up petition or otherwise, the court may give such directions as it thinks fit with respect to the accounts of his administration or any other matters which it thinks appropriate.

**4.31(3)** (Omitted by the Insolvency (Amendment) Rules 1987 (SI 1987/1919), r. 3(1), Sch., Pt 1, para. 44 as from 11 January 1988.)

#### GENERAL NOTE TO RR. 4.25-4.31

These rules set out the procedure governing an application to the court for the appointment of a provisional liquidator under IA 1986, s. 135, and the associated questions of furnishing a deposit (where the official receiver is appointed) or security (where the provisional liquidator is an insolvency practitioner), and the liquidator's remuneration.

Rule 4.25(1) was substituted by the Insolvency (Amendment) Rules 2002 (SI 2002/1307, effective May 31, 2002), so as to include the persons mentioned in sub-paras (f) and (g).

The court may in an appropriate case refer the fixing of remuneration under r. 4.30 to one or more assessors: *Re Independent Insurance Co. Ltd* [2002] EWHC 1577 (Ch); [2002] 2 B.C.L.C. 709. (For further proceedings, see *Re Independent Insurance Co. Ltd (No. 2)* [2003] EWHC 51 (Ch), [2003] 1 B.C.L.C. 640, where the principles for the fixing of remuneration and making of interim payments are discussed in detail.)

There is no provision in the rules governing the priority in which the remuneration and expenses of a provisional liquidator should be paid, either *vis-à-vis* the company's debts or in relation to each other; but in *Re Grey Marlin Ltd* [2000] B.C.C. 410 and in *Smith v UIC Insurance Co. Ltd* [2001] B.C.C. 11 the rules governing a liquidator's remuneration and expenses were applied by analogy.

The provisions in rr. 4.28 and 4.30 are directory, although subject to the overall discretion conferred by r. 4.31(2) (and formerly also by r. 4.31(3)); and so a court will not normally make an order that an unsuccessful petitioner should pay the remuneration of a provisional liquidator: *Re Walter L Jacob & Co. Ltd* (1987) 3 B.C.C. 532. (See, however, *Re Secure & Provide plc* [1992] B.C.C. 405, where such an order was made against the Secretary of State following the failure of a petition under s. 124A, and compare *Re Xyllyx plc (No. 2)* [1992] B.C.L.C. 378.)

The court has power under r. 4.31(2) to direct that a provisional liquidator who has been discharged before the hearing of the petition shall be paid remuneration out of the company's assets: *Re U O C Corporation, Alipour v U O C Corporation* [1998] B.C.C. 191.



PROCEEDINGS ON A PROPOSAL MADE BY THE DIRECTORS, OR BY THE ADMINISTRATOR, OR BY THE LIQUIDATOR

*Section A: meetings of company's creditors and members*

**1.13 Summoning of meetings**

**1.13(1) [Convener to regard convenience of creditors for venue]** Subject as follows, in fixing the venue for the creditors' meeting and the company meeting, the person summoning the meeting ("the convener") shall have regard primarily to the convenience of the creditors.

**1.13(2) [Time of meetings]** Meetings shall in each case be summoned for commencement between 10.00 and 16.00 hours on a business day.

**1.13(3) [Creditors' meeting in advance of company meeting]** The meetings may be held on the same day or on different days. If held on the same day, the meetings shall be held in the same place, but in either case the creditors' meeting shall be fixed for a time in advance of the company meeting.

**1.13(4) [Maximum seven days between meetings]** Where the meetings are not held on the same day, they shall be held within 7 days of each other.

**1.13(5) [Forms of proxy with notice]** With every notice summoning either meeting there shall be sent out forms of proxy.

**GENERAL NOTE**

Paragraph (3) was replaced and para. (4) added by the Insolvency (Amendment) (No. 2) Rules 2002 (SI 2002/2712). These changes reflect a need for greater clarity with regard to meetings' procedures and, while introducing some flexibility (subject to a maximum hiatus of seven days between meetings), also recognise the fact that there is no point of having a meeting of members if the creditors have voted down the proposal.

This rule was then further amended in the form of a complete reconstitution by Insolvency (Amendment) Rules 2003 (SI 2003/1730).

**1.14 The chairman at meetings**

**1.14(1) [Convener to be chairman]** Subject as follows, at both the creditors' meeting and the company meeting, and at any combined meeting, the convener shall be chairman.

**1.14(2) [Other nominated chairman]** If for any reason he is unable to attend, he may nominate another person to act as chairman in his place; but a person so nominated must be—

- (a) a person qualified to act as an insolvency practitioner in relation to the company;
- (b) an authorised person in relation to the company; or
- (c) an employee of the convener or his firm who is experienced in insolvency matters.

**GENERAL NOTE**

A number of amendments were made by Insolvency (Amendment) (No. 2) Rules 2002 (SI 2002/2712) with effect from January 1, 2003 to allow greater flexibility as to who should chair the meeting of creditors.

**1.15 The chairman as proxy-holder**

**1.15** The chairman shall not by virtue of any proxy held by him vote to increase or reduce the amount of the remuneration or expenses of the nominee or the supervisor of the proposed arrangement, unless the proxy specifically directs him to vote in that way.

*(See General Note after r. 1.21.)*

passed to that effect, adjourn the meeting for not more than 14 days and may only adjourn once (subject to any direction by the court).

(See General Note after r. 2.44.)

**2.35 Creditors' meetings generally**

**2.35(1) [Application of r. 2.35]** This Rule applies to creditors' meetings summoned by the administrator under—

- (a) paragraph 51 (initial creditors' meeting);
- (b) paragraph 52(2) (at the request of the creditors);
- (c) paragraph 54(2) (to consider revision to the administrator's proposals);
- (d) paragraph 56(1) (further creditors' meetings); and
- (e) paragraph 62 (general power to summon meetings of creditors).

**2.35(2) [Form of notice]** Notice of any of the meetings set out in paragraph (1) above shall be in Form 2.20B.

[FORM 2.20B]

**2.35(3) [Convenience of venue]** In fixing the venue for the meeting, the administrator shall have regard to the convenience of creditors and the meeting shall be summoned for commencement between 10.00 and 16.00 hours on a business day, unless the court otherwise directs.

**2.35(4) [Period of notice]** Subject to paragraphs (6) and (7) below, at least 14 days' notice of the meeting shall be given to all creditors who are known to the administrator and had claims against the company at the date when the company entered administration unless that creditor has subsequently been paid in full; and the notice shall—

- (a) specify the purpose of the meeting;
- (b) contain a statement of the effect of Rule 2.38 (entitlement to vote); and
- (c) contain the forms of proxy.

[FORM 8.2]

**2.35(5) [Adjournment where no chairman]** If within 30 minutes from the time fixed for commencement of the meeting there is no person present to act as chairman, the meeting stands adjourned to the same time and place in the following week or, if that is not a business day, to the business day immediately following.

**2.35(6) [Single adjournment]** The meeting may be adjourned once, if the chairman thinks fit, but not for more than 14 days from the date on which it was fixed to commence, subject to the direction of the court.

**2.35(7) [Notification of venue of adjourned meeting]** If a meeting is adjourned the administrator shall as soon as reasonably practicable notify the creditors of the venue of the adjourned meeting.

(See General Note after r. 2.44.)

**2.36 The chairman at meetings**

**2.36(1) [Administrator or his nominee to be chairman]** At any meeting of creditors summoned by the administrator, either he shall be chairman, or a person nominated by him in writing to act in his place.

**2.36(2) [Nominee chairman]** A person so nominated must be either—

- (a) one who is qualified to act as an insolvency practitioner in relation to the company; or
- (b) an employee of the administrator or his firm who is experienced in insolvency matters.

2.48(7) [Requisition of creditors' meeting] Any single creditor, or a group of creditors, of the company whose debt(s) amount to at least 10% of the total debts of the company may, within 5 business days from the date of the administrator sending out a resolution or proposals, require him to summon a meeting of creditors to consider the matters raised therein in accordance with Rule 2.37. Any meeting called under this Rule shall be conducted in accordance with Rule 2.35.

2.48(8) [Administrator's power to call meeting if proposals rejected] If the administrator's proposals or revised proposals are rejected by the creditors pursuant to this Rule, the administrator may call a meeting of creditors.

2.48(9) [Requirement for creditors' meeting to include course of correspondence] A reference in these Rules to anything done, or required to be done, at, or in connection with, or in consequence of, a creditors' meeting includes a reference to anything done in the course of correspondence in accordance with this Rule.

GENERAL NOTE

"Correspondence" includes correspondence by telephonic or other electronic means (para. 111(1)).

Note para. 2.48(8): the administrator need not accept a "No" vote by correspondence, but may disregard it and summon a meeting in the hope that the assembled creditors will think otherwise.

SECTION B: COMPANY MEETINGS

2.49 Venue and conduct of company meeting

2.49(1) [Convenience of venue] Where the administrator summons a meeting of members of the company, he shall fix a venue for it having regard to their convenience.

2.49(2) [Chairman] The chairman of the meeting shall be the administrator or a person nominated by him in writing to act in his place.

2.49(3) [Nominee chairman] A person so nominated must be either--

- (a) one who is qualified to act as an insolvency practitioner in relation to the company; or
- (b) an employee of the administrator or his firm who is experienced in insolvency matters.

2.49(4) [Adjournment if no chairman] If within 30 minutes from the time fixed for commencement of the meeting there is no person present to act as chairman, the meeting stands adjourned to the same time and place in the following week or, if that is not a business day, to the business day immediately following.

2.49(5) [Summoning and conduct of meeting] Subject as above, the meeting shall be summoned and conducted as if it were a general meeting of the company summoned under the company's articles of association, and in accordance with the applicable provisions of the Companies Act.

2.49(6) [Non-application of r. 2.49(5)] Paragraph (5) does not apply where the laws of a member State and not the laws of England and Wales apply in relation to the conduct of the meeting. The meeting shall be summoned and conducted in accordance with the constitution of the company and the laws of the member State referred to in this paragraph shall apply to the conduct of the meeting.

2.49(7) [Minutes] The chairman of the meeting shall cause minutes of its proceedings to be entered in the company's minute book.

GENERAL NOTE

There is no obligation placed on an administrator under Sch. B1 to call a shareholders' meeting for any purpose, but he may choose to do so (e.g. if it is proposed to institute a CVA), in which event this rule will apply.

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**2.52(2) [Holding of meetings]** Subject as follows, meetings of the committee shall be held when and where determined by the administrator.

**2.52(3) [Calling of meetings]** The administrator shall call a first meeting of the committee not later than 6 weeks after its first establishment, and thereafter he shall call a meeting—

- (a) if so requested by a member of the committee or his representative (the meeting then to be held within 14 days of the request being received by the administrator); and
- (b) for a specified date, if the committee has previously resolved that a meeting be held on that date.

**2.52(4) [Notice of venue]** The administrator shall give 7 days' written notice of the venue of any meeting to every member of the committee (or his representative designated for that purpose), unless in any case the requirement of notice has been waived by or on behalf of any member. Waiver may be signified either at or before the meeting.

*(See General Note after r. 2.65.)*

### **2.53 The chairman at meetings**

**2.53(1) [Administrator or nominee chairman]** Subject to Rule 2.62(3), the chairman at any meeting of the creditors' committee shall be the administrator or a person nominated by him in writing to act.

**2.53(2) [Nominee]** A person so nominated must be either—

- (a) one who is qualified to act as an insolvency practitioner in relation to the company; or
- (b) an employee of the administrator or his firm who is experienced in insolvency matters.

*(See General Note after r. 2.65.)*

### **2.54 Quorum**

**2.54** A meeting of the committee is duly constituted if due notice of it has been given to all the members, and at least 2 members are present or represented.

*(See General Note after r. 2.65.)*

### **2.55 Committee-members' representatives**

**2.55(1) [Representation]** A member of the committee may, in relation to the business of the committee, be represented by another person duly authorised by him for that purpose.

**2.55(2) [Letter of authority or proxy]** A person acting as a committee-member's representative must hold a letter of authority entitling him so to act (either generally or specially) and signed by or on behalf of the committee-member, and for this purpose any proxy or any authorisation under section 375 of the Companies Act in relation to any meeting of creditors of the company shall, unless it contains a statement to the contrary, be treated as a letter of authority to act generally signed by or on behalf of the committee-member.

**2.55(3) [Production of letter of authority]** The chairman at any meeting of the committee may call on a person claiming to act as a committee-member's representative to produce his letter of authority, and may exclude him if it appears that his authority is deficient.

**2.55(4) [Who may not be a representative]** No member may be represented by a body corporate, a person who is an undischarged bankrupt, or a disqualified director or a person who is subject to a bankruptcy restrictions order, bankruptcy restrictions undertaking or interim bankruptcy restrictions order.

**2.55(5) [No dual representation]** No person shall on the same committee, act at one and the same time as representative of more than one committee-member.

**2.55(6) [Signing as representative]** Where a member's representative signs any document on the member's behalf, the fact that he so signs must be stated below his signature.

