

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 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"), hereby moves for an order (1) determining that, by statute, documents held by the New Hampshire Insurance Department ("Department"), the Liquidator, and Risk Enterprise Management Ltd. ("REM") regarding the regulation of Home are required to be held in confidence and are not discoverable, and (2) directing the California Plaintiffs and Zurich not to seek production of such documents and REM to hold such documents as it possesses in confidence in accordance with the statute. As reasons therefor, the Commissioner states as follows:

INTRODUCTION

1. For over three years, the Commissioner has been addressing discovery issues arising from actions in California, including requests for documents from the Department, from Home, and from REM, which acted for Home from 1995 to 2003. The parties to those actions, the "California Plaintiffs" and defendants Zurich Insurance Company and its affiliates ("Zurich"), and the Liquidator entered a stipulation approved by this Court governing the Liquidator's production in response to subpoenas issued in 2006. The California Plaintiffs and Zurich are presently, but separately, seeking to obtain regulatory documents from the Commissioner and from REM, which holds them as a result of its actions as administrator of

Home. By statute, the 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). However, the California Plaintiffs and, to a lesser extent, Zurich dispute the application of the statute to the documents. To provide for consistent treatment of the documents, regardless of who holds them, in conformity with the clear language of the New Hampshire statute, the Court should determine that they are confidential and direct the California Plaintiffs, Zurich, and REM to act accordingly.¹

BACKGROUND

2. The 1995 Transaction and REM. In 1995, Zurich entered into a complex recapitalization transaction involving the acquisition of control of Home. The transaction was subject to approval of the Commissioner pursuant to RSA 401-B:3. The Commissioner approved the transaction in a Findings and Final Order entered May 26, 1995 that conditioned the approval on entry of a consent order providing for active oversight of Home by the Department. Findings and Final Order at pg. 8, Condition 1 (Affidavit of Alexander Feldvebel (“Feldvebel Aff.”) Exhibit 1). The Commissioner accordingly entered a Consent Order dated June 12, 1995, that was signed by Zurich and REM. Consent Order at 5 (Feldvebel Aff., Ex. 2). The Consent Order was entered pursuant to RSA 400-A:37 (the examination statute) and RSA 401-B:3 (the holding company act statute). Consent Order at 1. The Consent Order stated that the oversight “will require the participation and examination by the Department in the day-to-day business and operations of The Home,” *id.*, fourth Whereas clause, and it provided for the Department to appoint a representative to serve as the Department’s on-site monitor of the day-to-day business and operations of Home. *Id.* ¶ 1. See Feldvebel Aff. ¶ 2 and Exhibits 1 and 2.

¹ As noted below, both the California Plaintiffs and Zurich executed the Stipulation in the Home liquidation proceeding approved by this Court on June 22, 2006, and REM filed a motion to intervene in the proceeding that was granted on October 29, 2003.

3. Beginning in 1995, REM administered the business of Home pursuant to a Services Agreement entered as part of the recapitalization transaction. Effective January 1, 1996, Home had no employees. REM's employees, several of whom were also designated as officers of Home, acted for Home. Feldvebel Aff. ¶ 3.

4. The Order of Supervision. In 1997, Home submitted a risk based capital ("RBC") report that indicated that its financial status was such that a "mandatory control level" event had occurred. See Order of Supervision, first and second Whereas clauses (Feldvebel Aff., Ex. 3); RSA 404-F:2 (requiring annual RBC reports), :6, I(a) (defining "mandatory control level event"). Where a mandatory control level event occurs, the Commissioner is to place the insurer under regulatory control under RSA 402-C or, if the insurer is writing no business and is running-off its existing business (as was the case with Home), may allow the insurer "to continue its runoff under the supervision of the commissioner." RSA 404-F:6, II(b). The Commissioner accordingly entered an Order of Supervision dated March 3, 1997 to intensify the Department's oversight of Home. The Order of Supervision provided that for purposes of the order "The Home" included not only Home and its subsidiaries but also any controlling persons of Home, including Zurich. Order of Supervision ¶ 1. The Order of Supervision provided that Home was required to obtain the prior approval of the Commissioner before it could take a number of specified actions, such as making any payment in excess of \$1 million to claimants. Order of Supervision ¶ 4. See Feldvebel Aff. ¶ 3, Ex. 3.

5. The Order of Supervision provided for confidential treatment of submissions and other information under the order:

"Any and all statements, analyses, models, projections, reports and calculations obtained pursuant to this Order and the Consent Order and all other materials obtained in connection therewith (collectively 'the Information'), are subject to the confidentiality provisions of RSA 400-A:37 VI and 401-B:7 and 404-F:8 I (except for annual and quarterly statements required under RSA 400-A:36), but the Commissioner may, in his

sole discretion, share the Information on a confidential basis with such of his employees, consultants and advisors and such other insurance regulatory authorities to the extent he deems appropriate.”

Order of Supervision ¶ 9 (Feldvebel Aff., Ex. 3).

6. On December 14, 2001, the Commissioner issued a Second Supplemental Order of Supervision. The order also provided for confidential treatment of information:

“Information in any form produced by, obtained by or disclosed to the Representative or others acting on the Representative’s behalf which is resident or maintained at the Representative’s office or other location shall be subject to the same confidentiality and privilege as if resident or maintained at the executive offices of The Home or at the offices of the Department and shall be held confidential and privileged by the Representative and others acting on his behalf, in accordance with RSA 400-A:25 I, RSA 400-A:37 IV(d) and VI, RSA 401-B:7, RSA 404-F:8 I, and any other applicable provision of law or rule, except for annual and quarterly statements required to be disclosed under RSA 400-A:36.”

Second Supplemental Order of Supervision ¶ 3 (Feldvebel Aff., Ex. 4).

7. The Department’s Supervision of Home. Pursuant to the Consent Order, the Commissioner had an oversight role regarding Home’s operations that was implemented in part through the Department’s on-site Representative. The Department received reports and other information from REM personnel in order to oversee Home’s operations. The documents created in connection with the Department’s oversight of Home, including reports and other information that were provided to or generated for the Department, were held confidential pursuant to the examination statute referred to in the Consent Order. Feldvebel Aff. ¶ 6.

8. The Department’s supervision intensified after the Order of Supervision was entered. In addition to the ongoing review of Home’s operations and status, REM – acting for Home – was required to apply to the Department’s Representative to obtain prior approvals of the transactions specified in the Order of Supervision. REM made these prior approval requests (or “PARs”) on a “Prior Approval Request” form. The form specified that it was submitted under the confidentiality provisions of RSA 400-A:37 VI and 401-B:7 and later RSA 404-F:8I as

well. See Feldvebel Aff., Ex. 5. Between March 3, 1997, when the Order of Supervision entered, and March 5, 2003, when Home was placed in rehabilitation, REM submitted approximately 1,500 prior approval requests to the Department. See Feldvebel Aff. ¶ 7.

9. Home's Liquidation. Home was declared insolvent and the Commissioner was appointed as Liquidator of Home by the Order of Liquidation entered June 13, 2003. See Feldvebel Aff. ¶ 8 and Ex. 6. The Order of Liquidation enjoins all proceedings against Home and any act to obtain possession of or exercise control over property of Home. See Order of Liquidation ¶ (n) (1), (4). Pursuant to that order, the Liquidator is directed to take possession of the assets of Home and administer them under the orders of the liquidation court and is vested with title to the property of Home, including the books and records of Home. See Order of Liquidation ¶ (f); RSA 402-C:21, I. The Liquidator is to take possession of all of the assets, property, books, records, accounts and other documents of Home. See Order of Liquidation ¶ (g). See RSA 402-C:21, I; RSA 402-C:54, I.

