

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

**BEFORE THE COURT-APPOINTED REFEREE
IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY
DISPUTED CLAIMS DOCKET**

In Re Liquidator Number: 2007-HICIL-29

Proof of Claim Number: INTL46002

Claimant Name: QBE Insurance (Australia) Ltd.

Policyholder Account QBE Insurance (Australia) Ltd.

**LIQUIDATOR'S RESPONSE TO QBE'S SUBMISSION
REGARDING ITS ERICSSON CLAIM**

Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator ("Liquidator") of the Home Insurance Company ("Home"), hereby responds to the submission by QBE Insurance (Australia) Ltd. ("QBE") regarding its claim in the Home liquidation. The principal question is whether Home reinsured QBE regarding QBE's policyholder Ericsson Australia Pty Ltd ("Ericsson"). The documentation provided by QBE and available from Home's records shows that the policy QBE issued to Ericsson was facultatively reinsured by Home, which was in turn reinsured by Trygg Hansa Spp ("Trygg"), now Zurich Insurance Ireland Ltd., Swedish Branch ("Zurich"). QBE, however, disregards the documents and instead relies on supposed "admissions" by representatives of the Liquidator that QBE was reinsured by Trygg, not Home. Representatives of QBE, however, were previously insistent that QBE was reinsured by Home. QBE's position changed only when it was advised that it was unlikely that there would be any distributions on its Class V claim. In these circumstances, it would be unjust to the Home estate and its creditors to permit QBE to withdraw its claim in order to circumvent the liquidation and "cut-through" to Home's reinsurer Trygg. The Referee should

thus affirm the Liquidator's allowance of QBE's claim as a Class V claim in the amount of \$332,789.67.

As required by § 15(b) of the Claims Procedures Order, the contested issues of law and fact and exhibits relied upon by the Liquidator are as follows:

Contested issues:

Of fact:

1. Is Home the reinsurer of QBE based on all the relevant evidence, including QBE's facultative reinsurance proposal identifying Home as the reinsurer, QBE's payment of reinsurance premium to Home, and QBE's repeated submission of claims to Home?

Of law:

1. Are the supposed "admissions" by a member of the Home liquidation staff without personal knowledge relevant or binding on the Liquidator? If so, are the "admissions" by representatives of QBE without personal knowledge relevant and binding on QBE?
2. Does QBE have a right to withdraw its proof of claim from the Home liquidation so it may seek to circumvent the Home liquidation and "cut-through" to Home's reinsurer Zurich to the prejudice of Home's liquidation and its preferred creditors?

Exhibits relied upon:

The Liquidator relies upon the case file previously submitted in this matter and the Affidavit of Russell Bogin with respect to the post-liquidation communications between QBE, the Liquidator, and Zurich. Those communications are cited by the page number in the case file (e.g., H0001). With respect to the question of whether Home reinsured QBE, the Liquidator relies upon

1. QBE's Facultative Reinsurance Proposal regarding Ericsson and the related proposal regarding Nira. H0009, H0010.
2. The QBE check for the reinsurance premium payable to Home and related documentation. H0011, H0012, H0181.

3. The internal Home memorandum dated July 10, 1995 and wire transfer record. H0041, H0058.
4. QBE's claim submissions to Home. H0013-H0014, H0076, H0218-H0237, H0219, H0221.
5. The Partnership Agreement of Reinsurance (Reverse Flow Agreement) between Home and Trygg. H0093, H0114.

The Liquidator's legal brief follows.

Background

I. Procedural History

1. It is necessary to provide a detailed procedural history of QBE's claim because QBE has made its dealings with the Liquidator an issue. The procedural history shows that liquidation staff acquired information from both QBE and Zurich over time leading to the Liquidator's ultimate determination. It also shows that QBE has changed its position from insisting that Home was its reinsurer ("admissions" by QBE) to contending that Trygg was QBE's reinsurer. Most recently, QBE has sought to deal directly with Zurich/Trygg and has threatened Zurich with a lawsuit. (Zurich has declined to deal with QBE because Zurich recognizes Home as QBE's reinsurer.) As part of that effort, QBE purported to withdraw its claim from the Home estate. However, it later took the position that the claim was not withdrawn by advising Zurich that QBE would withdraw the claim if Zurich would pay QBE directly.

2. In the Liquidator's view, the statements made by representatives of the Liquidator and QBE are not relevant, since none of them had personal knowledge of the 1995 reinsurance arrangements. If, however, the Referee were to consider statements of the Liquidator's representatives as "admissions," the Referee should also consider the statements by QBE's

representatives. QBE's inconsistent positions regarding withdrawal of its proof of claim ("POC") and QBE's attempt to deal directly with Zurich bear on the equities of QBE's position that it should be permitted to withdraw its POC.

A. QBE's Pursuit of Its Claim Against Home as QBE's Reinsurer

3. QBE filed its POC in the Home liquidation by letter dated December 4, 2003.

H0003. QBE's POC asserted a claim for "facultative reinsurance provided by 'The Home Ins' to QBEMM on Ericsson Australia policy – 2X claims need to be recovered from 'The Home Ins' under this facultative arrangement." H0004. In support of its POC, QBE submitted what it described as two "Facultative Reinsurance Contracts" – one for Ericsson and one for another policyholder Nira, a QBE check payable to The Home Insurance Company for reinsurance premiums, proof that the check was presented for payment by Home, and proof of QBE's losses on the Ericsson policy. H0003; see H0009-H0030.

