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THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

MERRIMACK, SS

2009 NOV 16 P 3: 22

Docket No. 03-E-0106

NH SUPERIOR COURT
MERRIMACK COUNTY
CONCORD, NH

In the Matter of the Liquidation of
The Home Insurance Company

LIMITED OBJECTION OF THE *FULLER-AUSTIN* DEFENDANTS TO
COMMISSIONER'S AND LIQUIDATOR'S MOTION FOR ORDER GOVERNING
CONFIDENTIALITY OF REGULATORY DOCUMENTS

Zurich Insurance Company, Zurich American Insurance Company, Zurich-American Insurance Company of Illinois, American Guarantee & Liability Company, American Zurich Insurance Company, Steadfast Insurance Company, and Orange Stone Reinsurance (the "*Fuller Austin* Defendants") respectfully submit this limited objection to the Commissioner's and Liquidator's Motion for Order Governing Confidentiality of Regulatory Documents (the "Motion"). As explained in full below, the *Fuller-Austin* Defendants do not believe they have an active dispute with the Commissioner and Liquidator ("Liquidator") as they are seeking only some of the information on one type of document and have informed the Liquidator that the type of information he wants to protect can be redacted.

PRELIMINARY STATEMENT

In response to document subpoenas served on the Home Insurance Company in Liquidation and Risk Enterprise Management ("REM") by the parties in currently pending out-of-state litigation (the "*Fuller-Austin* cases"), the Liquidator seeks a determination from this Court that documents held by the New Hampshire Insurance Department ("NHID"), the Liquidator, and REM regarding the regulation of the Home are confidential under certain New Hampshire statutes. Several categories of documents already have been withheld by the

Liquidator on the basis of such “statutory confidentiality.” The categories were identified on a privilege log prepared by the Liquidator and annexed to its Motion.

As far as the *Fuller-Austin* Defendants are concerned, the Motion concerns just one category of withheld documents, so-called Prior Approval Requests (“PARs”). The PARs were the mechanism by which the Home was required to seek permission from the NHID to engage in transactions above certain thresholds and between the Home and certain entities (including any company affiliated with Zurich Insurance Company). As the Liquidator’s Motion acknowledges, the *Fuller-Austin* Defendants are willing to accept redacted versions of the PARs in which putative privileged or confidential material would be removed. See Liquidator’s Motion ¶ 21. However, the Liquidator’s Motion was filed before the Liquidator and the *Fuller-Austin* Defendants could complete discussion of the compromise offer. To be clear, the *Fuller-Austin* Defendants seek redacted versions of the PARs that would reveal only the following, limited, non-confidential information: (1) the date of the request; (2) the author; (3) the recipient; (4) a subject matter description sufficient to identify the particular transaction for which approval was sought; and (5) the result – whether the request was approved or not. The *Fuller-Austin* Defendants do not seek any of the reasoning, financial data, analysis, supporting information, or other arguably confidential material contained in the PARs.

The limited information sought by the *Fuller-Austin* Defendants is not confidential material. Since the *Fuller-Austin* Defendants are not seeking any arguably confidential information contained in the PARs, and courts have the inherent power to authorize the production of discoverable documents in redacted form, the Court should deny the Liquidator’s Motion seeking statutory confidentiality of the PARs in their entirety. And if the Liquidator does

not agree to produce the PARs in the redacted form outlined above, the Court should order the Liquidator to do so.¹

Finally, to the extent that the Liquidator seeks forms of relief other than a ruling as to the discoverability of the documents specifically identified on the Liquidator's privilege log, the Motion is premature. A ruling by this Court on such matters would constitute an improper advisory opinion on matters that are not ripe for adjudication.

FACTUAL BACKGROUND

The *Fuller-Austin* cases are four coordinated cases filed in a California state court beginning in May 2004 by former policyholders of the Home under insurance policies issued by the Home in the 1960s, 1970s and 1980s. The genesis of the lawsuit is the 1995 transaction through which Home Holdings, Inc. (the Home's then-parent) was recapitalized (the "Recapitalization"). The *Fuller-Austin* Plaintiffs contend that the Recapitalization, which was reviewed and approved by the NHID under New Hampshire's enactment of the Model Holding Company Act and the Insurers Rehabilitation and Liquidation Act, RSA 401-B:3, constituted a fraudulent transfer, and that the fraudulent transfers from the Home to the *Fuller-Austin* Defendants continued to occur while the Home was in run-off under the NHID's supervision for eight years, until the Home was placed into liquidation by order of this Court in 2003. The former policyholders of the Home then assert that by virtue of the *Fuller-Austin* Defendants' participation in the Recapitalization, the *Fuller-Austin* Defendants should be liable for all of the

¹ For purposes of ruling on the Liquidator's motion, this Court need not decide whether any other information contained in the PARs is confidential under the cited statutes. Moreover, because the *Fuller-Austin* Defendants are not challenging the Liquidator's assertion of confidentiality with respect to any other category of documents identified on the privilege log, this opposition does not take a position on the validity of the Liquidator's assertions of confidentiality with respect to those categories, or whether the Liquidator's interpretation of the cited statutory provisions is correct. The *Fuller-Austin* Defendants reserve the right to present their arguments concerning the scope of the relevant statutory provisions when and if those issues are relevant to a dispute between the *Fuller-Austin* Defendants and the Liquidator.