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GENERAL NOTE

It is for the administrative receiver to certify this committee.

Rules 3.17(2) and 3.17(2A) aim to facilitate the immediate establishment of a committee after the creditors' meeting.

**3.18 Functions and meetings of the committee**

**3.18(1) [Functions]** The creditors' committee shall assist the administrative receiver in discharging his functions, and act in relation to him in such manner as may be agreed from time to time.

**3.18(2) [Holding of meetings]** Subject as follows, meetings of the committee shall be held when and where determined by the receiver.

**3.18(3) [First and subsequent meetings]** The receiver shall call a first meeting of the committee not later than 3 months after its establishment; and thereafter he shall call a meeting—

(a) if requested by a member of the committee or his representative (the meeting then to be held within 21 days of the request being received by the receiver), and

(b) for a specified date, if the committee has previously resolved that a meeting be held on that date.

**3.18(4) [Notice of venue]** The receiver shall give 7 days' written notice of the venue of any meeting to every member (or his representative designated for that purpose), unless in any case the requirement of notice has been waived by or on behalf of any member.

Waiver may be signified either at or before the meeting.

GENERAL NOTE

This outlines the role of the committee. The committee's functions are left vague by IA 1986, s. 49. For "venue" in r. 3.18(4) see r. 13.6.

**3.19 The chairman at meetings**

**3.19(1) [Chairman]** Subject to Rule 3.28(3), the chairman at any meeting of the creditors' committee shall be the administrative receiver, or a person nominated by him in writing to act.

**3.19(2) [Nominated chairman]** A person so nominated must be either—

(a) one who is qualified to act as an insolvency practitioner in relation to the company, or

(b) an employee of the receiver or his firm who is experienced in insolvency matters.

GENERAL NOTE

This is similar to r. 3.10.

**3.20 Quorum**

**3.20** A meeting of the committee is duly constituted if due notice has been given to all the members, and at least 2 members are present or represented.

GENERAL NOTE

The committee's quorum is two.

**3.21 Committee-members' representatives**

**3.21(1) [Representation]** A member of the committee may, in relation to the business of the committee, be represented by another person duly authorised by him for that purpose.

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

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AFFIDAVIT OF  
GARETH HOWARD HUGHES

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I, GARETH HOWARD HUGHES, of 1 More London Place, London SE1 2AF, a licensed insolvency practitioner and a partner in the firm of chartered accountants Ernst & Young LLP ("E&Y") MAKE OATH AND SAYS AS FOLLOWS:

1. I am one of the Joint Provisional Liquidators of The Home Insurance Company ("the Company"), having been appointed by the High Court of Justice in England and Wales on 8 May 2003 pursuant to an order of Mr Justice Pumfrey together with my colleague Margaret Elizabeth Mills ("Ms Mills") (the "Appointment Order"). In this statement, I refer to both myself and Ms Mills as "the Joint Provisional Liquidators".
2. I make this statement with the knowledge and approval of Roger Sevigny ("Mr Sevigny"), who is the liquidator of the Company ("the NH Liquidator"). I make this statement in support of the NH Liquidator's response to the motion to compel directed to the NH Liquidator filed in the Superior Court for Merrimack County in the State of New Hampshire on behalf of Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (the "ACE Motion").
3. The facts and matters set out below are either within my own knowledge gained through my extensive involvement in this matter, in which case I confirm that they are true, or are based on information provided to me by others. Facts and matters set out in this statement which are not within my own knowledge are based on information supplied to me by (a) employees of Ernst & Young LLP who work on this matter under my supervision, (b) my English legal advisers, Clifford Chance Limited Liability

Partnership ("**Clifford Chance**"), and (c) Rackemann Sawyer & Brewster, in their capacity as US legal advisers to the NH Liquidator. Where facts and matters are not within my own knowledge but based on information supplied to me, they are true to the best of my knowledge, information and belief.

4. A bundle of copy documents to which I refer in this statement is exhibited, marked "GHH2". References to page numbers below are to the page numbers of "GHH2".
5. The business of E&Y in London includes the provision of restructuring and insolvency services. I am the head of the E&Y Financial Services Corporate Restructuring team ("**Corporate Restructuring**") in London. The Corporate Restructuring team provides advice and services to troubled companies, including formal insolvency procedures such as provisional liquidations, compulsory liquidations, creditors' and members' voluntary liquidations, administrative receiverships, administrations, company voluntary arrangements and schemes of arrangement. In this Affidavit these proceedings are referred to as "formal insolvency proceedings" (even though schemes of arrangement may be implemented in respect of solvent companies).
6. Margaret Elizabeth Mills is also a member of the E&Y Corporate Restructuring team. Internal arrangements at E&Y are such that, where an E&Y partner takes an appointment in respect of a formal insolvency proceeding, at least two E&Y partners will be appointed on a joint and several basis. One partner will have principal conduct of the proceeding and the second partner is appointed in order to have another person authorised to act in respect of the matter in the event the first partner is unable to do so: I am the lead Joint Provisional Liquidator regarding Home.
7. Where an English company enters into provisional liquidation or liquidation proceedings, its day-to-day affairs will cease to be conducted by its pre-insolvency management board and will instead be conducted by a provisional liquidator or liquidator, as relevant. A provisional liquidator or liquidator must be an individual who is qualified to act as an "insolvency practitioner" in accordance with the Insolvency Act 1986 and legislation derived from it, or, where no such individual has been requested or is available or willing to take the appointment, an officer of the court known as the "Official Receiver".
8. As the Appointment Order indicates, both of the Joint Provisional Liquidators are licensed insolvency practitioners. The Appointment Order also recognises that the Joint Provisional Liquidators are partners of E&Y and appoints them in that capacity (see GHH2, page 1).
9. By the terms of the Appointment Order, the Joint Provisional Liquidators jointly and severally have power to carry out the following functions, namely:
  - 9.1 to locate, protect, secure, take possession of, collect and get in the property and assets (of whatever nature) to which the Company is or appears to be entitled within England and Wales;

- 9.2 to locate, protect, secure, take possession of, collect and get in the books, papers and records of the Company including the accounting and statutory records in England and Wales;
- 9.3 to investigate the affairs of the Company so far as it is necessary to locate, protect, secure, take possession of, collect and get in the assets of the Company within England and Wales; and
- 9.4 to do all such things as may be necessary or expedient for the protection of the Company's property or assets within England and Wales.
10. Without prejudice to the generality of these powers, the Joint Provisional Liquidators also have a number of additional powers, including:
  - 10.1 to carry on the business of the Company in England and Wales to the extent necessary to process and settle claims against the Company and effect reinsurance recoveries;
  - 10.2 to enter into commutations with creditors or debtors of the Company in respect of business carried on by the Company in England and Wales; and
  - 10.3 if thought appropriate to finalise the terms of a scheme of arrangement and explanatory statement to be issued to the Company's creditors or any of them, if reasonably satisfied that such scheme has a reasonable prospect of being approved by the requisite majority of creditors and sanctioned by the English Court and, subject to such approval and sanction, to implement such scheme.
11. Given the breadth of the Joint Provisional Liquidators' powers and responsibilities in respect of the Company under the Appointment Order, the complexity and international nature of the Company's estate and the amount of time required in order to conduct the provisional liquidation effectively, it has not been possible nor indeed desirable for the Joint Provisional Liquidators personally to perform all of the work necessary to the provisional liquidation. The Joint Provisional Liquidators do not have their own staff but, as partners in E&Y, rely on a team of E&Y personnel at different levels to assist in the conduct of the provisional liquidation under the Joint Provisional Liquidators' supervision.
12. The Home provisional liquidation has been staffed principally as follows:
  - 12.1 Gareth Hughes, Partner, Corporate Restructuring (the lead Joint Provisional Liquidator and engagement partner). I have overall responsibility for the provisional liquidation of the Company pursuant to my appointment as Joint Provisional Liquidator in the Appointment Order;
  - 12.2 Sarah Ellis, Assistant Director, Corporate Restructuring (the engagement manager). Ms. Ellis is the person responsible for the day-to-day management of the Company's provisional liquidation and she supervises the work performed by other staff engaged in the administration of the provisional liquidation;



- 12.3 Benjamin Cairns, Senior Executive, Corporate Restructuring. Mr Cairns has had responsibility for the management of certain specific areas within the provisional liquidation, including consideration of the business of the City Insurance Company (a company which was merged into the Company in 1995). Mr Cairns reports to Ms. Ellis. His involvement in the provisional liquidation has declined over time and is currently minimal;
- 12.4 Matthew Harrison, Executive, Corporate Restructuring. Mr Harrison assists Ms. Ellis and Mr Cairns in their duties, carrying out time consuming tasks or recurring case management tasks. For example, Mr Harrison has recently taken responsibility for much of the day-to-day creditor contact and claims determination process. Mr Harrison regularly reports to Ms. Ellis.
13. Whilst Ms. Ellis, Mr. Cairns, and Mr. Harrison are the Joint Provisional Liquidators' principal staff (the "Core Staff"), this team is supplemented by other E&Y staff, as necessary for particular tasks (the "E&Y staff"). The Core Staff had my authority to seek legal advice on my behalf from Clifford Chance with respect to the conduct of the provisional liquidation and indeed have been in regular communication with Clifford Chance in that regard. The Core Staff also had my authority to act on legal advice received from Clifford Chance in respect of the conduct of the provisional liquidation under my supervision.
14. I understand that, in the ACE Motion, the ACE Companies claim that the involvement of the E&Y staff in attorney-client privileged communications or the disclosure to E&Y staff of privileged communications would generally waive the benefit of attorney-client privilege. I understand that the basis for this argument is that the ACE Companies presume that the Joint Provisional Liquidators retained E&Y to provide auditing / accounting services (see GHH2, page 11). This is incorrect for the reasons set out below.
15. The Joint Provisional Liquidators have not 'retained' E&Y to provide auditing, accounting or any other services to the Joint Provisional Liquidators in respect of the Company. To characterise the relationship between the Joint Provisional Liquidators and E&Y as based on a retainer is to misstate it. The Joint Provisional Liquidators are partners at E&Y and, as such, are entitled to use E&Y's premises, services, facilities and staff in the conduct of their appointments. In particular, no charges are levied upon the Joint Provisional Liquidators in respect of any work carried on by the E&Y staff or other services / facilities made available to the Joint Provisional Liquidators.
16. The fees charged by the Joint Provisional Liquidators in respect of their appointment are charged together with the fees incurred by the E&Y staff. By Rule 4.30 of the Insolvency Rules 1986 (the "Rules") (GHH2, page 31), the remuneration of a provisional liquidator must be fixed by the English court from time to time on his application. In fixing his remuneration, the English court must take into account:

*"the time properly given by him (as provisional liquidator) and his staff in attending to the company's affairs" [emphasis added].*

To date, the Joint Provisional Liquidators have made three applications to the English court to seek approval of their fees. Such fees have consisted not only of the Joint Provisional Liquidators' time charges but also the time charges of all E&Y staff who have billed time to the Company's provisional liquidation. On no occasion has the English court queried the inclusion of the fees incurred by the E&Y staff in such applications.

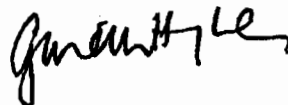
17. Any remuneration approved by the English Court is not paid to the Joint Provisional Liquidators in their personal capacity, but to E&Y as a firm. The Joint Provisional Liquidators are remunerated in respect of their position as partners of E&Y by way of drawings based upon E&Y's overall profits.
18. The allegation that the Joint Provisional Liquidators have 'retained' E&Y suggests that the Joint Provisional Liquidators would be free to seek the services provided by E&Y staff from other accountancy firms. The Joint Provisional Liquidators are partners at E&Y and as such seek, where appropriate, to involve E&Y staff in the conduct of the matters in respect of which they have been appointed. I believe that it is within the contemplation of clients who seek the appointment of an E&Y partner as an insolvency practitioner that it will be E&Y staff that would be primarily engaged in the relevant matter.
19. There appears to be some recognition in the Rules that most insolvency practitioners are members of a firm and that they themselves or their firm have employees who will carry out many of the tasks involved in certain insolvency proceedings. As such, the Rules give specific authorisation for acts to be carried out by employees of the insolvency practitioner or his firm in particular instances (GHH2, page 33-42).
20. Finally, I have been a partner at E&Y (and its predecessor) since 1988. I am also the President of the Association of Business Recovery Professionals (known by the brand name "R3"), which is the leading professional association for insolvency, business recovery and turnaround specialists in the UK. In my experience it is commonplace for insolvency practitioners who are members of an accountancy firm to use the staff, premises, facilities and services available from that firm as if the service is being provided by that firm itself, notwithstanding that they have been appointed in their personal capacity.
21. For the reasons stated above, I believe that there is an inextricable link between the Joint Provisional Liquidators and the E&Y staff and that treating them as separate for purposes of the attorney-client privilege would be artificial and run contrary to UK market practice. In dealing with complex issues in a large provisional liquidation, the Joint Provisional Liquidators need to involve staff as a team in matters requiring legal advice.
22. The negotiations with AFIA Cedents regarding the letter agreement dated 22 January 2004 were a joint effort involving teams for both the NH Liquidator and the Joint Provisional Liquidators in dealing with AFIA Cedents. The Joint Provisional Liquidators' team consisted of myself, Ms. Ellis, Mr. Cairns and Mr. Harrison,

advised by counsel from Clifford Chance (David Steinberg, Philip Hertz and Jeanette Best).