4. George Mitchell of the Home liquidation staff then exchanged a series of emails with Peter Chalmers of QBE regarding the claim. In an email dated March 3, 2004, Mr. Chalmers stated "[w]e have spent considerable time tracing the correct entity that is liable for the claim and the broker involved (Zurich Sweden) confirmed yourselves as being the party liable for the claim." H0031. Mr. Mitchell responded in an email on May 7, 2004 that "[w]e do not believe this risk was ever bound by Home. Rather, we believe that it was bound by Trygg Hansa Spp." H0034. The email referred to a fax indicating that Home sent the premium to Trygg. Id. Mr. Mitchell provided a copy of this fax to Steven Bautovich of QBE on September 30, 2004. H0040-H0041.

5. An in-house lawyer for QBE, Vivienne Webster, then asked about the status of the claim on January 17, 2006. H0043. Mr. Mitchell responded that he understood Mr.

Bautovich had been going to contact Trygg. H0044. Ms. Webster responded in an email dated February 1, 2006 saying that the matter had been transferred to legal, and that she had located additional information: the “two treaty numbers” and a fax from Home acknowledging receipt of the total premium from QBE in 1995. She asked whether the premium was transferred to Trygg and advised that, until determined otherwise, “QBE remains of the view, that it has a bona fide claim with Home Insurance, as the Reinsurance Company (as particularized in the Faculative [sic] Reinsurance Proposal) and as the receiver of the policy premium as opposed to Trygg Hansa.” H0045. See H0048-H0049.

6. Mr. Mitchell responded on March 2, 2006 by providing a document showing a wire transfer of the premium from Home to Trygg. H0057-H0059. After a discussion with Ms. Webster, Mr. Mitchell sent her an email on March 8, 2006 suggesting she contact Trygg with the information and that “they should be able to confirm that they received the money and have bound the risk.” H0061. He concluded that “if we do not hear from you to the contrary we shall recommend that your claim not be allowed into the Home estate as no risk was bound by Home.” Id.

7. Ms. Webster responded in an email dated March 9, 2006 (H0062) asking various questions and stating:

Therefore, until we are satisfied of any other legally binding arrangement, between HOME, Trygg that QBE may be able to call upon, we do not believe it is QBE’s obligation or responsibility to chase down HOME’s ceding companies, including Trygg Hansa. Accordingly, we do not resign from the position that QBE has a valid claim against HOME INSURANCE and believe that HOME was bound (in accepting the premium payment of \$66,423.28 in 1995) and submit in the alternative, that HOME INSURANCE, as our reinsurer, has a positive obligation to chase down Trygg for the claim on QBE’s behalf – as we have made a bona fide claim upon HOME.

I am instructed, therefore to request that you do not make any recommendation that our claim be disallowed into the HOME estate, unless advised otherwise by QBE.

8. QBE apparently then retained U.S. counsel, Edward Lenci. On May 3, 2006, Mr. Lenci sent a letter to the Liquidator seeking to discuss QBE's POC, which counsel described as "arising from the policy, reinsured by The Home Insurance Company ('The Home') as part of a fronting arrangement for Trygg-Hansa Spp, that QBE issued to Ericsson Australia Pty Limited and its associated companies ('Ericsson') in or about April 1995." H0065. Russell Bogin responded for the Liquidator on May 15, 2006. His email noted that QBE's claim is likely to be deemed a Class V claim and that "Home does not anticipate making a distribution to its Class V creditors." H0066.

9. As QBE had requested, liquidation staff (Efraim Abramsohn and Jamie Archibald) contacted Trygg to inquire whether Trygg had directly bound the risk or whether this was a "reverse flow account" ceded by Home to Trygg. H0073 (May 17, 2006 email); see H0070 (follow up May 19, 2006 email).

10. On May 22, 2006, Christina Lekerud of Trygg (now Zurich) said she would check. H0069. On June 15, 2006, Ms. Lekerud responded (H0077):

As far as we can see Trygg Hansa reinsured Home this year. This is supported by the facultative reinsurance proposal and by the fact that your company collected the premium and forwarded it to Trygg Hansa.

11. On June 28, 2006, Ms. Lekerud advised the Liquidator that QBE's counsel, Mr. Lenci, had sent a letter to Trygg (forwarded to Zurich) seeking "to collect payment for these two claims." H0079. Mr. Archibald responded on June 28, 2006 that this would be an improper cut-through and that if Trygg were to pay QBE it would nonetheless remain liable to Home. H0079.

B. QBE's Change of Positions and Attempt to Deal Directly with Zurich

12. On August 28, 2006, Ms. Lekerud reported that Zurich had received a letter from QBE's CEO talking about legal action. H0082. In that August 24, 2006 letter (H0084), QBE asserted that there was a fronting arrangement between QBE and Trygg, and that:

As QBE sees it, however, Home was involved in this fronting arrangement on behalf of Trygg Hansa merely as a 'go between' between Trygg Hansa and QBE and, while Home nominally may have assumed the role of 'reinsurer' (this is not clear in any event), it was understood by all involved that the arrangement was between Trygg Hansa and QBE.

