

THE STATE OF NEW HAMPSHIRE**MERRIMACK, SS.****SUPERIOR COURT****Docket No. 03-E-0106**

2005 MAR 24 P 12:38

**In the Matter of the Liquidation of
The Home Insurance Company**NH SUPERIOR COURT
MERRIMACK COUNTY**REPLY BRIEF IN FURTHER SUPPORT OF MOTION TO COMPEL
PRODUCTION OF DOCUMENTS BY EQUITAS LIMITED**

Equitas has submitted an affidavit in this proceeding in support of the Proposed Agreement, has filed a claim for tens of millions of dollars in this proceeding, acted as a driving force behind the negotiation and execution of the Proposed Agreement, and, finally, has "voluntarily" produced a limited number of documents. Equitas has refused to produce documents that would allow the ACE Companies the opportunity to meaningfully depose and cross-examine Mr. Williams, the affiant. Equitas apparently believes that it is entitled to all the benefits of this Court's jurisdiction and the Proposed Agreement but none of the obligations. But Equitas cannot have it both ways -- if Equitas is under no obligation to produce documents in this proceeding, then it has no right to submit an affidavit to this Court in support of the Proposed Agreement.

Equitas' reply to the ACE Companies' Motion to Compel Production of Documents (the "Motion") diverts this Court's attention to legal theories that are wholly irrelevant to this discovery dispute. No matter how often Equitas cites Superior Court Rule 35 or the Hague Convention for generic propositions, the dispositive fact is that, under New Hampshire law, it has subjected itself to the jurisdiction of this Court and therefore must produce the requested documents.

Accordingly, if the Court determines that Equitas is not now required to produce the documents sought by the ACE Companies, the Williams Affidavit should be quashed and all references to it stricken.

In light of Equitas' attempts to selectively take advantage of this Court, the Court should reject Equitas' contention that, while it may have submitted to the jurisdiction of the court for certain limited purposes, it did not do so for purposes of discovery. First, the Williams Affidavit affirmatively addressed substantive issues before this Court, and thus constituted a submission to this Court's jurisdiction. *See Lyford v. Trustees of Berwick Academy*, 97 N.H. 167, 168, 83 A.2d 302, 302 (1951). For instance, by attesting that Equitas would be "highly unlikely" to file proofs of claim against Home in the absence of a scheme like the Proposed Agreement, the Williams Affidavit provided support for the Liquidator's claim that the Proposed Agreement was necessary. Williams Affidavit at 2. Indeed, in approving the Proposed Agreement, this Court cited the Williams Affidavit in support of the Court's finding that "AFIA Cedents would have little reason to file and prosecute claims" in the absence of the Proposed Agreement. Order on Remand Dated October 8, 2004 at 8. Equitas cannot now claim that the Williams Affidavit did not submit any question to this court other than service of process or notice. *See Lyford*, 97 N.H. at 168. Second, the fact that Equitas is a nonparty is irrelevant; a nonparty, just like a party, waives its objection to a court's jurisdiction by submitting a substantive question to that court. *See Druding v. Allen*, 122 N.H. 823, 826, 451 A.2d 390, 393 (1982). Third, especially in light of its submission of the Williams Affidavit, Equitas, by filing a claim in this liquidation proceeding, has submitted to the general, equitable jurisdiction of this Court, not just the Court's jurisdiction over the

claims allowance process. *See, e.g., Katchen v. Landy, Trustee in Bankruptcy*, 382 U.S. 323, 335 (1966); *Langencamp v. Culp*, 498 U.S. 42, 44 (1990).

Equitas would have this Court, with one hand, use assertions in the Williams Affidavit against the ACE Companies and then, with the other hand, prevent the ACE Companies from viewing non-privileged documents that shed light on those assertions -- assertions that the ACE Companies believe should be scrutinized. *See* Motion at 2. Such one-sided treatment would prejudice the ACE Companies' exercise of their right to test the assertions in the Williams Affidavit via deposition and subsequent cross-examination at trial. This Court should not hamstring the ACE Companies while allowing Equitas to selectively take advantage of this Court. Accordingly, this Court should compel the production of all documents requested in the Motion. In the alternative, the Court should quash the Williams Affidavit and strike any reference to it in any Order of the Court in this insolvency proceeding, including the Order on Remand Dated October 8, 2004.

Conclusion

WHEREFORE, the ACE Companies respectfully request that this Court enter an order:

- A. Requiring Equitas to produce all nonprivileged documents responsive to the ACE Companies' Document Requests 1, 2, 6, 7(d), 9(c), 10, 21(e), and 22; and
- B. Requiring Equitas to provide a detailed privilege log for any document withheld on grounds of privilege and a redaction log for any portion of a document withheld on grounds of privilege; or
- C. In the alternative, quashing the Williams Affidavit and striking all references to the Williams Affidavit in any Order of the Court in this

insolvency proceeding, including the Order on Remand Dated October 8, 2004; and

- D. Granting 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 the Motion.

Respectfully submitted,

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Date: March 24, 2005

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing pleading has been served on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail on March 24, 2005:

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