10. The Liquidator disavowed the Services Agreement with REM on June 19, 2003. The Liquidator has created a stand-alone liquidation operation. Feldvebel Aff. ¶ 9.

11. The California litigation and discovery. A number of Home policyholders (the "California Plaintiffs") have brought actions against Zurich and others in the Superior Court of California, County of San Francisco: Fuller-Austin Asbestos Settlement Trust et al. v. Zurich-American Ins. Co., et al, No. CGC-04-431719; Western Asbestos Settlement Trust et al. v. Zurich-American Ins. Co., et al., No. 04-436181; PepsiAmericas, Inc., et al. v. Zurich-American Ins Co., et al., No. CGC-05-442140; and Pneumo Abex LLC v. Zurich American Ins. Co., et al, No. CGC 05-442745. In the actions, the California Plaintiffs contend, among other things, that the Zurich defendants were alter egos of Home and are responsible for Home's alleged

obligations to the California Plaintiffs under Home insurance policies and that the 1995 transaction resulted in fraudulent transfers to Zurich. See Feldvebel Aff. ¶ 10 and Ex. 8.

12. Many of the California Plaintiffs have filed proofs of claim in the Home liquidation. Feldvebel Aff. ¶ 11.

13. The California Plaintiffs and Zurich sought discovery of Home in 2006. In response to subpoenas purportedly served on the Department in New Hampshire, the Liquidator filed a Motion for Protective Order with this Court on May 2, 2006. Subsequently, the California Plaintiffs, Zurich, and Liquidator entered into a Stipulation Regarding California Subpoenas and Liquidator's Motion for Protective Order ("Stipulation") designed to more narrowly focus the inquiries of the Subpoenas to nineteen categories of documents and to alleviate some of the burdens on the Liquidator caused by the requested discovery. See Feldvebel Aff. ¶ 12 and Ex. 9.

14. On June 22, 2006, the Court (McGuire, J.) issued an order approving the Stipulation and staying proceedings regarding the requested protective order. The California Plaintiffs, Zurich and the Liquidator subsequently executed a Stipulation and Agreed Confidentiality Order to cover the production. On August 31, 2006, the Court issued an order approving the Stipulation and Agreed Confidentiality Order ("Confidentiality Order"). See Feldvebel Aff. ¶ 13 and Exhibits 10-12.

15. In accordance with the Stipulation, the Liquidator searched for documents in the nineteen categories and produced nearly 89,000 documents to the California Plaintiffs and Zurich. The rolling production was completed in June 2007 and, in February 2008, the Liquidator provided privilege logs reflecting the documents withheld on grounds of privilege/statutory confidentiality, including the prior approval requests as a group. See

Feldvebel Aff. ¶ 14 and Ex. 13 (the section of the privilege log addressing statutory confidentiality and list of persons).

16. The California Plaintiffs also served a subpoena on REM during 2007. Since REM held documents concerning Home due to its administration of Home pursuant to the 1995 Services Agreement, the Liquidator reviewed certain documents provided by REM to determine whether they were subject to statutory confidentiality. The Liquidator is informed that REM withheld certain documents from production on grounds of statutory confidentiality, and it provided the California Plaintiffs with a privilege log identifying the documents. Feldvebel Aff. ¶ 15.

17. On August 25, 2009, counsel for the California Plaintiffs requested thirty-three additional categories of documents from the Liquidator. The California Plaintiffs' Request 19 seeks: "All correspondence, including reports, authored by or directed to David Nichols concerning Home." Mr. Nichols was the Department's Representative under the Consent Order and the Order of Supervision from 1995 through 2001. The California Plaintiffs also purported to serve a subpoena upon the Commissioner, which sought the same thirty-three categories of documents. See Feldvebel Aff. ¶¶ 7, 16 and Exhibits 14 and 15.

18. On September 11, 2009, counsel for the Liquidator provided a letter response to the California Plaintiffs' requests. The Liquidator objected to Request 19 on the grounds of statutory confidentiality under RSA 400-A:37, 401-B:7 and 404-F:8. The California Plaintiffs disagreed with the assertion of statutory confidentiality in a letter dated September 23, 2009. See Feldvebel Aff. ¶ 17 and Exhibits 16 and 17.²

² Counsel for the Liquidator and for the California Plaintiffs have exchanged subsequent letters regarding the requests, but their positions regarding Request 19 remain unchanged.

19. On August 24, 2009, counsel for Zurich requested seventeen additional categories of documents from the Liquidator, including all prior approval requests. Zurich's Request 10 seeks: "All Prior Approval Requests submitted by the Home to the [Department] pursuant to the March 3, 1997 Order of Supervision or other Order issued by the [Department] regarding Home and documents related to approval and denial of such requests." See Feldvebel Aff. ¶ 18 and Ex. 18.

20. Counsel for the Liquidator responded to Zurich in a letter dated September 15, 2009 advising that the request for the prior approval requests seeks material protected by statutory confidentiality under RSA 400-A:37, 401-B:7 and 404-F:8. See Feldvebel Aff. ¶ 18 and Ex. 19.

21. Zurich responded to the Liquidator's letter on October 20, 2009. Zurich stated that it would be satisfied "with redacted copies of the documents in which privileged or confidential information would be removed." Zurich also issued a subpoena to REM in the California actions that seeks the prior approval requests and documents related to approval and denial of such requests. However, REM has informed the Liquidator that Zurich is not pressing that subpoena at this time. See Feldvebel Aff. ¶ 19 and Exhibits 20 and 21.

22. REM recently advised the Liquidator that the California Plaintiffs have told REM that they intend to file a motion to compel production of the documents withheld from REM's production on grounds of statutory confidentiality. Feldvebel Aff. ¶ 20.

ARGUMENT

23. The proper application of the confidentiality provided to the Department's regulatory activity under New Hampshire law to documents held by the Department, the Liquidator and REM, and sought by the California Plaintiffs and Zurich for use in private litigation, should be determined by this Court. The California Plaintiffs have sought to obtain documents the Liquidator believes are subject to statutory confidentiality from both the Liquidator and REM, while Zurich has also sought to obtain such documents from the Liquidator and REM. The Court should issue an order to maintain the statutory confidentiality applicable to the documents. The documents were created in connection with the Department's oversight and supervision of Home and include reports and information provided to the Department, and the prior approval requests and Department action on those requests. They are confidential under the clear language of the statutes and the express terms of the Order of Supervision. REM holds the documents only because it acted on behalf of Home. The records are thus appropriately addressed in Home's liquidation proceeding, especially in light of the Court's control over Home's records under the insurer liquidation statute. To provide a consistent and comprehensive resolution of the issue, the Court should determine that the documents are confidential under the New Hampshire statute and direct the California Plaintiffs and Zurich not to seek such documents and the Liquidator and REM to hold them confidential.

A. THE PROPER TREATMENT OF THE REGULATORY DOCUMENTS IS A MATTER OF NEW HAMPSHIRE INTEREST REQUIRING CONSISTENT APPLICATION OF NEW HAMPSHIRE STATUTES THAT SHOULD BE RESOLVED BY THIS COURT.

