

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 EQUITAS LIMITED**

Summary

1. This Motion arises out of the failure of Equitas Limited ("Equitas") to produce documents to Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, the "ACE Companies") as part of court-mandated discovery regarding the genesis, negotiation and execution of the proposed Agreement and Compromise with the AFIA Cedents (the "Proposed Agreement").

2. The Liquidator has engaged Equitas to lend its support to the Proposed Agreement. To that end, Equitas voluntarily interjected itself into this proceeding by submitting the Affidavit of Rhydian Williams in Support of the Liquidator's Reply in Support of the Proposed Agreement dated April 2, 2004 (the "Williams Affidavit," attached as Exhibit A).¹ Now, despite its appearance in this proceeding, Equitas refuses to engage in discovery to enable the ACE Companies to test the statements in the Williams Affidavit and allow this Court the opportunity to assess the fairness and reasonableness of the Proposed Agreement.

3. The ACE Companies are entitled to a meaningful opportunity for discovery of all those entities whose involvement is directly related to the approval of the Proposed Agreement,

and in particular, of those entities like Equitas who have voluntarily agreed to participate in the process through affidavits. Without the documents sought from Equitas which are the subject of this Motion, the ACE Companies' right to discovery will be unfairly restricted. The need for full discovery regarding the assertions in the Williams Affidavit is especially compelling because those assertions are so questionable. First, the Williams Affidavit avers that, in the absence of a scheme as contemplated by the Proposed Agreement, Equitas would not file a claim against Home in part because prosecuting claims is so "time consuming and costly" -- but this assertion is unfounded, since the claims process is relatively simple and inexpensive. Second, the affidavit references "any applicable set off" that may be realized by Equitas -- but there is no way Equitas could even know, at this juncture, what its set off is or could be. Third, the affidavit indicates that, if the Proposed Agreement is not approved, Equitas might consider an alternative mechanism for recovering funds from the ACE Companies -- the alternative mechanisms cited by Equitas are contrary to English law. Without the documents requested by this Motion, the ACE Companies will be unable to test assertions which, on their face, are questionable. The ACE Companies' right to such discovery is also significant because this Court, in its Order on Remand dated October 8, 2004, relied upon Equitas' affidavit in approving the Proposed Agreement. (The Order on Remand is attached as Exhibit B.) The ACE Companies' inability to take discovery has already contributed to an order of reversal by the New Hampshire Supreme Court. Denial of such discovery and of this Motion will imperil not only the ACE Companies' chances of a fair hearing, but also the sufficiency of any factual record ultimately presented for appellate review.

4. This Motion seeks, in particular, the production of documents and information regarding Equitas' internal communications and communications between and among AFIA

¹ Equitas also has submitted a claim in this proceeding and is one of the signatories to the Proposed Agreement.

Cedents regarding the Proposed Agreement. It is presented to the Court today following several months of negotiations, concessions by the ACE Companies, and delays and half measures by Equitas. The background of this dispute will show that the ACE Companies served their First Request for Production of Documents by Rhydian Williams and Equitas (the “Document Requests”) in early November 2004. (A copy of the Document Requests is attached hereto as Exhibit C.) Following the original response date, the ACE Companies granted Equitas a 20-day extension to respond. On the last day of the 20 day extension, Equitas responded with a two-page letter by its counsel agreeing to produce certain documents, objecting to others, and suggesting certain limitations on the scope of discovery. The ACE Companies agreed to all discovery limitations suggested by Equitas, but maintained their requests for the discovery of internal Equitas communications and communications between Equitas and other AFIA Cedents regarding the Proposed Agreement. Three weeks later, Equitas advised the ACE Companies that it would continue to withhold the disputed documents, and would “work on” producing the other documents by February 14, 2005. These other documents did not arrive, however, until March 2.

5. The documents currently sought by the ACE Companies (which Equitas has categorically refused to produce) are highly relevant to the fairness and reasonableness of the Proposed Agreement because they may shed light on such matters as the true purpose of the Proposed Agreement and its impact upon various classes of creditors of Home. Their relevance is further bolstered by the fact that they form the basis of the affidavit submitted by Equitas in this proceeding in support of the Proposed Agreement, and which this Court cited in approving the Proposed Agreement.

6. For these reasons, and because Equitas has failed to demonstrate any basis for withholding the documents sought, this Motion must be granted and Equitas ordered to produce the documents requested.

