

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**

**COMMISSIONER'S AND LIQUIDATOR'S REPLY IN SUPPORT OF
MOTION FOR ORDER GOVERNING CONFIDENTIALITY OF
REGULATORY DOCUMENTS**

Roger A. Sevigny, both as Insurance Commissioner of the State of New Hampshire and as Liquidator (collectively "Commissioner") of The Home Insurance Company ("Home"), submits this reply to respond to issues raised by the California Plaintiffs and Zurich in their respective oppositions to the Commissioner's Motion for Order Governing Confidentiality of Regulatory Documents ("Motion").¹

1. The California Plaintiffs and Zurich both seek determination of issues of interest to themselves but attempt to avoid determination of the scope of statutory confidentiality. The California Plaintiffs pursue their Request 19 but portray it as narrow, while Zurich seeks prior approval requests ("PARs") but states it will accept redacted copies. Both disregard the other items they have been seeking from the Commissioner and REM, although they reserve the right to pursue those items. It is appropriate to address these issues now to achieve consistency in the treatment of regulatory documents, in whoever's possession they may be, in light of the important New Hampshire regulatory interests at stake.

A. The Commissioner's Motion Presents Disputes That Are Ripe For Decision.

2. The disputes between the Commissioner, the California Plaintiffs and Zurich are ripe. As Zurich notes, New Hampshire courts have used a two-pronged analysis for ripeness that

¹ This reply uses terms as defined in the Motion.

“evaluates the fitness of the issue for judicial determination and the hardship to the parties if the court declines to consider the issue.” Petition of the State of New Hampshire (State v. Fischer), 152 N.H. 205, 210 (2005). “[A] claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” Id. (quotations omitted). “The second prong . . . requires that the contested action impose an impact on the parties sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage.” Id. (quotations omitted). These factors support judicial consideration here.

3. As to the California Plaintiffs, the dispute over Request 19 is clearly fit for decision. The Plaintiffs seek “[a]ll correspondence, including reports, authored by or directed to David Nichols” – the Department’s Representative from 1995-2001 – “concerning Home.” The Commissioner’s objection based on statutory confidentiality raises an issue that is “primarily legal” and there is no need for further factual development. The factual context – the Department’s Consent Order and Order of Supervision for Home – has been presented, and Plaintiffs’ request focuses precisely on the oversight and supervision of Home that is confidential under the terms of the statutes. There is no need to list all documents authored by or directed to Mr. Nichols during the 1995-2001 period that he was the Department’s Representative to frame the issue. In the Commissioner’s view, the statutes preclude such an inquiry, and in any event many such documents are listed on the Commissioner’s and REM’s privilege logs. The second prong of the ripeness test is also satisfied. The California Plaintiffs have not withdrawn their request but are pursuing it, so the dispute over whether the documents are shielded by statutory confidentiality is squarely presented.²

² The Motion addresses the statutory confidentiality applicable to the documents requested. The Commissioner reserves other issues presented by the request, including but not limited to the overbreadth and burden of the request and specific attorney-client privilege or work product protections that may attach to particular documents. Clearly, not every piece of paper authored by or directed to Mr. Nichols could be relevant to the California Actions.

4. Zurich's request for PARs is also ripe. Zurich has requested all PARs (there are approximately 1,500 of them), and the Commissioner has objected based on statutory confidentiality. The matter is fit for decision. The Commissioner's objection presents a legal issue, and the facts have been presented in the Commissioner's Motion. The reasons for and the types of matters covered by the requests are set forth in the Department's Order of Supervision, and the format of the requests is identified in the blank prior approval request form. Further, the PARs as a category are listed on the Commissioner's and REM's privilege logs. Zurich's request also has an immediate impact. While Zurich presents its demand as one merely for "non-confidential" information, it asks the Court to order the Commissioner to provide the documents in the "redacted" form that it proposes. The application of the confidentiality statutes to the PARs is properly framed for decision.³

5. The California Plaintiffs (and to a lesser degree Zurich) attempt to avoid a ruling directed to other categories of documents, and in particular seek to avoid a ruling regarding documents they seek from REM. However, the Commissioner's and REM's privilege logs are now before the Court.⁴ The logs reveal that REM and the Commissioner both hold documents "authored by or directed to" the Department's Representative and PARs. The issues in dispute between the Commissioner, the California Plaintiffs and Zurich thus also apply to REM.