24. The regulatory documents – reports, prior approval requests and other information and documents – concerning the Department's oversight of Home are properly addressed in the Home liquidation proceeding. The prior approval requests and a number of other documents fell

within the 2006 discovery pursuant to the Stipulation entered by the California Plaintiffs, Zurich and the Liquidator and approved by this Court, and the Liquidator listed them on the privilege log for the Liquidator's 2006-2007 production. The California Plaintiffs have sought to obtain the records from the Commissioner, who holds them in his regulatory capacity and, where they are part of Home's records, as Liquidator. Production of such records regarding Home is properly supervised by the Court in the Home liquidation proceeding, in particular because of the provisions in the Order of Liquidation regarding Home's records. The California Plaintiffs have also sought to obtain records from REM, which holds them only because it retained copies of them from the period when it acted for Home under the Services Agreement. The records held by REM from its operation of Home are also properly subject to the Court's supervision under the Order of Liquidation. Zurich similarly has sought to obtain regulatory documents, in particular the prior approval requests, from the Commissioner and from REM.

25. The appropriate handling of the regulatory documents, including prior approval requests, is a matter of significant regulatory concern and presents matters of New Hampshire law that should be determined in a consistent fashion in this Court. The documents concern the New Hampshire Insurance Department's oversight of a New Hampshire domiciled insurance company (Home) pursuant to the Consent Order and Order of Supervision. They thus directly concern New Hampshire's regulatory scheme, and the application of the New Hampshire statutes in this context will have ramifications for future regulatory action. The Consent Order and the Order of Supervision were issued by the Commissioner under New Hampshire statutes, *e.g.*, RSA 400-A:37, and Home (and thus REM) was required to submit reports and other information and to make the prior approval requests by those orders. Such questions of New Hampshire law regarding New Hampshire regulatory activity should be determined in a comprehensive and uniform manner by the New Hampshire courts, not in a piecemeal fashion elsewhere.

26. Furthermore, since Home is now in liquidation, the records of Home are under the supervision of the Court pursuant to the Order of Liquidation. Feldvebel Aff., Ex. 6. The Order of Liquidation enjoins all proceedings against Home and any act to obtain possession of or exercise control over property of Home. See Order of Liquidation ¶ (n) (1), (4). Pursuant to that order, the Liquidator is to take possession of the assets of Home and administer them under the orders of the liquidation court and is vested with title to all of the books and records of Home. See Order of Liquidation ¶ (f); RSA 402-C:21, I. The Liquidator is specifically directed to take possession of all of the assets, property, books, records, accounts and other documents of Home. See Order of Liquidation ¶ (g). See RSA 402-C:21, I; RSA 402-C:54, I. Thus, disputes concerning the records of Home, including those held by third parties, must be resolved by the Court in the liquidation proceeding.³

B. UNDER NEW HAMPSHIRE LAW, THE REGULATORY DOCUMENTS, INCLUDING PRIOR APPROVAL REQUESTS, ARE CONFIDENTIAL AND NOT SUBJECT TO DISCOVERY.

27. The regulatory documents are exempted from discovery in private litigation by statute. The Commissioner's oversight of Home starting in 1995 was conducted pursuant to statutes that expressly provide confidentiality. The Consent Order provides that it was issued pursuant to the insurer examination statute, RSA 400-A:37, and the holding company act, RSA 401-B:3. The Order of Supervision ¶ 9 makes clear that documents submitted pursuant to the order are subject to the confidentiality provisions of RSA 400-A:37 VI and 401-B:7, as well as RSA 404-F:8, I, while the Second Supplemental Order of Supervision ¶ 3 makes the same point and also refers to RSA 400-A:37 IV(d). The prior approval request form states that the request is submitted pursuant to the confidentiality provisions of RSA 400-A:37 VI and 401-B:7.

³ The Liquidator requested that REM return records regarding Home to the Liquidator in a letter dated June 9, 2004. See Feldvebel Aff. ¶ 9 and Ex. 7.

28. These statutes establish a clear legislative policy that materials exchanged between the regulator and the insurer are not discoverable. RSA 400-A:37, VI provides that reports under the examination statute “shall be absolutely privileged” and, at the time of the Consent Order and Order of Supervision, 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) (emphasis added). RSA 401-B:7 similarly provides for confidential treatment in the examination of insurers, such as Home, that were part of a holding company structure, by stating that: “[a]ll information, documents and copies thereof obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to RSA 401-B:6 . . . shall be given confidential treatment and shall not be subject to subpoena and shall not be made public by the commissioner or any other person, . . .” RSA 401-B:7 (emphasis added).⁴

29. The legislative determination in these statutes that information disclosed in the course of regulatory review should be confidential is confirmed and now governed by the provisions of RSA 400-A:37, IV-a, which was enacted in 2004 at the same time RSA 400-A:37, IV(d) was repealed. 2004 N.H. Laws ch. 155:2, :4. The present statute provides that, subject to an exception for disclosure to other regulators not applicable here, “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

⁴ Copies of the confidentiality statutes are attached to this motion.

admissible in evidence in any private civil action. 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) (emphasis added).

30. 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 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). The Legislature has recognized the need for confidentiality in regulatory activity in several other New Hampshire Insurance Laws. See RSA 400-A:16, III (confidentiality of investigations); RSA 400-A:36-c (confidentiality of financial analysis ratios and examination synopses); RSA 401-B:7 (confidentiality of holding company examinations and registration statements). The examination section at issue here is the broadest of these provisions.

31. The statutory provisions noted above are intended to provide the confidentiality essential to effective regulation, as they encourage open communication between the insurance company and its regulator. The supervision of insurance companies, especially those whose situation calls for direct oversight such as that under the Consent Order and Order of Supervision, depends upon the free and frank flow of information and commentary between the insurer and the regulator. The regulator needs to obtain full information from the insurer, not only in form of presentations, reports, memoranda and analyses (whether initiated by the regulator or the company) but also in informal back-and-forth discussions and correspondence. Only with such information can the regulator determine how to act effectively. The

confidentiality provided by the statutes fosters candid discussion and disclosure by ensuring that sensitive matters may be addressed without harm that could result from disclosures regarding the insurer's finances, claims or other matters. The absence of confidentiality would chill the insurer's willingness to disclose sensitive information. Feldvebel Aff. ¶ 5.

32. The Legislature recognized this by enacting the examination statute providing for confidentiality with only limited exceptions that do not apply here. Under RSA 400-A:37, IV-a, information obtained or developed in the course of an examination or financial review shall be "confidential by law and privileged," and it shall "not be subject to subpoena" and shall "not be subject to discovery or admissible in evidence in any private civil action." The only exceptions are (1) for disclosure to other government insurance regulators and law enforcement authorities, upon a written agreement to maintain confidentiality, RSA 400-A:37, IV-a(e)(1), and (2) in furtherance of any regulatory or legal action brought as part of the commissioner's official duties, RSA 400-A:37, IV-a(a). Where the disclosure sought does not fall within the statutory exceptions, the documents must be held confidential and are not subject to discovery.⁵

33. RSA 400-A:37, IV-a, is New Hampshire's enactment of the Model Law on Examinations, section 5(F), promulgated by the National Association of Insurance Commissioners ("NAIC"). III NAIC Model Laws, Regulations and Guidelines at 390-6 (2009). The language thus reflects a consensus of the national body of insurance regulators that confidentiality is necessary.

