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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Docket No. 03-E-0106

2009 NOV -9 P 2:57

In the Matter of the Liquidation of  
The Home Insurance Company

NH SUPERIOR COURT  
MERRIMACK COUNTY  
CONCORD, NH

OPPOSITION TO COMMISSIONER'S AND LIQUIDATOR'S MOTION FOR  
ORDER GOVERNING CONFIDENTIALITY OF REGULATORY DOCUMENTS

I. INTRODUCTION AND FACTUAL BACKGROUND

Roger Sevigny, Commissioner of the New Hampshire Insurance Department ("Department") and the Liquidator of The Home Insurance Company ("Home") filed a Motion for Order Governing Confidentiality of Regulatory Documents ("Motion") on or about October 30, 2009. The motion was filed in an effort to preclude twenty-nine (29) Home policyholders ("Policyholder Plaintiffs") from obtaining certain discovery from Home and its former third-party administrator, Risk Enterprise Management ("REM").<sup>1</sup> The sweeping relief sought by Home is overbroad, vague, premature, and as addressed more fully below, bears little relation to the *single* category of documents from the Policyholder Plaintiffs' document subpoena to Home that is the subject of the dispute concerning statutory privilege.

By way of background, the Policyholder Plaintiffs have filed four (4) separate but

<sup>1</sup> The Policyholder Plaintiffs are comprised of the following Home Policyholders: Fuller-Austin Asbestos Settlement Trust; Fuller-Austin Insulation Co.; Kraft Foods Global, Inc.; National Dairy Products Corporation; Kraftco Corporation; Kraft, Inc., Including Humko, Inc.; General Foods Corporation, Including Atlantic Gelatin Co.; Nabisco Brands Co.; Publicard, Inc.; Somerset Oil Inc.; Southland Oil Company; Ohio Edison Company; Pennsylvania Power Company; The Cleveland Electric Illuminating Company; Toledo Edison Company; ITT Industries, Inc.; Swan Transportation Company; Swan Asbestos & Silica Settlement Trust; Monongahela Power Company; West Penn Power Company; The Potomac Edison Company; Rohm And Haas Company; Deere & Company; Western Asbestos Settlement Trust; Western Mac Arthur Company; Mac Arthur Company; Western Asbestos Company; PepsiAmericas, Inc.; Southern Natural Gas Company; El Paso Production Company; Petro-Tex Chemical Corporation Dissolution, Distribution, Liquidating and Recovery Trust; Tennessee Gas Pipeline Company; and Pneumo Abex LLC.

related lawsuits against Zurich Insurance Company, Zurich American Insurance Company, Zurich American Insurance Company of Illinois, American Guarantee and Liability Co., Steadfast Insurance Company, American Zurich Insurance Company, and Orange Stone Reinsurance Company (collectively, “Zurich”), currently pending in the Superior Court of the State of California, County of San Francisco (“Zurich Litigation”).<sup>2</sup> The complaints in the Zurich Litigation allege that Home has failed and refused to pay *billions* of dollars of covered environmental, asbestos, silica and other liabilities incurred by the Policyholder Plaintiffs. The Zurich Litigation complaints further allege that Zurich’s extraction and secretion of Home’s assets through a series of transactions and agreements spanning several years left Home undercapitalized, with insufficient assets to pay the costs of defense and indemnity incurred by and owed to its policyholders. The Policyholder Plaintiffs allege, among other things, that Zurich is the alter ego of Home, and that Zurich should be held liable for insurance policies issued by Home, because the assets of the Home were fraudulently transferred to Zurich through a series of ongoing transactions and transfers commencing with and continuing after Zurich’s acquisition of Home approved by the New Hampshire Insurance Department in 1995. The issue of whether Home assets were transferred to Zurich is one of the key issues to be decided in the Phase One trial in the Zurich Litigation, which is expected to be held in San Francisco in 2010. *See* Affidavit of Dawn S. Pittman (“Pittman Aff.”) ¶3, Ex. 1 (“Stipulation and Order Bifurcating Certain Issues for Court Trial”).