Sworn this ( day of April 2005 )

Before me  )

Practising Solicitor REBECCA JONES.



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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

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EXHIBIT "GHH2" TO THE AFFIDAVIT OF  
GARETH HOWARD HUGHES

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This is the exhibit "GHH2" referred to in my Affidavit dated April 2005. The copy documents in this exhibit are listed below.

Description	Page
(1) 8 May 2003 Appointment Order	1
(2) ACE Companies' Motion To Compel	7
(3) Insolvency Rules 1986, Rule 4.30	31
(4) Extracts from the Insolvency Rules 1986	
(i) Rule 1.14 (Company Voluntary Arrangements; Meetings of company's creditors and members; The chairman at meetings)	33
(ii) Rule 2.36 (Administration procedure; Creditors' meetings; The chairman at meetings)	34
(iii) Rule 2.49 (Administration procedure; Company meetings; Venue and conduct of meeting)	35
(iv) Rule 2.53 (Administration procedure; The creditors' committee; The chairman at meetings)	36
(v) Rule 3.19 (Administrative receivership; The creditors' committee; The chairman at meetings)	37

(vi)	Rule 4.55 (Companies winding up; Rules of general application; The chairman at meetings)	38
(vii)	Rule 4.56 (Companies winding up; Rules of general application; The chairman at meetings (CVL))	39
(viii)	Rule 4.63 (Companies winding up; Rules of general application; Resolutions)	40
(ix)	Rule 4.157 (Companies winding up; The Liquidation Committee; The chairman at meetings)	42

Sworn at

This 1 day of April 2005

Before me,



REBECCA JONES.

Practising Solicitor

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IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION  
COMPANIES COURT



MR JUSTICE PUMFREY  
The 8th day of May 2003

IN THE MATTER OF THE HOME INSURANCE COMPANY  
AND  
IN THE MATTER OF THE INSOLVENCY ACT 1986

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MINUTE OF ORDER

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UPON the Application of The Home Insurance Company ("the Company") acting by its Rehabilitator Paula Taft Rogers, as appointed by the Superior Court of the State of New Hampshire on 5 March 2003 ("the Applicant")

AND UPON HEARING Counsel for the Applicant

AND UPON READING a copy of a Petition to wind-up the Company ("the Petition") and the witness statement of Paula Taft Rogers dated 7 May 2003



AND UPON the Applicant through its Counsel undertaking *as soon as practicable*

- (i) to present the Petition for the winding-up of the Company before the Court;
- (ii) to have filed the witness statement of Paula Taft Rogers; and
- (iii) to ~~forthwith~~ issue an Ordinary Application in the form of a draft Ordinary Application presented to the Court

IT IS ORDERED THAT Gareth Howard Hughes and Margaret Elizabeth Mills both Chartered Accountants and Licensed Insolvency Practitioners of Ernst & Young LLP of Becket House, 1 Lambeth Palace Road, London SE1 7EU be appointed joint provisional liquidators of the Company (the "Joint Provisional Liquidators") and that any act required or authorised to be done by a provisional liquidator be done by either or both of the above mentioned Joint Provisional Liquidators

**AND IT IS FURTHER ORDERED THAT**

1. the Joint Provisional Liquidators shall jointly and severally have power to carry out the following functions namely:
  - (1) to locate, protect, secure, take possession of, collect and get in the property and assets (of whatever nature) to which the Company is or appears to be entitled within England and Wales;
  - (2) to locate, protect, secure, take possession of, collect and get in the books, papers and records of the Company including the accounting and statutory records in England and Wales;
  - (3) to investigate the affairs of the Company so far as it is necessary to locate, protect, secure, take possession of, collect and get in the assets of the Company within England and Wales;
  - (4) to do all such things as may be necessary or expedient for the protection of the Company's property or assets within England and Wales.
2. Without prejudice to the generality of the powers set forth in paragraph 1 above, the Joint Provisional Liquidators do have the following powers:
  - (1) to carry on the business of the Company in England and Wales to the extent necessary to process and settle claims against the Company and effect reinsurance recoveries (including but not limited to paying reinstatement premiums);
  - (2) to enter into commutations with any creditors or debtors of the Company in respect of business carried on by the Company in England and Wales;
  - (3) to consider whether it would be desirable to implement a scheme of arrangement pursuant to Section 425 of the Companies Act 1985 between the Company and its creditors or any of them and, if so, to develop proposals for such a scheme of arrangement;
  - (4) if they see fit, to nominate an informal creditors' committee from among the members of the general body of creditors of the Company, such informal creditors' committee to assist the Joint Provisional Liquidators in the discharge of their duties;
  - (5) if thought appropriate, to finalise the terms of a scheme of arrangement and explanatory statement to be issued to the Company's creditors, or any of them, if reasonably satisfied that such scheme has a reasonable prospect of being approved by the requisite majority of creditors and sanctioned by the Court and, subject to such approval and sanction, to implement such scheme;
  - (6) to investigate the affairs of the Company and obtain such information as is necessary to locate, protect, secure, take possession of, collect and get in the assets of the Company within England and Wales;

- (7) to employ any employees of the Company in England and Wales, to pay such employees of the Company or of any other company or entity providing the services of its employees to the Company or concerned in the business of the Company within England and Wales, and to dismiss any such employees of the Company;
- (8) to continue to operate the existing bank accounts of the Company within England and Wales and to open and operate new bank accounts within England and Wales as appropriate and to pay monies into such accounts and authorise payments from such accounts;
- (9) to discharge rent on behalf of the Company and other current expense of the Company within England and Wales;
- (10) to incur and pay out of the assets of the Company within England and Wales the normal administrative expenses of the Company and any other payment which they are empowered to make pursuant to this Order which are necessary or incidental to the performance of the Joint Provisional Liquidators' duties and functions;
- (11) to terminate, complete, or perfect, any contracts or transactions relating to the business of the Company within England and Wales;
- (12) to bring or defend any action or other legal proceedings in the name and on behalf of the Company within England and Wales;
- (13) to effect and maintain insurances in respect of the business and property and assets of the Company within England and Wales as they see fit;
- (14) to do all acts and to execute in the name and on behalf of the Company, all deeds, receipts or other documents (and for that purpose using, where necessary, the Company's seal) pursuant to the powers conferred herein;
- (15) to engage and retain and/or employ any solicitors, counsel, lawyers, accountants, investment advisors, actuaries, run-off and claims consultants, loss adjusters, surveyors, and/or other qualified persons to assist them in the performance of their duties and functions;
- (16) to grant or accept a surrender of a lease or tenancy of any of the property of the Company within England and Wales, and to take a lease or tenancy of any property required or convenient for the business of the Company within England and Wales;
- (17) to rank and claim in the bankruptcy, liquidation or insolvency of any person (including but not limited to any body corporate) indebted to the Company and to receive dividends, and to accede to trust deeds for the creditors of any such person;
- (18) to change the situation of the Company's registered office in England and Wales;
- (19) to pay premiums due or to become due under contracts of reinsurance entered into by the Company in England and Wales and to enter into new and/or replacement contracts of reinsurance for the protection of the Company in relation to liabilities of the



Company under current policies of insurance or reinsurance issued by the Company within England and Wales;

- (20) to enter into agreements with third parties for the provision of run-off and related services to the Company in relation to the Company's insurance and reinsurance business within England and Wales;
- (21) to sell or otherwise dispose of the property of the Company within England and Wales by public auction or private treaty;
- (22) to enter into a protocol, memorandum of understanding or other similar arrangement with the US Liquidator (as hereinafter defined) and/or insolvency officeholders appointed in other jurisdictions in respect of the Company for the purposes of co-ordinating the management and administration of the liquidation and affairs of the Company worldwide in the best interests of creditors; and
- (23) to do all other things incidental to the exercise of the foregoing powers.

**AND IT IS FURTHER DIRECTED THAT**

1. The Joint Provisional Liquidators:
  - (1) shall exercise their powers under paragraphs 1 and 2 above after consultation with the Rehabilitator of the Company, save where this Court shall otherwise direct and save where to do so would cause them to contravene English law, until such time as a liquidator of the Company is appointed by order of the Superior Court of the State of New Hampshire ("the US Liquidator"); and
  - (2) following the appointment of the US Liquidator shall exercise their powers under paragraphs 1 and 2 above as requested and approved by the US Liquidator, save where this Court shall otherwise direct and save where to do so would cause them to contravene English law.
2. No disposition of the Company's property by or with the authority of the Joint Provisional Liquidators in either case in the carrying out of their duties and functions and the exercise of their powers under this Order shall be avoided by virtue of the provision of Section 127 of the Insolvency Act 1986.
3. The costs of the Company in this application and in its petitioning to wind the Company up be paid as costs in the Petition.
4. There shall be liberty to apply to the Court for such further orders or directions whether in relation to the exercise of the above powers or otherwise as may appear to the Joint Provisional Liquidators to be necessary or appropriate.

W1 or LD

**NOTICE TO OFFICERS OF THE COMPANY**

You are required by Section 235 of the Insolvency Act 1986 to give the Joint Provisional Liquidators all of the information as they may reasonably require relating to the Company's property and affairs and to attend upon their instructions as they may reasonably require.

Dated: 8 May 2003

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

**ACE COMPANIES' MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS BY THE LIQUIDATOR**

The Liquidator has impeded discovery in this case by withholding several hundred critical documents that — based on the information provided in the Liquidator's privilege logs and follow-up correspondence— are not protected by any privilege. The documents at issue (the "Subject Documents") make up nearly three-quarters of the total number of documents that the Liquidator has withheld on privilege grounds.<sup>1</sup> Accordingly, respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, the "ACE Companies"), by their attorneys, Orr & Reno P.A., move this Court for an order compelling Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as liquidator (the "Liquidator") of The Home Insurance Company ("Home"), to produce the Subject Documents. In support of the Motion, the ACE Companies respectfully state as follows:

**Introduction**

1. The majority of the Subject Documents should be produced because any privilege that may have originally attached to them was waived when the Liquidator shared the documents

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<sup>1</sup> The ACE Companies have annexed, as Exhibits 1 and 2, the versions of the Liquidator's privilege logs that were provided on February 14, 2005. A listing of the Subject Documents, which are 550 in number, is attached to this Motion at Appendix 1.

with third parties outside of the attorney-client relationship between the Liquidator and his counsel. The relevant provisions in Rule 502(b) of the New Hampshire Rules of Evidence generally restrict the attorney-client privilege to communications between or among the client (or the client's representatives) and the lawyer (or the lawyer's representatives). The Liquidator waived any applicable attorney-client privilege by sharing documents and information with employees of Ernst & Young LLP ("E & Y"), which cannot be considered the "lawyer," a "client," a "representative of the lawyer" or a "representative of a client" under Rule 502(b).

2. The Liquidator has claimed that a small number of the Subject Documents are also protected under the attorney work-product doctrine. However, the sharing of such documents with a third party caused a waiver of any work-product protection as well.

3. The balance of the Subject Documents were not privileged in the first instance and must be produced because they do not constitute communications between the Liquidator and his counsel (or between representatives of the Liquidator) that were "made for the purpose of facilitating the rendition of professional legal services" to the Liquidator.

4. In sum, the Liquidator has withheld documents that are clearly relevant to the subject matter of this dispute, but has failed to carry his burden of demonstrating that the strict requirements for privilege are satisfied. Therefore, the ACE Companies respectfully request that the Court order the production of the Subject Documents.<sup>2</sup>

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<sup>2</sup> As discussed below, the information provided in the privilege logs demonstrates that the majority of the Subject Documents are not privileged and should be produced without any need for an in camera review. The Liquidator also appears to have waived the privilege with respect to other documents that are identified below in Paragraph 24, but the ACE Companies respectfully request that the Court review those documents in camera to confirm that they are not privileged.

### Background

5. On the day of the October 4, 2004 status conference with the Court and in keeping with the Supreme Court's broad mandate in its September 13, 2004 Order, the ACE Companies served their First Set of Interrogatories to Liquidator and First Request for Production of Documents by Liquidator (collectively, the "Discovery Requests"). The Discovery Requests track the allegations in the Liquidator's Motion for Approval of the Proposed Agreement.