H0085. QBE concluded by threatening legal action in New York against Zurich. H0085-86.

13. Mr. Bogin responded to Ms. Lekerud's email on August 28, 2006. He noted the uncertainties in the situation and asked for clarification but noted the risk of double payment faced by Trygg if it paid QBE directly. H0089. On August 30, 2006, Mr. Bogin again emailed Ms. Lekerud to advise that a copy of the Partnership Agreement of Reinsurance (the "Reverse Flow Agreement") between Home and Trygg had been located. H0090. He attached a copy of the Reverse Flow Agreement and noted that QBE has no right to cut-through and seek direct payment from Trygg under the Agreement. *Id.* See H0096, H0108 (Articles I and XX).

14. On August 31, 2006, Ms. Lekerud advised Mr. Bogin that Zurich was still researching its files for any documents in this matter. H0119. She subsequently advised that it had written to QBE for information. H0128. On October 12, 2006, Ms. Lekerud forwarded an October 9, 2006 email from QBE concerning the Ericsson policy and the basis for its claim. H0133-H0141. Mr. Bogin responded that in view of this information, the Liquidator intended to issue a notice of determination allowing QBE's claim in its stated amount, and that Zurich (as successor to Trygg under the Reverse Flow Agreement) would be responsible for indemnifying the allowed amount. In accordance with the insolvency clause (Article XX) in the Reverse Flow Agreement, Mr. Bogin provided Zurich with an opportunity to interpose defenses to the claim. H0133.

15. Meanwhile, on October 11, 2006, Mr. Lenci met with Jonathan Rosen and Mr. Bogin. At that meeting, Mr. Rosen and Mr. Bogin advised Mr. Lenci that based on the documents (meaning the Facultative Reinsurance Proposal, QBE's premium check to Home,

QBE's claims submissions to Home, Zurich's communications and the Reverse Flow Agreement) Home reinsured QBE with respect to the Ericsson policy, and that, in turn, Trygg-Hansa (now Zurich) reinsured Home under the Reverse Flow Agreement. They told Mr. Lenci that the Liquidator accordingly intended to recommend allowance of QBE's claim and present it to the Court for approval. They also informed Mr. Lenci that QBE's claim for reinsurance would be deemed a Class V claim, and that claims in that class were unlikely to receive any distributions from the Home estate. Bogin Aff. ¶ 8.¹

C. QBE's Purported Withdrawal of Its POC and Assertion to Zurich that QBE Would Withdraw Its POC If Zurich Would Deal Directly.

16. On October 13, 2006, Mr. Lenci sent an email to Mr. Rosen and Mr. Bogin purporting to withdraw QBE's claim. H0142; see H0147 (QBE confirmatory letter). Mr. Rosen responded in an email on October 13, 2006 setting forth the preliminary view that in the circumstances QBE was not entitled to unilaterally withdraw the claim. Mr. Rosen also advised that he did not recognize the purported withdrawal and reserved the Liquidator's rights in that regard. H0143.

17. On December 14, 2006, Duncan Ramsay, QBE's General Counsel, sent an email to John Cashin of Zurich asserting that QBE had a claim against Trygg and demanding to know "how much Zurich will pay us and when and on what terms in full and final settlement." H0157. Mr. Cashin responded on December 19, 2006 that the claim "presents some serious potential issues with the liquidator of the Home Insurance Company who Trygg Hansa reinsured. We cannot afford to bypass the liquidator and make direct payments to parties who have no contract privity with us." H0156. Mr. Ramsay responded to Mr. Cashin on February 1, 2007 stating that

¹ Mr. Bogin had informed Mr. Lenci of the likely classification of the claim as Class V in an earlier conversation on May 15, 2006. Mr. Lenci then responded that he "would find a way to get around" this classification to obtain recovery for QBE. Bogin Aff. ¶ 6.

the facultative reinsurance proposal “clearly indicates we dealt with Home’s HK branch” and that:

[W]e remain happy to withdraw our claim in the Home US liquidation, which we believe would remove your concerns re the liquidator.

[H]owever, this withdrawal depends upon you making us a fair and reasonable offer in full and final settlement.

QBE concluded by stating that its US counsel “has drafted a complaint to be filed in NY.”

H00155. Mr. Cashin advised Mr. Bogin of QBE’s threatened suit against Zurich by forwarding the above emails on February 1, 2007. H0154.

D. The Notice of Determination

18. On February 6, 2007, the Liquidator issued a Notice of Determination (“NOD”) allowing QBE’s claim in its full amount of US\$332,789.67 as a Class V claim. H0164. The NOD concluded that, while QBE had purported to withdraw its claim, QBE’s proof was subject to determination because QBE was asserting to Zurich that the proof was still pending. H0165.

