

**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' REPLY IN FURTHER SUPPORT OF MOTION  
TO COMPEL PRODUCTION OF DOCUMENTS BY LIQUIDATOR  
(PRIOR TO JUNE 27, 2005 DEPOSITIONS)**

Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, the "ACE Companies"), by their attorneys, Orr & Reno P.A., respectfully submit this reply brief in connection with their motion (the "Motion") for an order compelling Roger A. Sevigny, as liquidator (the "Liquidator") of Home Insurance Company ("Home"), to produce any legal opinions or analyses he developed or received prior to the submission of the motion for approval of the Proposed Agreement on (1) "side arrangements" or "cut-through" deals between any of the ACE Companies and the AFIA Cedents; (2) the "walling-off" or "ring-fencing" of the Home's assets in the U.K.; or (3) any alleged novation, waiver and/or estoppel created by direct dealings between the AFIA Cedents and any of the ACE Companies. ACE Companies seek production of such documents in advance of the depositions of Messrs. Rosen and Bengelsdorf, which are now scheduled for June 27, 2005. In further support of the Motion, the ACE Companies respectfully state as follows:

1. The Motion seeks the production of only a small number of highly relevant documents that are within the scope of the Court's recent Orders on discovery. The legal opinions and analysis developed or received by the Liquidator go directly to the arguments that he has made in support of the Proposed Agreement. They also relate to the credibility of the

Liquidator's witnesses, who have testified that the threat of ring fencing, cut-throughs or direct deals between the AFIA Cedents and ACE was **the** impetus for the Proposed Agreement.

2. The Liquidator avoids the real issues and instead accuses the ACE Companies of trying to create a broad relevance standard that would defeat any assertion of privilege. (Opp'n at 6-7.) That is simply not the case. The ACE Companies are applying this Court's own criteria — which have been set forth and clarified in several Orders — to a limited universe of documents, *i.e.*, the legal opinions or analyses that the Liquidator received on the “threats” that allegedly were the motivating factors in pursuing the Proposed Agreement. As demonstrated in the Motion, such documents are indisputably relevant because they relate to the fairness and reasonableness of the Proposed Agreements and whether, in the Liquidator's own view, the purported “threats” in fact existed.<sup>1</sup>

3. The Liquidator is attempting to avoid the production of these key documents by taking the same narrow interpretation of the words “relied upon” that the Court has rejected several times. The Court has stated over and over that “relied upon” must be viewed broadly and that it embraces documents that relate to the issues raised in the affidavits, regardless of whether those documents were initially withheld on privilege grounds. When counsel for Equitas, Ltd. took a similarly narrow view of “relied upon,” the Court rejected his interpretation:

MR. GORDON: So, if Equitas got legal advice on one of these alternatives, and it's in a document, I take it, your Honor is not suggesting that we have to turn over that legal advice,

---

<sup>1</sup> Given the limited scope of the Motion, there is no basis for the Liquidator's claim that granting the ACE Companies relief would result in “further expensive motion practice.” (Opp'n at 2.) Indeed, the only reason there has been any motion practice on these issues is that the Liquidator has improperly withheld documents and has forced the ACE Companies to seek Court intervention. Tellingly, the Liquidator produced its analysis of ring-fencing -- an argument it now disavows. The ACE Companies are entitled to test the credibility of the Liquidator's witnesses as to the viability of the other purported “threats.”

merely because Mr. Williams said that he considered an alternative.

THE COURT: Yes, I am suggesting that.

(Tr. of May 12, 2005 Hearing at 20.) By the same token, the Liquidator must produce any legal opinions or analyses that relate to the “threats” referred to in the affidavits.<sup>2</sup>

4. The Liquidator once again argues that Rule 612 of the New Hampshire Rules of Evidence sets forth the applicable standard. (Opp’n at 3.) As the ACE Companies have previously shown, Rule 612 applies in a different context and it has nothing to do with the situation here, where there has been no showing that the affiants’ recollection needed to be refreshed. The Court’s Orders do not refer to Rule 612 and it is fair to say that the Court rejected the Liquidator’s argument relying on that rule.

5. The Liquidator also suggests that, in the June 1 Order, the Court “implicitly declined to direct production” of the subject documents based on the principle of “at issue” waiver. (Opp’n at 5.) The June 1 Order does not specifically mention the portion of the ACE Companies’ motion seeking the production of legal opinions or analyses. That is because the June 1 Order (as well as the earlier Orders) clearly cover the production of such documents. At most, the Court did not reach that portion of the ACE Companies’ motion, which is why the Motion alternatively requests the entry of a separate order compelling the production of the subject documents.