6. The Liquidator provided a privilege log on December 21, 2004 and a supplemental privilege log on January 5, 2005 for the documents withheld from production. (Copies of these privilege logs are attached as Exhibits 3 and 4, respectively.) The privilege logs are 82-pages long and contain 442 separate entries. Also, many of the 442 entries have multiple sub-entries for e-mails or attachments, which are considered separate documents. In total, the two logs listed 784 documents. Thus, the number of documents withheld may equal or exceed the number of documents produced.<sup>3</sup>

7. The December 21 log included a "legend" identifying the initials used on the log. The E & Y employees listed on the legend are Benjamin Cairns ("BC"), Matthew Harrison ("MH") and Sarah Ellis ("SE"). (See Ex. 3.)

8. Following receipt of the privilege logs, the ACE Companies, as required under New Hampshire law, attempted to "meet and confer" by addressing the deficiencies in the Liquidator's privilege logs in a letter dated January 19, 2005. (A copy of the letter is attached hereto as Exhibit 5.) Among other things, counsel for the ACE Companies pointed out to counsel for the Liquidator that under New Hampshire law the attorney-client privilege is limited

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<sup>3</sup> In order to keep track of the documents, the parties have adopted the practice of using parentheses to refer to the sub-entries. For example, item number 13 in Exhibit 3 has two entries, a December 18,

by Rule 502(b) and that the Liquidator has the burden of proving that the documents listed on the privilege logs were shared only with the individuals covered under Rule 502(b). (*See id.* at 1-2.) Counsel for the ACE Companies also noted that the Liquidator had not established the link to an attorney or legal advice with respect to certain enumerated documents. (*Id.* at 2.)

9. Counsel for the Liquidator took nearly one month, until February 14, 2005, to respond to the ACE Companies' letter. In the February 14 letter (a copy of which is attached hereto as Exhibit 6), counsel for the Liquidator clarified some of the privilege claims, but not others. The Liquidator also produced about 152 pages of documents that had been withheld before, implicitly acknowledging that his previous assertions of privilege were unfounded. (*See id.* at 1-2.) The Liquidator, however, did not address the fundamental issue of waiver, nor did he provide any basis for claiming privilege as to documents that were sent to third parties.<sup>4</sup>

10. By letter dated February 18, 2005 (just four days after the Liquidator's service of the revised privilege logs), counsel for the ACE Companies noted that "[w]e continue to be troubled by the positions that the Liquidator has taken" on privilege issues. (February 18 letter, a copy of which is attached as Exhibit 7, at 1.) However, the February 18 letter focused on certain areas where the ACE Companies hoped the parties could reach a compromise and avoid Court intervention. Among other things, the counsel for the ACE Companies pointed out that the Liquidator still had not provided a basis for his assertion of attorney-client privilege regarding documents that were not authored or received by an attorney. (*See id.*)

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2003 e-mail and an e-mail attachment also dated December 18, 2003. The parties have referred to the first entry as 13(1) and the one below it as 13(2). This Motion follows the same convention.

<sup>4</sup> The Liquidator also enclosed the revised privileged logs that are attached as Exhibits 1 and 2 to the Motion. The revised logs have 443 entries and list 764 documents.

11. Nearly a month later, counsel for the Liquidator responded to the ACE Companies' February 18 letter. (See March 11, 2005 letter attached as Exhibit 8.) The Liquidator produced a few documents, again acknowledging that his earlier assertion of privilege was improper, but the March 11 letter did not adequately address the issue of documents that were not authored or received by an attorney. (See *id.* at 1-4.)

12. On March 21, 2005, counsel for the ACE Companies noted that the parties had reached an impasse on this issue as well as the Liquidator's failure to justify a claim of privilege regarding documents that were disclosed to third parties. (See March 21 e-mail, a copy of which is attached as Exhibit 9.)

### Request for Relief

#### I. New Hampshire Law On Privilege

13. The Liquidator has the burden, as the party resisting discovery, to demonstrate that any communication or document withheld from production is actually privileged and, if so, that the privilege has not been waived. See, e.g., *State v. Gordon*, 141 N.H. 703, 705, 692 A.2d 505, 506 (1997); *Moore v. Medeva Pharmaceuticals, Inc.*, No. Civ. 01-311-M, 2003 WL 1856422, at \*2 (D.N.H. Apr. 9, 2003) (applying New Hampshire law). The attorney-client privilege in New Hampshire is statutory and, as such, it "must be strictly construed." *State v. LaRoche*, 122 N.H. 231, 233, 442 A.2d 602, 603 (1982).

#### II. Communications Involving E & Y Are Not Privileged and Must Be Produced

14. Rule 502(b) states that a party may withhold "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client," but only if the communications are (1) between the client (or the client's representative) and the lawyer (or the lawyer's representative); (2) between the client or the lawyer (or their representatives)

and a lawyer (or the lawyer's representative) representing another party in a pending action concerning a matter of common interest; (3) between representatives of the client or between the client and a representative of the client; or (4) among lawyers and their representatives representing the same client. N.H. R. EVID. 502(B).

15. In other words, the Subject Documents must be produced unless the Liquidator proves that the E & Y employees are "representatives," under Rule 502(b), of either the client's lawyers (*i.e.*, the New Hampshire Attorney General's Office, Rackemann, Sawyer & Brewster, or Clifford Chance) or the client (*i.e.*, the Liquidator, Home or the Joint Provisional Liquidators ("JPLs")).<sup>5</sup> As demonstrated below, the Liquidator cannot carry that burden.<sup>6</sup>

**A. E & Y Is Not A "Representative Of The Lawyer" Under Rule 502**

16. Under Rule 502(a), a representative of the lawyer is "one employed by the lawyer to assist the lawyer in the rendition of professional legal services." N.H. R. EVID. 502(A)(4). There is no evidence in this case that E & Y was employed by the lawyers involved in the Home liquidations to assist in the "rendition of professional legal services." E & Y is primarily an auditing and accounting firm and was presumably engaged by the "client" (either the Liquidator,

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<sup>5</sup> E & Y cannot be considered a "lawyer" for purposes of Rule 502(b) because it was not providing legal services in this matter, and it is not the "client" because the client is defined as an entity that "is rendered professional services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him." N.H. R. EVID. 502(A)(1). E & Y is a service provider rather than the recipient of legal advice from the various lawyers involved here. The Liquidator may argue that the E & Y employees listed on the privilege logs are effectively the "client" because the JPLs are also E & Y employees. That argument, however, would be unavailing because the U.K. court appointed Gareth Hughes and Margaret Mills, individually, and did not appoint E & Y as the JPLs. E & Y is a third party engaged by Mr. Hughes and Ms. Mills as the JPLs.

<sup>6</sup> Any work-product protection attaching to the Subject Documents would also be waived if the Court were to hold that the E & Y employees are third parties. *See State v. Dedrick*, 135 N.H. 502, 507-08, 607 A.2d 127, 130-31 (1992) (holding that work-product had been waived through disclosure); *State v. Settle*, 124 N.H. 832, 836, 480 A.2d 6, 8 (1984) (same). *See generally U.S. v. Nobles*, 422 U.S. 225, 239 (1975) ("Like other qualified privileges, [the work-product privilege] may be waived.").



Home or the JPLs) to provide those types of services. Therefore, E & Y employees do not meet the definition of a “representative of the lawyer” under Rule 502(a).

17. The First Circuit dealt with a similar situation in *Cavallaro v. U.S.*, 284 F.3d 236 (1<sup>st</sup> Cir. 2002), and held that a client had waived the attorney-client by sharing documents with its accountant, E & Y. As noted in *Cavallaro*, the general rule is that “disclosing attorney-client communications to a third party undermines the privilege.” *Id.* at 246-47. “An exception to this general rule exists for the third parties employed to assist a lawyer in rendering legal advice.” *Id.* at 247. That exception, however, is limited to cases where “[t]he involvement of the third party [is] nearly indispensable[,] or serve[s] some specialized purpose[,] in facilitating the attorney-client communications.” *Id.* at 249. The *Cavallaro* court found that the privilege was waived because E & Y was not employed to assist the lawyer in rendering legal advice to the client and was instead acting in its capacity as an accounting firm.

18. The Court should reach the same conclusion here because a closer examination of the Liquidator’s privilege logs confirms that the E & Y employees were not engaged to assist in the rendering of legal advice to the clients.

**1. Documents Where E & Y Employees Are The Author, Sole Recipient Or One Of A Limited Number Of Recipients**

19. E & Y employees are listed as the author, sole recipient or one of a limited number of recipients on only 165 of the Subject Documents, which is about 30 percent of the total number of Subject Documents. Even from the sparse descriptions provided in the logs, it is clear that many of those communications do not meet the threshold requirement for the assertion of attorney-client privilege, which is that they must relate to the rendering of legal advice. For example, document numbers 19(1) and 19(2) on the December 21 log are described as e-mails between the Special Deputy Liquidator, Peter Bengelsdorf, and Sarah Ellis of E & Y regarding

“RW’s View of Actuarial Model.” (“RW” is Rhydian Williams of Equitas, Ltd., who has submitted an affidavit to this Court in support of the Proposed Agreement.) These e-mails between a representative of the client and a third party touch on actuarial issues, not legal issues, raised by another third party. Two Clifford Chance attorneys are listed as “cc’s,” but it is well established that the mere copying of an attorney on a non-legal matter does not make the communication privileged. See *Pacamor Bearings, Inc. v. Minebea Co., Ltd.*, 918 F. Supp. 491, 511 (D.N.H. 1996) (“[D]ocuments prepared by non-attorneys and addressed to non-attorneys with copies routed to counsel are generally not privileged ...”).

20. Moreover, even if the Liquidator could carry his burden of showing that the communications were made for the purpose of providing legal advice, there is no indication that Mr. Bengelsdorf was communicating with Ms. Ellis so that E & Y could lend “indispensable” or “specialized” assistance in the rendering of legal advice. To the contrary, it is clear that Ms. Ellis was being consulted on an actuarial matter, which is in keeping with E & Y’s expertise.<sup>7</sup>

21. In Appendix 2 to this Motion, the ACE Companies have listed all the documents that — as with the documents discussed above — should be produced because they do not involve the rendering of legal advice or, at the very least, do not reflect that E & Y assisted in the rendering of legal advice. Many of the documents discuss actuarial or accounting issues and simply list attorneys as “cc’s.” For example, document number 92(2) on the December 21 log is an e-mail from Matthew Harrison of E & Y to Gareth Hughes, one of the JPLs, regarding “OSLR Figures.” “OSLR” refers to “outstanding loss reserves,” which is a figure that accountants or actuaries will often calculate for reinsurers. Although two Clifford Chance

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<sup>7</sup> Document numbers 132(1), 132(2), 133, 221(1), 221(2), 222 and 306(2) on the December 21 log and 8(2) on the January 5 log appear to be duplicates of 19(1) and 19(2).

attorneys were copied on the e-mail, it is clear from the context that this was for informational purposes and that no legal advice was being sought. *See Pacamor*, 918 F. Supp. at 511.

22. Document numbers 13(2), 20, 127(1), 127(2), 146, 197, 202, 207(1) and 207(2) on the December 21 log and document number 46 on the January 5 log similarly involve accounting or actuarial issues. At least one of the documents, document number 197 on the December 21 log, apparently discusses how much of a distribution the AFIA Cedents will receive, which is a key issue in determining the fairness and reasonableness of the Proposed Agreement.<sup>8</sup>

23. In sum, the ACE Companies respectfully request that the Court order the immediate production of the documents listed in Appendix 2 because the Liquidator's privilege logs demonstrate that (a) there was no legal advice being provided in those documents; and (b) even assuming the lawyers were rendering legal advice, the third-party E & Y employees were consulted for the purpose of advising on accounting or actuarial issues, not for the purpose of providing "indispensable" or specialized assistance to the lawyers rendering legal advice.

24. Appendix 3 to this Motion lists the balance of the 165 documents where E & Y employees are the author, sole recipient or one of a limited number of recipients. Given that the E & Y employees were clearly not assisting the lawyers in rendering legal advice with respect to the documents in Appendix 2, it is likely that the Liquidator also waived the attorney-client privilege for the documents in Appendix 3 (which involve many of the same individuals and subjects). Because the ACE Companies have shown a "reasonable probability" that these

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<sup>8</sup> The rest of the documents in Appendix 2 are described as "discussions with Mike Durkin" or "discussions with Rhydian Williams." The Liquidator may not attempt to hide the contents of discussions that E & Y employees had with third parties by relying on the fact that the documents relating to those conversations were circulated to attorneys.

communications are not privileged, an in camera review is necessary. See *Bennett v. ITT Hartford Group, Inc.*, 150 N.H. 753, 846 A.2d 560, 567 (2004).

**2. Documents Where E & Y Employees Are Shown On The Privilege Logs As “CC’s” Or One Of Multiple Recipients**

25. The privilege logs also reveal that E & Y employees often received the communications for informational purposes only. E & Y employees are shown on the logs as “cc’s” or one of multiple recipients on 367 of the Subject Documents (*i.e.*, two-thirds of the total number of Subject Documents).<sup>9</sup> As discussed above, a third party will be deemed to assist a lawyer in rendering legal advice in very limited circumstances where the third party’s involvement is “nearly indispensable” or “serve[s] some specialized purpose” in facilitating attorney-client communications. *Cavallaro*, 284 F.3d at 249. Even assuming, for the sake of argument, that the documents in Appendix 4 relate to the rendering of legal advice, it cannot be said that the E & Y employees were “indispensable” or served a “specialized purpose” because it is obvious that they received the communications simply for their information.