19. QBE subsequently asked the Liquidator for various information, particularly regarding Home Insurance Company in Hong Kong. Mr. Bogin advised that Home did not have a separate Hong Kong corporate entity. H0173. Mr. Bogin also provided certain documents regarding Home’s Hong Kong operations (which were conducted through a Hong Kong management company, Home International Services (H.K.) Limited). H0176; see H0180 and H0206 (Home 1995 Schedule Y); H0181 (document showing transfer of premium check from Hong Kong to Home New York). Mr. Bogin later provided a copy of Home International Services (H.K.) Limited’s 1994 report. H0188; see H0195-H0204. Mr. Bogin finally provided billing materials QBE sent to Home in 1999 and 2000. H0216-H0237.

II. Factual Background Regarding Reinsurance Arrangements

20. None of the many persons involved in the exchanges between QBE, Home, and Zurich regarding QBE's proof of claim was personally involved in the 1995 reinsurance transactions. All of them based their various assertions upon the documents that emerged over the course of the exchanges. Accordingly, the most persuasive evidence of the arrangements are the documents, which show that QBE was facultatively reinsured by Home, which was in turn reinsured by Trygg.

21. The critical document is QBE's "Facultative Reinsurance Proposal." H0009. That proposal was signed by QBE on June 5, 1995. It identifies the "Reinsurance Company" as "The Home Insurance Company" with an "Issuing Branch" at "Suite 1108 Harcourt House, 99 Gloucester Road, Hong Kong." It specifies the "Original Insured" as "Teleric Pty Ltd and Ericsson Australia Pty Ltd" and sets forth the underlying policy period and limits and reinsurance premium. H0009. A second Facultative Reinsurance Proposal regarding a QBE policy issued to Nira Australia Pty Ltd provides the same information. H0010. The Ericsson Facultative Reinsurance Proposal bears a QBE authorization dated June 19, 1995 for payment of reinsurance premium of A\$66,423.28 – the total reinsurance premium for Ericsson and Nira together. H0009.

22. QBE also provided a copy of the check for the reinsurance premium payable to "The Home Insurance Co" endorsed by Home and paid by Citibank about July 24, 1995. H0011. The list of presented cheques provided by QBE shows the amount of the check was A\$66,423.28. H0012. Home located a document showing that the check was deposited with Citibank by Home's New York office on July 18, 1995. H0181.

23. An internal Home memorandum dated July 10, 1995 states that Home International in Hong Kong received the QBE reinsurance premium check and would send it to Home in New York, which was to arrange a wire transfer of the full amount to Trygg Hansa. H0041. Home also located a transaction record showing the wire transfer. H0058.

24. QBE also provided copies of two claim submissions it made to "The Home Insurance Company c/o Risk Enterprise Management" on November 11, 1999 (H0013-H0014) and on April 29, 2002 (H0076). QBE made another claim submission to Home on May 1, 2000. H0218-H0237. That submission included a statement of account in the name of "The Home Insurance Company" at the Hong Kong address (H0219) and another copy of the November 11, 1999 submission (H0221).

25. In late August 2006, liquidation staff located the Partnership Agreement of Reinsurance between Home and Trygg dated June 19, 1992. H0093, H0114. This agreement is sometimes referred to as the "Reverse Flow Agreement" because it provides for Trygg and Home to be either the "Producing Company" (the party accepting reinsurance in a particular instance) or the "Fronting Company" (the party ceding reinsurance in a particular instance). H0096. The "Producing Company" is "the party producing the business and directing the placement and issuance of the policy"; it is synonymous with "Reinsurer." PAR Art. III(c); H0097. While the Reverse Flow Agreement provides customary provisions for certain reinsurance transactions, it provides for "special acceptances" of "[r]isks and accounts which necessitate cessions that are beyond the terms, conditions or limitations of this agreement" Article V; H0101.

26. The Reverse Flow Agreement contains two provisions pertinent to QBE's assertion of direct rights against Trygg. Article I provides in part:

This Agreement is solely between the Fronting Company and the Producing Company. Performance of the obligations of each party under this Agreement shall be rendering [sic] solely to the other party. However, if the Fronting Company becomes insolvent, the liability of the Producing Company shall be modified to the extent set forth in the article entitled INSOLVENCY OF THE FRONTING COMPANY. In no instance shall any insured of the Fronting Company or any claimant against an insured of the Fronting Company have any rights under this Agreement, except to the extent provided in the article entitled INSOLVENCY OF THE FRONTING COMPANY. [H0096-H0097]

27. Article XX – INSOLVENCY OF THE FRONTING COMPANY is an insolvency clause that provides in part:

In the event of the insolvency of the Fronting Company, liability under this agreement shall be payable directly to the Fronting Company, or its liquidator, receiver, conservator or statutory successor on the basis of the liability of the Fronting Company without diminution because of the insolvency of the Fronting Company or because the liquidator, receiver, conservator or statutory successor of the Fronting Company has failed to pay all or a portion of any claim.

