

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 MEMORANDUM CONCERNING ACE COMPANIES'  
MOTIONS TO COMPEL DIRECTED TO NONPARTY WITNESSES**

Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), submits this memorandum to address issues raised by the ACE Companies' motions to compel directed to nonparties expected to be witnesses in support of the Liquidator's motion for approval of the agreement with AFIA Cedents (the "Agreement"). The ACE Companies' motions ignore the context within which the Court is acting and implicitly assume that this is an action between the ACE Companies and the Liquidator. Further, the motions may leave the Court with the erroneous impression that the nonparties have not provided appropriate voluntary responses to the ACE Companies' discovery requests. In these circumstances, and because the ACE Companies seek to strike affidavits and potentially to limit testimony supporting the Liquidator, the Liquidator offers this memorandum to assist the Court's consideration of the motions to compel directed to (1) Gareth Howard Hughes, a Joint Provisional Liquidator appointed by the High Court of Justice in England ("Joint Provisional Liquidator") (the "JPL Motion"), (2) AFIA Cedent Equitas Limited ("Equitas") (the "Equitas Motion"), and (3) AFIA Cedent Zurich Verisherung Aktiengesellschaft (Deutschland) ("Zurich") (the "Zurich Motion").<sup>1</sup>

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<sup>1</sup> The ACE Companies have also filed motions to compel directed to AFIA Cedent Unionamerica Insurance Company ("Unionamerica" and the "Unionamerica Motion") and the Liquidator (the "ACE Liquidator Motion"). Benjamin Moore & Co. ("BMC") also recently filed a motion to compel addressed to the Liquidator (the "BMC Liquidator Motion").

**I. The Nature Of This Proceeding And The Discovery Sought By The ACE Companies.**

**A. The Liquidator seeks the approval of the Agreement with AFIA Cedents from the Court supervising the Home liquidation proceeding in the interests of Home's policyholders and other creditors.**

The context in which these motions to compel arise is important. The Court is supervising the liquidation of Home, an *in rem* proceeding in which the Court has taken control of Home through the statutorily designated Liquidator, the Insurance Commissioner. See RSA 402-C:21, I; Liquidation Order ¶¶ (f), (g). The liquidation proceeding is for the protection of Home's insureds and creditors, as well as the public generally. See RSA 402-C:1, IV. The Liquidator, who approved the Agreement with AFIA Cedents, has moved for the approval of the Court, acting in its supervisory capacity under RSA 402-C:25. See Rand v. Merrimack River Sav. Bank, 86 N.H. 351, 354 (1933) (court has discretion to authorize action in receivership proceeding). In that capacity, the Court has an independent obligation to determine whether the Agreement is "necessary, fair and reasonable" from the point of view of the policyholders and other creditors of Home. See Order on Remand at 11-13.<sup>2</sup> The Liquidator needs to demonstrate this to the Court's satisfaction, and will outline how he will do so in the offer of proof due May 1, 2005.

**B. The role of the ACE Companies and BMC in these proceedings is limited.**

Approval of the Agreement is opposed by the ACE Companies, net debtors of Home whose economic interests would be served by defeating the Agreement, and BMC, a potential creditor (linked to debtors) whose interests have been impossible to discern. (BMC has argued both that the Agreement is not legal and that it is not good enough for creditors.) The ACE

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<sup>2</sup> The Court has already addressed the arguments made by the ACE Companies and BMC concerning the legality of the Agreement in holding that the contingent payments to AFIA Cedents contemplated by the Agreement are administrative expenses ("actual and necessary costs of preserving or recovering assets of the insurer") under RSA 402-C:44, I. Order on Remand at 6-10.

Companies and BMC are not litigants in adversary proceedings but intervenors whose role is to bring matters to the Court's attention to assist the Court in its evaluation of the necessity, fairness and reasonableness of the Agreement. See In the Matter of the Liquidation of American Mut. Liab. Ins. Co., 417 Mass. 724, 735-736, 738-39, 632 N.E.2d 1209, 1215, 1217 (1994) ("American Mutual") (guaranty funds that sought to intervene in motion for approval of settlement "should have access to the information on which the receiver relied" in investigating claim against third-party and should be "afforded an opportunity to submit written comments and to participate in oral argument regarding the propriety of the settlement") (emphasis added).