26. For example, document number 12(1) on the December 21 log, which is an e-mail regarding “discussions with Richard Leedham,” was sent by a Clifford Chance attorney to seven people, including Sarah Ellis of E & Y. A related e-mail, document number 12(2), was sent by Jonathan Rosen to Gareth Hughes, with a “cc” to six people, including Ms. Ellis. There is no suggestion that Ms. Ellis was acting on the e-mail or lending “indispensable” assistance on legal matters, and the context proves otherwise. Document numbers 12(1) and 12(2) are illustrative of the hundreds of other documents in Appendix 4, all of which should have been produced by the Liquidator.

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<sup>9</sup> These documents are set forth in Appendix 4 to the Motion.

**B. E & Y Is Not A "Representative Of A Client" Under Rule 502**

27. Rule 502 states that "a representative of a client" is "one having authority to obtain professional legal services, or to act on advice pursuant thereto, on behalf of a client." N.H. R. EVID. 502(A)(2). The New Hampshire Evidence Manual notes that Rule 502(a)(2) reflects the "most restricted position" regarding the definition of a client representative, which is the "control group" test. 1 N.H. EVID. MANUAL § 502.02[7]. See also *National Tank Co. v. The 30th Judicial Dist. Ct. ("NATCO")*, 851 S.W.2d 193, 197 (Tex. 1993) (noting that the definition of a client representative in the Texas statute, which is the same as Rule 502(a)(2), "adopts the 'control group' test previously recognized by many federal courts").

28. The "control group" test "generally protect[s] only statements made by the upper echelon of corporate management." *Id.* There are sound public policy reasons for narrowly defining which employees may be considered client representatives:

The "control group" test is preferable to the principal alternative, which is that the privilege cover[s] any employee communication to counsel directed by the employer and referring to the performance of his duties. This approach would permit a corporation to insulate all of its normal fact gathering about a matter by using the medium of communication with counsel for it.

1 N.H. EVID. MANUAL § 502.02[7].

29. In this case, the E & Y employees cannot be considered the "upper echelon" of the client because they are not even employees of the client. See *Langdon v. Champion*, 752 P.2d 999, 1002 (Alaska 1988) (holding, without further consideration, that the "control group" definition cannot apply to third parties). Some courts have gone beyond the holding in *Langdon* by examining whether employees of a third party may be client representatives, but they have also required express instructions from the client providing the third party "with discretion to either accept or reject the legal advice." *NATCO*, 851 S.W.2d at 199. Even if this Court were to

hold that the “control group” test applies to third parties, there is no evidence that the E & Y employees were provided with the requisite authority.

30. Accordingly, the Liquidator cannot rely on Section 502(a)(2) to argue that the privileged was maintained when communications were shared with E & Y employees.

**III. Another Group Of Documents Withheld  
By The Liquidator Were Never Privileged**

31. In addition to the documents for which any arguable privilege was waived, the Liquidator has withheld fifteen documents that were never privileged at all because there is no indication in the privilege logs that they were communications between the lawyer and the client (or the client’s representatives) “made for the purpose of facilitating the rendition of professional legal services to the client.” N.H. R. EVID. 502(B).<sup>10</sup>

32. The main flaw in the Liquidator’s assertion of privilege is that the documents in Appendix 5 involve only non-lawyers. The Liquidator may try to argue that the communications are “between representatives of the client” under Rule 502(b), but there are several problems with such an argument. First, several of the documents — document numbers 22(3), 94 and 203(2) on the December 21 log and 25(3) and 25(4) on the January 5 log — were also sent to Sarah Ellis of E & Y, who is demonstrably not a client representative. Second, the Liquidator has not shown how the communications in Appendix 5 were expressly “made for the purpose of facilitating the rendition of professional legal services to the client.” N.H. R. EVID. 502(B). This is an essential component of the statute; otherwise, a client could cloak all the communications of its employees under the mantle of attorney-client privilege.

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<sup>10</sup> The documents are listed in Appendix 5 to this Motion.

33. When the ACE Companies brought some of these and other documents to the Liquidator's attention, his counsel purported to address the ACE Companies' concerns in the March 11 letter. The letter, however, only confirms that documents were withheld improperly.

34. Counsel for the Liquidator admitted in the March 11 letter that two e-mails (document numbers 24(1) and 24(2) on the January 5 log) should have been produced and enclosed them with the letter. (The e-mails are annexed to this Motion as Exhibit 10.) A review of the two e-mails shows that the Liquidator lacked any basis for withholding the documents originally and it raises suspicion about the Liquidator's other claims of privilege.

35. The Liquidator's attempted justification in the March 11 letter for withholding other documents in Appendix 5 falls far short and instead supports the ACE Companies' assertions. For example, counsel for the Liquidator claimed that document number 203(2) on the December 21 log was properly withheld because document numbers 203(1) and 203(2) "comprise essentially one email sent to counsel." (Ex. 8 at 2.) However, counsel for the Liquidator also admitted that document number 203(2) was forwarded to counsel "for information" in document number 203(1). (*Id.*) The mere forwarding of an unprivileged e-mail to counsel "for information" does not make the underlying e-mail a communication for the purpose of legal advice. It also provides another reason for holding that document number 203(1) is not privileged, since clearly no legal advice was being sought.<sup>11</sup>

36. In the March 11 letter, counsel for the Liquidator also tried to portray other documents — namely, document numbers 136(1), 179(1) and 301(1) on the December 21 log and document numbers 84(1) on the January 5 log — as privileged because they related to allegedly privileged communications. (Ex. 8 at 2.) Those documents, however, cannot be

characterized as facilitating the rendition of any legal services by the Liquidator's counsel because they were after the alleged rendition of legal services on which the Liquidator relies.<sup>12</sup>

37. Finally, in the March 11 letter, counsel for the Liquidator stated that document numbers 25(3) and 25(4) on the January 5 log were properly withheld because they are e-mails "addressed to counsel." (Ex. 8 at 2.) However, the descriptions for document numbers 25(3) and 25(4) list only Jonathan Rosen, Gareth Hughes, Sarah Ellis and Matthew Harrison as senders or recipients. None of those individuals is a "lawyer" for purposes of Rule 502(b).

WHEREFORE, the ACE Companies respectfully request that the Court:

- A. Enter an Order compelling the Liquidator to produce to the ACE Companies the documents listed in Appendices 2, 4 and 5;
- B. Enter an Order compelling the Liquidator to produce to the Court, for in camera review, the documents listed in Appendix 3; and
- C. Grant such other and further relief as this Court deems just and proper, including, but not limited to, the fees and costs incurred by the ACE Companies in bringing this Motion.

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<sup>11</sup> The ACE Companies have moved for the production of document number 203(1) on the separate and independent ground that any applicable privilege was waived.

<sup>12</sup> The ACE Companies do not concede that the underlying documents are privileged. For example, any privilege attaching to document numbers 179(4) and 301(2) on the December 21 log was waived because they were sent to E & Y employees.



Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that I served a copy of the foregoing on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via facsimile and First Class mail on March 22, 2005

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**APPENDIX 1**

**SUBJECT DOCUMENTS**

December 21 Log				
11	12(1)	12(2)	13(1)	13(2)
14(1)	14(2)	15	17(1)	17(2)
17(3)	17(4)	17(5)	18(1)	18(2)
18(3)	18(4)	19(1)	19(2)	20
21(1)	21(2)	22(1)	22(2)	22(3)
23(2)	24(1)	25(1)	25(2)	26(1)
27	29	30	33(1)	33(2)
33(3)	34(1)	34(2)	36(1)	36(2)
38(1)	38(2)	38(3)	39(1)	39(3)
40(1)	40(2)	42	43	48
49	51	52(1)	52(2)	52(3)
53	58	59	60	62(1)
62(2)	62(3)	63	64(1)	64(2)
65	68(1)	68(2)	68(3)	71(1)
71(2)	71(3)	71(4)	71(5)	72
76(1)	76(2)	77(1)	77(2)	78(1)
78(2)	79	86	90(1)	90(2)
90(3)	92(2)	93	94	96(1)
96(2)	111	112(1)	112(2)	112(3)
113	116	120(1)	120(2)	122
123	124	125(1)	125(2)	125(3)
126(1)	126(2)	127(1)	127(2)	128(1)
128(2)	128(3)	128(4)	129(1)	129(2)
129(3)	129(4)	130(1)	130(2)	130(3)
130(4)	130(5)	131(1)	131(2)	131(3)
132(1)	132(2)	133	134(1)	134(2)
135(1)	136(1)	136(2)	138(1)	138(2)
139	140(1)	142(1)	142(2)	144
145(1)	145(2)	146	147	148
150(1)	150(2)	150(3)	152	153
154	155	156	157(1)	157(2)
157(3)	160	162	164(1)	164(3)
165(1)	165(2)	165(3)	166(1)	166(2)
166(4)	169	170(1)	170(2)	174
176(1)	176(2)	177(3)	178(2)	179(1)
179(2)	179(4)	182(1)	182(2)	183(2)
185	186	187(2)	187(3)	189(1)
189(2)	190	191(1)	191(2)	192(1)
193	194	195(1)	195(2)	195(3)

195(4)	195(5)	196	197	198(1)
198(2)	200	201	202	203(1)
203(2)	204	205(2)	205(3)	206(1)
206(2)	207(1)	207(2)	208	209(1)
209(2)	209(3)	209(4)	210(2)	210(3)
211(2)	211(3)	212	213	214
215	216	217(1)	217(2)	217(3)
218	219(1)	219(2)	219(3)	219(4)
219(5)	220(1)	220(2)	220(3)	220(4)
220(5)	221(1)	221(2)	222	223(1)
223(2)	224(1)	225(3)	226(1)	226(2)
226(3)	227	228(1)	228(2)	229
230	231	232	233	235(1)
235(2)	236	237(1)	237(2)	238(1)
238(2)	238(3)	239(1)	239(2)	239(3)
239(4)	239(5)	240(1)	240(2)	241
242	244	245(1)	245(2)	245(3)
245(4)	246	248(1)	248(2)	248(3)
249	252(1)	252(2)	252(3)	253
254(1)	254(2)	254(3)	255(2)	255(3)
255(4)	256(2)	256(3)	257(2)	259
260	262(1)	262(2)	262(3)	262(5)
263(1)	263(3)	264(1)	264(2)	264(3)
265	268	270	273(1)	273(2)
273(3)	273(4)	273(5)	276(1)	276(2)
276(3)	277(1)	277(2)	278	279
281	284(2)	286(1)	286(2)	286(3)
286(4)	287	288	293(1)	293(2)
293(3)	293(4)	294(1)	294(2)	294(3)
295(1)	295(2)	296(1)	296(2)	297(1)
297(2)	298	299	301(1)	301(2)
302(1)	302(2)	302(3)	303(1)	303(2)
303(3)	303(4)	304(1)	304(2)	304(3)
304(4)	304(5)	305(2)	306(2)	307(2)
309	310	311(1)	311(2)	311(3)
312(1)	312(2)	313(1)	313(2)	314
315	316(1)	316(2)	317(1)	317(2)
318(1)	319(1)	319(2)	319(3)	319(4)
319(5)	320	323(1)	323(2)	323(3)
323(4)	324(2)	324(3)	324(4)	325(1)
325(2)	325(3)	326(1)	326(2)	328
329	330	332	333	334(1)
334(2)	335(1)	335(2)	336(1)	336(2)
336(3)	337(2)	337(3)	337(4)	340(2)
341(2)	342(2)	342(3)	343(1)	343(2)

344	346	352(1)	352(2)	353
354	359			

January 5 Log				
1(1)	1(2)	2(1)	2(2)	2(3)
3	4(1)	4(2)	5(2)	6(2)
8(2)	11(1)	11(2)	12	13(1)
13(2)	13(3)	14(1)	14(2)	14(3)
14(4)	14(5)	15(3)	15(4)	15(5)
16(1)	16(2)	17(1)	17(2)	17(3)
17(4)	18	19	20	21
22	23(2)	24(3)	25(1)	25(2)
25(3)	25(4)	25(5)	26(1)	26(2)
27	28(1)	28(2)	29(1)	29(2)
29(3)	30	32(4)	32(5)	32(6)
33(1)	33(2)	34(1)	34(2)	34(3)
38	39(1)	39(2)	40	41
42(2)	42(3)	43(1)	43(2)	44(1)
44(2)	45	46	51(1)	52(1)
52(2)	53(1)	53(2)	54(1)	54(2)
54(3)	54(4)	55(1)	55(2)	56(1)
56(2)	57(1)	57(2)	57(3)	58(1)
58(2)	58(3)	58(4)	59(3)	59(4)
59(5)	60(4)	60(5)	60(6)	62(1)
63(1)	65	66	68	69(1)
69(2)	70	74	75	76(2)
77(1)	77(2)	78(2)	78(3)	78(4)
79	80(1)	80(2)	81(1)	81(2)
83	84(1)	84(2)		

