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

LIQUIDATOR'S OPPOSITION TO ACE COMPANIES' MOTION TO STRIKE LIQUIDATOR'S OFFERS OF PROOF

Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby opposes the Emergency Motion of ACE Companies to Strike Liquidator's Offers of Proof and For Sanctions and Related Relief. The motion is in the nature of a motion in limine seeking to exclude certain paragraphs in the Liquidator's Offer of Proof ("Offer of Proof") based on New Hampshire Rule of Evidence 408. Those paragraphs involve communications with ACE that explain why the Liquidator was very concerned that AFIA Cedents might enter cut-through agreements with ACE (ACE asserted such agreements were legitimate) and why commutation with ACE was not a viable alternative (negotiations with ACE were not leading anywhere). This evidence is not barred by Rule 408, which only limits evidence of statements in compromise negotiations when offered to prove liability. The communications at issue are not being offered for that purpose – no claim is being asserted against ACE – but to show the circumstances facing the Liquidator that made the Agreement with AFIA Cedents necessary and reasonable. Furthermore, most of the challenged statements were not even made in compromise negotiations but during ordinary business discussions. The motion accordingly should be denied.

I. THE CHALLENGED EVIDENCE IS ADMISSIBLE BECAUSE IT IS NOT OFFERED FOR THE PURPOSE OF PROVING LIABILITY.

1. In their motion, the ACE Companies seek to exclude evidence of statements and conduct during discussions and meetings between representatives of Home (the Liquidator and Joint Provisional Liquidators) and of ACE (members of the ACE group of companies, including ACE INA Services UK Limited) during September and October 2003. Even assuming, for the sake of argument, that all these communications were made in the course of compromise negotiations, they are admissible under Rule 408. The Rule only bars evidence of compromise negotiations to prove liability or the invalidity of a claim. The issue before the Court on the Liquidator's motion for approval of the Agreement with AFIA Cedents is the necessity, reasonableness and fairness of that Agreement, not a claim against the ACE Companies. The communications that ACE seeks to strike bear directly on the Agreement. If they were not admitted into evidence, important aspects of the situation that faced the Liquidator and Joint Provisional Liquidators in deciding to pursue an agreement with AFIA Cedents in late October 2003 would not be before the Court.

A. Rule 408 Only Limits The Admissibility of Evidence When It Is Offered For The Purpose Of Proving Liability.

2. The ACE Companies seek to exclude this important evidence based on the assertion that Rule 408 "provides that information obtained in compromise negotiations is not admissible." ACE Motion ¶ 7. This ignores both the language of the Rule itself and settled New Hampshire case law that limits admissibility of such evidence only where it is offered for a particular purpose. The Rule provides (in the portions quoted by the ACE Companies) that:

> In any other case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

> Evidence of conduct or statements made in compromise negotiations is likewise not admissible. However, this rule does not require exclusion of evidence otherwise admissible merely because it is presented in the course of compromise negotiations.

Rule 408 (second and third paragraphs) (emphasis added). The Rule thus provides that offers of compromise and conduct or statements in compromise negotiations are not admissible if offered for the purpose of establishing liability for or invalidity of the claim at issue in the compromise negotiations. This is confirmed by the fourth paragraph of the Rule, which was omitted by the ACE Companies from their motion:

> This rule does not require exclusion when the evidence is offered for a purpose other than the proof of liability for or invalidity of the claim or its amount, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 408 (fourth paragraph). A copy of Rule 408 is attached as Exhibit A.

3. The New Hampshire Supreme Court addressed this aspect of Rule 408 in Gelinas v. Metropolitan Prop. & Liab. Ins. Co., 131 N.H. 154, 166 (1988), where it held that evidence concerning settlement negotiations was admissible in a case where the reasonableness of settlement positions was at issue. The Court specifically quoted the parts of the second and fourth paragraphs of Rule 408 underscored above and added that "As commentators have noted, 'The exclusionary rule is designed to exclude the offer of compromise only when it is tendered as an admission of the weakness of the offering party's claim or defense.'" Id., quoting McCormick on Evidence 812 (3d ed.). Accord Slattery v. Norwood Realty, Inc., 145 N.H. 447, 450 (2000). See 2 McCormick on Evidence § 266 at 185 (5th ed. 1999).[1]

[1] Federal Rule of Evidence 408 also permits evidence concerning settlement negotiations when offered for a purpose other than proving liability for or invalidity of a claim. See 2 Weinstein's Federal Evidence § 408.08 at 408-27 (2d ed. 2005); e.g., Urico v. Parnell Oil Co., 708 F.2d 852, 854 (1st Cir. 1983). The federal cases cited by the ACE Companies all involved the presentation of evidence of settlement negotiations to show liability of one of the negotiating parties, and all involved evidence of settlement negotiations with respect to the matter actually before the court. McInnis v. A.M.F., Inc., 765 F.2d 240, 247 (1st Cir. 1985) (excluding evidence of release); Carballo-

B. The Challenged Evidence Is Offered To Show The Situation Facing The Liquidator In The Fall Of 2003 And Thus Why The Agreement Is Necessary, Fair And Reasonable.