34. In this case, the application of the examination statute was specified in the Consent Order, and the confidential nature of the supervision was expressly set forth in the Order

⁵ The absolute language chosen by the Legislature in the examination statute distinguishes this case from the federal common law bank examiner privilege, see In re Subpoena Served upon the Comptroller of the Currency and the Secretary of the Bd. of Governors of the Fed. Reserve Sys., 967 F.2d 630 (D.C. Cir. 1992), and statutes that expressly permit disclosure upon order of a court. See State ex rel. Cline, Ins. Comm'r of the State of W. Va. v. Circuit Court, 672 S.E.2d 303 (W. Va. 2008).

of Supervision. Persons dealing with the Department relied upon the application of the statutes, in particular the confidentiality afforded thereunder. Production of confidential material would undermine the Department's ability to supervise regulated insurers and retain consultants in the future. Feldvebel Aff. ¶ 22.

35. The documents at issue include communications between personnel at Home or REM (acting for Home) and the Department examiners or Department's Representative or the Department's consultants who worked with the Representative in the supervision of Home, as well as presentations, memoranda and emails prepared for the Department or responding to inquiries from the Department, memoranda between Department personnel, and prior approval requests. See Feldvebel Aff., Ex. 13. Matters concerning the Department's oversight and financial analysis regarding Home plainly fall within the zone of confidentiality provided by the examination statutes cited above. Further, as shown by the express terms of the Order of Supervision, such materials were intended to be developed, provided and analyzed in confidence.

36. The prior approval requests also warrant confidential treatment. The need for confidential treatment of the prior approval requests is apparent from the matters subject to approval under the Order of Supervision. They include payments to claimants (e.g., persons asserting a claim against a Home policyholder or a Home policyholder) in excess of \$1,000,000; payments to other creditors or any other person in excess of \$500,000; payments to cedents or reinsurers in excess of \$250,000 or any commutation with a cedent or reinsurer; release of any obligation or collateral in excess of \$500,000; material changes to any contracts and leases with a consideration in excess of \$500,000; entering into any new contracts with consideration in excess of \$500,000; and any transaction with Zurich, Home Holdings Inc., REM or affiliates of those entities. Order of Supervision ¶ 4.

37. The prior approval request form itself stated that the requests were made pursuant to the confidentiality provisions of the examination statutes. See Feldvebel Aff., Ex. 5. Disclosure of the requests for approval of such matters, the supporting material, any communications regarding the submission and the Department's action presents a risk of harm to Home and now to the liquidation of Home. In many instances, the requests for prior approval of necessity will discuss the strengths and weaknesses of Home's position regarding a claim settlement or other a proposed transaction, which often will involve consideration of litigation or other privileged analysis. Such materials may reveal Home's strategy in approaching or resolving claims, and California Plaintiffs have filed proofs of claim in the Home estate. Feldvebel Aff. ¶ 23.

38. The legislative policy of regulatory confidentiality established by RSA 400-A:37 needs to be consistently determined and applied. In light of the multiple efforts to obtain regulatory documents subject to confidentiality by the California Plaintiffs and Zurich, and the control over Home's records residing in the Liquidator and ultimately the Court under the Order of Liquidation, the Court should address the issue and hold that the documents are subject to the statute and that the California Plaintiffs and Zurich may not obtain them, while REM must hold them confidential.

WHEREFORE, the Liquidator respectfully requests that this Court:

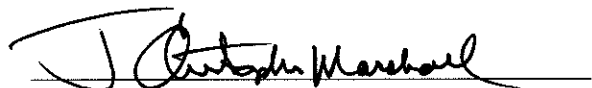
- A. Grant this Motion;
- B. Enter an Order determining that the regulatory documents, including prior approval requests, are confidential under the New Hampshire statutes and directing the California Plaintiffs and Zurich not to seek such documents and directing the Liquidator and REM to hold them confidential; and
- C. Grant such other and further relief as justice may require.

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

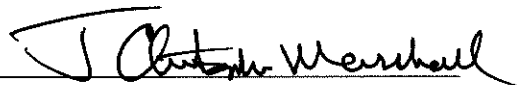


J. David Leslie
NH Bar ID No. 16859
Eric A. Smith
NH Bar ID No. 16952
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110
(617) 542-2300

October 30, 2009

Certificate of Service

I hereby certify that a copy of the foregoing Motion for Order Governing the Confidentiality of Regulatory Documents and Affidavit of Alexander K. Feldvebel were sent, this 30th day of October, 2009, by first class mail, postage prepaid to all persons on the attached service list and to counsel for the California Plaintiffs, Zurich, and REM.

A handwritten signature in black ink, appearing to read "J. Christopher Marshall". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke extending to the right.

J. Christopher Marshall

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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The Home Insurance Company
Docket No. 03-E-0106

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

Peter 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

Stephan P. Parks, Esq.
Doreen F. Connor, Esq.
Wiggin & Nourie, P.A.
670 North Commercial Street, Suite 305
P.O. Box 808
Manchester, New Hampshire 03105-0808

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

ADDITIONAL DISTRIBUTION LIST

Dawn S. Pittman, Esq. (also by e-mail)
Brady R. Dewar, Esq.
Morgan Lewis & Bockius, LLP
One Market, Spear Street Tower
San Francisco, California 94105

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

Jordan S. Stanzler, Esq.
Stanzler FunderBurk & Castellon LLP
180 Montgomery Street
Suite 1700
San Francisco, California 94111

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

Samuel M. Leaf, Esq. (also by e-mail)
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, New York 10019-6099

Martin P. Honigberg, Esq. (also by e-mail)
Suloway & Hollis, P.L.L.C.
9 Capitol Street
P.O. Box 1256
Concord, New Hampshire 03302

Dean Hansell, Esq. (also by e-mail)
Dewey & LeBoeuf
333 South Grand Avenue
Suite 2600
Los Angeles, California 90071-1530

TITLE XXXVII INSURANCE

CHAPTER 400-A INSURANCE DEPARTMENT

Section 400-A:37

400-A:37 Examinations. –

I. The commissioner or any of his examiners may conduct an examination of any company as often as the commissioner deems appropriate but shall at a minimum, conduct an examination of every insurer licensed in this state at least once every 5 years. In scheduling and determining the nature, scope and frequency of the examinations, the commissioner shall consider the results of financial statement analyses and ratios, changes in management or ownership, actuarial opinions, reports of independent Certified Public Accountants and other criteria as set forth in the Examiners' Handbook in effect and adopted by the National Association of Insurance Commissioners.

(a) Except as otherwise expressly provided, the commissioner shall examine each domestic insurer at least once every 5 years, and he shall annually examine, value, or cause to be valued the reserve liabilities, including loss adjustment expense reserves, of each domestic insurer. For the purpose of making the annual valuation of the reserve liabilities for all outstanding life insurance policies and annuity and pure endowment contracts of domestic insurance companies, the commissioner may employ a competent actuary who shall make such valuation of a company's contractual obligations and the company's compliance with the law.

(b) For purposes of completing an examination of any company under this title, the commissioner may examine or investigate any person, or the business of any person, in so far as such examination or investigation is, in the sole discretion of the commissioner, necessary or material to the examination of the company.