Home's policy obligations. In the process, the *Fuller-Austin* Plaintiffs claim for themselves, and themselves alone, the right to recover assets of the Home they say were fraudulently transferred away from the Home, notwithstanding the NHID's liquidation and asset-marshalling powers.

As described in the NHID's Findings & Final Order approving the Recapitalization ("Approval Order"), the NHID closely scrutinized, negotiated and approved the Recapitalization in 1995. Under the Approval Order, a June 1995 Consent Order that called for the placement of an NHID representative at The Home's offices to monitor the day-to-day operations of the Home and to oversee its run-off, and a March 1997 Supervision Order with respect to the Home which further strengthened the NHID's oversight over the affairs of the Home, the NHID carefully monitored the Home in run-off for the next eight years, until taking full control of the Home in March 2003.

In June 1995, after a several month review process and two days of public hearings, the NHID issued its Approval Order, finding that the Recapitalization was "fair and reasonable to the policyholders" of the Home. (*See* Affidavit of Alexander K. Feldvebel submitted with the Liquidator's Motion ("Feldvebel Aff.") ¶ 2, Ex. 1.) In connection with that order, the NHID also issued the Consent Order. (*Id.*) The Order of Supervision issued by the Commissioner in March 1997 subjected all transactions between the Home and entities affiliated with Zurich Insurance Company to the NHID's prior approval. (*Id.* ¶ 4.) The PARs were the mechanism by which the Home (through REM) sought prior approval for the transactions from the NHID, and during the next six years, over 1,500 PARs were submitted to the NHID. (*Id.* ¶ 7.) On March 5, 2003, this Court issued a Rehabilitation Order pursuant to which the NHID took control over the Home and its assets. On May 8, 2003, the Commissioner petitioned for The Home's Liquidation. This Court granted the petition, issuing the Liquidation Order on June 13, 2003.

A detailed description of the discovery involving the Home, REM, and the Liquidator is set forth in the Feldvebel Affidavit submitted with the Liquidator's Motion. (*Id.* ¶¶ 12-20.) The importance of such discovery to the parties in the *Fuller-Austin* cases and to the Liquidator is understandable, given the nature of the claims asserted by the *Fuller-Austin* Plaintiffs, the Liquidator's current status as titleholder to all of the Home's assets and rights of action, and the long-standing and important role of the NHID in the Home's affairs since 1995.

ARGUMENT

I. The Confidentiality Provisions Of The New Hampshire Statutes Do Not Cover The Limited Discovery Sought By The *Fuller-Austin* Defendants.

The *Fuller-Austin* Defendants only seek redacted versions of the PARs that contain the following non-confidential information: (1) the date of the request; (2) the author; (3) the recipient; (4) a subject matter description sufficient to identify the particular transaction for which approval was sought; and (5) the result – whether the request was approved or not. The *Fuller-Austin* Defendants do not seek any of the NHID's reasoning, supporting information, financial analyses, or other documents or information that support or underlie the PARs. The limited information sought here does not implicate either the statutory confidentiality provisions of the New Hampshire statutes cited by the Liquidator or the confidentiality concerns identified by the Liquidator in the Motion.

The Liquidator has asserted that the PARs are protected under RSA 400-A:37, 401-B:7, and 404-F:8. (*See* Motion ¶¶ 20, 36-37.) These statutes apply to specific documents created under specific circumstances, none of which are implicated by the PARs, especially after any arguably confidential information has been redacted, as proposed by the *Fuller-Austin* Defendants. For example, RSA 400-A:37 sets forth detailed procedures concerning examination and confidentiality provisions governing specific documents submitted and generated during the

course of these examinations. RSA 400-A:37, VI, makes confidential “examination reports,” which summarize the examiner’s findings upon the conclusion of the examination. Similarly, the confidentiality provisions of RSA 400-A:37, IV-a (adopted in 2004), provide confidentiality to information “ancillary” to such reports, consisting of documents “created, produced, or obtained by or disclosed to the commissioner . . . in the course of an examination under this title, or in the course of analysis by the commissioner of the financial condition or market conduct of a company.” RSA 400-A:37, IV-a(a); *see also* RSA 401-B:7 (protecting information in the course of an analysis of “the financial condition or legality of conduct of [an] insurer”); RSA 404-F:8 (protecting information submitted in connection with Risk-Based Capital (“RBC”) reports and plans).²

This Court need not determine the precise contours of these confidentiality provisions, because the *Fuller-Austin* Defendants do not request that the Liquidator release any confidential information. The redacted PARs, as requested, cannot plausibly be deemed to fall within the scope of the statutes and, as they seek no confidential information, do not raise any of the confidentiality concerns identified in the Motion. *See* Motion ¶¶ 36-37. The *Fuller-Austin* Defendants have agreed that the Liquidator can redact discussions of “the strengths and weaknesses of Home’s positions regarding a claim settlement” (Motion ¶ 37) or information that “reveal[s] Home’s strategy in approaching or resolving claims” (*id.*). If the Liquidator remains unwilling to voluntarily redact this information, the Court has the power to order redactions of otherwise discoverable documents. *See, e.g., Douglas v. Douglas*, 146 N.H. 205, 208 (2001).