Background

I. The ACE Companies' Document Requests

7. On November 8, 2004, the ACE Companies served the Document Requests upon Equitas, seeking specific information and documents regarding the negotiation and execution of the Proposed Agreement. The Document Requests were addressed specifically to Rhyddian Williams, and tracked, virtually line by line, the statements made in the Williams Affidavit.

8. On December 28, 2004, Equitas agreed through its counsel to a partial, limited production only to those communications between Equitas, the Liquidator and the Joint Provisional Liquidators regarding issues bearing on the Proposed Agreement, namely alternative means of recovery by the AFIA Cedents, the application of New Hampshire claims and distribution procedures, the "walling off" of U.K. assets, and the U.K. Scheme of Arrangement. (Equitas' letter is attached as Exhibit D.)

9. In the December 28 letter, Equitas also asserted a number of nominal objections to the Document Requests, which are not the subject of this Motion.² With regard to Document

² By voluntarily agreeing to produce certain documents, Equitas appears to have waived its objections to the jurisdiction of the Court and service under the Hague Convention. In the event, however, that Equitas argues that it has not waived those objections, they are without merit. Equitas has submitted a claim in this liquidation proceeding. It has also submitted the Williams Affidavit in support of the Liquidator's Reply in Support of the Proposed Agreement. Having taken affirmative steps to avail itself of the Court's jurisdiction and participated in the process, Equitas has submitted itself to that jurisdiction. See, e.g., Lyford v. Trustees of Berwick Academy, 97 N.H. 167, 168, 83 A.2d 302, 302 (1951) (objection to jurisdiction waived when party, by general appearance "or otherwise," submits to court any question other than sufficiency of service of process or notice); Druding v. Allen, 122 N.H. 823, 826, 451 A.2d 390, 393 (1982) (applying Lyford rule to nonparty who submitted to court's jurisdiction); Sunshine Development, Inc. v. F.D.I.C., 33 F.3d 106, 115-16 (1st Cir. 1994) (in absence of statutory exception, filing of proof of claim in bankruptcy submits claimant to court's jurisdiction). It would be unfair to allow Equitas to be allowed to use this forum only when convenient to Equitas. For the same reasons, Equitas may not now argue that service of process was improper. If Equitas maintains these objections, the ACE Companies will address them in greater detail in their reply papers.

Requests 1, 2, 6, 7(d), 9(c), 10, 21(e), and 22, however, Equitas objected to the production of its internal communications and of communications between and among AFIA Cedents regarding the Proposed Agreement, claiming that such communications are both irrelevant and privileged.

10. Following that refusal by Equitas, as required under New Hampshire law, the ACE Companies attempted on January 7, 2005 to “meet and confer” by responding to each of Equitas’ objections. In the course of the several discussions that followed, in an effort to resolve the dispute, the ACE Companies accepted each of the discovery limitations sought by Equitas, but maintained that internal Equitas communications and communications between and among AFIA Cedents relating to the Agreement should be produced. (A copy of the ACE Companies’ letter is attached as Exhibit E.)

11. In a letter dated January 26, 2005, Equitas continued its refusal to produce the disputed documents. (A copy of Equitas’ letter dated January 26, 2005 is attached as Exhibit F.)

12. By letter dated January 27, 2005, the ACE Companies again sought the disputed documents along with a privilege log to demonstrate the basis of Equitas’ claims of privilege. (A copy of the ACE Companies’ letter is attached as Exhibit G.)

13. By e-mail dated February 7, 2005, after Equitas’ failure to respond, counsel for the ACE Companies renewed its request. Equitas simply indicated that, on February 14, it would “work on” producing documents to the ACE Companies, and refused to produce a privilege log to substantiate its claims of privilege as to the disputed documents. (A copy of these e-mail messages between counsel for the Ace Companies and for Equitas is attached as Exhibit H.)

14. Finally, on March 2, 2005, Equitas produced the promised documents to the ACE Companies. In light of the parties’ unresolved disagreement regarding disclosure of the outstanding documents, however, judicial intervention has become necessary.