4. The statements and conduct are not offered to show any liability on ACE's part but to show why the Liquidator approved the Agreement and why it is necessary, fair and reasonable. Some of the communications show that ACE viewed direct agreements between ACE and AFIA Cedents (which would circumvent the Home liquidation and deprive Home creditors of substantial assets) as permissible and that it might enter such agreements. See Offer of Proof ¶¶ 23 (ACE personnel stated that Unionamerica might seek to ignore Home and attempt to deal directly with ACE); 24 (Home liquidation personnel express concern over direct dealings between ACE and AFIA Cedents but receive only noncommittal responses); 25 (ACE personnel raised possibility that ACE could deal directly with AFIA Cedents); 26 (Home liquidation personnel state that side deals are inappropriate but ACE personnel refuse to address ACE's intentions); 28-29 (ACE does not respond to letter requesting confirmation that ACE will not deal directly with AFIA Cedents); 33 (ACE personnel assert direct agreements are permissible, citing the NEMGIA decision and counsel's views). These statements and conduct explain (in part) why the Liquidator viewed "cut-through" agreements directly between ACE and AFIA Cedents as a serious issue that threatened the collection of assets and thus needed to be addressed by the Agreement.

5. Other communications show that ACE was not willing to reach a commutation agreement with the Liquidator. See Offer of Proof ¶¶ 32 (meeting among Liquidator, Joint

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Rodriguez v. Clark Equip. Co., 147 F. Supp.2d 66, 76 (D. P.R. 2001) (excluding letter from counsel seeking authorization to settle case); Pierce v. F.R. Tripler & Co., 955 F.2d 820, 827 (2d Cir. 1992) (excluding evidence of defendant's job offer to plaintiff in age discrimination case); Ramada Dev. Co. v. Rauch, 644 F.2d 1097, 1106 (5th Cir. 1981) (excluding report prepared by plaintiff as part of settlement negotiations); Blu-J, Inc. v. Kemper C.P.A. Group, 916 F.2d 637, 642 (11th Cir. 1990) (excluding accounting firm's evaluation prepared at request of both parties as part of settlement negotiations). They have no bearing here. (Another case cited by ACE does not actually involve Rule 408. See Tactical Software, LLC v. Digi Int'l, Inc., 2003 U.S. Dist. LEXIS 18831, *10 n.3 (D. N.H. 2003) (dicta regarding placement of "Subject to Fed. R. Evid. 408" on letter).

Provisional Liquidator and ACE to discuss possibility of commutation); 34 (despite follow up discussions, ACE did not provide substantive response and discussions did not progress). This explains why a resolution with ACE was not an available alternative to an agreement with the AFIA Cedents. Indeed, the Court noted in its May 12, 2005 Order that discussions of settlement options with the ACE Companies "is relevant to whether the Liquidator acted reasonably in reaching the agreement at issue." May 12, 2005 Order at 4.

6. The Liquidator is not using the challenged communications for the purpose of proving liability for or the invalidity of a claim against ACE by the Liquidator. There is no claim against ACE being made here: the only issue before the Court is approval of the Agreement with AFIA Cedents. The statements are being offered to explain why the Liquidator approved the Agreement with AFIA Cedents and why it is necessary, reasonable and fair. They are admissible for that purpose. See 2 Weinstein's Federal Evidence § 408.08[5] at 408-36 (2d ed. 2005) ("If the settlement negotiations and terms explain and are part of another dispute, they must often be admitted if the trier is to understand the case."); Broadcort Capital Corp. v. Summa Med. Corp., 972 F.2d 1183, 1194 (10th Cir. 1992) (Rule 408 does not bar evidence of settlement discussions that involved a different claim than that at issue in the case). The statements are not being used on any question of liability or damages and thus are not excluded by Rule 408.[2]

[2] The admissibility of evidence with respect to the necessity, reasonableness and fairness of the Agreement at the hearing before this Court on the Liquidator's motion for approval is governed by the New Hampshire Rules of Evidence. The ACE Companies do not attempt to explain why English law should apply to this issue, see Affidavit of Richard Daniel Hacker Q.C., and admissibility should be governed by the law of the forum. Affirmation of Robin Knowles Q.C. ¶¶ 8-9 (attached as Exhibit C). The ACE Companies' suggestion is particularly inappropriate given that the only actual "without prejudice" meeting (that of September 30, 2003) was held in New York and principally concerned obligations under the Assumption Agreement, which is governed by New York law. Affidavit of Jonathan Rosen ¶ 8. To the extent English law might be deemed relevant, it does not assist the ACE Companies. See Affirmation of Robin Knowles ¶¶ 10-18, especially ¶¶ 10(3), (4)-(5), (6), (11), 13-15.

II. Most Of The Evidence Attacked In ACE's Motion Was Not Part Of Compromise Negotiations And Therefore Is Not Subject To Rule 408 In Any Event.