(c) In lieu of an examination of any foreign or alien insurer licensed in this state, the commissioner may accept an examination report on the company as prepared by the insurance department for the company's state of domicile or port-of-entry state until January 1, 1994. Thereafter, such reports may only be accepted if:

(1) The insurance department was at the time of the examination accredited under the National Association of Insurance Commissioners' Financial Regulation Standards and Accreditation Program; or

(2) The examination is performed under the supervision of an accredited insurance department or with the participation of one or more examiners who are employed by such an accredited state insurance department and who, after a review of the examination work papers and report, state under oath that the examination was performed in a manner consistent with the standards and procedures required by their insurance department.

II. For the purpose of ascertaining compliance with law or relationships and transactions between any person and any insurer or proposed insurer, and in circumstances where the commissioner has reasonable grounds to believe there is noncompliance with or violation of law, regulation, or order, he may, as often and to the extent he deems advisable, examine the accounts, records, documents, and transactions pertaining to or affecting the insurance affairs or proposed insurance affairs and transactions of:

(a) Any insurance agent, broker, general agent, surplus line licensee, adjuster, consultant, insurer representative, or any person holding himself out as any of the foregoing. (Provided, however, that if upon examination of any person specified in this paragraph the commissioner shall determine that such

person is not in violation of the provisions of Title XXXVII or applicable regulations, the expense of the examination shall be borne by the insurance department.)

(b) Any person having a contract under which he enjoys by terms or in fact the exclusive or dominant right to manage or control the insurer.

(c) Any person in this state engaged in, or proposing to be engaged in this state in, or holding himself out in this state as so engaging or proposing, or in this state assisting in, the promotion, formation, or financing of an insurer or insurance holding corporation, or corporation or other group to finance an insurer or the production of its business.

(d) Any rating bureau or organization.

(e) Any licensee or other person subject to this title.

(f) Or if adequate information cannot be obtained, any insurance holding company; or person holding the shares of voting stock or policyholder proxies of an insurer as voting trustee or otherwise, for the purpose of controlling the management thereof.

III. CONDUCT OF EXAMINATIONS.

(a) Upon determining that an examination should be conducted, the commissioner or the commissioner's designee shall issue an examination warrant appointing one or more examiners to perform the examination and instructing them as to the scope of the examination. In conducting the examination, the examiner shall observe those guidelines and procedures set forth in the Examiners' Handbook adopted by the National Association of Insurance Commissioners. The commissioner may also employ such other guidelines or procedures as the commissioner may deem appropriate.

(b) (1) Every company or person from whom information is sought, its officers, directors and agents must provide to the examiners timely, convenient and free access at all reasonable hours at its offices to all books, records, accounts, papers, documents and any or all computer or other recordings relating to the property, assets, business and affairs of the company being examined. The officers, directors, employees and agents of the company or person must facilitate the examination and aid in the examination so far as it is in their power to do so. The refusal of any company, by its officers, directors, employees or agents, to submit to examination or to comply with any reasonable written request of the examiners shall be grounds for suspension or refusal of, or nonrenewal of any license or authority held by the company to engage in an insurance or other business subject to the commissioner's jurisdiction. Any such proceedings for suspension, revocation, or refusal of a license or authority shall be conducted pursuant to RSA 400-A:15, III.

(2) Neither the commissioner nor any examiner shall remove any record, account, document, file, or other property of the person being examined from the office or place of such person except with the written consent of such person in advance of such removal or pursuant to an order of court duly obtained. This subparagraph shall not be deemed to affect the making and removal of copies or abstracts of any such record, account, document, or file.

(c) The commissioner or any of his examiners shall have the power to issue subpoenas, to administer oaths and to examine under oath any person as to any matter pertinent to the examination. Upon the failure or refusal of any person to obey a subpoena, the commissioner may petition a court of competent jurisdiction, and upon proper showing, the court may enter an order compelling the witness to appear and testify or produce documentary evidence. Failure to obey the court order shall be punishable as contempt of court.

(d) When making an examination under this title, the commissioner may retain, without appropriation under RSA 9 and without qualifying as a department expenditure under RSA 4:15, attorneys, appraisers, independent actuaries, independent certified public accountants or other professionals and specialists as examiners, the cost of which shall be borne by the company which is the subject of the examination. The company shall pay the retained professional or specialist directly for these costs.

(e) Nothing contained in this title shall be construed to limit the commissioner's authority to terminate or suspend any examination in order to pursue other legal or regulatory action pursuant to the insurance laws of this state. Findings of fact and conclusions made pursuant to any examination shall be

prima facie evidence in any legal or regulatory action.

(f) Nothing contained in this title shall be construed to limit the commissioner's authority to use and, if appropriate, to make public any final or preliminary examination report, any examiner or company workpapers or other documents, or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action which the commissioner may, in his discretion, deem appropriate.

(g) For the purposes of this section "person" means an individual, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization, and any similar entity or any combination of such entities acting in concert.

IV. (a) No later than 60 days following completion of the examination, the examiner in charge shall file with the department a verified written report of examination under oath. Upon receipt of the verified report, the department shall transmit the report to the company examined, together with a notice which shall afford the company examined not more than 30 days to make a written submission or rebuttal with respect to any matters contained in the examination report.

(b) Within 30 days of the period allowed for the receipt of written submissions or rebuttals, the commissioner shall fully consider and review the report, together with any written submissions or rebuttals, and any relevant portions of the examiner's workpapers and enter an order:

(1) Adopting the examination report as filed or with modification or corrections. If the examination report reveals that the company is operating in violation of any law, regulation or prior order of the commissioner, the commissioner may order the company to take any action the commissioner considers necessary and appropriate to cure such violation; or

(2) Rejecting the examination report with directions to the examiners to reopen the examination for purposes of obtaining additional data, documentation or information, and refiling as provided in subparagraph (a); or

(3) Calling for an investigatory hearing with no less than 20 days notice to the company for purposes of obtaining additional documentation, data, information and testimony.

(c) (1) Upon the adoption of the examination report, the commissioner shall continue to hold the content of the examination report as private and confidential information for a period of 20 days, except to the extent provided in subparagraph (a). Thereafter, the commissioner may open the report for public inspection so long as no court of competent jurisdiction has stayed its publication.

(2) Nothing 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 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.

(3) In the event the commissioner determines that regulatory action is appropriate as a result of any examination, he may initiate any proceedings or actions as provided by law.

(d) [Repealed.]

IV-a. PRIVILEGE FOR, CONFIDENTIALITY OF ANCILLARY INFORMATION.

(a) Except as provided in subparagraph IV(c)(2) 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 RSA 91-A, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action. 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.

(b) Documents, materials, or other information, including, but not limited to, all working papers, and copies thereof, in the possession or control of the National Association of Insurance Commissioners

and its affiliates and subsidiaries 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, if they are:

(1) Created, produced, or obtained by or disclosed to the National Association of Insurance Commissioners and its affiliates and subsidiaries in the course of the National Association of Insurance Commissioners and its affiliates and subsidiaries assisting an examination made under this chapter, or assisting a commissioner in the analysis of the financial condition or market conduct of a company; or

(2) Disclosed to the National Association of Insurance Commissioners and its affiliates and subsidiaries under subparagraph (b)(1) by a commissioner.

(c) For the purposes of subparagraph (b), this chapter includes the law of another state or jurisdiction that is substantially similar to this chapter.