To develop their case, the Policyholder Plaintiffs have sought discovery regarding

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<sup>2</sup> The suits are captioned *Fuller-Austin Settlement Trust v. Zurich American Insurance Company*, Case No. CGC-04-431719, *Western Asbestos Settlement Trust v. Zurich American Insurance Company*, Case No. CGC-04-436181; *PespiAmericas, Inc. v. Zurich American Insurance Company*, Case No. CGC-05-442140; *Pneumo Abex LLC v. Zurich American Insurance Company*, Case No. CGC-05-442745.

the transactions between Home and Zurich, primarily from Zurich, but where required, limited requests have been made to third parties, including Home. The Policyholder Plaintiffs have used their best efforts to minimize the discovery burden on Home. In 2006, the Policyholder Plaintiffs and Zurich jointly sought discovery from Home; this effort resulted in a stipulation by which Home agreed to produce 19 categories of documents. The Home's rolling production of documents was completed with the production of a privilege log in February 2008. Motion at ¶¶13-15. In connection with the preparation of the Phase One Trial issues in the Zurich Litigation, and only after making a good faith effort to create a joint request with Zurich, *see* Pittman Aff. ¶4, the Policyholder Plaintiffs requested 33 additional categories of documents from the Home in August 2009. *See* Feldvebel Aff., Ex. 14. Through meet-and-confer efforts, the Policyholder Plaintiffs and the Home reached agreement on most of these document requests. *See* Pittman Aff. ¶¶5-6, Ex. 2-3. In fact, only Request 19 of the Policyholder Plaintiffs' pending request to Home is at issue in this motion. Motion at ¶17.

As discussed in Section II, below, the statutory privilege asserted by Home should not apply categorically to Request 19 of the Policyholder Plaintiffs' document request. However, even assuming New Hampshire's statutory privileges do protect the documents sought by Request 19, the relief sought by the Motion — an “Order determining that *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 to hold them confidential” — is vague, overly broad, and impermissibly purports to direct parties in the Zurich Litigation not to seek undefined “regulatory documents” from any source whether within or without the

jurisdiction of this Court. Motion at 17 (emphasis added). Accordingly, any order by the Court should be limited to an order on the propriety of Request 19 vis-à-vis the Home.

Further, the production of documents by REM is not properly before this Court. There is no pending motion (before this Court or elsewhere) regarding REM's compliance or lack thereof pursuant to the California subpoena. The prospective relief sought by Home in this Court, regarding a California subpoena issued to another entity in connection with the Zurich Litigation pending in California, is inappropriate and premature. Any issues of statutory privilege as it applies to REM's documents are best addressed on a document-by-document basis in California, if and when any such motion to compel further production by REM is filed.

**II. THE STATUTORY PRIVILEGES SHOULD NOT APPLY TO THE POLICYHOLDER PLAINTIFFS' DOCUMENT REQUEST 19 TO THE HOME**

The Policyholder Plaintiffs' Request No. 19 seeks: "All correspondence, including reports, authored by or directed to David Nichols concerning Home." *See* Feldvebel Aff., Ex. 14. As the Commissioner notes, Mr. Nichols was the Department's Representative under the Consent Order and the Order of Supervision. Motion at 17. The Consent Order and Order of Supervision cite to and rely upon New Hampshire statutory provisions that set forth the "statutory privileges" claimed by Home in connection with Request No. 19. Feldvebel Aff., Ex. 2 (citing RSA 401-A:37), Ex. 3 at ¶9 (citing RSA 400-A:37 VI, 401-B:7, and 404-F:8 I). However, the privilege created by these statutes does not create the blanket prohibition asserted by the Commissioner.

For instance, RSA 400-A:37 IV-a. (a), the broadest statutory statement of confidentiality, only applies to documents created, produced, obtained, or disclosed "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 condition of a company.” RSA 400-A37 IV-a. (a). But, pursuant to the Consent Order, David Nichols was appointed to monitor “the day-to-day business and operations of the Home.” Feldvebel Aff., Ex. 2 at ¶2. It is by no means clear that that every document that came across Mr. Nichols’s desk as he oversaw the day-to-day business and operations of the Home were seen by him in the course of an examination or analysis of Home’s financial condition. Yet the Commissioner’s effort categorically to preclude the Policyholder Plaintiffs from seeking documents responsive to Request 19 treats all documents of Mr. Nichols’s correspondence as such, without a showing as to why day-to-day operational documents of Home fall within the statutory provisions.