6. The California Plaintiffs have threatened to pursue documents the Commissioner contends are subject to statutory confidentiality from REM, and, unlike Zurich, they have not been willing to agree not to pursue documents in California while this motion is pending. Since REM only holds documents regarding the oversight and supervision of Home because it

³ As with the California Plaintiffs' request for the Representative's documents, the Commissioner addresses only the statutory confidentiality regarding the 1500 PARs. Other issues relating to the request, including relevance and burden, or to individual documents are reserved.

⁴ The REM log is included with the California Plaintiffs' Opposition; the Commissioner did not have it when the Motion was filed.

administered Home (which had no employees) from 1995 to early 2003, there is a strong New Hampshire interest in having them treated in accordance with New Hampshire law and pursuant to orders of the Court supervising the Home liquidation proceeding. The Commissioner had requested return of such documents, *Feldvebel Aff.*, Ex. 7, and they are properly among the books and records to be controlled by the Liquidator and Court under RSA 402-C:21, I. Documents concerning the regulation of Home should be treated consistently regardless of whether they are held by the Commissioner or REM. The California Plaintiffs cite no authority for the proposition that parties properly before the Court (the California Plaintiffs and Zurich) cannot be directed not to seek documents that are subject to statutory confidentiality, whether they are in the hands of the Commissioner or REM.

7. The document-by-document review called for by the California Plaintiffs is unnecessary. As discussed below, the statutory confidentiality is broad and places the categories of documents to which it applies beyond the scope of private litigation. The disagreement between the Commissioner and the California Plaintiffs and Zurich is not simply over individual documents but – as demonstrated by Plaintiffs’ Request 19 and Zurich’s demand for PARs – the overall reach and application of the statutory confidentiality to documents created in connection with the Department’s oversight and supervision of Home. That issue should be resolved, and the parties can then determine if there is a need for further judicial intervention.

B. The Statutory Confidentiality Broadly Shields Documents Regarding The Oversight And Supervision Of Home.

8. The confidentiality provided by the examination statute is unique in that it places certain aspects of the Department’s regulation of insurers outside the scope of discovery in private litigation. The positions of the California Plaintiffs and Zurich conflict with well-established principles of statutory construction. “In interpreting a statute, [the courts] first look

to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. Where the language of a statute is clear on its face, its meaning is not subject to modification. Unless [the court] find[s] that the statutory language is ambiguous, [the court] need not look to legislative intent. Furthermore, [the courts] interpret statutes in the context of the overall statutory scheme and not in isolation.” DeLuca v. DeLuca, 152 N.H. 100, 103 (2005). See Upton v. Town of Hopkinton, 157 N.H. 115, 119 (2008) (“We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.”).

9. The plain language of the statute exempts materials covered by the statute from discovery in private civil actions: “Except as provided in subparagraph IV(c)(2)⁵ and in this subparagraph, documents, materials, or other information, including, but not limited to, all working papers, and copies thereof created, produced or obtained by or disclosed to the commissioner or any other person in the course of an examination made under this title, or in the course of analysis by the commissioner of the financial condition or market conduct of a company shall be confidential by law and privileged, . . . shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action.” RSA 400-A:37, IV-a(a) (emphasis added).⁶ The Legislature’s intent that regulatory activity be outside the scope of private litigation is emphasized by subparagraph (d), which provides that “[n]either the

⁵ Subparagraph IV(c)(2) states that “[n]othing contained in this title shall prevent or be construed as prohibiting the commissioner from disclosing the content of an examination report, preliminary examination report or results, or any matter relating thereto, to the insurance department of this or any other state or country, or to law enforcement officials of this or any other state agency of [sic] the federal government at any time, so long as such agency or office receiving the report or matters relating thereto agrees in writing to hold it confidential and in a manner consistent with this title.”