(d) Neither the commissioner nor any person who received the documents, material, or other information while acting under the authority of the commissioner, including the National Association of Insurance Commissioners and its affiliates and subsidiaries, shall be permitted to testify in any private civil action concerning any confidential documents, materials, or other information subject to subparagraphs (a) and (b).

(e) In order to assist in the performance of the commissioner's duties, the commissioner:

(1) May share documents, materials, or other information, including the confidential and privileged documents, materials, or information subject to subparagraphs (a) and (b), with other state, federal, and international regulatory agencies, with the National Association of Insurance Commissioners and its affiliates and subsidiaries, and with state, federal, and international law enforcement authorities; provided, that the recipient agrees to maintain the confidentiality and privileged status of the document, material, communication, or other information. Such parties shall agree in writing prior to receiving the information to provide to it the same confidential treatment as required by this paragraph, unless the prior written consent of the company to which it pertains has been obtained;

(2) May receive documents, materials, communications, or information, including otherwise confidential and privileged documents, materials, or information, from the National Association of Insurance Commissioners and its affiliates and subsidiaries, and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material, or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material, or information; and

(3) May enter into agreements governing sharing and use of information consistent with this subparagraph.

(f) No waiver of any applicable privilege or claim of confidentiality in the documents, materials, or information shall occur as a result of disclosure to the commissioner under this paragraph or as a result of sharing as authorized in subparagraph (e).

(g) A privilege established under the law of any state or jurisdiction that is substantially similar to the privilege established under this paragraph shall be available and enforced in any proceeding in, and in any court of, this state.

(h) In this paragraph "department," "insurance department," "law enforcement agency," "regulatory agency," and the "National Association of Insurance Commissioners" include, but are not limited to, their employees, agents, consultants, and contractors.

V. EXAM REPORTS; DISTRIBUTION; PROCEDURE.

(a) The commissioner shall deliver a copy of the examination report to the person examined, together with a notice affording such person 20 days or such additional reasonable period as the commissioner for good cause may allow, within which to review the report and recommend changes therein.

(b) If so requested by the person examined, within the period allowed under RSA 400-A:37, V(a), or if deemed advisable by the commissioner without such request, the commissioner shall hold a closed hearing relative to the report and shall not file the report in the department until after such closed hearing

and his order thereon; except, that the commissioner may furnish a copy of the report to the governor, attorney general or treasurer of state pending final decision thereon.

(c) If no such closed hearing has been requested or held, the examination report, with such modifications, if any, thereof as the commissioner deems proper, shall be accepted by the commissioner and filed in the department upon expiration of the review period provided for in RSA 400-A:37, V(a). The report shall in any event be so accepted and filed within 6 months after final hearing thereon.

(d) The commissioner shall forward to the person examined a copy of the examination report as filed, together with any recommendations or statements relating thereto which he deems proper.

(e) If the report is of an examination of a domestic insurer, a copy of the report, or a summary thereof approved by the commissioner, when filed in the department, together with the recommendations or statements of the commissioner or his examiner, shall be presented by the insurer's chief executive officer to the insurer's board of directors or similar governing body at a meeting thereof which shall be held within 90 days next following receipt of the report in final form by the insurer. A copy of the report shall also be furnished by the secretary of the insurer, if incorporated, or by the attorney-in-fact if a reciprocal insurer, to each member of the insurer's board of directors or board of governors (if a reciprocal insurer), and the certificate of the secretary or attorney-in-fact that a copy of the examination report has been so furnished shall be deemed to constitute knowledge of the contents of the report by each such member.

(f) The report when so filed in the department shall be admissible in evidence in accordance with rules of the superior court, in any action or proceeding brought by the commissioner against the person examined, or against its officers, employees or agents. In any such action or proceeding, the commissioner or his examiners may, however, at any time testify and offer proper evidence as to information secured or matters discovered during the course of an examination, whether or not a written report of the examination has been either made, furnished, or filed in the department.

VI. All reports pursuant to this section shall be absolutely privileged and although filed in the department provided in RSA 400-A:37, V shall nevertheless not be for public inspection except as to those portions of reports pursuant to paragraph I hereof showing the current financial condition of the domestic insurers. The comments and recommendations of the examiner shall also be deemed confidential information and shall not be available for public inspection, except as the commissioner in his discretion may deem.

VII. EXAMINATION EXPENSE. The insurer or other person examined pursuant to this section shall bear the expense of the examination. Such expense shall be limited to expenses charged pursuant to RSA 400-A:37, III(d) and a reasonable per diem allowance for compensation and expenses for state employee examiners as determined by the commissioner. As to the per diem expense allowance and compensation allowance involved in any such examination, the commissioner may give due consideration to scales and limitations recommended by the National Association of Insurance Commissioners and outlined in the examination manual sponsored by that association. Provided, however, that if upon examination of any person specified in RSA 400-A:37, II(a) the commissioner shall determine that such person is not in violation of the provisions of Title XXXVII or applicable regulations, the expense of the examination shall be borne by the department.

VIII. STATE EMPLOYEE EXAMINERS. Notwithstanding any other provision of law, the insurer or other person liable for the travel expense of an examination pursuant to RSA 400-A:37, VII shall make such payment either directly to the state employee examiner conducting the examination, whether or not such individual is in the classified system, or to the state of New Hampshire, as may be directed by the commissioner. The commissioner may direct that the travel expense allowance be paid directly to the individual conducting the examination. The compensation allowance charged for work by state employee examiners shall be paid directly to the state. The amounts paid directly to individuals conducting the examination pursuant to this paragraph may be in excess of any amounts that may be appropriated for such purposes.

IX. IMMUNITY FROM LIABILITY.

(a) No cause of action shall arise nor shall any liability be imposed against the commissioner, the

commissioner's authorized representatives, or an examiner appointed by the commissioner for any statements made or conduct performed in good faith while carrying out the provisions of this chapter.

(b) No cause of action shall arise, nor shall any liability be imposed against any person for the act of communicating or delivering information or data to the commissioner or the commissioner's authorized representative, or examiner pursuant to an examination made under this chapter, if the act of communication or delivery was performed in good faith and without fraudulent intent or the intent to deceive.

(c) This paragraph shall not abrogate or modify in any way common law or statutory privilege or immunity heretofore enjoyed by any person identified in subparagraph (a).

(d) A person identified in subparagraph (a) shall be entitled to an award of attorney's fees and costs if he or she is the prevailing party in a civil cause of action for libel, slander or any other relevant tort arising out of activities in carrying out the provisions of this chapter and the party bringing the action was not substantially justified in doing so. For the purposes of this paragraph, a proceeding is ""substantially justified" if it had a reasonable basis in law or fact at the time that it was initiated.

Source. 1971, 244:1. 1979, 40:1. 1983, 371:1. 1992, 288:4 to 6. 1993, 254:1. 2000, 166:2. 2004, 155:1-4, eff. Jan. 1, 2005. 2007, 255:6, 7, eff. Jan. 1, 2008.



1 of 1 DOCUMENT

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TITLE XXXVII. INSURANCE
CHAPTER 400-A. INSURANCE DEPARTMENT

RSA 400-A:37 (1995)

400-A:37. Examinations

I. The commissioner or any of his examiners may conduct an examination of any company as often as the commissioner deems appropriate but shall at a minimum, conduct an examination of every insurer licensed in this state at least once every 5 years. In scheduling and determining the nature, scope and frequency of the examinations, the commissioner shall consider the results of financial statement analyses and ratios, changes in management or ownership, actuarial opinions, reports of independent Certified Public Accountants and other criteria as set forth in the Examiners' Handbook in effect and adopted by the National Association of Insurance Commissioners.