**APPENDIX 2**

**WAIVER WHERE E & Y EMPLOYEES ARE AUTHOR,  
SOLE RECIPIENT OR ONE OF LIMITED NUMBER OF RECIPIENTS**

<b>December 21 Log</b>				
13(2)	19(1)	19(2)	20	68(1)
68(2)	68(3)	92(2)	127(1)	127(2)
132(1)	132(2)	133	146	176(1)
176(2)	197	202	207(1)	207(2)
221(1)	221(2)	222	233	244
264(1)	264(2)	264(3)	306(2)	342(2)
342(3)				

<b>January 5 Log</b>				
1(1)	1(2)	2(1)	2(2)	2(3)
8(2)	46			

**APPENDIX 3**

**IN CAMERA REVIEW OF DOCUMENTS WHERE  
E & Y EMPLOYEES ARE AUTHOR, SOLE  
RECIPIENT OR ONE OF LIMITED NUMBER OF RECIPIENTS**

<b>December 21 Log</b>				
22(1)	22(2)	23(2)	24(1)	25(1)
25(2)	27	38(1)	39(1)	40(1)
40(2)	43	59	60(1)	62(2)
62(3)	63	64(1)	64(2)	71(5)
72	76(2)	96(2)	120(2)	134(1)
134(2)	135(1)	138(1)	138(2)	139
142(1)	142(2)	154	164(1)	166(1)
166(2)	169	177(3)	178(2)	179(4)
182(1)	182(2)	187(3)	189(1)	189(2)
192(1)	195(1)	201	203(1)	206(2)
218	223(1)	223(2)	224(1)	225(3)
226(2)	226(3)	228(1)	228(2)	229(1)
236	237(1)	238(1)	238(2)	238(3)
239(1)	239(2)	239(3)	239(4)	239(5)
240(1)	242	245(4)	252(1)	252(2)
262(1)	262(2)	262(3)	263(1)	273(5)
276(1)	276(2)	277(1)	286(4)	287
301(2)	305(2)	307(2)	317(1)	337(2)

<b>January 5 Log</b>				
5(2)	6(2)	11(1)	11(2)	14(1)
14(2)	16(1)	16(2)	17(1)	17(2)
17(3)	17(4)	18	25(1)	25(2)
27	32(4)	32(5)	32(6)	44(1)
44(2)	45	53(1)	53(2)	59(3)
59(4)	59(4)	60(4)	60(5)	60(6)
63(1)	66	68	69(1)	69(2)
70	83			



**APPENDIX 4**

**WAIVER WHERE E & Y EMPLOYEES ARE SHOWN  
AS "CC'S" OR ONE OF MULTIPLE RECIPIENTS**

<b>December 21 Log</b>				
11	12(1)	12(2)	14(1)	14(2)
15	17(1)	17(2)	17(3)	17(4)
17(5)	18(1)	18(2)	18(3)	18(4)
21(1)	21(2)	26(1)	29	30
33(1)	33(2)	33(3)	34(1)	34(2)
36(1)	36(2)	38(2)	38(3)	39(3)
42	48	49	51	52(1)
52(2)	52(3)	53	58	62(1)
65	71(1)	71(2)	71(3)	71(4)
76(1)	77(1)	77(2)	78(1)	78(2)
79	86	90(1)	90(2)	90(3)
96(1)	111	112(1)	112(2)	112(3)
113	116	120(1)	122	123
124	125(1)	125(2)	125(3)	126(1)
126(2)	128(1)	128(2)	128(3)	128(4)
129(1)	129(2)	129(3)	129(4)	130(1)
130(2)	130(3)	130(4)	130(5)	131(1)
131(2)	131(3)	140(1)	144	145(1)
145(2)	147	148	150(1)	150(2)
150(3)	152	153	155	156
157(1)	157(2)	157(3)	160	162
164(3)	165(1)	165(2)	165(3)	166(4)
170(1)	170(2)	174	183(2)	185
186	187(2)	190	191(1)	191(2)
193	194	195(2)	195(3)	195(4)
195(5)	196	198(1)	198(2)	200
204	205(2)	205(3)	206(1)	208
209(1)	209(2)	209(3)	209(4)	210(2)
210(3)	211(2)	211(3)	212	213
214	215	216	217(1)	217(2)
217(3)	219(1)	219(2)	219(3)	219(4)
219(5)	220(1)	220(2)	220(3)	220(4)
220(5)	226(1)	227	230	231
232	235(1)	235(2)	237(2)	240(2)
241	245(1)	245(2)	245(3)	246
248(1)	248(2)	248(3)	249	252(3)
253	254(1)	254(2)	254(3)	255(2)
255(3)	255(4)	256(2)	256(3)	257(2)

259	260	262(5)	263(3)	273(1)
273(2)	273(3)	273(4)	276(3)	277(2)
278	279	281	284(2)	286(1)
286(2)	286(3)	288	293(1)	293(2)
293(3)	293(4)	294(1)	294(2)	294(3)
295(1)	295(2)	296(1)	296(2)	297(1)
297(2)	298	299	302(1)	302(2)
302(3)	303(1)	303(2)	303(3)	303(4)
304(1)	304(2)	304(3)	304(4)	304(5)
309	310	311(1)	311(2)	311(3)
312(1)	312(2)	313(1)	313(2)	314
315	316(1)	316(2)	317(2)	318(1)
319(1)	319(2)	319(3)	319(4)	319(5)
320	323(1)	323(2)	323(3)	323(4)
324(2)	324(3)	324(4)	325(1)	325(2)
325(3)	326(1)	326(2)	328	329
330	332	333	334(1)	334(2)
335(1)	335(2)	336(1)	336(2)	336(3)
337(3)	337(4)	340(2)	341(2)	343(1)
343(2)	344	346	352(1)	352(2)
353	354	359		

<b>January 5 Log</b>				
3	4(1)	4(2)	12	13(1)
13(2)	13(3)	14(3)	14(4)	14(5)
15(3)	15(4)	15(5)	19	20
21	22	23(2)	24(3)	25(5)
26(1)	26(2)	28(1)	28(2)	29(1)
29(2)	29(3)	30	33(2)	34(1)
34(2)	34(3)	38	39(1)	39(2)
40	41	42(2)	42(3)	43(1)
43(2)	51(1)	52(1)	52(2)	54(1)
54(2)	54(3)	54(4)	55(1)	55(2)
56(1)	56(2)	57(1)	57(2)	57(3)
58(1)	58(2)	58(3)	58(4)	62(1)
65	74	75	76(2)	77(1)
77(2)	78(2)	78(3)	78(4)	79
80(1)	80(2)	81(1)	81(2)	

**APPENDIX 5**

**NO PRIVILEGE ESTABLISHED**

<b>December 21 Log</b>				
13(1)	22(3)	93	94	136(1)
136(2)	179(1)	179(2)	203(2)	301(1)

<b>January 5 Log</b>				
25(3)	25(4)	33(1)	84(1)	84(2)

4.27(3) [Repayment of deposit etc.] If a winding-up order is made after a provisional liquidator has been appointed, any money deposited under this Rule shall (unless it is required by reason of insufficiency of assets for payment of remuneration and expenses of the provisional liquidator) be repaid to the person depositing it (or as that person may direct) out of the assets, in the prescribed order of priority.

(See General Note after r. 4.31.)

4.28 Security

4.28(1) [Application of Rule] The following applies where an insolvency practitioner is appointed to be provisional liquidator under section 135.

4.28(2) [Cost of providing security] The cost of providing the security required under the Act shall be paid in the first instance by the provisional liquidator; but—

- (a) if a winding-up order is not made, the person so appointed is entitled to be reimbursed out of the property of the company, and the court may make an order on the company accordingly, and
(b) if a winding-up order is made, he is entitled to be reimbursed out of the assets in the prescribed order of priority.

(See General Note after r. 4.31.)

4.29 Failure to give or keep up security

4.29(1) [Powers of court] If the provisional liquidator fails to give or keep up his security, the court may remove him, and make such order as it thinks fit as to costs.

4.29(2) [Directions for replacement] If an order is made under this Rule removing the provisional liquidator, or discharging the order appointing him, the court shall give directions as to whether any, and if so what, steps should be taken for the appointment of another person in his place.

(See General Note after r. 4.31.)

4.30 Remuneration

4.30(1) [To be fixed by court] The remuneration of the provisional liquidator (other than the official receiver) shall be fixed by the court from time to time on his application.

4.30(2) [Matters to be taken into account] In fixing his remuneration, the court shall take into account—

- (a) the time properly given by him (as provisional liquidator) and his staff in attending to the company's affairs;
(b) the complexity (or otherwise) of the case;
(c) any respects in which, in connection with the company's affairs, there falls on the provisional liquidator any responsibility of an exceptional kind or degree;
(d) the effectiveness with which the provisional liquidator appears to be carrying out, or to have carried out, his duties; and
(e) the value and nature of the property with which he has to deal.

4.30(3) [Source of payment of remuneration etc.] Without prejudice to any order the court may make as to costs, the provisional liquidator's remuneration (whether the official receiver or another) shall be paid to him, and the amount of any expenses incurred by him (including the remuneration and expenses of any special manager appointed under section 177) reimbursed—

- (a) if a winding-up order is not made, out of the property of the company; and
(b) if a winding-up order is made, out of the assets, in the prescribed order of priority,

or, in either case (the relevant funds being insufficient), out of the deposit under Rule 4.27.

**4.30(3A) [Power of retention]** Unless the court otherwise directs, in a case falling within paragraph (3)(a) above the provisional liquidator may retain out of the company's property such sums or property as are or may be required for meeting his remuneration and expenses.

**4.30(4) [Provisional liquidator other than official receiver]** Where a person other than the official receiver has been appointed provisional liquidator, and the official receiver has taken any steps for the purpose of obtaining a statement of affairs or has performed any other duty under the Rules, he shall pay the official receiver such sum (if any) as the court may direct.

(See General Note after r. 4.31.)

#### 4.31 Termination of appointment

**4.31(1) [Termination by court]** The appointment of the provisional liquidator may be terminated by the court on his application, or on that of any of the persons specified in Rule 4.25(1).

**4.31(2) [Directions on termination]** If the provisional liquidator's appointment terminates, in consequence of the dismissal of the winding-up petition or otherwise, the court may give such directions as it thinks fit with respect to the accounts of his administration or any other matters which it thinks appropriate.

**4.31(3)** (Omitted by the Insolvency (Amendment) Rules 1987 (SI 1987/1919), r. 3(1), Sch., Pt 1, para. 44 as from 11 January 1988.)

#### GENERAL NOTE TO RR. 4.25-4.31

These rules set out the procedure governing an application to the court for the appointment of a provisional liquidator under IA 1986, s. 135, and the associated questions of furnishing a deposit (where the official receiver is appointed) or security (where the provisional liquidator is an insolvency practitioner), and the liquidator's remuneration.

Rule 4.25(1) was substituted by the Insolvency (Amendment) Rules 2002 (SI 2002/1307, effective May 31, 2002), so as to include the persons mentioned in sub-paras (f) and (g).

The court may in an appropriate case refer the fixing of remuneration under r. 4.30 to one or more assessors: *Re Independent Insurance Co. Ltd* [2002] EWHC 1577 (Ch); [2002] 2 B.C.L.C. 709. (For further proceedings, see *Re Independent Insurance Co. Ltd (No. 2)* [2003] EWHC 51 (Ch), [2003] 1 B.C.L.C. 640, where the principles for the fixing of remuneration and making of interim payments are discussed in detail.)

There is no provision in the rules governing the priority in which the remuneration and expenses of a provisional liquidator should be paid, either *vis-à-vis* the company's debts or in relation to each other; but in *Re Grey Marlin Ltd* [2000] B.C.C. 410 and in *Smith v UIC Insurance Co. Ltd* [2001] B.C.C. 11 the rules governing a liquidator's remuneration and expenses were applied by analogy.

The provisions in rr. 4.28 and 4.30 are directory, although subject to the overall discretion conferred by r. 4.31(2) (and formerly also by r. 4.31(3)); and so a court will not normally make an order that an unsuccessful petitioner should pay the remuneration of a provisional liquidator: *Re Walter L Jacob & Co. Ltd* (1987) 3 B.C.C. 532. (See, however, *Re Secure & Provide plc* [1992] B.C.C. 405, where such an order was made against the Secretary of State following the failure of a petition under s. 124A, and compare *Re Xyllyx plc (No. 2)* [1992] B.C.L.C. 378.)