7. The Court need not address the question whether the challenged communications were in fact part of compromise negotiations because they are not being used for a purpose forbidden by Rule 408. However, should the Court wish to consider the issue, the Liquidator notes that of the evidence challenged in the motion only the statements during the September 30, 2003 meeting and follow up discussions were part of compromise negotiations. The other evidence (concerning the September 16 and 17, 2003 discussions) is accordingly admissible regardless of Rule 408. See Slattery, 145 N.H. at 450 (affirming admission of evidence challenged under Rule 408 because "the discussions did not involve settlement negotiations between the parties"). In particular:

8. Mr. Rosen's routine business meeting with Mr. Durkin on September 16, 2003 (and the other September meetings with Mr. Durkin) were not "without prejudice," although Mr. Durkin attempted to designate them as such as part of his overall designation of every discussion with Home. Mr. Rosen took issue with those attempted designations. See Affidavit of Jonathan Rosen ¶¶ 4-5, 7 (attached as Exhibit B). The existence of various issues about which there was disagreement does not support Mr. Durkin's attempt to render discussion at every routine business meeting inadmissible. To even be potentially subject to Rule 408, a discussion must be an effort to negotiate a compromise of a dispute; it is not enough that some disputes lurk in the background. See Slattery, 145 N.H. at 450. The affidavit proffered by the ACE Companies makes no effort to show that the discussions with Mr. Durkin in September 2003 were in fact settlement negotiations. Mr. Durkin only states that ACE had a "systematic practice" that meetings be "without prejudice" "[b]ecause it was always clear to me and other ACE representatives that the disputes might well lead to litigation." Durkin Aff. ¶ 6. This does not

demonstrate that there were any compromise negotiations going on, only that Mr. Durkin did not want to be faced with his statements. [3]

9. Mr. Rosen's discussion with Barbara Nowak on September 17, 2003 (with which Mr. Durkin has no personal familiarity, see Durkin Aff. ¶ 7(i)) took place in the course of gathering to go to a meeting with Unionamerica, was not a settlement discussion, and was not "without prejudice." See Rosen Aff. ¶ 6.

10. The September 26, 2003 letter from the Liquidator and Joint Provisional Liquidators to the President of Century Indemnity Company (Exhibit 16) was not "without prejudice" or part of any compromise negotiations. Rosen Aff. ¶ 9; Offer of Proof Exhibit 16. It was a demand that ACE refrain from entering cut-through agreements. The letter and ACE's non-response cannot be characterized as part of settlement negotiations. Cf. Winchester Packaging, Inc. v. Mobil Chemical Co., 14 F.3d 316, 319 (7th Cir. 1994) (a demand for payment under threat of legal action is not a settlement offer excludable under Rule 408).

11. The September 30, 2003 meeting was stated to be "without prejudice" as it concerned negotiations over potential commutation of ACE's liabilities under the Assumption Agreement. However, as demonstrated in part I above, the statements and communications at the meeting and thereafter (and related materials (Exhibits 17-19)) are not being offered for any prohibited purpose and are therefore admissible under Rule 408.

12. In sum, the paragraphs in the Offer of Proof challenged by ACE clearly contain material admissible under the plain language of Rule 408 and the Gelinas decision of the New

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[3] ACE also seeks to exclude an email given to Mr. Rosen by Mr. Durkin (Offer of Proof Exhibit 13) but provides no supporting reasons. Contrary to Mr. Durkin's assertions, his act in handing the email (Exhibit 13) to Mr. Rosen during the September 16, 2003 meeting was not "inadvertent" but purposeful. Rosen Aff. ¶ 7. Indeed, Mr. Rosen understood Mr. Durkin to provide it as a precursor to a further communication alleging that Mr. Rosen had interfered with ACE's dealings with AFIA Cedents. Id. ACE sent such a letter that day. See Offer of Proof Exhibit 15 at 3. The email is properly admissible as the disclosure effected a waiver.

Hampshire Supreme Court. Most of the paragraphs do not even concern compromise negotiations that could be the subject of Rule 408. The Liquidator certainly is not knowingly seeking to offer inadmissible evidence. The ACE Companies' motion should be denied in its entirety.

CONCLUSION

For the foregoing reasons, the ACE Companies' motion should be denied.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, AS LIQUIDATOR OF THE HOME INSURANCE COMPANY

By his attorneys,

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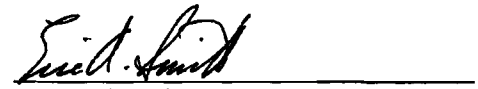

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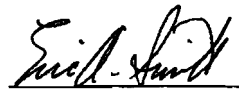
May 27, 2005

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Opposition to ACE Companies' Motion to Strike Liquidator's Offers of Proof was sent, this 27th day of May, 2005, by first class mail, postage prepaid to all persons on the attached service list.



Eric A. Smith

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

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party was injured in a golf cart accident, volunteered testimony that placing warning signs on a cart path were not practical in response to questions on the safety of a cart path at a golf course. MacDonald v. B.M.D. Golf Assocs. (2002) 148 N.H. 582, 813 A.2d 488.

If, on remand, the defendants introduce evidence that back-up alarms interfere with safety in some way, then the plaintiff will be allowed to use Rule 407's impeachment exception to rebut such evidence; however, the plaintiff should not be permitted to impeach a defense witness with the subsequent modification evidence if the witness makes an impeachable statement only in response to cross-examination by the plaintiff designed to elicit that statement. Cyr v. J.I. Case Co. (1994) 139 N.H. 193, 652 A.2d 685.

3. Strict liability

Evidence of subsequent modification will be excluded because of the public policy concern that people may not repair their property after an accident if such measures could be used against them in a lawsuit; such exclusion will apply to both negligence and strict liability cases because the effect of the rule would be the same regardless of the theory of liability. Cyr v. J.I. Case Co. (1994) 139 N.H. 193, 652 A.2d 685.