The reinsurance shall be payable by the Reinsurer to the Fronting Company or to its liquidator, receiver, conservator or statutory successor, except as provided by Sections 4118 and 1308 of the New York Insurance Law or except:

- (a) Where the Agreement specifically provides another payee of such reinsurance in the event of the insolvency of the Company, and
- (b) Where the Reinsurer, with the consent of the direct assured or assureds, has assumed such policy obligations of the Company as direct obligation of the Reinsurer to the payees under such policies and in substitution for the obligations of the Company to such payees. [H0108-H0109]

ARGUMENT

I. QBE MAY SEEK PAYMENT ON ITS CLAIM ONLY THROUGH THE HOME LIQUIDATION CLAIMS PROCEDURE BECAUSE THE EVIDENCE SHOWS THAT HOME IS QBE'S REINSURER

28. None of the persons involved in the lengthy exchanges since the filing of QBE's proof of claim asserted any personal knowledge of the arrangements reached in 1995. The Referee accordingly should look to the documents from 1995 and the remainder of the pre-liquidation period as the best and most reliable evidence of the contractual relationships. That

evidence supports the Liquidator's determination that QBE was reinsured by Home, and that Home was reinsured by Trygg (now Zurich).

A. The Contemporary Documents and QBE's Post-1995 Conduct Demonstrate That Home Reinsured QBE.

29. The central document is QBE's "Facultative Reinsurance Proposal." H0009. The proposal is signed by QBE and dated June 5, 1995. It identifies the "Reinsurance Company" as "The Home Insurance Company" with an "Issuing Branch" at "Suite 1108 Harcourt House, 99 Gloucester Road, Hong Kong." There is no ambiguity in the document as to the identity of the reinsurer. It is Home.

30. The Facultative Reinsurance Proposal also bears an authorization dated June 19, 1995 for payment of the reinsurance premium. H0009. That premium was paid to Home. The QBE check for the reinsurance premium was payable to "The Home Insurance Co," and it was endorsed by Home and paid by Citibank about July 24, 1995. H0011. The list of presented cheques provided by QBE shows the amount of the check was A\$66,423.28. H0012. A Home document shows that the check was deposited with Citibank by Home's New York office on July 18, 1995. H0181.

31. QBE's subsequent reinsurance billings show that it acted consistently with the specification of Home as the reinsurer on the Facultative Reinsurance Proposal and its payment of premium to Home. QBE's November 11, 1999 and April 29, 2002 claim submissions were made to "The Home Insurance Company c/o Risk Enterprise Management." H0013-H0014, H0076. QBE's May 1, 2000 claim submission was also made to Home, and it included a statement of account in the name of "The Home Insurance Company" at the Hong Kong address and another copy of the November 11, 1999 submission. H0218, H0219, H0221.

B. QBE Has Failed To Meet Its Burden Of Showing Mistake.

32. In the face of these documents – on which QBE relied in asserting there was a QBE/Home contract in its POC (see H0003), QBE simply asserts that Home, “for reasons unknown, was mistakenly named as the reinsurer instead of Trygg Hansa.” QBE Br. ¶ 8. QBE, as the party asserting mistake, bears the burden of proving it. See Hillside Associates of Hollis v. Main Bonding & Cas. Co., 135 N.H. 325, 329 (1992) (citing Williston on Contracts § 1597 at 595 (3d ed. 1970)). It fails to do so. QBE has not provided any affidavit or document that would tend to show how or why it made the alleged mistake in specifying Home as the reinsurer, paying premium to Home, and billing Home.² Nor has QBE provided any evidence that it had a direct reinsurance relationship with Trygg. Zurich itself takes the contrary position that Trygg reinsured Home. H0077.

33. QBE first cites to “various communications . . . exchanged between the brokers for QBE and Trygg Hansa in April 1995.” QBE Br. ¶ 8(a), citing to QBE Exhibit I. Those documents were not provided to the Liquidator until QBE’s objection and are not actually discussed in QBE’s brief. They consist of exchanges between Willis Faber in Sweden and Willis Corroon in Australia from April 1995. They show only that during April 1995 Ericsson and Trygg were discussing a global liability policy and that QBE was to be a fronting company in Australia. They say nothing about how any relationship between QBE and Trygg was to be

² The two cases cited by QBE concerning the identity of contracting parties are inapposite. In In re Stafford’s in the Field, Inc., 192 B.R. 29, 34 (Bankr. D.N.H. 1996), the contract contained an ambiguity over whether the owner of business had signed a contract as representative of his company or as an individual because he mistakenly signed as “seller” rather than “president”. The question, then, was whether the company itself was a party to the agreement, and it was rooted in an obvious ambiguity in the contract. In Lawrence v. U.S., 378 F.2d 452, 461 (5th Cir. 1967), using federal common law to construe government contracts, the court construed two related contracts together, and the issue was whether mention of a *first* contract in a *second* contract was enough to make a party to the *first* contract obligated under the *second* contract. It was in this context that the Court stated that “[a] person is not made party to a contract merely by being named and described in it” The issues dealt with by these courts are unrelated the situation here, where the parties are clearly identified in their corporate capacities on the facultative reinsurance proposals.

structured and whether Home would be involved. Indeed, one of the documents, a Willis Corroon fax dated April 6, 1995, states that “our local fronting company, QBE Insurance, have advised that to date they have not received any instructions from Trygg Hansa regarding the placement of the liability program.” It would be completely consistent with these exchanges for Trygg to have directed QBE to reinsure the Ericsson policy with Home, which would reinsure it with Trygg under the Reverse Flow Agreement. QBE has not shown any other arrangement.