The court has power under r. 4.31(2) to direct that a provisional liquidator who has been discharged before the hearing of the petition shall be paid remuneration out of the company's assets: *Re U O C Corporation, Alipour v U O C Corporation* [1998] B.C.C. 191.

PROCEEDINGS ON A PROPOSAL MADE BY THE DIRECTORS, OR BY THE ADMINISTRATOR, OR BY THE LIQUIDATOR

*Section A: meetings of company's creditors and members*

**1.13 Summoning of meetings**

**1.13(1) [Convener to regard convenience of creditors for venue]** Subject as follows, in fixing the venue for the creditors' meeting and the company meeting, the person summoning the meeting ("the convener") shall have regard primarily to the convenience of the creditors.

**1.13(2) [Time of meetings]** Meetings shall in each case be summoned for commencement between 10.00 and 16.00 hours on a business day.

**1.13(3) [Creditors' meeting in advance of company meeting]** The meetings may be held on the same day or on different days. If held on the same day, the meetings shall be held in the same place, but in either case the creditors' meeting shall be fixed for a time in advance of the company meeting.

**1.13(4) [Maximum seven days between meetings]** Where the meetings are not held on the same day, they shall be held within 7 days of each other.

**1.13(5) [Forms of proxy with notice]** With every notice summoning either meeting there shall be sent out forms of proxy.

**GENERAL NOTE**

Paragraph (3) was replaced and para. (4) added by the Insolvency (Amendment) (No. 2) Rules 2002 (SI 2002/2712). These changes reflect a need for greater clarity with regard to meetings' procedures and, while introducing some flexibility (subject to a maximum hiatus of seven days between meetings), also recognise the fact that there is no point of having a meeting of members if the creditors have voted down the proposal.

This rule was then further amended in the form of a complete reconstitution by Insolvency (Amendment) Rules 2003 (SI 2003/1730).

**1.14 The chairman at meetings**

**1.14(1) [Convener to be chairman]** Subject as follows, at both the creditors' meeting and the company meeting, and at any combined meeting, the convener shall be chairman.

**1.14(2) [Other nominated chairman]** If for any reason he is unable to attend, he may nominate another person to act as chairman in his place; but a person so nominated must be—

- (a) a person qualified to act as an insolvency practitioner in relation to the company;
- (b) an authorised person in relation to the company; or
- (c) an employee of the convener or his firm who is experienced in insolvency matters.

**GENERAL NOTE**

A number of amendments were made by Insolvency (Amendment) (No. 2) Rules 2002 (SI 2002/2712) with effect from January 1, 2003 to allow greater flexibility as to who should chair the meeting of creditors.

**1.15 The chairman as proxy-holder**

**1.15** The chairman shall not by virtue of any proxy held by him vote to increase or reduce the amount of the remuneration or expenses of the nominee or the supervisor of the proposed arrangement, unless the proxy specifically directs him to vote in that way.

*(See General Note after r. 1.21.)*

passed to that effect, adjourn the meeting for not more than 14 days and may only adjourn once (subject to any direction by the court).

(See General Note after r. 2.44.)

**2.35 Creditors' meetings generally**

**2.35(1) [Application of r. 2.35]** This Rule applies to creditors' meetings summoned by the administrator under—

- (a) paragraph 51 (initial creditors' meeting);
- (b) paragraph 52(2) (at the request of the creditors);
- (c) paragraph 54(2) (to consider revision to the administrator's proposals);
- (d) paragraph 56(1) (further creditors' meetings); and
- (e) paragraph 62 (general power to summon meetings of creditors).

**2.35(2) [Form of notice]** Notice of any of the meetings set out in paragraph (1) above shall be in Form 2.20B.

[FORM 2.20B]

**2.35(3) [Convenience of venue]** In fixing the venue for the meeting, the administrator shall have regard to the convenience of creditors and the meeting shall be summoned for commencement between 10.00 and 16.00 hours on a business day, unless the court otherwise directs.

**2.35(4) [Period of notice]** Subject to paragraphs (6) and (7) below, at least 14 days' notice of the meeting shall be given to all creditors who are known to the administrator and had claims against the company at the date when the company entered administration unless that creditor has subsequently been paid in full; and the notice shall—

- (a) specify the purpose of the meeting;
- (b) contain a statement of the effect of Rule 2.38 (entitlement to vote); and
- (c) contain the forms of proxy.

[FORM 8.2]

**2.35(5) [Adjournment where no chairman]** If within 30 minutes from the time fixed for commencement of the meeting there is no person present to act as chairman, the meeting stands adjourned to the same time and place in the following week or, if that is not a business day, to the business day immediately following.

**2.35(6) [Single adjournment]** The meeting may be adjourned once, if the chairman thinks fit, but not for more than 14 days from the date on which it was fixed to commence, subject to the direction of the court.

**2.35(7) [Notification of venue of adjourned meeting]** If a meeting is adjourned the administrator shall as soon as reasonably practicable notify the creditors of the venue of the adjourned meeting.

(See General Note after r. 2.44.)

**2.36 The chairman at meetings**

**2.36(1) [Administrator or his nominee to be chairman]** At any meeting of creditors summoned by the administrator, either he shall be chairman, or a person nominated by him in writing to act in his place.

**2.36(2) [Nominee chairman]** A person so nominated must be either—

- (a) one who is qualified to act as an insolvency practitioner in relation to the company; or
- (b) an employee of the administrator or his firm who is experienced in insolvency matters.

2.48(7) [Requisition of creditors' meeting] Any single creditor, or a group of creditors, of the company whose debt(s) amount to at least 10% of the total debts of the company may, within 5 business days from the date of the administrator sending out a resolution or proposals, require him to summon a meeting of creditors to consider the matters raised therein in accordance with Rule 2.37. Any meeting called under this Rule shall be conducted in accordance with Rule 2.35.

2.48(8) [Administrator's power to call meeting if proposals rejected] If the administrator's proposals or revised proposals are rejected by the creditors pursuant to this Rule, the administrator may call a meeting of creditors.

2.48(9) [Requirement for creditors' meeting to include course of correspondence] A reference in these Rules to anything done, or required to be done, at, or in connection with, or in consequence of, a creditors' meeting includes a reference to anything done in the course of correspondence in accordance with this Rule.

GENERAL NOTE

"Correspondence" includes correspondence by telephonic or other electronic means (para. 111(1)).

Note para. 2.48(8): the administrator need not accept a "No" vote by correspondence, but may disregard it and summon a meeting in the hope that the assembled creditors will think otherwise.

SECTION B: COMPANY MEETINGS

2.49 Venue and conduct of company meeting

2.49(1) [Convenience of venue] Where the administrator summons a meeting of members of the company, he shall fix a venue for it having regard to their convenience.

2.49(2) [Chairman] The chairman of the meeting shall be the administrator or a person nominated by him in writing to act in his place.

2.49(3) [Nominee chairman] A person so nominated must be either—

- (a) one who is qualified to act as an insolvency practitioner in relation to the company; or
- (b) an employee of the administrator or his firm who is experienced in insolvency matters.

2.49(4) [Adjournment if no chairman] If within 30 minutes from the time fixed for commencement of the meeting there is no person present to act as chairman, the meeting stands adjourned to the same time and place in the following week or, if that is not a business day, to the business day immediately following.

2.49(5) [Summoning and conduct of meeting] Subject as above, the meeting shall be summoned and conducted as if it were a general meeting of the company summoned under the company's articles of association, and in accordance with the applicable provisions of the Companies Act.

2.49(6) [Non-application of r. 2.49(5)] Paragraph (5) does not apply where the laws of a member State and not the laws of England and Wales apply in relation to the conduct of the meeting. The meeting shall be summoned and conducted in accordance with the constitution of the company and the laws of the member State referred to in this paragraph shall apply to the conduct of the meeting.

2.49(7) [Minutes] The chairman of the meeting shall cause minutes of its proceedings to be entered in the company's minute book.

GENERAL NOTE

There is no obligation placed on an administrator under Sch. B1 to call a shareholders' meeting for any purpose, but he may choose to do so (e.g. if it is proposed to institute a CVA), in which event this rule will apply.

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**2.52(2) [Holding of meetings]** Subject as follows, meetings of the committee shall be held when and where determined by the administrator.

**2.52(3) [Calling of meetings]** The administrator shall call a first meeting of the committee not later than 6 weeks after its first establishment, and thereafter he shall call a meeting—

- (a) if so requested by a member of the committee or his representative (the meeting then to be held within 14 days of the request being received by the administrator); and
- (b) for a specified date, if the committee has previously resolved that a meeting be held on that date.

**2.52(4) [Notice of venue]** The administrator shall give 7 days' written notice of the venue of any meeting to every member of the committee (or his representative designated for that purpose), unless in any case the requirement of notice has been waived by or on behalf of any member. Waiver may be signified either at or before the meeting.

*(See General Note after r. 2.65.)*

**2.53 The chairman at meetings**

**2.53(1) [Administrator or nominee chairman]** Subject to Rule 2.62(3), the chairman at any meeting of the creditors' committee shall be the administrator or a person nominated by him in writing to act.

**2.53(2) [Nominee]** A person so nominated must be either—

- (a) one who is qualified to act as an insolvency practitioner in relation to the company; or
- (b) an employee of the administrator or his firm who is experienced in insolvency matters.

*(See General Note after r. 2.65.)*

**2.54 Quorum**

**2.54** A meeting of the committee is duly constituted if due notice of it has been given to all the members, and at least 2 members are present or represented.

*(See General Note after r. 2.65.)*

**2.55 Committee-members' representatives**

**2.55(1) [Representation]** A member of the committee may, in relation to the business of the committee, be represented by another person duly authorised by him for that purpose.

**2.55(2) [Letter of authority or proxy]** A person acting as a committee-member's representative must hold a letter of authority entitling him so to act (either generally or specially) and signed by or on behalf of the committee-member, and for this purpose any proxy or any authorisation under section 375 of the Companies Act in relation to any meeting of creditors of the company shall, unless it contains a statement to the contrary, be treated as a letter of authority to act generally signed by or on behalf of the committee-member.

**2.55(3) [Production of letter of authority]** The chairman at any meeting of the committee may call on a person claiming to act as a committee-member's representative to produce his letter of authority, and may exclude him if it appears that his authority is deficient.

**2.55(4) [Who may not be a representative]** No member may be represented by a body corporate, a person who is an undischarged bankrupt, or a disqualified director or a person who is subject to a bankruptcy restrictions order, bankruptcy restrictions undertaking or interim bankruptcy restrictions order.

**2.55(5) [No dual representation]** No person shall on the same committee, act at one and the same time as representative of more than one committee-member.

**2.55(6) [Signing as representative]** Where a member's representative signs any document on the member's behalf, the fact that he so signs must be stated below his signature.

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GENERAL NOTE

It is for the administrative receiver to certify this committee.  
Rules 3.17(2) and 3.17(2A) aim to facilitate the immediate establishment of a committee after the creditors' meeting.

3.18 Functions and meetings of the committee

3.18(1) [Functions] The creditors' committee shall assist the administrative receiver in discharging his functions, and act in relation to him in such manner as may be agreed from time to time.

3.18(2) [Holding of meetings] Subject as follows, meetings of the committee shall be held when and where determined by the receiver.

3.18(3) [First and subsequent meetings] The receiver shall call a first meeting of the committee not later than 3 months after its establishment; and thereafter he shall call a meeting—

- (a) if requested by a member of the committee or his representative (the meeting then to be held within 21 days of the request being received by the receiver), and
- (b) for a specified date, if the committee has previously resolved that a meeting be held on that date.

3.18(4) [Notice of venue] The receiver shall give 7 days' written notice of the venue of any meeting to every member (or his representative designated for that purpose), unless in any case the requirement of notice has been waived by or on behalf of any member.

Waiver may be signified either at or before the meeting.

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GENERAL NOTE

This outlines the role of the committee. The committee's functions are left vague by IA 1986, s. 49. For "venue" in r. 3.18(4) see r. 13.6.

3.19 The chairman at meetings

3.19(1) [Chairman] Subject to Rule 3.28(3), the chairman at any meeting of the creditors' committee shall be the administrative receiver, or a person nominated by him in writing to act.

3.19(2) [Nominated chairman] A person so nominated must be either—

- (a) one who is qualified to act as an insolvency practitioner in relation to the company, or
- (b) an employee of the receiver or his firm who is experienced in insolvency matters.

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GENERAL NOTE

This is similar to r. 3.10.

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3.20 Quorum

3.20 A meeting of the committee is duly constituted if due notice has been given to all the members, and at least 2 members are present or represented.

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GENERAL NOTE

The committee's quorum is two.

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3.21 Committee-members' representatives

3.21(1) [Representation] A member of the committee may, in relation to the business of the committee, be represented by another person duly authorised by him for that purpose.

**4.53B-CVL(2)** [Recorded in minutes] Any such report shall be recorded in the minutes of the meeting kept under Rule 4.71.

(See General Note after r. 4.71.)