Cited

Cited in Young v. Clogston (1985) 127 N.H. 340, 499 A.2d 1007.

Rule 408. Compromise and Offers To Compromise

In a tort case, evidence of (1) a settlement with or the giving of a release or covenant not to sue to or, (2) furnishing or offering or promising to furnish or accepting or offering or promising to accept, a valuable consideration in compromising a disputed claim with one or more persons liable in tort for the same injury to person or property or for the same wrongful death shall not be introduced in evidence in a subsequent trial of an action against any other tortfeasor to recover damages for the injury or wrongful death. Upon the return of a verdict, the court shall inquire of the attorneys for the parties the amount of the consideration paid for any settlement, release or covenant not to sue, and shall reduce the verdict by that amount.

In any other case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

Evidence of conduct or statements made in compromise negotiations is likewise not admissible. However, this rule does not require the exclusion of any evidence otherwise admissible merely because it is presented in the course of compromise negotiations.

This rule does not require exclusion when the evidence is offered for a purpose other than the proof of liability for or invalidity of the claim or its amount, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.—Amended July 1, 1985.

History

Amendments—1985. Inserted "in a tort case" preceding "evidence of (1)" and made other minor stylistic changes in the first sentence of the first paragraph, and added the second paragraph.

Federal Rule: Compromise and Offers to Compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for

Exhibit B

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

AFFIDAVIT OF JONATHAN ROSEN

I, Jonathan Rosen, depose and say:

1. I am the Chief Operating Officer of The Home Insurance Company In Liquidation, a position I have held since shortly after the liquidation commenced. Prior to that I was Executive Vice President and Reinsurance Counsel of The Home Insurance Company ("Home") and Executive Vice President of Risk Enterprise Management Limited, a third party administrator that, among other things, administered the business of Home. In addition, I am an attorney admitted to practice law in New York, Massachusetts and South Africa.

2. I make this Affidavit with respect to the May 9, 2005 Affidavit of Michael Durkin (the "Durkin Affidavit") submitted in support of the Emergency Motion of ACE Companies To Strike Liquidator's Offers of Proof And For Sanctions and Related Relief. I have also reviewed the paragraphs in and exhibits to the Liquidator's April 28, 2005 Offer of Proof (the "Offer of Proof") cited in the Durkin Affidavit. Unless otherwise stated below, this affidavit is based on my personal knowledge. I address the principle assertions made in the Durkin Affidavit below. If I have not addressed an assertion, however, that should not be construed as agreement with it.

3. At paragraph 2 of the Durkin Affidavit, Mr. Durkin asserts that each and every communication made at meetings and discussions between the Liquidator and/or the Joint Provisional Liquidators of the Home UK Branch (the "JPLs") and the ACE group of companies that were referred to in the Offer of Proof (as well as the other communications addressed in the Durkin Affidavit) were preceded with the condition that the discussions were "without prejudice" and under a full reservation of rights. Furthermore, at paragraph 6 of the Durkin Affidavit, Mr. Durkin asserts that there was a systematic practice by him and others at ACE INA Services U.K. Limited that any meetings or discussions held with Home or its Liquidator or the JPLs would be expressly "without prejudice" and that at one meeting in England during the second half of 2003 I commented that it was no longer necessary for ACE to use the "without prejudice" caveat, because that was understood (albeit that despite such purported acknowledgement by me, ACE continued that policy).

4. While it is true that Mr. Durkin preceded every meeting and discussion with me with the comment that he construed our communications to be "without prejudice" and under a full reservation of rights, it is incorrect for Mr. Durkin to assert that I understood and acknowledged that premise so as to forever shield the entire content of such communications from disclosure in any legal proceedings. Rather, on a number of occasions when Mr. Durkin expressed his "caveat" (including those communications involving Mr. Durkin referenced in the Offer of Proof), I merely noted that I heard what he said, that the concept of "without prejudice" communications had a defined legal meaning, driven by the rules regarding admissibility of the

communications at issue, and that I would only accept a "without prejudice" premise with respect to communications specifically aimed at the compromise of disputed matters as they related to establishing ACE's liability therefor.

5. Indeed, on numerous occasions I expressed frustration with Mr. Durkin's attempt to unilaterally designate all communications with ACE as "without prejudice" because not only did I construe the caveat as a sweeping hollow statement, but I did not know how it was supposed to apply within the context of a routine business meeting (such as the September 16, 2003 meeting to discuss open issues). That was my expressed rationale to him when I advised him that it was not necessary for him to utter those words as a predicate to every one of our discussions because I knew that he took the position that everything he breathed in Home's direction was "without prejudice" from his perspective, that he was never forthcoming or committal in any event, and that the fact that he made the utterance did not necessarily give it any legal effect.