The statutory privileges at issue here clearly contemplate situations in which the Commissioner, as regulator, comes into possession of a regulated insurer’s documents, the disclosure of which could put an insurer at a competitive disadvantage. These privileges are not intended to preclude policyholders from obtaining information after an insurer becomes insolvent and liquidates, and they do not contemplate the situation here, where the Commissioner essentially *became* Home.<sup>3</sup> Here, the Policyholder Plaintiffs directed their requests to the Home Insurance Company in Liquidation. That Home’s documents are now technically in the possession of the Commissioner in his capacity as Liquidator does not provide them with any greater protection than they would have otherwise. Indeed, even if the requests are seen as being made directly to the Commissioner, he has the discretion to disclose such documents to policyholders. *Id.*

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<sup>3</sup> See also RSA 401-B:7 (protecting documents disclosed by an insurance holding company during the course of an examination except with “the written consent of the insurer” or where the Commissioner determines “the interests of policyholders....will be served by the publication thereof”); RSA 404-F:8 I

Further, given that Home is in liquidation, has no employees, and no longer underwrites policies, any risk of “competitive advantage” through disclosure of such materials ceased long ago.

The only alleged “harm” raised in the Home motion papers is that the production of documents responsive to Request No. 19 may somehow provide the Policyholder Plaintiffs with information that could be used in the pursuit of the proofs of claim submitted to the Home Insurance Company in the liquidation proceedings. Motion ¶37. However, the Commissioner offers no evidence as to how disclosure of these materials would impact or “harm” the Home. All that is offered is a blank “Prior Approval Request” form and a representation that approximately 1500 such prior approval requests were made to the New Hampshire Insurance Department. Feldvebel Aff., ¶7, Ex. 5. It is unclear precisely how Home believes disclosure of such materials would cause any harm, and how, if at all, the statutory privileges were meant to preclude a policyholder from obtaining such information. If, as it appears, these prior request forms are at the heart of the Home’s attempts to avoid production of materials responsive to Request No. 19, more reasonable solutions than an outright bar of such discovery are available. For example, a protective order was previously agreed to in connection with the prior document productions, and these documents could be covered by the same or a similar protective order. Alternatively, Home could simply redact the information it believes falls within the statutory privilege. This would allow Plaintiffs to obtain the necessary discovery and a basis to evaluate any claims of privilege, while protecting the Home’s asserted interest in maintaining the confidentiality of such information.

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(protects risk-based capital reports and plans “that might be damaging to the insurer if made available to its competitors”).

Accordingly, Home should be required to produce all responsive non-privileged documents, and to the extent Home determines that certain responsive documents are privileged, they may redact the documents and/or produce a privilege log, and such issues can be addressed on a document-by-document basis. The New Hampshire statutory privileges simply do not comprehensively bar Request 19.

**III. THE RELIEF REQUESTED BY THE COMMISSIONER'S AND LIQUIDATOR'S MOTION IS VAGUE AND OVERLY BROAD**

Even if the Court determines that the Policyholder Plaintiffs' Request 19 is improper because it, as a category, seeks documents protected by New Hampshire's statutory privileges, the request sought by the Motion is unjustifiably broad and ambiguous. The Commissioner and Liquidator seek an "Order determining that *regulatory documents*, including prior approval requests, are confidential under the New Hampshire statutes and directing the Policyholder Plaintiffs and Zurich not to seek such documents and directing the Liquidator to hold them confidential." Motion at 17 (emphasis added). Nowhere does Home explain or define "regulatory documents." Thus, if such an order is issued, it is expected and feared that the Commissioner would seek to use such an order as both a sword and shield to argue that any document that came across the desk of a representative of the Commissioner, regardless whether the representative was acting as a regulator examining the Home or analyzing its financial condition or whether the representative was simply overseeing the day-to-day business operations of the Home. It is unclear whether documents regarding the transactions for which approval was requested (as opposed to simply the prior approval request form) would be considered a "regulatory document" under the order requested by the

Commissioner.<sup>4</sup> The fact and character of transactions between Home and Zurich is, of course, at the very heart of the Policyholder Plaintiffs' case against Zurich.

Accordingly, the Court should not grant the Commissioner the broad, amorphous and ambiguous relief requested.

Finally, to the extent the Commissioner seeks an order directing the Policyholder Plaintiffs "not to seek" regulatory documents, the Motion should be denied. The Commissioner cites no authority that would allow this Court prospectively to order parties in California litigation to refrain from seeking documents, wherever they may be located, that may be relevant to litigation pending in the California Courts. Therefore, any order issued by this Court pursuant to the Motion should not direct, impede, or enjoin the Policyholder Plaintiffs to take or refrain from taking any action in connection with the Zurich Litigation pending in California.