**4.54 General power to call meetings**

**4.54(1)** [General power, "the convener"] The official receiver or the liquidator may at any time summon and conduct meetings of creditors or of contributories for the purpose of ascertaining their wishes in all matters relating to the liquidation; and in relation to any meeting summoned under the Act or the Rules, the person summoning it is referred to as "the convener".

**4.54(2)** [Notice of venue] When (in either case) a venue for the meeting has been fixed, notice of it shall be given by the convener—

(a) in the case of a creditors' meeting, to every creditor who is known to him or is identified in the company's statement of affairs; and

[FORM 4.22]

(b) in the case of a meeting of contributories, to every person appearing (by the company's books or otherwise) to be a contributory of the company.

[FORM 4.23]

**4.54(3)** [Time for giving notice etc.] Notice of the meeting shall be given at least 21 days before the date fixed for it, and shall specify the purpose of the meeting.

**4.54(4)** [Contents of notice] The notice shall specify a time and date, not more than 4 days before the date fixed for the meeting, by which, and the place at which, creditors must lodge proofs and proxies, in order to be entitled to vote at the meeting; and the same applies in respect of contributories and their proxies.

(NO CVL APPLICATION)

**4.54(5)** [Contents of notice] The notice shall specify a time and date, not more than 4 days before that fixed for the meeting, by which, and the place at which, creditors (if not individuals attending in person) must lodge proxies, in order to be entitled to vote at the meeting.

**4.54(6)** [Additional notice by public advertisement] Additional notice of the meeting may be given by public advertisement if the convener thinks fit, and shall be so given if the court orders.

(See General Note after r. 4.71.)

**4.55 The chairman at meetings**

(NO CVL APPLICATION)

**4.55(1)** [Application of Rule] This Rule applies both to a meeting of creditors and to a meeting of contributories.

**4.55(2)** [Where convener official receiver] Where the convener of the meeting is the official receiver, he, or a person nominated by him, shall be chairman.

A nomination under this paragraph shall be in writing, unless the nominee is another official receiver or a deputy official receiver.

**4.55(3)** [Where convener not official receiver] Where the convener is other than the official receiver, the chairman shall be he, or a person nominated in writing by him.

A person nominated under this paragraph must be either—

- (a) one who is qualified to act as an insolvency practitioner in relation to the company, or
- (b) an employee of the liquidator or his firm who is experienced in insolvency matters.

(See General Note after r. 4.71.)

**4.56-CVL The chairman at meetings**

**4.56-CVL(1) [Application of Rule]** This Rule applies both to a meeting of creditors (except a meeting under section 95 or 98) and to a meeting of contributories.

**4.56-CVL(2) [Liquidator or his nominee to be chairman]** The liquidator, or a person nominated by him in writing to act, shall be chairman of the meeting.

A person nominated under this paragraph must be either—

- (a) one who is qualified to act as an insolvency practitioner in relation to the company, or
- (b) an employee of the liquidator or his firm who is experienced in insolvency matters.

(See General Note after r. 4.71.)

**4.57 Requisitioned meetings**

**4.57(1) [Documents to accompany creditors' request]** Any request by creditors to the liquidator (whether or not the official receiver) for a meeting of creditors or contributories, or meetings of both, to be summoned shall be accompanied by—

- (a) a list of the creditors concurring with the request and the amount of their respective claims in the winding up;
- (b) from each creditor concurring, written confirmation of his concurrence; and
- (c) a statement of the purpose of the proposed meeting.

Sub-paragraphs (a) and (b) do not apply if the requisitioning creditor's debt is alone sufficient, without the concurrence of other creditors.

[FORM 4.21]

**4.57(2) [Liquidator to fix venue]** The liquidator shall, if he considers the request to be properly made in accordance with the Act, fix a venue for the meeting, not more than 35 days from his receipt of the request.

**4.57(3) [Notice of meeting]** The liquidator shall give 21 days' notice of the meeting, and the venue for it, to creditors.

**4.57(4) [Application of r. 4.57(1)–(3) to contributories' meetings]** Paragraphs (1) to (3) above apply to the requisitioning by contributories of contributories' meetings, with the following modifications—

- (a) for the reference in paragraph (1)(a) to the creditors' respective claims substitute the contributories' respective values (being the amounts for which they may vote at any meeting); and
- (b) the persons to be given notice under paragraph (3) are those appearing (by the company's books or otherwise) to be contributories of the company.

[FORM 4.24]

(NO CVL APPLICATION)

(See General Note after r. 4.71.)

**4.58 Attendance at meetings of company's personnel**

**4.58(1) [Application of Rule]** This Rule applies to meetings of creditors and to meetings of contributories.

**4.58(2) [Notice to company's personnel]** Whenever a meeting is summoned, the convener shall give at least 21 days' notice to such of the company's personnel as he thinks should be told of, or be present at, the meeting.

(See General Note after r. 4.71.)

**4.61 Expenses of summoning meetings**

**4.61(1) [Deposit for payment of expenses]** Subject as follows, the expenses of summoning and holding a meeting of creditors or contributories at the instance of any person other than the official receiver or the liquidator shall be paid by that person, who shall deposit with the liquidator security for their payment.

**4.61(2) [Appropriate security]** The sum to be deposited shall be such as the official receiver or liquidator (as the case may be) determines to be appropriate; and neither shall act without the deposit having been made.

**4.61(3) [Vote for expenses to be paid out of assets]** Where a meeting of creditors is so summoned, it may vote that the expenses of summoning and holding it, and of summoning and holding any meeting of contributories requisitioned at the same time, shall be payable out of the assets, as an expense of the liquidation.

**4.61(4) [Contributories' meeting]** Where a meeting of contributories is summoned on the requisition of contributories, it may vote that the expenses of summoning and holding it shall be payable out of the assets, but subject to the right of creditors to be paid in full, with interest.

**4.61(5) [Repayment of deposit]** To the extent that any deposit made under this Rule is not required for the payment of expenses of summoning and holding a meeting, it shall be repaid to the person who made it.

(See General Note after r. 4.71.)

**4.62-CVL Expenses of meeting under s. 98**

**4.62-CVL(1) [Payment out of assets]** Payment may be made out of the company's assets, either before or after the commencement of the winding up, of any reasonable and necessary expenses incurred in connection with the summoning, advertisement and holding of a creditors' meeting under section 98.

Any such payment is an expense of the liquidation.

**4.62-CVL(2) [Payment before commencement of winding up]** Where such payments are made before the commencement of the winding up, the director presiding at the creditors' meeting shall inform the meeting of their amount and the identity of the persons to whom they were made.

**4.62-CVL(3) [Payment by s. 100 liquidator]** The liquidator appointed under section 100 may make such a payment (subject to the next paragraph); but if there is a liquidation committee, he must give the committee at least 7 days' notice of his intention to make the payment.

**4.62-CVL(4) [No payment by liquidator to himself]** Such a payment shall not be made by the liquidator to himself, or to any associate of his, otherwise than with the approval of the liquidation committee, the creditors, or the court.

**4.62-CVL(5) [Powers of court under r. 4.219]** This Rule is without prejudice to the powers of the court under Rule 4.219 (voluntary winding up superseded by winding up by the court).

(See General Note after r. 4.71.)

**4.63 Resolutions**

**4.63(1) [Resolution passed by majority in value]** Subject as follows, at a meeting of creditors or contributories, a resolution is passed when a majority (in value) of those present and voting, in person or by proxy, have voted in favour of the resolution.

The value of contributories is determined by reference to the number of votes conferred on each contributory by the company's articles.

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**4.63(2) [Resolution for appointment of liquidator]** In the case of a resolution for the appointment of a liquidator—

- (a) subject to paragraph (2A), if on any vote there are two nominees for appointment, the person who obtains the most support is appointed;
- (b) if there are three or more nominees, and one of them has a clear majority over both or all the others together, that one is appointed; and
- (c) in any other case, the chairman of the meeting shall continue to take votes (disregarding at each vote any nominee who has withdrawn and, if no nominee has withdrawn, the nominee who obtained the least support last time), until a clear majority is obtained for any one nominee.

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**4.63(2A) [Majority in value]** In a winding up by the court the support referred to in paragraph (2)(a) must represent a majority in value of all those present (in person or by proxy) at the meeting and entitled to vote. (NO CVL APPLICATION).

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**4.63(3) [Resolution for joint appointment]** The chairman may at any time put to the meeting a resolution for the joint appointment of any two or more nominees.

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**4.63(4) [Resolution affecting liquidator etc.]** Where a resolution is proposed which affects a person in respect of his remuneration or conduct as liquidator, or as proposed or former liquidator, the vote of that person, and of any partner or employee of his, shall not be reckoned in the majority required for passing the resolution.

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This paragraph applies with respect to a vote given by a person (whether personally or on his behalf by a proxy-holder) either as creditor or contributory or as proxy-holder for a creditor or a contributory (but subject to Rule 8.6 in Part 8 of the Rules).

*(See General Note after r. 4.71.)*

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**4.64 Chairman of meeting as proxy-holder**

**4.64** Where the chairman at a meeting of creditors or contributories holds a proxy which requires him to vote for a particular resolution, and no other person proposes that resolution—

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- (a) he shall himself propose it, unless he considers that there is good reason for not doing so, and
- (b) if he does not propose it, he shall forthwith after the meeting notify his principal of the reason why not.

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*(See General Note after r. 4.71.)*

**4.65 Suspension and adjournment**

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**4.65(1) [Application of Rule]** This Rule applies to meetings of creditors and to meetings of contributories.

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**4.65(2) [Suspension at chairman's discretion]** Once only in the course of any meeting, the chairman may, in his discretion and without an adjournment, declare the meeting suspended for any period up to one hour.

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**4.65(3) [Adjournment]** The chairman at any meeting may in his discretion, and shall if the meeting so resolves, adjourn it to such time and place as seems to him to be appropriate in the circumstances.

This is subject to Rule 4.113(3) or, as the case may be, 4.114-CVL(3), in a case where the liquidator or his nominee is chairman, and a resolution has been proposed for the liquidator's removal.

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**4.65(4) [Adjourned if inquorate]** If within a period of 30 minutes from the time appointed for the commencement of a meeting a quorum is not present, then the chairman may, at his discretion, adjourn the meeting to such time and place as he may appoint.

Waiver may be signified either at or before the meeting.

(See General Note after r. 4.159.)

4.157 The chairman at meetings

4.157(1) [Liquidator or his nominee] The chairman at any meeting of the liquidation committee shall be the liquidator, or a person nominated by him to act.

4.157(2) [Nominated chairman] A person so nominated must be either-

- (a) one who is qualified to act as an insolvency practitioner in relation to the company, or
- (b) an employee of the liquidator or his firm who is experienced in insolvency matters.

(See General Note after r. 4.159.)

4.158 Quorum

4.158(1) [Two creditor members] A meeting of the committee is duly constituted if due notice of it has been given to all the members, and at least 2 creditor members are present or represented. (NO CVL APPLICATION)

4.158(2) [Two members] A meeting of the committee is duly constituted if due notice of it has been given to all the members, and at least 2 members are present or represented.

(See General Note after r. 4.159.)

4.159 Committee-members' representatives

4.159(1) [Representation] A member of the liquidation committee may, in relation to the business of the committee, be represented by another person duly authorised by him for that purpose.

4.159(2) [Letter of authority] A person acting as a committee-member's representative must hold a letter of authority entitling him so to act (either generally or specially) and signed by or on behalf of the committee-member, and for this purpose any proxy or any authorisation under section 375 of the Companies Act in relation to any meeting of creditors (or, as the case may be, members or contributories) of the company shall, unless it contains a statement to the contrary, be treated as such a letter of authority to act generally signed by or on behalf of the committee-member.

4.159(3) [Production of letter of authority] The chairman at any meeting of the committee may call on a person claiming to act as a committee-member's representative to produce his letter of authority, and may exclude him if it appears that his authority is deficient.

4.159(4) [Who may not be a representative] No member may be represented by a body corporate, or by a person who is an undischarged bankrupt or a disqualified director or is subject to a bankruptcy restrictions order, bankruptcy restrictions undertaking or an interim bankruptcy restrictions order.

4.159(5) [No dual representation] No person shall-

- (a) on the same committee, act at one and the same time as representative of more than one committee-member, or
- (b) act both as a member of the committee and as representative of another member.

4.159(6) [Signing as representative] Where a member's representative signs any document on the member's behalf, the fact that he so signs must be stated below his signature.

GENERAL NOTE TO RR. 4.156-4.159

Some of the rules regarding the holding and conduct of meetings of the liquidation committee are set out here. The remainder are at rr. 4.165-4.168. On the members' expenses, see r. 4.169, and on the role of representatives, see *Re W & A Glaser Ltd* [1994] B.C.C. 199 at p. 208. Rule 4.159(4) was amended by the Insolvency (Amendment) Rules 2004 (SI 2004/584), effective April 1, 2004, by the insertion of the reference to "a disqualified director", and also to take account of the changes made by the new bankruptcy regime.