6. The discussion with Barbara Nowak referred to in paragraph 7(i) of the Durkin Affidavit and paragraph 23 of the Offer of Proof was not "without prejudice," even within Mr. Durkin's view of the world. Mr. Durkin appears to incorrectly assume that the discussion took place at the meeting with representatives of Unionamerica Insurance Company ("Unionamerica"). In fact, the discussion took place while standing at Ms. Nowak's desk at the offices of ACE INA Services, where I had gone to meet Ms. Nowak so she could accompany me (at my invitation) to the meeting at Unionamerica's offices. Ms. Nowak was the person at ACE INA Services responsible for handling the Unionamerica account and one of the issues to be discussed with Unionamerica was its withdrawal of all claims submissions involving Home UK Branch business. While standing at Ms. Nowak's desk, I asked her why she thought Unionamerica had withdrawn its claims and she responded that Unionamerica might seek to ignore Home in the claims submission process and attempt to enter into a side deal with ACE. There was absolutely no "without prejudice" intimation with respect to that discussion. I was alarmed by Ms. Nowak's response because during my meeting with Mr. Durkin the preceding day I had asked for a commitment that ACE would not do side deals with AFIA Cedents and his response, as reflected in my meeting notes attached as Exhibit 14 to the Offer of Proof, was noncommittal.

7. For the reasons set forth in paragraph 4 above, the September 2003 meetings referred to in paragraph 7 (ii) of the Durkin Affidavit and paragraphs 24-26 of the Offer of Proof cannot be construed as being "without prejudice" in accordance with Mr. Durkin's unilateral designation as such. With respect to the email referred to in ¶ 25 of and attached as Exhibit 13 to the Offer of Proof, Mr. Durkin handed it to me at the conclusion of the September 16, 2003 meeting where, to my surprise (given that I had invited ACE to attend all pertinent meetings that I was conducting with AFIA Cedents during the course of my London sojourn and had been completely forthcoming on the substance of those meetings), Mr. Durkin advised me that ACE believed that I was interfering in ACE's dealings with AFIA Cedents and that ACE's counsel would be communicating with the Liquidator in that regard. I construed his handing to me of the email to be reflective of what would be forthcoming and, indeed, a letter dated September 16, 2003 (included in Exhibit 15 to the Offer of Proof) was sent by ACE's counsel to Clifford Chance (the JPLs' counsel) alleging my interference. That letter was responded to by Clifford Chance in a letter dated September 29, 2003, attached hereto as Exhibit "A", detailing the reasons why such alleged interference had not occurred. In any event, Mr. Durkin's act in handing me the email was not inadvertent but purposeful.

8. As stated in paragraph 32 of the Offer of Proof, the September 30, 2003 meeting (which was not attended by Mr. Durkin) referred to in paragraphs 32-34 of the Offer of Proof and in paragraph 7 (iii) of the Durkin Affidavit was stated at the beginning to be "without prejudice." This was because the purpose of the meeting was to discuss potential commutation (i.e., compromise) of ACE's obligations under the Assumption Agreement attached as Exhibit 3 to the Offer of Proof. The Assumption Agreement provides at ¶ 10 that it is governed by the laws of the State of New York, and the meeting took place at Home's offices at 59 Maiden Lane, New York, New York. The communications made at that meeting and referred to in the Offer of Proof (as well as the others referred to in the Offer of Proof and in the ACE motion) are not being used in a manner inconsistent with the opening statement. They are not included in the Offer of Proof to establish liability on ACE's part in relation to a claim against ACE, but rather bear on the necessity, reasonableness and fairness of the Agreement with AFIA Cedents, which is the sole issue presently before the Court.

9. The Durkin Affidavit at paragraph 7 (iv) also refers to paragraphs 21 and 28 of the Offer of Proof. The challenged portions of these paragraphs only refer back to meetings and discussions addressed above (and other matters which Mr. Durkin does not contend were "without prejudice") and do not require separate response. For the sake of clarity, however, I note that the letter from the Liquidator and Joint Provisional Liquidator to Century dated September 26, 2003 described in Paragraph 28 of and attached as Exhibit 16 to the Offer of Proof was not part of any compromise negotiations.

Jonathan Rosen

Sworn to before me this 18 day of May, 2005

~~Notary Public~~ Solicitor of the Supreme Court of England & Wales
Commissioner for Oaths.

Julia Alexandra Ford.

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Exhibit A

FAX

FAX COUNTRY/NUMBER
020 7296 2000

DATE
29 September 2003

NUMBER OF PAGES INCLUDING THIS PAGE

TIME SENT

YOUR REFERENCE
F1PJW1531445.01

OUR REFERENCE
DJS/H2164/00043

TO
J Bannister Esq/ P. Wilkinson Esq
Lovells

FROM
David Steinberg
SENDER FAX: 020 7006 5555
DIRECT DIAL: 020 7006 1621

COPY TO
G. H. Hughes/ Ms Sarah Ellis
Ernst & Young
J. Rosen Esq/ P Benglesdorf Esq
Home Insurance Company

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YOUR REFERENCE
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IN REPLY PLEASE QUOTE
DJS/H2164/00043

DIRECT DIAL
020 7006 1621

DATE
29 September 2003

Lovells
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EC1A 2FG

For the attention of: J. Bannister Esq / P. Wilkinson Esq

Dear Sirs

Re : Home Insurance Company : the Assumption Agreement dated 31 January 1984

We thank you for your letter dated 16 September, which we have discussed with the provisional liquidators as well as with Jonathan Rosen.