⁶ The policy of RSA 400-A:37, IV-a was established at the time of the Consent Order and Order of Supervision, when RSA 400-A:37 IV(d) provided that “[a]ll working papers, recorded information, documents and copies thereof produced by, obtained by or disclosed to the commissioner or any other person in the course of any examination made under this title must be given confidential treatment and are not subject to subpoena and may not be made public by the commissioner or any other person” RSA 400-A:37, IV(d) (1995).

commissioner nor any person who received the documents, material, or other information while acting under the authority of the commissioner, . . . shall be permitted to testify in any private civil action concerning any confidential documents, materials, or other information subject to subparagraphs (a) and (b).” RSA 400-A:37, IV-a(d).

10. The statute permits the Commissioner to use the materials only in limited ways: “The commissioner is authorized to use the documents, materials, or other information in the furtherance of any regulatory or legal action brought as part of the commissioner’s official duties.” RSA 400-A:37, IV-a(a) The statute authorizes disclosure only to insurance regulators and law enforcement officials or to other state, federal, and international regulatory agencies, the National Association of Insurance Commissioners, and state, federal and international law enforcement agencies. RSA 400-A:37, IV(c)(2), RSA 400-A:37, IV-a(e). The statute thus mandates confidentiality and exempts covered documents from discovery subject only to exceptions that do not apply here.

1. The California Plaintiffs’ request for the Representative’s documents is barred by the statute.

11. The California Plaintiffs ask the Court to disregard the language of the statute on the ground that it was merely intended to avoid placing the insurer at a “competitive disadvantage.” California Pl. Opp. at 5. They conclude that once the insurer is in liquidation, the purpose of the statute does not apply so disclosure is appropriate. This is contrary to the fundamental principles of statutory construction noted above. The plain and ordinary meaning of the statute controls, and clear language is not subject to modification. In RSA 400-A:37, IV-a, the Legislature provided that examination documents are confidential and not subject to disclosure in private litigation. The California Plaintiffs seek to add a limitation to the statute (“except where the company is in liquidation”) that the legislature did not see fit to include and

to permit disclosure where the Legislature has not. Where the legislature has specified exceptions in a statute, the courts should not create additional exceptions. “It is a well-established canon of statutory construction that the expression of one thing in a statute normally implies the exclusion of another.” State v. Fournier, 158 N.H. 441, 449 (2009), citing St. Joseph Hosp. of Nashua v. Rizzo, 141 N.H. 9, 11-12 (1996). The fundamental purpose of RSA 400-A:37, IV-a, is to provide confidentiality, and there is no “clear showing of legislative intent” that could warrant reading additional exceptions into the statute. St. Joseph, 141 N.H. at 12.

12. In any event, the purposes of the statute are more than promoting disclosure to the regulator by reducing the possibility of competitive disadvantage. The statute serves to promote effective regulation by avoiding the threat that disclosures and communications between the regulator and the insurer will be used in private litigation. See Feldvebel Aff. ¶¶ 21-22. It also serves to avoid the burden on regulators of becoming involved in private litigation. That burden looms large here, as Zurich apparently seeks to rely on the Department’s regulatory action over the period from the 1995 Consent Order to the 2003 rehabilitation, while Plaintiffs appear poised to attack it. The California Plaintiffs’ request for “[a]ll correspondence, including reports, authored by or directed to” the Department’s Representative from 1995 to 2001 strikes at the core of the activity protected by the statute.

13. The California Plaintiffs also assert that the documents are somehow not “examination” documents because they relate to the “day-to-day” operation of Home. California Pl. Opp. at 4-5. They offer no authority for this distinction, however, and the operations of the insurer cannot be so arbitrarily separated from its finances. Examination of an insurer’s finances is necessarily connected to the insurer’s everyday operations, especially given the types and size of the transactions that are the focus of review under the Consent Order and the Order of

Supervision. See Feldvebel Aff., Ex. 2 (¶ 7), Ex. 3 (¶¶ 4-5). Indeed, the orders themselves show that the Department viewed its activities under those orders as examinations. The Consent Order expressly stated that pursuant to the Department’s examination authority “the Department will appoint one representative (the ‘Representative’) to serve as its on-site monitor of the day-to-day business and operations of The Home.” Feldvebel Aff., Ex. 2 at 1 (emphasis added). The Order of Supervision continued and heightened the Department’s scrutiny, and it specifically referred to the examination statute in addressing confidentiality of the supervision triggered by the risk based capital report. Feldvebel Aff., Ex. 3 (¶ 9). The Commissioner’s position in the orders that the examination statute applies to the Department’s oversight and supervision is persuasive and entitled to deference. See Appeal of Morton, 158 N.H. 76, 78-79 (2008); New Hampshire Retirement Sys. v. Sununu, 126 N.H. 104, 108 (1985).