(a) Except as otherwise expressly provided, the commissioner shall examine each domestic insurer at least once every 5 years, and he shall annually examine, value, or cause to be valued the reserve liabilities, including loss adjustment expense reserves, of each domestic insurer. For the purpose of making the annual valuation of the reserve liabilities for all outstanding life insurance policies and annuity and pure endowment contracts of domestic insurance companies, the commissioner may employ a competent actuary who shall make such valuation of a company's contractual obligations and the company's compliance with the law.

(b) For purposes of completing an examination of any company under this title, the commissioner may examine or investigate any person, or the business of any person, in so far as such examination or investigation is, in the sole discretion of the commissioner, necessary or material to the examination of the company.

(c) In lieu of an examination of any foreign or alien insurer licensed in this state, the commissioner may accept an examination report on the company as prepared by the insurance department for the company's state of domicile or port-of-entry state until January 1, 1994. Thereafter, such reports may only be accepted if:

(1) The insurance department was at the time of the examination accredited under the National Association of Insurance Commissioners' Financial Regulation Standards and Accreditation Program; or

(2) The examination is performed under the supervision of an accredited insurance department or with the participation of one or more examiners who are employed by such an accredited state insurance department and who, after a review of the examination work papers and report, state under oath that the examination was performed in a manner consistent with the standards and procedures required by their insurance department.

II. For the purpose of ascertaining compliance with law or relationships and transactions between any person and any insurer or proposed insurer, and in circumstances where the commissioner has reasonable grounds to believe there is noncompliance with or violation of law, regulation, or order, he may, as often and to the extent he deems advisable, examine the accounts, records, documents, and transactions pertaining to or affecting the insurance affairs or proposed insurance affairs and transactions of:

(a) Any insurance agent, broker, general agent, surplus line licensee, adjuster, consultant, insurer representative, or any person holding himself out as any of the foregoing. (Provided, however, that if upon examination of any person specified in this paragraph the commissioner shall determine that such person is not in violation of the provisions of Title XXXVII or applicable regulations, the expense of the examination shall be borne by the insurance department.)

(b) Any person having a contract under which he enjoys by terms or in fact the exclusive or dominant right to manage or control the insurer.

(c) Any person in this state engaged in, or proposing to be engaged in this state in, or holding himself out in this state as so engaging or proposing, or in this state assisting in, the promotion, formation, or financing of an insurer or insurance holding corporation, or corporation or other group to finance an insurer or the production of its business.

(d) Any rating bureau or organization.

(e) Any licensee or other person subject to this title.

(f) Or if adequate information cannot be obtained, any insurance holding company; or person holding the shares of voting stock or policyholder proxies of an insurer as voting trustee or otherwise, for the purpose of controlling the management thereof.

III. CONDUCT OF EXAMINATION.

(a) Upon determining that an examination should be conducted, the 400-A:37 commissioner or the commissioner's designee shall issue an examination warrant appointing one or more examiners to perform the examination and instructing them as to the scope of the examination. In conducting the examination, the examiner shall observe those guidelines and procedures set forth in the Examiners' Handbook adopted by the National Association of Insurance Commissioners. The commissioner may also employ such other guidelines or procedures as the commissioner may deem appropriate.

(b) Every company or person from whom information is sought, its officers, directors and agents must provide to the examiners timely, convenient and free access at all reasonable hours at its offices to all books, records, accounts, papers, documents and any or all computer or other recordings relating to the property, assets, business and affairs of the company being examined. The officers, directors, employees and agents of the company or person must facilitate the examination and aid in the examination so far as it is in their power to do so. The refusal of any company, by its officers, directors, employees or agents, to submit to examination or to comply with any reasonable written request of the examiners shall be grounds for suspension or refusal of, or nonrenewal of any license or authority held by the company to engage in an insurance or other business subject to the commissioner's jurisdiction.

(c) The commissioner or any of his examiners shall have the power to issue subpoenas, to administer oaths and to examine under oath any person as to any matter pertinent to the examination. Upon the failure or refusal of any person to obey a subpoena, the commissioner may petition a court of competent jurisdiction, and upon proper showing, the court may enter an order compelling the witness to appear and testify or produce documentary evidence. Failure to obey the court order shall be punishable as contempt of court.

(d) When making an examination under this title, the commissioner may retain attorneys, appraisers, independent actuaries, independent certified public accountants or other professionals and specialists as examiners, the cost of which

shall be borne by the company which is the subject of the examination.

(e) Nothing contained in this title shall be construed to limit the commissioner's authority to terminate or suspend any examination in order to pursue other legal or regulatory action pursuant to the insurance laws of this state. Findings of fact and conclusions made pursuant to any examination shall be prima facie evidence in any legal or regulatory action.

(f) Nothing contained in this title shall be construed to limit the commissioner's authority to use and, if appropriate, to make public any final or preliminary examination report, any examiner or company workpapers or other documents, or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action which the commissioner may, in his discretion, deem appropriate.

(g) For the purposes of this section "person" means an individual, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization, and any similar entity or any combination of such entities acting in concert.

IV. (a) No later than 60 days following completion of the examination, the examiner in charge shall file with the department a verified written report of examination under oath. Upon receipt of the verified report, the department shall transmit the report to the company examined, together with a notice which shall afford the company examined not more than 30 days to make a written submission or rebuttal with respect to any matters contained in the examination report.

(b) Within 30 days of the period allowed for the receipt of written submissions or rebuttals, the commissioner shall fully consider and review the report, together with any written submissions or rebuttals, and any relevant portions of the examiner's workpapers and enter an order:

(1) Adopting the examination report as filed or with modification or corrections. If the examination report reveals that the company is operating in violation of any law, regulation or prior order of the commissioner, the commissioner may order the company to take any action the commissioner considers necessary and appropriate to cure such violation; or

(2) Rejecting the examination report with directions to the examiners to reopen the examination for purposes of obtaining additional data, documentation or information, and refiling as provided in subparagraph (a); or

(3) Calling for an investigatory hearing with no less than 20 days notice to the company for purposes of obtaining additional documentation, data, information and testimony.

(c)(1) Upon the adoption of the examination report, the commissioner shall continue to hold the content of the examination report as private and confidential information for a period of 20 days, except to the extent provided in subparagraph (a). Thereafter, the commissioner may open the report for public inspection so long as no court of competent jurisdiction has stayed its publication.

(2) Nothing 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 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.

(3) In the event the commissioner determines that regulatory action is appropriate as a result of any examination, he may initiate any proceedings or actions as provided by law.

(d) All 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, except to the extent provided in subparagraph (c). Access may also be granted to the National Association of Insurance Commissioners. Such parties shall agree in writing prior to receiving the information to provide to it the same confidential treatment as required by this section, unless the prior written consent of the company to which it pertains has been obtained.

V. Exam reports; distribution; procedure.

(a) The commissioner shall deliver a copy of the examination report to the person examined, together with a notice affording such person 20 days or such additional reasonable period as the commissioner for good cause may allow, within which to review the report and recommend changes therein.

