

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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

Docket No. 03-E-0106

ORDER ON DISCOVERY

ACE Companies' have filed two discovery motions, one a renewed motion seeking to strike the affidavit of Rhydian Williams, or in the alternative, compel production of documents, and the other, a motion seeking to compel production of documents by the Liquidator. The ACE Companies' motions, and Equitas' and Liquidator's responses, are accompanied by a significant number of exhibits.

The Court has reviewed the pleadings and, for purposes of framing the rulings thereon, will revisit the earlier guidance relating to discovery in this matter. In its recent orders, the Court has limited the scope of discovery and provided specific direction on discovery relating to affidavits that have been filed in support of the agreement and compromise. The scope of discovery was initially outlined in a May 12, 2005 order, then clarified in the order of June 1, 2005.

Both orders stated that the focus at the upcoming hearing is upon whether the agreement with AFIA cedents is necessary, fair and reasonable and upon the rationales of the Liquidator and JPL in negotiating and reaching the agreement. The June 1, 2005 order provided that any documents that the affiants "relied upon" in developing their affidavits must be provided to Ace Companies, regardless of whether those documents are otherwise

privileged. The parties and Equitas now seek further direction regarding how "relied upon" is to be properly construed, and whether claims of attorney-client privilege, apart from their application to matters raised in affidavits, is otherwise constrained by the prior discovery orders.

The first ACE Companies' motion seeks access to information and various documents on matters that are not directly covered in the Rhydian Williams affidavit, or matters in which Rhydian Williams had no direct involvement. Illustrative of that is the issue that has arisen with regard to set-off, a matter referenced in the Williams' affidavit. Rhydian Williams indicates in his affidavit that Equitas would have little incentive to file claims in the liquidation beyond the value necessary to exercise its set-off rights. ACE Companies had previously agreed that discovery would not include inquiry into matters relating to the Liquidator's commutation with Equitas approved by this Court on February 18, 2004. ACE Companies now argue that such inquiry is necessary because, within that commutation which covered non-AFIA business, Equitas and the Liquidator agreed to a specific set-off amount that Equitas may claim on AFIA business. However, Rhydian Williams indicated during his deposition that he was not directly involved in the negotiations over the commutation, or in calculating the set-off.

The Court agrees with Equitas that Rhydian Williams' examination is properly confined to matters raised in his affidavit and about which he has personal knowledge, specific or institutional. If there were documents, notes, or other records upon which he directly relied in developing the affidavit, those documents shall be produced. And, finally, if he relied upon consultation with others in developing the content of the affidavit without reference to specific documents, or if his assertions are based only upon his institutional

knowledge or understanding rather than upon specific documents, he is subject to examination on those matters.

The Court finds no basis to conclude, as ACE Companies suggest, that documents upon which Rhydian Williams may have relied in his affidavit have been improperly withheld. Therefore, ACE Companies' Motion to Strike Affidavit and Verification of Rhydian Williams, or In the Alternative, Compel Production of Documents is **DENIED**.

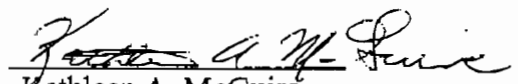
In the second motion, ACE Companies seek an order compelling the Liquidator to produce documents relating to legal advice and analysis received regarding ring-fencing, cut-throughs, and concern that cedents might claim that the history of direct dealing between them and ACE Companies constitutes a novation. ACE Companies argue that legal analysis and advice received by the Liquidator on those matters is highly relevant; that such information goes directly to arguments relied upon by the Liquidator in advancing the agreement; and that withholding such information is contrary to the Court's June 1, 2005 order. ACE Companies also argue that the Liquidator has put these matters "at issue". Finally, should the Court determine that those matters are protected by attorney-client privilege, ACE Companies urge the Court to consider whether the privilege should be overcome. In opposition to ACE Companies' motion the Liquidator points out that though the documents Ace Companies seek may be relevant, the "relevance trumps privilege" standard that ACE Companies asks the Court to apply would essentially render the attorney-client privilege meaningless. Further, the Liquidator argues that ACE Companies' invocation of the "at issue doctrine" is misapplied.

The rationales of the JPL and the Liquidator in negotiating and approving the agreement with AFIA cedents are important areas of inquiry. Therefore, any documents

relating to ring-fencing, cut-throughs, and alleged novation, waiver and/or estoppel assertions shall be disclosed, except to the extent that such documents reflect communications made by or to the Liquidator “in furtherance of the rendition of legal services”. As to ACE Companies’ argument that the “at issue doctrine” applies in this matter, the Court notes that the application of the “at issue” waiver is narrowly applied, and only when the privilege holder injects the privileged material into the case. Bennett v. ITT Hartford Group, 150 N. H 753,761 (2004). While the Liquidator has raised AFIA cedents' exploration of certain actions and possible litigation over AFIA matters as substantial concerns, he has not “injected” legal advice he may have had on the viability of any such contemplated actions into this matter. Finally, the Court declines to rule that the Liquidator’s assertion of attorney-client privilege as to the specified documents sought by ACE Companies is overcome. Accordingly, ACE Companies’ Motion to Compel Production of Documents by the Liquidator is **DENIED**.

SO ORDERED.

6/28/05
Date


Kathleen A. McGuire
Presiding Justice