34. QBE also notes that documents show that Home transferred the entire premium to Trygg. QBE Br. ¶ 8(b). See H0041. This is consistent with the Reverse Flow Agreement and the timing of the transaction, which straddled the June 12, 1995 date after which Home was generally to cease writing business. The Reverse Flow Agreement provides for “special acceptances” – one-off arrangements – in Article V. Payment of the premium over to Trygg as such an arrangement makes sense where the facultatively reinsured business incepted April 1, 1995 and was bound on June 5, 1995, but the premium was not paid until later in June 1995. See H0009.

C. The Purported “Admissions” By Liquidation Staff Without Personal Knowledge Are Not Relevant, But If They Were The Corresponding “Admissions” By QBE’s Representatives Should Also Be Considered.

35. Finally, QBE relies on alleged “admissions” by liquidation staff that QBE did not have a contract of reinsurance with Home but was reinsured by Trygg. QBE Br. ¶ 8(c). This argument ignores the fact that Mr. Mitchell³ did not assert any personal knowledge of the 1995 transaction. He based his statements on inferences he drew from the records available to him. See H0034. Indeed, he said that “our only assumption is that i[t] was bound by Trygg Hansa.” *Id.* (emphasis added). He later suggested that QBE contact Trygg, who “should be able to confirm that they received the money and have bound the risk.” H0061. Such “assumptions”

³ Mr. Mitchell has since left the Home liquidation staff.

and inferences by persons without personal knowledge are subject to reevaluation and review by others as the claims determination process moves forward. They are neither relevant nor binding.

36. The Referee should not consider evidence not based on personal knowledge. See N.H. Rule of Evidence 602 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”). The emails themselves demonstrate that Mr. Mitchell had no personal knowledge of the relationship between QBE and Home, nor of the pattern of business between the two companies. *Cf.* RSA 491:8-a:II (the affidavit accompanying a motion for summary judgment must be based on personal knowledge of admissible facts); Omiya v. Castor, 130 N.H. 234, 238 (1987) (same).

37. Indeed, if this type of statement were binding, QBE would itself be bound by the statements of its representatives that Home was QBE’s reinsurer. QBE representatives rejected Mr. Mitchell’s position and stated that Home, and not Trygg, reinsured QBE:

- QBE based its POC (signed under penalties of perjury by Mr. Chalmers) on the assertion that QBE had a facultative contract with Home. H0004.
- QBE’s Mr. Chalmers also asserted that “[w]e have spent considerable time tracing the correct entity that is liable for the claim and the broker involved (Zurich Sweden) confirmed yourselves [Home] as being the party liable for the claim” H0031.
- In response to Mr. Mitchell, QBE’s Ms. Webster stated “QBE remains of the view, that it has a bona fide claim with Home Insurance, as the Reinsurance Company (as particularized in the Faculative [sic] Reinsurance Proposal) and as the receiver of the policy premium as opposed to Trygg Hansa.” H0045.
- QBE’s Ms. Webster later reiterated that “we do not resign from the position that QBE has a valid claim against HOME INSURANCE and believe HOME was bound (in accepting the premium payment of [A]\$66,423.28 in 1995) and submit in the alternative, that HOME INSURANCE, as our reinsurer, has a positive obligation to chase down Trygg” H0062.

The same standards should be applied to “admissions” by QBE’s representatives as to “admissions” by the Liquidator’s representatives. The only appropriate result is that none of the statements made by persons without personal knowledge of the 1995 transaction are relevant or binding.

D. QBE’s Allegations Of Bad Faith Are Groundless.

38. QBE also asserts that the Liquidator acted in “bad faith” by changing position. These assertions – which may be a preemptive strike to distract from QBE’s own changes of position and inconsistent position on withdrawal of its proof of claim – are without basis. Mr. Mitchell expressed his preliminary views before the Liquidator either received the response to his suggestion that confirmation be sought from Zurich or located the Reverse Flow Agreement. It is appropriate, as happened here, for preliminary views expressed during the course of claim review to change as information is gathered and reviewed throughout the claims determination process.

39. When the Liquidator’s representatives – at QBE’s insistence (see H0062) – contacted Zurich to inquire whether Trygg directly bound the risk or reinsured Home (see H0073, H0070), Zurich said it would check. H0069. Zurich then confirmed that “[a]s far as we can see Trygg Hansa reinsured Home this year.” H0077. Thus, contrary to what Mr. Mitchell apparently expected, Zurich did not advise that it reinsured QBE. It said it reinsured Home..

40. Furthermore, liquidation staff subsequently located the Reverse Flow Agreement (see H0090). The Reverse Flow Agreement did not provide QBE with any right of direct access to reinsurance, and it provided a mechanism for Trygg to direct Home to provide reinsurance to QBE on a risk produced by Trygg. The Liquidator’s ultimate conclusion that Home reinsured QBE is well supported by (a) the Facultative Reinsurance Proposal signed by QBE identifying

Home as the reinsurer; (b) QBE's payment of premium to Home; (c) QBE's presentation of claims submissions to Home in 1999, 2000 and 2002; (d) Zurich's position that it reinsured Home, and (e) the Reverse Flow Agreement.