In this regard, it is important to note that, contrary to the assertions of the ACE Companies (Zurich Motion ¶ 4; ACE Companies Status Report and Proposed Schedule for Discovery and Evidentiary Hearing ("ACE Companies Status Report") ¶ 5 (March 3, 2005)), the Supreme Court did not direct this Court to conduct an adversarial evidentiary proceeding including discovery. The Supreme Court instead expressly stated that "[o]n remand, the trial court may resolve these issues through offers of proof, unless it determines that a full evidentiary hearing is necessary." September 13, 2004 Order at 2. The ACE Companies, as debtors, do not have protected interests supporting any due process rights. The point of the Court's fairness review is to act "for the benefit of all creditors." See *id.* at 1, quoting Matter of Boston & Providence R.R. Corp., 673 F.2d 11, 13 (1<sup>st</sup> Cir. 1982). To the extent BMC or the ACE Companies were viewed as creditors, their diffuse interest in maximizing recovery for Home (and thus for all of its policyholders and other creditors) is addressed by the Court's review of the Agreement, and their ability to raise issues and be heard by the Court as commentators satisfies any cognizable rights they might have. See American Mutual, 417 Mass. at 739 n.12,

632 N.E.2d at 1217 n.12.<sup>3</sup> The rights and interests of the ACE Companies and BMC as debtors or creditors of Home are not being adjudicated by the motion for approval of the Agreement with AFIA Cedents, which will resolve only the legality and reasonableness of the Agreement.

The ACE Companies have cited American Mutual and another Massachusetts case, In the Matter of the Receivership of Harvard Pilgrim Health Care, Inc., 434 Mass. 51, 62, 746 N.E.2d 513, 521-22 (2001), for the proposition that there must be discovery. See ACE Companies' Status Report ¶ 5. However, these cases merely permit the supervising court, in its discretion, to allow a person "who had raised a proper objection and shown a valid interest in the proceedings" to "review and comment on the documents" from the receiver. Harvard Pilgrim, 434 Mass. at 62, 746 N.E.2d at 521. See American Mutual, 417 Mass. at 738, 632 N.E.2d at 1217 (receiver is to provide "the information on which the receiver's decision to settle was based" to the court and, in the court's discretion, to others whose comments would assist the court's review). These cases said nothing about discovery and certainly did not contemplate that there would be discovery of nonparties.

This is consistent with the cases cited in the Supreme Court's September 13, 2004 Order. Boston & Providence R.R., 673 F.2d at 13; In re Estate of Indian Motorcycle Mfg., Inc., 299 B.R. 8, 20 (D. Mass. 2003). In Boston and Providence, the First Circuit stressed the supervising court's duty to inform itself through examination of the trustee, but it also emphasized the court's "discretion to direct the inquiry in an efficient manner," and did not refer at all to discovery by

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<sup>3</sup> In American Mutual, the creditor guaranty funds sought to comment on a compromise with Coopers & Lybrand because they asserted rights to present their own personal claims and were of the view that the receiver had not obtained enough in settlement for the estate. The guaranty funds' interest in encouraging the collection of assets should be contrasted with that of the ACE Companies and BMC, who are seeking to advance debtor interests by delaying or defeating the Agreement. The ACE Companies stated last Spring that "'complex, protracted and costly litigation' is assured so long as the Liquidator continues to pursue implementation of the proposed Agreement" because "regardless of the result before this Court" the ACE Companies intend "to pursue all available remedies on appeal and in England." ACE Companies Memorandum in Support of Their Objections at 15 (March 19, 2004). Expansive discovery is just one aspect of this strategy.

the creditor opposing the settlement. 673 F.2d at 13. In Indian Motorcycle, the district court specifically noted that the court “may give substantial deference to the business judgment of a bankruptcy trustee when deciding whether to approve a settlement,” and the decision does not indicate that the objecting party was permitted to conduct discovery. 299 B.R. at 21, 20-23.

In sum, the ACE Companies and BMC may participate to the extent the Court considers their involvement useful. They are not entitled to conduct discovery as of right as litigants but only in the discretion of the Court and to the extent the Court deems appropriate. The ACE Companies’ reliance on cases concerning discovery in adversary litigation (JPL Motion ¶ 25; Equitas Motion ¶ 18) is accordingly misplaced. Moreover, even in the usual litigation context, the Court has “broad discretion” in controlling discovery matters. See, e.g., YYY Corp. v. Gazda, 145 N.H. 53, 59 (2000); Bronson v. The Hitchcock Clinic, 140 N.H. 798, 809 (1996). Burden on nonparties is a consideration in exercising that discretion. See Robbins v. Kawall Corp., 120 N.H. 451, 453 (1980) (“The trial court has ample power to set appropriate time, place, manner and scope of restrictions on non-party discovery.”); Heidelberg Ams., Inc. v. Tokyo Kikai Seisakusho, Ltd., 333 F.3d 38, 41-42 (1<sup>st</sup> Cir. 2003) (discovery of nonparties in litigation).

