

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Docket No. 03-E-0106

2010 MAR 10 A 9:27

In the Matter of the Liquidation of  
The Home Insurance Company

NH SUPERIOR COURT  
MERRIMACK COUNTY  
CONCORD, NH

COMMISSIONER'S AND LIQUIDATOR'S OBJECTION TO  
FULLER-AUSTIN DEFENDANTS' MOTION TO RECONSIDER

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 objects to the motion to reconsider the Court's February 19, 2010 Order regarding statutory confidentiality filed by Zurich Insurance Company and affiliates ("Zurich") who are defendants in the Fuller-Austin litigation in California.<sup>1</sup>

1. Zurich's motion to reconsider is most noteworthy because it raises an argument Zurich did not make in its original "limited objection" to the Motion. Zurich now contends that the statutes providing confidentiality do not apply to an insurer in liquidation and that the Court failed to consider this argument. This is mistaken. While Zurich apparently did not think the argument warranted raising in its initial objection, it was made by the California Plaintiffs at pages 5-6 of their Opposition, addressed by the Commissioner at pages 6-7 of his Reply and considered by the Court.

2. The principal flaw in this argument is that it requires grafting an exception onto a statute that provides none. The Court addressed the issue in its Order in its discussion of the applicable principles of statutory construction. As the Court noted, it "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and

<sup>1</sup> This Objection uses terms as defined in the motion for order governing confidentiality of regulatory documents ("Motion").

ordinary meaning.’ *Remington Invs., Inc. v. Howard*, 150 N.H. 653, 654 (2004). ‘When a statute’s language is plain and unambiguous, [the court] need not look beyond it for further indication of legislative intent, and . . . will not consider what the legislature might have said or add language that the legislature did not see fit to include.’ *Cloutier v. City of Berlin*, 154 N.H. 13, 17 (2006).” Order at 2-3. The Court then considered the language of the statutes at issue and concluded it “is clear and unambiguous.” *Id.* at 4. As “the statutory language provides that no information gathered as a result of NHID regulation is subject to discovery in these circumstances,” *id.*, the Court properly declined to gut the statute by adding the liquidation exception sought by the California Plaintiffs and now by Zurich.

3. Zurich now joins in the California Plaintiffs’ rejected argument, but its motion for reconsideration simply fails to address the broad, mandatory language of the statutes. As noted by the Court, RSA 400-A:37, IV-a provides that the documents and information “shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action.” Order at 3 (emphasizing the quoted language). RSA 401-B:7 similarly provides that they “shall not be subject to subpoena.” *Id.* at 4 (emphasizing the quoted language). Zurich’s argument leaps over this language and attempts to declare it inapplicable based on assertions regarding the statute’s “purpose.” As the Court implicitly held, this is contrary to the principles of construction regarding such clear and unambiguous statutes.

4. The position now advocated by Zurich would embroil the NHID in the California litigation. Zurich refers to its requests as “narrow” and “targeted,” but it fails to mention that it seeks all of the prior approval requests for the entire period of supervision. As noted in the Commissioner’s moving papers, this is approximately 1,500 requests. The California Plaintiffs of course have sought broader additional discovery. The parties to the litigation not only seek

documents and information but, as disclosed in recent filings in California, will also seek to depose the NHID's representative during the supervision and potentially other persons at NHID. The plain language of the statutes was clearly intended to avoid the NHID being drawn into private disputes. The statutes not only bar production of confidential information and documents, see RSA 400-A:37, IV-a(a), 401-B:7, 404-F:8, but they also bar testimony regarding the information and documents. See RSA 400-A:37, IV-a(d) ("Neither 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 paragraphs (a) and (b).").

5. Zurich's reliance on the trial court decision of Consolidated Edison Co. of N.Y., Inc. v. Ins. Dept of N.Y., 532 N.Y.S.2d 186, 191 (N.Y. Sup. Ct. 1988), is misplaced and does not warrant reconsideration. Contrary to Zurich's assertion at page 4 n.1 of its motion to reconsider, the provisions of the New York statute are not "substantially similar" to those of RSA 400-A:37, IV-a. Most importantly, the New York statute, N.Y. Ins. Law § 1504(c) (quoted in note 1), does not contain the language of the New Hampshire statutes relied on by the Court in the Order. The New York statute does not provide that documents and information "shall not be subject to subpoena" – the language found in the New Hampshire statutes and emphasized by the Court at pages 3 and 4 of the Order. RSA 400-A:37, IV-a, also contains no reference to the consent of the insurer, nor does it provide for publication after a hearing.

6. Zurich's motion expresses some confusion over the Commissioner's role. The Commissioner filed the motion both as regulator and as Liquidator of Home to emphasize that these matters are of concern in both capacities: as Liquidator in responding to discovery

regarding Home's records concerning NHID oversight and supervision, and as regulator responsible for the regulation of companies organized or licensed to do business in New Hampshire and concerned over future impacts on NHID records regarding Home and past regulatory personnel who ought not be dragged into private litigation. These roles are distinct, and their common interest in upholding the confidentiality provisions of the statutes does not create a "bridge" between Home's obligations, which under RSA 402-C must be addressed solely from Home's assets, and the State treasury.

**CONCLUSION**

For the foregoing reasons and those in the Commissioner's prior filings, the Court should deny Zurich's motion for reconsideration.

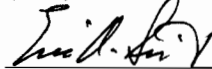
Respectfully submitted,

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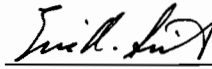
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March 9, 2010

**Certificate of Service**

I hereby certify that a copy of the foregoing Liquidator's Objection to Fuller-Austin Defendants' Motion for Reconsideration was sent, this 9th day of March, 2010, by first class mail, postage prepaid to all persons on the attached service list and additional distribution list and by email to counsel for Zurich, the California Plaintiffs, and REM.



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Eric A. Smith

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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Docket No. 03-E-0106

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