We do not accept that there has been any 'intervention' by Mr Rosen in relation to AFIA matters which could in any way be said to prejudice or otherwise interfere with the functions which ACE is obliged to perform, whether as run-off manager or as reinsurer. Dealing with the specific instances which you cite, we would comment as follows (following your numbering):

1. Home Insurance has indeed notified Agrippina and Wurttembergische that any purported attempt on their part to terminate the R treaties would constitute a breach of the statutory moratorium imposed upon counterparties by the New Hampshire liquidation order. Peter Benglesdorf, the Special Deputy Liquidator of Home Insurance, wrote to these two Rutty pool members (via their New Hampshire counsel) in these terms on 14 August 2003. When Mr Rosen met with the same Rutty pool members in London on Friday, 12 September, he reiterated this point to those companies' representatives. However, this in no way cuts across anything which ACE is doing on Home Insurance's behalf in the pending arbitration; the moratorium imposed by the liquidation order is an unavoidable fact; Mr Benglesdorf and Mr Rosen were merely advising these pool members of that fact. In addition, the impact of the moratorium in no way interferes, or is inconsistent, with the avoidance argument which ACE is asserting on Home Insurance's behalf in the pending arbitration. The moratorium is a 'look forward' restraint upon counterparties' actions, whereas the avoidance argument

is being asserted by Home Insurance and seeks to avoid the treaties ab initio. These are wholly consistent positions.

2. The discussion which Mr Rosen had with Agrippina concerning inspection of ACE's records did not cut across any position which ACE had adopted on Home Insurance's behalf in the context of the arbitration. They related to different issues. In any event, Mr Rosen had discussions the week before last with Mike Durkin of ACE on this issue and we understand that Mr Durkin has agreed to permit Agrippina to carry out the inspection which had been under discussion with Mr Rosen and that this is no longer an issue between our clients.

3. Mr Rosen has had only one meeting with a cedant to discuss commutation; that was with Equitas and took place on Wednesday 17 September 2003. This was a follow-on to the now long-running commutation negotiation between Home Insurance and Equitas in relation to the business ceded by Home Insurance to Equitas on its US book - ie non-AFIA. It is true that Equitas has sought to introduce into that negotiation the question of Equitas's ceded claims against Home Insurance on the AFIA business. However, Mr Rosen has not entered into any discussions with Equitas about including the AFIA items in the commutation already under negotiation, other than to join issue with Equitas on how set-off of balances on those items might work vis-a-vis the US book items.

We trust that this has clarified matters.

Yours faithfully,

Clifford Chance LLP

cc: G. H. Hughes Esq/ Ms Sarah Ellis, Ernst & Young London

J Rosen Esq/ P Bengtesdorf Esq, Home Insurance Company (in liquidation)

Exhibit C

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

AFFIRMATION OF ROBIN KNOWLES QC

IN RELATION TO THE EMERGENCY MOTION OF ACE COMPANIES TO STRIKE LIQUIDATOR'S OFFERS OF PROOF

I, ROBIN KNOWLES, one of Her Majesty's Counsel, of 3-4 South Square, Gray's Inn, London, England, hereby affirm and say:

Introduction

1. I am a member of the English Bar admitted to practice law in England. As a member of the English Bar, I am qualified to advise and express an opinion on English Law.

2. I have an Honours Degree in Law from the University of Cambridge. I have been in practice at the English Bar since 1984, and specialise in commercial, financial and business law, including insolvency law.

3. In 1999 I was appointed Queen's Counsel. I sit as a Recorder (a part time judge) in the Crown Court. I am a Bencher of the Honourable Society of the Middle Temple, the Treasurer of the Commercial Bar Association in England and Wales and the Vice Chairman of the Pro Bono Unit of the Bar of England and Wales.

4. I appeared before the English High Court on the application for an order placing The Home Insurance Company ("the Company") into provisional liquidation.

5. I have reviewed the Second Affidavit of Richard Hacker Q.C..

6. In light of the Second Affidavit of Mr Hacker Q.C. I have been asked by Clifford Chance to give my opinion on the principles of English Law that would be applied by an English Court to a determination of the following question, namely whether, by reference to the 'without prejudice' rule, the statements and materials referred to in Mr Durkin's Affidavit of 9th May 2005 were admissible in these particular proceedings (i.e. the motion dated 11 February 2004 by the Liquidator for approval of agreement and compromise with AFIA Cedents).

Preliminary observation

7. I refer further below to the public policy foundation for the 'without prejudice' rule and the contractual basis for such a rule. However I should make one preliminary observation.

8. This is that, in my opinion, where the public policy foundation for the rule (rather than a contractual basis) is in issue, the English Court would view the question of admissibility of the statements and materials in these particular proceedings as a question for determination under the law of the forum (i.e. the State of New Hampshire) rather than English Law.

9. As Lord Justice Chadwick observed in **Prudential Assurance Co Ltd v Prudential Insurance Co of America** [2003] EWCA Civ 1154 at paragraph [23]:

> "... it is important to keep in mind that the rule in England - in so far as it is based on public policy - has evolved in response to the need to balance two different public interests, "namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation" - see the observation of Lord Griffiths in **Rush v Tompkins** [1989] AC 1280, 1300A-B). The latter interest is a reflection of the principle that trials should be conducted on the basis of a full understanding, by both parties and the court, of the facts relevant to the issues in dispute. The 'without prejudice' rule has to be seen as encroaching upon that principle. The justification for such encroachment, in the eyes of the English courts, has been the greater public interest in promoting settlements. But it would be insular not to recognise that courts in other jurisdictions might think - or might be required by legislation to accept - that a different balance should be struck; and arrogant to seek to impose on the conduct of litigation in other jurisdictions a rule which is based on our own perception of where the greater public interest lies."