**C. The ACE Companies’ discovery campaign has been ever expanding.**

The Court ruled in the Order on Remand that the ACE Companies and BMC could conduct discovery “limited to the necessity, fairness and reasonableness of the agreement.” That direction came, however, in the context of the ACE Companies’ proposal to serve interrogatories and document requests on the Liquidator and depose persons who had provided affidavits. ACE Companies’ Proposed Discovery Schedule (October 1, 2004). In the months since the October 4 conference, however, the ACE Companies have conducted an ever expanding discovery campaign:

- On October 4, 2004, the ACE Companies served a set of 25 interrogatories and a set of 29 document requests on the Liquidator. JPL Motion Ex. G; see *id.*, Ex. H at 3-6. (BMC served 8 interrogatories and 3 document requests on the Liquidator on October 13, 2004. BMC Liquidator Motion, Exs. A, B.)
- On November 8, 2004, the ACE Companies mailed a set of 43 document requests to AFIA Cedent Equitas. Equitas Motion ¶ 4, Ex. C; ACE Companies Status Report ¶ 13.
- On December 9, 2004, the ACE Companies mailed a set of 49 document requests to AFIA Cedent Zurich. Zurich Motion ¶ 5, Ex. B.
- On January 13, 2005, the ACE Companies mailed sets of 3 document requests to nine other AFIA Cedents, including Unionamerica. Unionamerica Motion ¶ 1, Ex. 1; see ACE Companies Status Report ¶ 1.
- On January 21, 2005, the ACE Companies mailed a set of 68 document requests to Joint Provisional Liquidator Gareth Hughes (even though the Liquidator had previously produced documents from the Joint Provisional Liquidator). JPL Motion ¶ 1, Ex. A.

The ACE Companies' requests for documents and motions to compel directed to the Joint Provisional Liquidator, Equitas, Zurich and Unionamerica (and the other AFIA Cedents) go far beyond the discovery contemplated at the time of the Order on Remand.

## **II. The ACE Companies' Motions To Compel Are Inappropriate.**

### **A. The motion to the Joint Provisional Liquidator seeks to expand on discovery already provided by the Liquidator and inquires into broad and irrelevant subjects that would be burdensome.**

The ACE Companies' document requests to the Liquidator were broad and sought all documents regarding the Agreement, its negotiation, and the reasons for entering it. See JPL Motion ¶ 14 (describing requests to the Liquidator as "seeking information and documents regarding the negotiation and execution of the Proposed Agreement"). BMC's document requests to the Liquidator covered alternatives to the Agreement, in particular the discussions with the ACE Companies that immediately preceded negotiation of the Agreement. See BMC Liquidator Motion Ex. C at 2. In his November 24, 2004 responses, the Liquidator agreed to provide documents in these areas, while objecting to others as beyond the scope of discovery

permitted by the Order on Remand. The Liquidator specified that the production would encompass the period from September 1, 2003 (before the September discussions with the ACE Companies and the October 21, 2003 first Informal Creditors' Committee meeting following which the Agreement was negotiated) through February 11, 2004 (when the Liquidator served the motion for approval of the Agreement).<sup>4</sup>

The ACE Companies are well aware that the Liquidator's production includes production from the Joint Provisional Liquidators. The ACE Companies' counsel asked about this on November 11, 2004, and on November 15, 2004, the Liquidator's counsel advised that the Liquidator had requested and received documents from the Joint Provisional Liquidators and would "make production in accordance with the Liquidator's written response to ACE's document request, which will be forthcoming on November 24." JPL Motion Ex. D at Ex. A. The Liquidator's written responses to the ACE Companies' and BMC's discovery specified that they would include documents received from the Joint Provisional Liquidators. See JPL Motion Ex. G at 3. The Liquidator's document production on December 16, 2004, and January 5, 2005, totaled approximately 2,700 pages, including approximately 800 pages from the Joint Provisional Liquidators (H01131 through H01905). See JPL Motion Ex. H at 7. The Liquidator's privilege logs also included approximately 140 items (including strings of e-mails) from the Joint Provisional Liquidators. The Liquidator's January 14, 2005 response to questions from the ACE Companies further pointed out that the Liquidator had produced documents from the Joint Provisional Liquidators. Id.