Request for Relief

I. The Disputed Document Requests Track the Williams Affidavit and Must Be Produced for Due Process Considerations

15. The discovery sought by the ACE Companies was designed to track, line by line, the factual assertions made by Rhydian Williams in his affidavit submitted in support of the Liquidator's Motion for Approval of the Proposed Agreement. The Williams Affidavit makes assertions that bear upon the Proposed Agreement's fairness and reasonableness. The Williams Affidavit avers that, in the absence of a scheme as contemplated by the Proposed Agreement, Equitas would never file a claim against the Home estate, in part because Equitas would be a Class V creditor and thus would be unlikely to recover from the estate. Ex. A at 2. Internal Equitas communications and communications between and among AFIA Cedents regarding the Proposed Agreement will shed light upon the facts underlying this assertion: Individual representatives of AFIA Cedents have necessarily discussed the Proposed Agreement, the rationale for entering into it, and the impact on their claims. Those communications go to the heart of the fairness and reasonableness of the Proposed Agreement, i.e. the fair and reasonable impact on all Home creditors, including certain Class V creditors but not others, to recover against the estate. The Williams Affidavit further addresses Equitas' consideration of other central issues, namely set off rights and alternatives, which were necessarily raised among AFIA Cedents.

16. The ACE Companies will depose Rhydian Williams on the substance and bases for the factual assertions made by that witness in this proceeding. Without all of the documents which support those assertions, the ACE Companies will be unable meaningfully to cross-examine that witness. A limited production will deprive the ACE Companies of their due process rights in discovery.

17. This prejudice to the ACE Companies is particularly significant because this Court has relied upon the Williams Affidavit in finding in its Order on Remand dated October 8, 2004 that payments under the Proposed Agreement constitute “administrative expenses” under RSA 402-C:44, thereby approving the Proposed Agreement. Ex. B at 8. The Court cited the Williams Affidavit for the justification advanced by the Liquidator that “AFIA Cedents would have little reason to file and prosecute claims if neither setoff nor distribution were likely. Id. That justification is central to the inquiry into whether the Proposed Agreement is fair and reasonable, and makes the documents reflecting the AFIA Cedents' position on the Proposed Agreement necessary to the inquiry at hand. To prevent discovery of matters which the Court itself has relied upon to approve the Proposed Agreement would be highly prejudicial to the ACE Companies and would jeopardize their chances of having a fair hearing regarding the fairness and reasonableness of the Proposed Agreement.

II. **The Disputed Document Requests Are Central to the Discovery Ordered by This Court**

18. Internal Equitas communications and communications between and among AFIA Cedents regarding the Proposed Agreement are relevant to “the necessity, reasonableness, and fairness of the [Proposed Agreement]” and thus fall squarely within the scope of discovery authorized by the Court’s Order on Remand. Under New Hampshire law, “[p]retrial discovery ... has been regarded ... as a proper procedural aid for the parties to prepare their case in advance of trial and has been given a broad and liberal interpretation.” Calderwood v. Calderwood, 112 N.H. 355, 357-58, 296 A.2d 910, 912 (1972). Relevance under this Court’s rules is defined very broadly and is based on the substance of a document or communication rather than the identity of the author or recipient of the document or communication. Superior

Court Rule 35 states that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” N.H. SUPER. CT. R. 35(b)(1) (emphasis added). Requests for information or documents will satisfy the relevance standard if they “appear[] reasonably calculated to lead to the discovery of admissible evidence.” Id. See also McDuffy v. Boston & Maine R.R., 102 N.H. 179, 182, 152 A.2d 606, 609 (1959) (“[D]iscovery has been allowed of facts which are material to the proper preparation of the plaintiff’s action or the defendant’s defense thereof.”); Ingram v. Boston & Maine R.R., 197 A. 822, 823 (N.H. 1938) (production of documents will be ordered “if the court can fairly find that [the evidence sought] may in any way be material to the [party’s] cause”). The sole question is whether the requested documents might “in any way” shed light on the “subject matter pending in the action.” N.H. SUPER. CT. R. 35(b)(1); Ingram, 197 A. at 823.

19. The ACE Companies' requests for documents reflecting internal Equitas communications and communications with AFIA Cedents regarding the Proposed Agreement seek discoverable information which go to the heart of how the Proposed Agreement was negotiated and ultimately executed by and between the AFIA Cedents. That evaluation cannot be made by this Court without the benefit of full disclosure of all relevant documents, including those in Equitas' possession concerning the genesis, negotiation and execution of the Proposed Agreement. In particular, internal Equitas communications and communications with AFIA Cedents regarding the Proposed Agreement are sought because they shed light on, among other matters, the purpose and mechanics of the Proposed Agreement and any promises and expectations of Equitas or other AFIA Cedents as regards the Proposed Agreement. Given New Hampshire's liberal standard for “relevance” in discovery, Equitas' refusal to withhold internal Equitas communications and communications with AFIA Cedents is inappropriate.