6. The Liquidator further argues that there is no need to produce documents on ring fencing because it is a “subsidiary matter that is not even included in the Offer of Proof.”

(Opp’n at 6.) First, despite the Liquidator’s current efforts to back away from the ring fencing

---

<sup>2</sup> At his deposition on June 14, 2005, Mr. Rosen confirmed that the Liquidator had received legal advice on cut-throughs and direct dealing between the AFIA Cedents and ACE. (Ex. 1 annexed hereto at 84:2-17.)

allegations, the Liquidator's motion for approval of the Proposed Agreement (and the Bengelsdorf Affidavit) cite the threat of a "walling-off" of assets as one of the main reasons for entering into the settlement with the AFIA Cedents. (See Motion for Approval at ¶ 6; Bengelsdorf Aff. at ¶ 8.) Because ring-fencing was integral to the Liquidator's effort to obtain approval of the Proposed Agreement, the ACE Companies are entitled to discovery of documents on this issue. Second, it is irrelevant that the Liquidator did not include ring fencing in the Offer of Proof. The ACE Companies anticipate that the Liquidator will present his case at the July 2005 hearing through live testimony. Therefore, the Liquidator may try to introduce evidence on the ring fencing issue through testimony at the hearing and the ACE Companies must have access to the relevant documents in order to cross-examine the Liquidator's witnesses.

7. Finally, the Liquidator requests reconsideration of the June 1 Order if the Court intended it to cover the production of the documents sought by the ACE Companies. There are no grounds for reconsideration here and the Liquidator has not demonstrated, as required by Rule 59-A of the Superior Court Rules, that the Court overlooked or misapprehended points of law or fact. The issues before the Court were fully briefed, and the Court decided them. Moreover, the Court gave all parties the opportunity to ask for a clarification, at the June 1 hearing, of any part of the June 1 Order if they felt it was necessary. The Liquidator did not ask for a clarification or other relief at the time, and there is no reason for any reconsideration of the June 1 Order now.

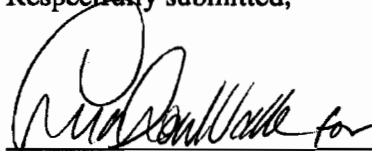
WHEREFORE, the ACE Companies respectfully request that the Court enter an order:

A. Compelling the Liquidator to produce any legal opinions or analyses on (1) side arrangements or cut-through deals between any of the ACE Companies and the AFIA Cedents; (2) the walling-off or ring-fencing of the Home's assets in the U.K.; or (3) any alleged novation, waiver and/or estoppel caused by direct dealing between the AFIA Cedents and any of the ACE

Companies, sufficiently in advance of the June 27, 2005 depositions of Messrs. Rosen and Bengelsdorf to permit such documents to be reviewed and meaningfully used to question them; and

B. Granting such other and further relief as the Court deems just and proper, including an award of the fees and costs incurred by the ACE Companies in bringing the Motion.

Respectfully submitted,



Date: June 17, 2005

---

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

-and-

Gary S. Lee  
Pieter Van Tol  
LOVELLS  
900 Third Avenue, 16<sup>th</sup> Floor  
New York, New York 10022  
Telephone (212) 909-0600  
Facsimile (212) 909-0666

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 a copy of the foregoing pleading has been served on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail on June 17, 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.  
Rackemann, 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. Callaghan, Esq.  
Preti, Flaherty, Beliveau, Pachios & Haley, PLLP  
57 North Main Street  
PO Box 1318  
Concord, NH 03302-1318

Martin P. Honigberg, Esq.  
Sulloway & Hollis, PLLC  
9 Capitol Street  
P.O. Box 1256  
Concord, NH 03302-1256

George T. Campbell, Esq.  
Robert Stein & Associates, PLLC  
One Barberry Lane  
P.O. Box 2159  
Concord, NH 03302-2159

David Steinberg, Esq.  
Clifford Chance LLP  
10 Upper Bank Street  
Canary Wharf  
London E14 5JJ  
United Kingdom

Jack B. Gordon, Esq.  
Fried Frank Harris Shriver & Jacobson LLP  
1001 Pennsylvania Avenue, NW  
Washington, DC 20004-2505

David M. Spector, Esq.  
Dennis G. LaGory, Esq.  
Kristy L. Allen, Esq.  
Schiff Hardin LLP  
6600 Sears Tower  
Chicago, Illinois 60606

Andrew W. Serell, Esq.  
Rath, Young and Pignatelli  
One Capital Plaza  
P.O. Box 1500  
Concord, New Hampshire 03302-1500

A handwritten signature in black ink, appearing to read "Ronald L. Snow", written over a horizontal line.

Ronald L. Snow