Despite this production from the Joint Provisional Liquidators, the ACE Companies mailed a request for production of 68 categories (and numerous sub-categories) of documents to

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<sup>4</sup> While the ACE Companies questioned aspects of the Liquidator's production, the Liquidator's explanations (and supplemental interrogatory answers) were apparently sufficient. The ACE Companies' motion to compel directed to the Liquidator presents only questions concerning privilege, not the scope of the Liquidator's production.

the Joint Provisional Liquidator in England on January 21, 2005. JPL Motion Ex. A. While they acknowledge that they initially accepted the production of documents through the Liquidator's production, JPL Motion ¶ 8, the ACE Companies attempt to justify their requests by asserting that the Liquidator subsequently "disclaimed" the production (*id.* ¶¶ 9, 14, 27) and that the Joint Provisional Liquidators later confirmed that it was "a piecemeal production" (*id.* ¶¶ 10, 27). This inaccurately characterizes the letters from the Liquidator's counsel and Joint Provisional Liquidators' counsel. The Liquidator's counsel actually stated that "the Liquidator requested that the Joint Provisional Liquidators provide documents within the scope of the Liquidator's responses and has produced documents received from the Joint Provisional Liquidators in accordance with the Liquidator's responses (documents H01131 through H01905)." JPL Motion Ex. H at 7. The Joint Provisional Liquidators' counsel confirmed that "[a]s described in the Liquidator's responses, the Joint Provisional Liquidators and their Staff provided the documents requested." JPL Motion Ex. D. at 1.<sup>5</sup>

The ACE Companies also purport to base their motions on the alleged dearth of documents concerning the AFIA Cedents' unwillingness to file and prosecute claims or pursue other mechanisms for recovery from the ACE Companies. JPL Motion ¶ 21. However, the claimed lack of documents on these topics (but see ACE Companies Status Report Ex. C at H01828 (comments of Mr. Williams and Mr. Goodlud at the first Informal Creditors' Committee meeting)) does not warrant requiring production of documents on other, irrelevant subjects. Evidence concerning the statements made and positions taken by AFIA Cedents in discussions with the Liquidator and Joint Provisional Liquidator will obviously take the form of sworn

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<sup>5</sup> As noted in the letter response, the Joint Provisional Liquidator has provided documents regarding the Agreement through the Liquidator, and the Joint Provisional Liquidator's production corresponds in scope to that provided by the Liquidator. JPL Motion Ex. D at 3-7 (describing the Joint Provisional Liquidator's response to the "General Requests" by identifying the pertinent Liquidator's responses for Nos. 1-16, subject to objection when the new request is broader than the initial request and response).



testimony. The existence or non-existence of documents concerning those communications is not probative, particularly when the position is self-evident. There was no need for the AFIA Cedents (or the Liquidator and Joint Provisional Liquidator) to analyze in writing whether the Cedents will spend money filing and prosecuting claims where they would not receive any distributions from the estate if they did so. It is self-evident that sensible businesses do not spend money where they will not receive any benefit, which is precisely why the ACE Companies want to defeat the Agreement and reap a windfall.

The ACE Companies seek to use their discovery of the Joint Provisional Liquidator to expand into broad, irrelevant and burdensome areas that should not be allowed. See Robbins, 120 N.H. at 453 (“[O]pen-ended ‘fishing expeditions’ are not permitted.”). Their description of the new discovery as focused on relevant matters does not correspond to the actual discovery requests. The ACE Companies assert that the documents requested are relevant to the fairness and reasonableness of the Agreement because they “closely track” the Hughes affidavit, JPL Motion ¶ 28, and the affidavit addresses three points: (1) whether the AFIA Cedents would file and prosecute claims absent the Agreement, (2) whether AFIA Cedents would file and prosecute claims to preserve offset rights, and (3) whether AFIA Cedents would pursue alternative means to recover funds from the ACE Companies. Id. ¶¶ 5, 21, 23.

However, the requests that are at issue in this motion go far beyond these points. See JPL Motion Ex. D at 8-14. The 32 requests purportedly arising from the Hughes affidavit are not limited to the subjects referenced in the ACE Motion (which have been produced, see, e.g., JPL responses to requests 19, 20, 23, 31, 33-41 at JPL Motion Ex. D at 8-12) but instead are broad inquiries into background and irrelevant issues on which ACE-INA (as the run-off manager of

the AFIA book) itself has the best knowledge. For instance, the ACE Companies ask for “all documents” concerning:

- “the issues confronting the Home estate as a result of its participating in the AFIA pool”
- “any progress on the provisional liquidation”
- “the reinsurance contract(s) provided by BAFCO”
- “Home’s reinsurance claim(s) against CIRC”
- “any ‘UK nexus’ between Home and CIRC”
- “any cash reconciliation regarding Home’s UK Branch”
- “your understanding of how Home’s UK Branch funded its operations”
- “any reinsurance contract(s) giving rise to any AFIA Cedent’s claim(s) against Home”
- “your review, interpretation, and understanding of the terms of any reinsurance contract(s) giving rise to any AFIA Cedent’s claim(s) against Home”

Id. (requests 18, 22, 24, 25, 26, 28, 29, 43, 44).