20. Indeed, Equitas has already conceded that communications regarding the Proposed Agreement are relevant by producing such documents relating to its communications with the Liquidator and the Joint Provisional Liquidators regarding the Proposed Agreement. Ex. D at 1-2. Having conceded that such documents are subject to production, Equitas may not now carve out an exception for communications with certain other entities. Equitas can point to nothing that renders the disputed documents any less relevant than the documents it has already agreed to produce: if a communication with the Liquidator regarding the Proposed Agreement is relevant, so is an internal Equitas communication or communication with an AFIA Cedent on the same issue. The ACE Companies should be permitted to discover *any* nonprivileged document that may “in any way be material” to the fairness and reasonableness of the Proposed Agreement. Ingram, 197 A. at 823.

21. Whether the Proposed Agreement was “negotiated at arms-length between the AFIA cedents and the Liquidator,” as asserted by Equitas, has no bearing upon the relevance of the disputed documents, nor is it a basis for Equitas' nondisclosure. Ex. F at 1. The New Hampshire Superior Court Rules do not provide an exception to discovery on that basis.

III. The Documents Sought by the ACE Companies Are Not Privileged

22. Any claim that internal Equitas communications and communications between and among AFIA Cedents are protected by any claim of privilege under New Hampshire law is equally wrong. Equitas has asserted various grounds of privilege for refusing to produce discoverable materials. Those grounds are inapplicable here.

23. As the party asserting privilege, Equitas bears the burden of demonstrating that any communication or document withheld from production is in fact privileged. 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). Yet no such showing has been made by Equitas here, particularly since the objections were made by counsel without the support of a privilege log to substantiate the claims.

24. Internal Equitas communications or communications between and among AFIA Cedents cannot be protected by the attorney-client privilege unless the disputed documents qualify for protection under Rule of Evidence 502(b) as communications between and among qualified individuals. Under Rule 502(b), the attorney-client privilege would only attach to a limited number of communications, namely those between Equitas or its agents and Equitas' attorney, between and among Equitas' attorneys and the attorneys' representatives, or between Equitas and its "representative"³ or among Equitas' "representatives." N.H. R. EVID. 502(b). It is insufficient for Equitas to make an unsubstantiated assertion that certain of the disputed documents "include legal advice" where there is no indication of who authored or received the subject documents or communications. Where Equitas has not demonstrated that the documents qualify under Rule 502 for protection from disclosure under the attorney-client privilege, it may not withhold any documents on that basis.

25. Similarly, the "common interest" privilege would only attach to communications between Equitas and another AFIA Cedent if that AFIA Cedent were "another party in a pending action," and only if the "common interest" asserted concerned that "pending action." N.H. R. EVID. 502(b)(3). There simply was no "pending action" in which Equitas and other AFIA Cedents could have a common interest, so the privilege cannot apply -- no matter what Equitas may claim about the extent of the AFIA Cedents' cooperation and common interests. Moreover,

³ "Representative of a client" is narrowly defined as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." N.H. R. EVID. 502(a)(2).

even if there were such a “pending action,” a communication between Equitas and another AFIA Cedent would not fall under the “common interest” privilege unless directed solely to an attorney or attorney representative of the AFIA Cedent in question. *Id.* Accordingly, communications with anyone who is not an attorney or attorney representative of the AFIA Cedent are subject to production. See also *In re Tyco Int’l, Inc. Multidistrict Litig.*, No. MDL 02-1335-B, Civ. 02-352-B, 02-1357-B, 2004 WL 556715, at * 2 (D.N.H. Mar. 19, 2004) (“[T]he common interest exception exists to permit lawyers for parties bound by a common interest to work together to achieve a shared goal.” (emphasis supplied).) Because Equitas has not shown that the communications among AFIA Cedents were solely directed to, or authored by, attorneys or attorney representatives of those AFIA Cedents, it cannot claim the protection of the “common interest” privilege. Finally, even if there were a “pending action” and the communications in question were directed solely to an attorney or attorney representative of the AFIA Cedent, the fact is that the AFIA Cedents have never had, and do not have, a “common interest” within the meaning of Rule 502(b)(3). The “common interest” privilege does not apply to parties with merely a common commercial interest, but to parties “who are working together in prosecuting or defending a lawsuit or in certain other legal transactions.” *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 686 (1st Cir. 1997). “[T]he term ‘common interest’ typically entails an identical (or nearly identical) legal interest as opposed to a merely similar interest.” *F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000) (emphases supplied). While the AFIA Cedents may have a common commercial interest in obtaining recoveries on their reinsurance contracts with Home, that is a far cry from the common legal interest that is required under New Hampshire law for the assertion of a privilege on that basis. Here, the negotiation of the Proposed Agreement was not directed toward litigation, but toward the