2. Zurich’s proposed production of “redacted” prior approval requests is inconsistent with the statutory confidentiality.

14. Zurich takes a different approach in pursuing its request for the PARs. It seeks to downplay the significance of its demand by asserting that it does not request any confidential information but only “redacted versions of the PARs” that contain “(1) the date of the request; (2) the author; (3) the recipient; (4) a subject matter description sufficient to identify the particular transaction for which approval was sought; and (5) the result – whether the request was approved or not.” Zurich Opp. at 5. (The California Plaintiffs also suggest redaction, although merely in passing. California Pl. Opp. at 6.) Zurich specifically disclaims any request for “the [Department’s] reasoning, supporting information, financial analyses, or other documents or information that support or underlie the PARs.” Zurich Opp. at 5. However, this seemingly innocuous proposal is inconsistent with the statute, and it merely sets up future and

greater disputes with the California Plaintiffs over the underlying documents that Zurich contends it does not want.⁷

15. The plain language of the statute protects the regulatory process from discovery, and it exempts entire documents, not just certain information. The statute provides confidentiality for “documents, materials, or other information, including, but not limited to, all working papers, and copies thereof created, produced or obtained by or disclosed to the commissioner or any other person.” RSA 400-A:37, IV-a(a) (emphasis added). The PARs are forms prepared for and submitted to the Department or its Representative in the course of the examination pursuant to the statute and the Order of Supervision, and they constitute working papers within the statute. Indeed, the PAR form expressly provides that it is submitted pursuant to the confidentiality afforded by statute. Feldvebel Aff., Ex. 5. Such documents “shall be confidential by law and privileged, . . . shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action.” RSA 400-A:37, IV-a(a). The redactions proposed by Zurich are thus improper. The statute does not provide for redaction of working papers; it shields them from discovery in their entirety.

16. Since the statute expressly provides for confidentiality of documents (which are not “subject to subpoena” or “subject to discovery”), it is quite unlike the procedural rule at issue in Douglas v. Douglas, 146 N.H. 205 (2001), cited by Zurich. That case concerned Superior Court Rule 158, and the court itself distinguished the rule from statutes mandating confidentiality. Id. at 207 (contrasting the rule with the confidentiality accorded juvenile delinquency proceedings and records by RSA 169-B:35). As the statute expressly shields

⁷ The Commissioner notes that the Department’s principal files regarding PARs were held at the offices of Home in New York, as the Representative usually operated from those offices. Those files are separate from Home’s files under the control of the Commissioner as Liquidator.

documents, it is also broader than the physician-patient privilege at issue in State v. Elwell, 132 N.H. 599, 604 (1989) (construing RSA 329:26), cited by Plaintiffs.

17. The flaw in Zurich's approach is evident when its consequences are considered. If the Commissioner, or REM, produced a "redacted" version of a PAR, Zurich would presumably use it to contend that the transaction at issue was presented to the Department and approved (or disapproved) by the Department. That is, the only purpose of the redacted PAR would be for Zurich to use it as evidence of the Department's regulatory activity. This would violate the statutory prohibition on admission of such documents in any private civil action. RSA 400-A:37, IV-a(a). It would also provide a springboard for Zurich to seek testimony from regulators, contrary to the specific prohibition of testimony in a private civil action regarding "confidential documents, materials, or other information subject to subparagraphs (a) and (b)." RSA 400-A:37, IV-a(d) (emphasis added).⁸

18. Moreover, it is unlikely that production of a "redacted" PAR would end the matter. Zurich states that it is willing to forego discovery of "the [Department's] reasoning, supporting information, financial analyses, or other documents or information that support or underlie the PARs." Zurich Opp. at 5. However, if Zurich could use the "redacted" PAR to show the Department's approval of a transaction, it can reasonably be anticipated that the California Plaintiffs will want to look behind the PAR and seek the underlying reasoning and information that Zurich purports to be willing to do without. Zurich's approach is thus inconsistent with the statute, and it will likely only lead to additional disputes with the California Plaintiffs about the Department's regulatory actions.