II. IN THE CIRCUMSTANCES, IT WOULD BE UNJUST TO ALLOW QBE TO WITHDRAW ITS POC TO THE PREJUDICE OF THE HOME LIQUIDATION AND ITS PREFERRED CREDITORS.

A. QBE May Only Withdraw Its POC If It Does Not Unjustly Prejudice The Liquidation And Its Preferred Creditors.

41. Contrary to QBE's contention, there is no unfettered right to withdraw a proof of claim. A claimant may withdraw a POC only where the withdrawal does not unjustly prejudice another. In the circumstances here, it would be unjust to permit QBE to withdraw its POC. As shown above, QBE is reinsured by Home, which is reinsured by Zurich/Trygg. Since Home reinsured QBE, QBE's POC was properly filed with the Liquidator of Home.⁴ QBE seeks to withdraw its POC so that it may circumvent the Home liquidation and deal directly with Home's reinsurer Zurich. Such a result would prejudice the Liquidator by potentially denying recovery of reinsurance proceeds for the Home estate and its creditors, contrary to the public policies underlying the New Hampshire Insurers Rehabilitation and Liquidation Act, RSA 402-C. It would be particularly inequitable because QBE is simultaneously asserting that it has withdrawn its POC while taking the position with Zurich that it has not withdrawn the POC.

42. Having filed its POC, QBE cannot withdraw the claim from the Home insolvency proceeding as of right. The New Hampshire Act does not grant claimants such a right. The Referee should evaluate a request to withdraw a POC by considering whether the withdrawal

⁴ QBE asserts that USI Re is somehow involved because it was the parent of Home International Services (H.K.) Limited ("Home Services H.K."). Home Services H.K., however, was not an insurer. See H0206 (Home 1995 Schedule Y noting insurers with an asterisk). Home Services H.K. was a management company. See H0197 (Home Services H.K. 1994 Report of Directors stating "[t]he principal activity of the company is the provision of management services."). In transferring the QBE reinsurance premium check to Home, Home Services H.K. merely acted as an agent of Home. That USI Re was Home Services H.K.'s intermediate parent is not relevant.

would be unjust to the liquidation, just as in litigation the court would evaluate a request for a voluntary nonsuit without prejudice to see if it is unjust to the defendant. See Paragraph 44 below. The Pennsylvania Commonwealth Court has looked to voluntary dismissal standards in determining whether to allow withdrawal of a proof of claim. Koken v. Reliance Ins. Co., 841 A.2d 588, 592 (Pa. Comm. Ct. 2003) (proof may be withdrawn for cause shown, which turns on whether permitting withdrawal “operates as an unjust disadvantage” to another), rev’d, 893 A.2d 70 (Pa. 2006).⁵

43. QBE’s reliance on Rule 3006 of the Rules of Bankruptcy Procedure and cases from other jurisdictions is misplaced. The bankruptcy procedures are not relevant because there is no equivalent to Rule 3006 in the Act or the Claims Procedures Order.⁶ In any event, the bankruptcy rule provides that if the creditor has “participated significantly in the case” it “may not withdraw the claim except on order of the court after a hearing.” U.S. Bankr. R. 3006. The rule thus invokes the discretion of the court and the types of equitable considerations which the Liquidator submits should be controlling here, in particular whether withdrawal of the claim will cause “legal prejudice” to the opposing party. See In re Lowenschuss, 67 F.3d 1394, 1399-1400 (9th Cir. 1995); In re Ogden New York Services, Inc., 312 B.R. 729, 732-33 (S.D.N.Y. 2004).

The state cases cited by QBE shed no light on the issue. The decision in Cogliano v. Ferguson,

⁵ Unlike this matter, Koken involved an attempted withdrawal of a third party claimant’s claim. The Pennsylvania Supreme Court reversed the Commonwealth Court based on statutory language specific to third party claimants (that the filing of a proof “shall” release the insured from claims by the third party claimant) that it held mandated that such claimants could not withdraw their proofs of claim. 893 A.2d at 82-83. Accord Ramos v. Jackson, 510 So.2d 1241, 1241-1242 (Fla. Dist. Ct. App. 1987) (per curiam) (same); In re International Forum of Florida Health Benefit Trust, 607 So.2d 432, 441 (Fla. Dist. Ct. App. 1992) (same). That language is also found in the New Hampshire Act, see RSA 402-C:40, I, but the claim at issue here is not a third party claim. The New Hampshire Supreme Court did not address this issue in Gonya v. Commissioner, New Hampshire Ins. Dept., 153 N.H. 521 (2006).