The ACE Companies also fail to note that their document request itself describes large numbers of the requests as inquiring into other matters. See JPL Motion Ex. D at 14-18 and Ex. A at 18, 19 (describing requests 50-68 as “Document Requests Regarding the First Witness Statement [in the UK proceeding]”; “Document Requests Regarding the Second Witness Statement [in the UK proceeding]”; and “Document Requests Regarding Your Dealings with the Liquidator”). Indeed, the ACE Companies’ last two requests seek documents concerning the engagement of Ernst & Young in the United States to “value any assets, including those of Risk Enterprise Management Limited; and design employee compensation plans for Home” and “communications with the Liquidator concerning the retention of Conning Asset Management Company to manage the investment portfolio of Home.” JPL Motion Ex. D at 18 (requests 67 and 68). The ACE Companies’ document requests to the Joint Provisional Liquidator are not narrow and focused but hugely broad, irrelevant and burdensome.

In light of the Joint Provisional Liquidator’s previous provision of documents through the Liquidator and the irrelevant nature of the requests that are the subject of their motion, there is no

basis for the suggestion at paragraph 34 of the ACE Companies' motion that the Hughes affidavit should be stricken.

**B. The motions to AFIA Cedents Equitas and Zurich seek to obtain information not available to the Liquidator and thus not relevant to the fairness and reasonableness of the Agreement.**

The ACE Companies' motions directed to Equitas and Zurich attempt to go beyond the information that was the basis for the Liquidator's approval of the Agreement to inquire into the basis for the positions taken by the AFIA Cedents. Both Equitas and Zurich have made voluntary productions regarding their dealings with the Joint Provisional Liquidator and Liquidator in negotiating the Agreement. See Equitas Motion ¶ 4, Ex. D; Zurich Motion Ex. C. (Equitas produced over 800 pages, while Zurich produced approximately 250 pages.) The documents at issue in the motions to compel only concern communications between or among AFIA Cedents. Equitas Motion ¶ 4; Zurich Motion ¶¶ 6, 19. Such communications were not available to the Liquidator during the negotiations.

As discussed at pages 3-5 above, the Supreme Court's order and pertinent case law does not support discovery of third parties or of information not available to the Liquidator during the negotiation of the Agreement. The Court's review of the Agreement focuses on the reasonableness of the Liquidator's determination to enter it, not the inner thoughts of the parties with which the Liquidator and Joint Provisional Liquidator were negotiating.<sup>6</sup> The Liquidator's determination to approve the Agreement with the AFIA Cedents can only be based on what was known to him, i.e., communications between AFIA Cedents and the Liquidator or Joint Provisional Liquidators, not on communications between and among AFIA Cedents to which the

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<sup>6</sup> The illogic of the ACE Companies' position is most evident when applied to a motion for approval of a settlement between the Liquidator as plaintiff and a debtor defendant. The ACE Companies' approach would require that the Court permit discovery of the defendant to determine what it actually believed about the strengths and weaknesses of its case. Of course, such information would typically be privileged or work product. In any event, it would be odd to test the reasonableness of a settlement by discovery of one of the settling parties.

Liquidator was not (and is not) privy. As AFIA Cedent-only communications were not available to the Liquidator, they are not relevant to the necessity, reasonableness and fairness of the Agreement and are beyond the limited discovery permitted by the Order on Remand.

In these circumstances, non-production of AFIA Cedent-only communications does not support efforts to strike affidavits or prevent testimony by the representatives of Equitas (Rhydian Williams) or Zurich (Gernot Warmuth).

### CONCLUSION

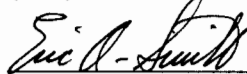
For the reasons stated above, the Court should not strike affidavits submitted by the Liquidator or prevent testimony by witnesses to be presented by the Liquidator based on the motions to compel filed by the ACE Companies.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE  
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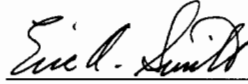
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April 12, 2005

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Memorandum Concerning ACE Companies' Motions to Compel Directed to Nonparty Witnesses was sent, this 12th day of April, 2005, by first class mail, postage prepaid to all persons on the attached service list.



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Eric A. Smith

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

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