⁸ The "redacted" PARs sought by Zurich sound innocuous because the information Zurich seeks is very like the information that would be provided on a privilege log. See Zurich Opp. at 5. However, a privilege log could not be used as evidence.

CONCLUSION

For the foregoing reasons and those in the Commissioner's Motion, the Court should enter an Order determining that the documents sought in the California Plaintiffs' Request 19 and the PARs sought by Zurich are confidential under the New Hampshire statutes and directing the California Plaintiffs and Zurich not to seek such documents from the Liquidator or REM.


Respectfully submitted,

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

By his attorneys,

MICHAEL A. DELANEY
ATTORNEY GENERAL

J. Christopher Marshall
NH Bar ID No. 1619
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3650

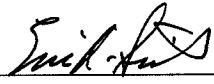


J. David Leslie
NH Bar ID No. 16859
Eric A. Smith
NH Bar ID No. 16952
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110
(617) 542-2300

November 24, 2009

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Reply in Support of Motion for Order Governing the Confidentiality of Regulatory Documents was sent, this 24th day of November, 2009, by first class mail, postage prepaid to all persons on the attached service list and additional distribution list.



Eric A. Smith

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

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SERVICE LIST

Lisa Snow Wade, Esq.
Orr & Reno
One Eagle Square
P.O. Box 3550
Concord, New Hampshire 03302-3550

Gary S. Lee, Esq.
James J. DeCristofaro, Esq.
Kathleen E. Schaaf, Esq.
Morrison & Foerster
1290 Avenue of the Americas
New York, New York 10104-0050

Pieter Van Tol, Esq.
Lovells
590 Madison Avenue
New York, New York 10022

Gail M. Goering, Esq.
Adam Goodman, Esq.
Eric Haab, Esq.
Lovells
One IBM Plaza
330 N. Wabash Avenue, Suite 1900
Chicago, Illinois 60611

Peter G. Callaghan, Esq.
Preti, Flaherty, Beliveau, Pachos
& Haley, PLLP
57 North Main Street
P.O. Box 1318
Concord, New Hampshire 03302-1318

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

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

Michael Cohen, Esq.
Cohen & Buckley, LLP
1301 York Road
Baltimore, Maryland 21093

David H. Simmons, Esq.
Mary Ann Etzler, Esq.
de Beaubien, Knight, Simmons,
Mantzaris & Neal, LLP
332 North Magnolia Avenue
P.O. Box 87
Orlando, Florida 32801

Martin P. Honigberg, Esq.
Suloway & Hollis, P.L.L.C.
9 Capitol Street
P.O. Box 1256
Concord, New Hampshire 03302-1256

Richard Mancino, Esq.
Willkie Farr & Gallagher, LLP
787 Seventh Avenue
New York, New York 10019

Joseph G. Davis, Esq.
Willkie Farr & Gallagher, LLP
1875 K Street, N.W.
Washington, DC 20006

Albert P. Bedecarre, Esq.
Quinn Emanuel Urguhart Oliver & Hedges, LLP
50 California Street, 22nd Floor
San Francisco, California 94111

Jeffrey W. Moss, Esq.
Morgan Lewis & Bockius, LLP
225 Franklin Street
16th Floor
Boston, Massachusetts 02110

ADDITIONAL DISTRIBUTION LIST

Dawn S. Pittman, Esq.
Brady R. Dewar, Esq.
Morgan Lewis & Bockius, LLP
One Market, Spear Street Tower
San Francisco, California 94105

Dean Hansell, Esq.
Dewey & LeBoeuf
333 South Grand Avenue
Suite 2600
Los Angeles, California 90071-1530