The "without prejudice" rule: the principles

10. Subject to that preliminary observation, my opinion can be stated in the following propositions, derived from the authorities referred to:

    (1) "The 'without prejudice' rule is a rule governing the admissibility of evidence": Lord Griffiths in **Rush & Tompkins Limited v Greater London Council** [1989] AC 1280 at 1299D.

(2) The first foundation of the rule is "upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish": Lord Griffiths in **Rush & Tompkins Limited v Greater London Council** [1989] AC 1280 at 1299D.

(3) "The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.": Lord Justice (later Lord) Oliver in **Cutts v Head** [1984] Ch 290 at 306, approved by Lord Griffiths in **Rush & Tompkins Limited v Greater London Council** [1989] AC 1280 at 1299F-G.

(4) The rule "... has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation ...": single judgment of the Court of Appeal in **In re Daintry** [1893] 2 QB 116 at 199, cited with apparent approval by Lord Justice (now Lord) Robert Walker in **Unilever plc v The Procter & Gamble Co** [2000] 1 WLR 2436 at 2447E-2448C.

(5) For the rule to apply the negotiations must be "... genuinely aimed at settlement ...": Lord Griffiths in **Rush & Tompkins Limited v Greater London Council** [1989] AC 1280 at 1299G.

(6) "... the application of the rule is not dependent upon the use of the phrase 'without prejudice' ...": Lord Griffiths in **Rush & Tompkins Limited v Greater London Council** [1989] AC 1280 at 1299H. "... 'without prejudice' is not a label which can be used indiscriminately so as to immunise an act from its normal legal consequences, where there is no genuine dispute or negotiation": Lord Justice (now Lord) Robert Walker in **Unilever plc v The Procter & Gamble Co** [2000] 1 WLR 2436 at 2448A-B.

(7) "A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not referred to at the subsequent trial.": Lord Griffiths in **Rush & Tompkins Limited v Greater London Council** [1989] AC 1280 at 1299G [the emphasis by underlining the word "negotiating" is my emphasis]. Failure, over a long period of time, to add the caption 'without prejudice' has been considered to be "plainly ... a matter of significance": Lord Justice Chadwick in **Prudential Assurance Co Ltd v Prudential Insurance Co of America** [2003] EWCA Civ 1154 at paragraph [26].

(8) However:

"The mere fact of heading a letter 'without prejudice' is not in the least decisive as to whether or not the letter is in fact privileged. The privilege exists in order to encourage bona fide attempts to negotiate a settlement of an action and if the

letter is not written to initiate or continue such a bona fide attempt to effect a settlement it will not be protected by privilege. But, conversely, if it is written in the course of such a bona fide attempt, it will be covered by privilege, and the absence of any heading or reference in the letter to show it is written without prejudice will not be fatal.":

Mr Justice Drake in **Dixons Stores Group Ltd v Thames Television plc** [1993] 1 All ER 349 at 351c-e.

(9) "... as a general rule, the 'without prejudice' rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made in a genuine attempt to reach a settlement.": Lord Griffiths in **Rush & Tompkins Limited v Greater London Council** [1989] AC 1280 at 1301C-D.

(10) The rule "is not absolute" and there are exceptions to it: Lord Griffiths in **Rush & Tompkins Limited v Greater London Council** [1989] AC 1280 at 1300B-G; Lord Justice (now Lord) Robert Walker in **Unilever plc v The Procter & Gamble Co** [2000] 1 WLR 2436 at 2444C-2445H. "Many of the alleged exceptions to the rule will be found on analysis to be cases in which the relevance of the communication lies not in the truth of any fact which it asserts or admits, but simply in the fact that it was made.": Lord Justice (now Lord) Hoffmann in **Muller v Linsley & Mortimer** 30 November 1994.

(11) Thus, an exception to the rule arises, or the rule has no application, where material is sought to be referred to "not for the purpose of diminishing the protection afforded to [a party] for any admissions that they may have made, but for the purpose of proving what they did": Lord Justice Leggatt in **Muller v Linsley & Mortimer** 30 November 1994 (a case concerned with discovery or disclosure of documents). "The public policy aspect of the rule is not ... concerned with the admissibility of statements which are relevant otherwise than as admissions, i.e. independently of the truth of the facts alleged to have been admitted. ... the public policy rationale is ... directed solely to admissions ...": Lord Justice (now Lord) Hoffmann in **Muller v Linsley & Mortimer** 30 November 1994.

(12) The situation where the issue before the Court is "whether [a party] had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against [third parties]" is an example of the operation of the exception referred to at (11): Lord Justice (now Lord) Robert Walker in **Unilever plc v The Procter & Gamble Co** [2000] 1 WLR 2436 at 2445B summarising and categorising **Muller v Linsley & Mortimer** within the exceptions to the rule.

(13) There is a second "basis or foundation" for the rule, namely "... the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the

negotiations, a contested hearing ensues.": Lord Justice (now Lord) Robert Walker in **Unilever plc v The Procter & Gamble Co** [2000] 1 WLR 2436 at 2442D.