**IV. DOCUMENTS HELD BY RISK ENTERPRISE MANAGEMENT THAT ARE THE SUBJECT OF A CALIFORNIA SUBPOENA ARE NOT PROPERLY BEFORE THIS COURT**

Finally, through this Motion, the Commissioner purports to request the Court to order REM not to produce documents pursuant to a California subpoena served by the Policyholder Plaintiffs in 2007. *See* Motion at ¶16; *See* Pittman Aff., Ex. 4. REM asserted the statutory confidentiality as a basis for withholding certain documents. *See*

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<sup>4</sup> The order sought by Home seems to ignore the principle that the fact that a document is privileged as a protected communication—whether from a client to an attorney or from a regulated insurer to a regulator—does not mean that the underlying facts within that communication are privileged. *See, e.g., 2,022 Ranch, L.L.C. v. Super. Ct.*, 113 Cal. App. 4th 1377, 1388 (2003) (attorney-client privilege "does not protect disclosure of underlying facts which may be referenced within a qualifying communication") (internal quotes omitted). And, as the Commissioner notes, the statutory privileges at issue "here are intended to encourage open communication between an insurance company and its regulator." Motion at ¶13. In this respect, the statutory privileges are like the attorney-client privilege and the doctor-patient privileges, the purpose of which courts have noted "is not to exclude relevant evidence, but simply to facilitate activities which require confidence." *State v. Elwell*, 132 N.H. 599, 605 (1989), *superseded by statute on other*



Pittman Aff., Ex. 5. There is no pending motion regarding the documents withheld on grounds of statutory privilege. If, however, the Policyholder Plaintiffs choose to pursue a motion to compel against REM, the issue whether the documents are protected by the New Hampshire confidentiality statutes will be determined on a document-by-document basis by the trial court in the Zurich Litigation. Accordingly, the Commissioner's statements about New Hampshire's interest in interpreting its own laws notwithstanding, the issue whether REM should produce in California documents in its possession pursuant to a California motion to compel simply is not properly before this Court and no prospective ruling should issue in that regard.

V. **CONCLUSION**

For the reasons discussed above, the Policyholder Plaintiffs request that the Court deny in its entirety the Commissioner's and Liquidator's Motion for Order Governing Confidentiality of Regulatory Documents. In the alternative, the Policyholder Plaintiffs request the Court issue a limited order allowing the Home in Liquidation to redact or withhold documents responsive to Request 19 of the Policyholder Plaintiffs' August 2009 document request, and to produce a privilege log identifying such documents, and denying the motion in all other respects.

Respectfully submitted,

FULLER-AUSTIN ASBESTOS  
SETTLEMENT TRUST; FULLER-  
AUSTIN INSULATION CO.; KRAFT  
FOODS GLOBAL, INC.; NATIONAL  
DAIRY PRODUCTS CORPORATION;  
KRAFTCO CORPORATION; KRAFT,  
INC., INCLUDING HUMKO, INC.;

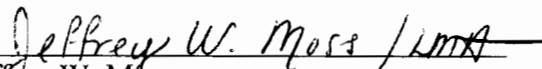
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*grounds.* Here, of course, where the regulator and the insurance company are now one and the same as a result of the company's liquidation, this concern is significantly lessened.

GENERAL FOODS CORPORATION,  
INCLUDING ATLANTIC GELATIN CO.;  
NABISCO BRANDS CO.; PUBLICARD,  
INC.; SOMERSET OIL INC.;  
SOUTHLAND OIL COMPANY; OHIO  
EDISON COMPANY; PENNSYLVANIA  
POWER COMPANY; THE CLEVELAND  
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TRUST; MONONGAHELA POWER  
COMPANY; WEST PENN POWER  
COMPANY; THE POTOMAC EDISON  
COMPANY; ROHM AND HAAS  
COMPANY; DEERE & COMPANY;  
WESTERN ASBESTOS SETTLEMENT  
TRUST; WESTERN MAC ARTHUR  
COMPANY; MAC ARTHUR COMPANY;  
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PRODUCTION COMPANY; PETRO-TEX  
CHEMICAL CORPORATION  
DISSOLUTION, DISTRIBUTION,  
LIQUIDATING AND RECOVERY  
TRUST; TENNESSEE GAS PIPELINE  
COMPANY; AND PNEUMO ABEX LLC  
(collectively, "Policyholder Plaintiffs"),

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November 9, 2009

**Certificate of Service**

I hereby certify that a copy of the foregoing Opposition To Commissioner's And Liquidator's Motion For Order Governing Confidentiality Of Regulatory Documents and Affidavit of Dawn S. Pittman were sent, this 9th day of November, 2009, by first class mail, postage prepaid to all persons on the attached service list, including counsel for the Commissioner, Zurich, and REM.

  
Brady R. Dewar

**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**

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