(b) If so requested by the person examined, within the period allowed under RSA 400-A:37, V (a), or if deemed advisable by the commissioner without such request, the commissioner shall hold a closed hearing relative to the report and shall not file the report in the department until after such closed hearing and his order thereon; except, that the commissioner may furnish a copy of the report to the governor, attorney general or treasurer of state pending final decision thereon.

(c) If no such closed hearing has been requested or held, the examination report, with such modifications, if any, thereof as the commissioner deems proper, shall be accepted by the commissioner and filed in the department upon expiration of the review period provided for in RSA 400-A:37, V (a). The report shall in any event be so accepted and filed within 6 months after final hearing thereon.

(D) The commissioner shall forward to the person examined a copy of the examination report as filed, together with any recommendations or statements relating thereto which he deems proper.

(e) If the report is of an examination of a domestic insurer, a copy of the report, or a summary thereof approved by the commissioner, when filed in the department, together with the recommendations or statements of the commissioner or his examiner, shall be presented by the insurer's chief executive officer to the insurer's board of directors or similar governing body at a meeting thereof which shall be held within 90 days next following receipt of the report in final form by the insurer. A copy of the report shall also be furnished by the secretary of the insurer, if incorporated, or by the attorney-in-fact if a reciprocal insurer, to each member of the insurer's board of directors or board of governors (if a reciprocal insurer), and the certificate of the secretary or attorney-in-fact that a copy of the examination report has been so furnished shall be deemed to constitute knowledge of the contents of the report by each such member.

(f) The report when so filed in the department shall be admissible in evidence in accordance with rules of the superior court, in any action or proceeding brought by the commissioner against the person examined, or against its officers, employees or agents. In any such action or proceeding, the commissioner or his examiners may, however, at any time testify and offer proper evidence as to information secured or matters discovered during the course of an examination, whether or not a written report of the examination has been either made, furnished, or filed in the department.

VI. All reports pursuant to this section shall be absolutely privileged and although filed in the department provided in RSA 400-A:37, V shall nevertheless not be for public inspection except as to those portions of reports pursuant to paragraph I hereof showing the current financial condition of the domestic insurers. The comments and recommendations of the examiner shall also be deemed confidential information and shall not be available for public inspection, except as the commissioner in his discretion may deem.

VII. EXAMINATION EXPENSE. The insurer or other person examined pursuant to this section shall bear the expense of the examination. Such expense shall be limited to a reasonable per diem allowance for compensation and expenses as determined by the commissioner. As to the per diem expense allowance and compensation allowance involved in any such examination, the commissioner may give due consideration to scales and limitations recommended

by the National Association of Insurance Commissioners and outlined in the examination manual sponsored by that association. Provided, however, that if upon examination of any person specified in RSA 400-A:37, II (a) the commissioner shall determine that such person is not in violation of the provisions of Title XXXVII or applicable regulations, the expense of the examination shall be borne by the department.

VIII. Notwithstanding any other provision of law, the insurer or other person liable for the travel expense of an examination pursuant to RSA 400-A:37, VII shall make such payment either directly to the individual conducting the examination, whether or not such individual is a classified state employee, or to the state of New Hampshire, as may be directed by the commissioner. The commissioner may direct that the travel expense allowance be paid directly to the individual conducting the examination. The compensation allowance shall be paid directly to the state. The amounts paid directly to individuals conducting the examination pursuant to this paragraph may be in excess of any amounts that may be appropriated for such purposes.

HISTORY: SOURCE. 1971, 244:1. 1979, 40:1. 1983, 371:1. 1992, 288:4-6. 1993, 254:1, eff. Jan. 1, 1994.

NOTES: AMENDMENTS--1993. Paragraph III(g): Added.

--1992. Amended pars. I, III and IV generally.

--1983. Paragraph I: Amended generally.

--1979. Paragraph VIII: Added.

CROSS REFERENCES

Administrative inspection warrants, see RSA 595-B.

Director of examinations, see RSA 400-A:6.

Obstructing government administration, see RSA 642:1.

Sentences, see RSA 651.

ANNOTATIONS

1. CITED

Cited in Appeal of Metropolitan Property and Liability Insurance Co. (1980) 120 NH 733, 422 A2d 1037; In re Beacon Health, Inc., 105 B.R. 178 (Bkrtcy. D.N.H. 1989).

TITLE XXXVII INSURANCE

CHAPTER 401-B INSURANCE HOLDING COMPANIES

Section 401-B:7

401-B:7 Confidential Treatment. – All information, documents and copies thereof obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to RSA 401-B:6 and all information reported pursuant to RSA 401-B:4 shall be given confidential treatment and shall not be subject to subpoena and shall not be made public by the commissioner or any other person, except to insurance departments of other states, without the prior written consent of the insurer to which it pertains unless the commissioner, after giving the insurer and its affiliates who would be affected thereby, notice and opportunity to be heard, determines that the interests of policyholders, shareholders or the public will be served by the publication thereof, in which event he may publish all or any part thereof in such manner as he may deem appropriate.

Source. 1971, 176:1, eff. Aug. 7, 1971.

TITLE XXXVII INSURANCE

CHAPTER 404-F RISK-BASED CAPITAL (RBC) FOR INSURERS

Section 404-F:8

404-F:8 Confidentiality; Prohibition on Announcements; Prohibition on Use in Ratemaking. –

I. All RBC reports, to the extent the information therein is not required to be set forth in a publicly available annual statement schedule, and RBC plans, including the results or report of any examination or analysis of an insurer performed pursuant hereto and any corrective order issued by the commissioner pursuant to examination or analysis, with respect to any domestic insurer or foreign insurer which are filed with the commissioner constitute information that might be damaging to the insurer if made available to its competitors, and therefore shall be kept confidential by the commissioner. This information shall not be made public or be subject to subpoena, other than by the commissioner and then only for the purpose of enforcement actions taken by the commissioner pursuant to this chapter or any other provision of the insurance laws of this state.

II. It is the judgment of the legislature that the comparison of an insurer's total adjusted capital to any of its RBC levels is a regulatory tool which may indicate the need for possible corrective action with respect to the insurer, and is not intended as a means to rank insurers generally. Therefore, except as otherwise required under the provisions of this chapter, the making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine, or other publication, or in the form of a notice, circular, pamphlet, letter, or poster, or over any radio or television station, or in any other way, an advertisement, announcement, or statement containing an assertion, representation, or statement with regard to the RBC levels of any insurer, or of any component derived in the calculation, by any insurer, agent, broker, or other person engaged in any manner in the insurance business would be misleading and is therefore prohibited; provided, however, that if any materially false statement with respect to the comparison regarding an insurer's total adjusted capital to its RBC levels, or any of them, or an inappropriate comparison of any other amount to the insurer's RBC levels is published in any written publication and the insurer is able to demonstrate to the commissioner with substantial proof the falsity of such statement, or the inappropriateness, as the case may be, then the insurer may publish an announcement in a written publication if the sole purpose of the announcement is to rebut the materially false statement.

III. It is the further judgment of the legislature that the RBC instructions, RBC reports, adjusted RBC reports, RBC plans and revised RBC plans are intended solely for use by the commissioner in monitoring the solvency of insurers and the need for possible corrective action with respect to insurers and shall not be used by the commissioner for ratemaking nor considered or introduced as evidence in any rate proceeding nor used by the commissioner to calculate or derive any elements of an appropriate premium level or rate of return for any line of insurance which an insurer or any affiliate is authorized to write.

Source. 1995, 113:1, eff. July 15, 1995.