contractual settlement of putative debts. Moreover, the AFIA Cedents have never had, nor ever asserted, “identical (or nearly identical) legal interests.” Id. Unlike the parties “working together in prosecuting or defending a lawsuit,” the AFIA Cedents were only ever bound by their voluntary agreement to enter into the Proposed Agreement rather than pursue the ordinary claims process.

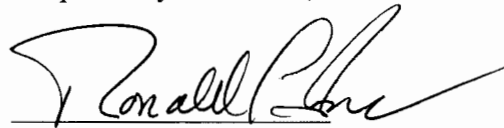
26. Finally, Equitas' work product argument fails for one simple reason: Equitas, as a nonparty to this proceeding, cannot assert the protection of the work product doctrine. See Gomez v. City of Nashua, New Hampshire, 126 F.R.D. 432, 434 n. 2 (D.N.H. 1989). In Gomez, the United States District Court for the District of New Hampshire held that the work product doctrine did not apply to documents created by a nonparty, citing the language in Federal Rule of Civil Procedure 26(b)(3) which is identical to New Hampshire Superior Court Rule 35(b)(2): “The [work-product] rule applies only to documents which are prepared in anticipation of trial 'by or for another party or by or for that party's representative....’” Id. Even if Equitas somehow could assert work product protection in a proceeding to which it is not a party, the process by which claims are submitted in an insolvency proceeding -- whether via the ordinary route or via a scheme like the Proposed Agreement -- is a far cry from the “adversarial proceedings” that qualify as “litigation” for purposes of the work-product doctrine. See, e.g., In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 924 (8th Cir. 1997). Moreover, when the Proposed Agreement was being negotiated, Equitas had no reason to believe that any dispute regarding the Proposed Agreement would arise. In fact, the documents produced to date in this proceeding contain no reference to any anticipated litigation during the time the Proposed Agreement was being negotiated. Therefore, any claim that litigation was anticipated then is merely self-serving and unsubstantiated.

27. With regard to any documents as to which a claim of privilege is asserted, Equitas must provide the ACE Companies with a detailed privilege and redaction log to allow the latter to ascertain the bases for Equitas' privilege claims as to each document. Accordingly, if this Court is inclined to entertain Equitas' privilege claims, then Equitas must be ordered to produce a privilege and redaction log.

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; and
- C. 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 this Motion.

Respectfully submitted,



Ronald L. Snow
ORR & RENO, Professional Association
One Eagle Square
P.O. Box 3550
Concord, New Hampshire 03302-3550
Telephone (603) 224-2381
Facsimile (603) 224-2318

Attorneys for Respondents Century
Indemnity Company, ACE Property and
Casualty Insurance Company, Pacific
Employers Insurance Company, and ACE
American Reinsurance Company

CERTIFICATE OF SERVICE

The undersigned certifies that I served a copy of the foregoing on the following counsel via First Class mail on March 3, 2005

Paula T. Rogers, Esq.
Case Administrator
Office of the Liquidation Clerk
The Home Insurance Company
286 Commercial Street
Manchester, NH 03101


Suzanne M. Gorman, Esq.
Senior Assistant Attorney General
Environmental Protection Bureau
New Hampshire Department of Justice
Attorney General's Office
33 Capitol Street
Concord, NH 03301-6397

J. David Leslie, Esq.
Eric. A. Smith, Esq.
Rackermann, Sawyer & Brewster
One Financial Center
Boston, MA 02111

Andre Bouffard, Esq.
Downs, Rachlin, Martin, PLLC
199 Main Street
Box 190
Burlington, VT 05402

Eric D. Jones, Esq.
Downs, Rachlin, Martin PLLC
199 Main Street
Box 190
Burlington, VT 05402

Peter G. Callahan, Esq.
Preti, Blaherty, Beliveau, Pachios & Haley, PLLP
57 North Main Street
PO Box 1318
Concord, NH 03302-1318



Ronald L. Snow

366052_1.DOC