(14) The public policy foundation for the rule and the contractual basis for the rule are "distinct bases": Lord Justice Chadwick in **Prudential Assurance Co Ltd v Prudential Insurance Co** of America [2003] EWCA Civ 1154 at paragraph [21].

(15) As regards the question whether an "implied agreement" is made out such as to establish the contractual basis, it has been considered in the present context to be "no[t] ... in doubt" that "... an implied contract '... is one imposed by law on the parties when they have not themselves consciously addressed the issue it governs'; ... 'is the law's objective assessment of what they are deemed to have intended, as derived from the surrounding circumstances'; and [requires an answer to the question whether] the circumstances in which the letters were written objectively require such an agreement to be implied.'": Lord Justice Chadwick in **Prudential Assurance Co Ltd v Prudential Insurance Co of America** [2003] EWCA Civ 1154 at paragraph [25], accepting propositions formulated in argument.

11. Mr Hacker Q.C. refers at paragraph 8 of his Second Affidavit to what he terms "the general rule", and says that this "can be simply stated". I appreciate that Mr Hacker Q.C. goes on to develop his treatment in subsequent paragraphs. But as will be clear from the propositions set out above in my view, and with respect, Mr Hacker Q.C.'s statement of a "general rule" at paragraph 8 does not capture some of the (important) features of the rule and its precise application.

Applying the principles

12. I am not in a position to pass comment on the accuracy of Mr Durkin's Affidavit, or of any evidence that may be filed in support of or in answer to it. Nor is it useful for me to make assumptions about what evidence is accurate or inaccurate. These are matters for the Court seized of the proceedings, and are matters of fact (or, in the case of implied agreement, of objective assessment) rather than law.

13. However, on the basis of the propositions set out above, I am able to express the opinion that the key issues of fact that would fall to be determined, on an examination by an English Court of the evidence, in my opinion are or include the following:

(1) Was there a dispute or negotiation, with terms offered for the settlement of the dispute or negotiation?

(2) Were the statements or materials the subject of the Emergency Motion of the ACE Companies part of the negotiations?

(3) Were the negotiations genuinely aimed at settlement?

(4) Is the Liquidator's Motion connected with the same subject matter as the negotiations?

(5) Does the Liquidator's Motion involve proof of any admissions made in the negotiations?

(6) In this connection, does the relevance of the statement or material lie in the truth of any fact which it asserts or admits or in the fact that it was made or exists (i.e. is it the case that the statement or material is sought to be used not for the purpose of diminishing the protection afforded to a party for any admissions that they may have made, but for the purpose of proving what they did)?

(7) Was there an express agreement of the parties that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, a contested hearing ensued?

(8) Was there an implied agreement of the parties to that effect?

14. Mr Hacker Q.C. offers the view in the closing paragraph (paragraph 21) of his Second Affidavit that "...if an English court (applying English law) was presented with uncontroverted evidence as set forth in the Durkin Affidavit, it would conclude that the statements and materials to which Mr Durkin refers in paragraph 7 of the Durkin Affidavit, are not admissible in evidence in any dispute or litigation to which the Ace Companies are parties." It will be clear from my treatment of the applicable principles, and of the questions to which those principles give rise, that a conclusion of this breadth ("... not admissible in evidence in any dispute or litigation to which the Ace Companies are parties ...") could not be drawn.

15. Further (and whilst I do not understand the Durkin Affidavit in fact to be uncontroverted) even assuming the Durkin Affidavit did present uncontroverted evidence, it does not provide all that a Court needs to know or consider in order to undertake the close and careful enquiry required by the applicable principles and to answer the questions to which those principles give rise. Were it the English Court that was considering the matter (which it is not, and see also the point made in the section above entitled "Preliminary observation") the English Court moreover would need to consider not simply the statements or materials and their precise circumstances, but also the nature of the Liquidator's Motion (a procedure that is not an English law procedure). In any event it is, to my mind, for a Court, not an expert, to undertake the enquiry, assisted (where the applicable principles are those of a foreign law) by expert evidence on what the applicable principles are and to what questions they give rise.

Legal professional privilege

16. I should turn to one final point. At paragraph 7(ii) of Mr Durkin's Affidavit, Mr Durkin states that "the Liquidator has obtained inadvertent access to ... attorney-client information [previously referred to by Mr Durkin as "an attorney-client communication"]".

The principles that would be applied by the English Court to determine whether a document attracts legal professional privilege, and the approach the English Court would take if there had been inadvertent access to such a document, are not matters within the 'without prejudice' rule but attract their own body of law and authority.

18. A development of that body of law and authority would be outside the scope of this opinion. But I cannot, with respect, share Mr Hacker Q.C.'s approach of treating this communication as falling to be considered under the 'without prejudice' rule alongside everything else.

Confirmation of opinion

19. The opinions expressed in this Affirmation are my own, and represent my true opinion on the points under consideration.

Signed under the penalties of perjury this 27th day of May 2005.

Executed at London, England

on 27th May 2005

Robin Knowles Q.C. _____

Subscribed and affirmed to me before me this 27th day of May 2005 at London, England

Notary Public _____

Notary Public, London, England (Sophie J. Jenkins)

My Commission expires at Death

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