² These confidentiality provisions have been enacted by the legislature and cannot be expanded by the Commissioner. *See Appeal of N. H. Dept. of Transp.*, 152 N.H. 565, 571 (2005) (“Administrative officials . . . do not possess the power to contravene a statute and cannot add to, detract from, or in any way modify statutory law.” (internal quotations and citations omitted)). Any actions by the Commissioner that purported to extend the reach of confidentiality provisions to cover additional documents would be ineffective.

Therefore, since the *Fuller-Austin* Defendants do not seek the production of confidential information, the redacted PARs should be produced.

II. To The Extent That The Liquidator Seeks Relief From This Court Regarding Documents Or Information Not Specifically Identified On Its Privilege Log, The Liquidator's Motion Is Premature.

The Liquidator has asked this Court to enter an order “determining that the regulatory documents, including prior approval requests, are confidential under the New Hampshire statutes.” As discussed above, *Fuller-Austin* Defendants do not believe that the PARs, redacted if necessary, are covered by the New Hampshire statutes. To the extent that the Liquidator's Motion purports to pertain to “regulatory” documents that are not identified on the Liquidator's privilege log (*see* Feldvebel Aff. Ex. 13) prepared in response to *Fuller-Austin* Defendants' document subpoena (the “Subpoena”), the Motion is overbroad and presents issues that are not ripe for adjudication. A determination by the Court regarding discovery issues that are not specifically identified on the Liquidator's privilege log and, thus, unripe would be an impermissible advisory opinion.

Any issue presented to a court for adjudication must have an adequately developed factual record, such as exists for the PARs, to be ripe for adjudication. *See State Employees' Assoc.*, 142 N.H. 874, 878 (1998) (quoting *Dept. of Env't v. Chem. Waste*, 643 N.E.2d 331, 336 (Ind. 1994)). New Hampshire courts use a two-pronged test to determine ripeness: (1) is the issue submitted fit for judicial determination; and (2) will the parties incur hardship if the issue goes undecided? *State Employees' Assoc. of N.H.*, 142 N.H. at 878. An issue is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *State of New Hampshire (People v. Fischer)*, 152 N.H. 205, 210 (2005) (quoting *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989)). Parties experience hardship if “the contested action imposes an impact on the parties sufficiently

direct and immediate as to render the issue appropriate for judicial review at this stage.” *State of New Hampshire (People v. Fischer)*, 152 N.H. at 210 (internal quotations omitted). Parties cannot demonstrate hardship when they seek grants of relief premised upon speculative factual scenarios. *Id.*

The *Fuller-Austin* Defendants have sought production of specific documents – the PARs – from the Liquidator. In response, the Liquidator has withheld these documents as privileged, provided *Fuller-Austin* Defendants with a privilege log, and brought this Motion. The Court has been provided with a full factual record regarding the PARs (including *Fuller-Austin* Defendants’ Subpoena, the Liquidator’s privilege log identifying the PARs as privileged, and now briefing as to why these documents qualify or fail to qualify for confidentiality), providing a sufficient basis for a ruling by the Court. No other “regulatory” documents as they are generally referred to in the Liquidator’s Motion have a similarly developed factual record.

Any order regarding issues other than the documents expressly withheld by the Liquidator and enumerated on its privilege log would fail to satisfy either prong of the ripeness test. Any potential dispute regarding documents that may be withheld at some time in the future are hypothetical. Whether any such hypothetical documents meet the requirements for statutory confidentiality is a question that requires “further factual development,” making it unfit for judicial determination at this time. *See State of New Hampshire (People v. Fischer)*, 152 N.H. at 210. Indeed, claims of privilege are not ripe for review unless the Court is provided with sufficient information to determine whether privilege applies to the specific materials withheld. *See Cacovski v. United Farm Family Mut. Ins. Co.*, 2008 WL 2456342, *3 (N.D. Ind. June 12, 2008).

The Liquidator cannot obtain an order prohibiting discovery that has not yet been requested or withheld. Opinions regarding discovery issues premised upon what parties *may* choose to do in the future or concerning documents that have not yet been withheld as privileged and identified on a privilege log constitute impermissible advisory opinions, *N. Country Envtl. Servs. v. Town of Bethlehem*, 150 N.H. 606, 619-20 (2004), and the New Hampshire Superior Court lacks jurisdiction to render them, *Piper v. Town of Meredith*, 109 N.H. 328, 331 (1969).

CONCLUSION

For all of the foregoing reasons, the *Fuller-Austin* Defendants respectfully request that the Court deny the Commissioner's and Liquidator's Motion for Order Governing Confidentiality of Regulatory Documents.


Respectfully submitted,

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Dated: November 16, 2009



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by first-class mail postage prepaid on all parties listed on the attached service list.



Martin P. Honigberg

STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Docket No. 03-E-0106

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The Home Insurance Company

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