⁶ The Bankruptcy Code and the New Hampshire Act are quite different. For instance, a claim in bankruptcy is deemed allowed until objected to, 11 U.S.C. § 502(a), while under the Act the proof of claim only commences the Liquidator’s claim determination process. See RSA 402-C:38, II; RSA 402-C:45, I. Further, there is no rule like Bankruptcy Rule 3006 in insurer liquidations. Accordingly, the bankruptcy process does not provide a precedent here. See In the Matter of the Liquidation of The Home Insurance Company, 154 N.H. 472, 484 (2006) (distinguishing bankruptcy cases based on differences between the Bankruptcy Code and the New Hampshire Act).

245 Mass. 364, 369, 139 N.E. 527 (1923), supports the Liquidator's position because the claimant was only "allowed" to withdraw its claim "upon application to the court," although the decision does not discuss the applicable standard. The other cases merely mention withdrawal in passing and do not provide any analysis. See Hemisphere Nat'l Bank v. D.C. Ins. Guaranty Ass'n, 412 A.2d 31, 33 (D.C. Ct. App. 1980); Hahn v. Gen'l Am. Life Ins. Co., 272 N.W. 321, 323, 132 Neb. 509, 514 (1937); In the Matter of the Liquidation of N.Y. Title & Mortgage Co., 9 N.Y.S.2d 994, 997 (1939).

44. The Referee thus should look by analogy to the standards for withdrawal of a lawsuit. In New Hampshire, "[t]he trial court may deny a voluntary nonsuit without prejudice if 'the plaintiff has so far committed to the case by act or agreement that it would be unjust to permit the case to be discontinued.'" Bennett v. ITT Hartford Group, Inc., 150 N.H. 753, 759 (2004), quoting 5 R. Wiebusch, New Hampshire Practice, Civil Practice & Procedure § 32.11 at 62 (2003). "[T]he court has discretion to grant a nonsuit only *with* prejudice [i.e., barring the claim] if it would be 'manifestly unjust' to the defendant to grant plaintiff's request." Roberts v. General Motors Corp., 140 N.H. 723, 727 (1996), quoting Total Service, Inc. v. Promotional Printers, Inc., 129 N.H. 266, 268 (1987). Thus, where there is "sufficient general harm to warrant a finding of prejudice to the defendants," a nonsuit without prejudice may be denied. Total Service, 129 N.H. at 269.

B. Withdrawal Of QBE's POC To Permit It To Circumvent The Liquidation And Deal Directly With Zurich Would Unjustly Prejudice The Home Liquidation And Its Preferred Creditors.

45. Applying this standard, the Referee should decline to allow QBE to withdraw its claim because it would be unjust and prejudice the Home liquidation and its creditors. As shown by the extensive case file, representatives of the Liquidator investigated the claim and conducted

lengthy exchanges with QBE (and Zurich) over a three year period. QBE only purported to withdraw its proof of claim on October 13, 2006, after the October 11, 2006 meeting in which QBE was advised that the Liquidator intended to allow the claim. H0147; Bogin Aff. ¶ 9. QBE, however, is continuing to pursue its claim against Home's reinsurer, Zurich. H0154-H0155. Indeed, it is asserting to Zurich that the claim remains pending with the Liquidator. *Id.* In these circumstances, allowing withdrawal of QBE's claim would prejudice the Home liquidation and its creditors by permitting QBE to circumvent the liquidation and deal directly with Home's reinsurer Zurich. This improper direct dealing would deprive the estate and its creditors of the reinsurance on QBE's claim. QBE's attempt at direct dealing is without basis and frustrates the public policies reflected in the New Hampshire statutes.

46. As an initial matter, there is no contractual privity between QBE and Zurich. See Plourde Sand & Gravel Co. v. JGI Eastern, Inc., 154 N.H. 791, 795 (2007) (where there is no contract between two parties there is no privity). This lack of privity prevents QBE from obtaining payment from Zurich. The general rule is that there is no direct access by the policyholder to reinsurance, and that reinsurance must be paid to the liquidator to increase the size of the fund available for distribution to all creditors. See, e.g., Barhan v. Ry-Ron, Inc., 121 F.3d 198, 202 (5th Cir. 1997); Ainsworth v. General Reinsurance Corp., 751 F.2d 962, 965-66 (8th Cir. 1985). The Reverse Flow Agreement obligates Zurich to pay reinsurance to Home's Liquidator. It contains an "insolvency clause" that mandates that Zurich pay reinsurance directly to Home's liquidator without diminution because of Home's insolvency or failure to pay. See Reverse Flow Agreement Art. XX. As provided by N.Y. Ins. Law § 1308 (an analogue to RSA 405:49), that clause permits Zurich to pay a Home insured directly only if it is expressly named

in the reinsurance agreement or if the reinsurer has assumed the insurer's obligations by assumption and novation. Neither condition applies here.

47. The direct dealing sought by QBE is contrary the public policies reflected in the New Hampshire statutes. As the New Hampshire Supreme Court recently held, the purpose of RSA 402-C "is to protect preferred creditors by reserving assets for them." Liquidation of Home Ins. Co., 154 N.H. at 488, citing RSA 402-C:1, IV. Allowing the withdrawal of QBE's claim to permit direct dealing between QBE and Zurich would frustrate this purpose by allowing QBE to obtain reinsurance under the Reverse Flow Agreement that should benefit the Home liquidation's preferred creditors. QBE's implicit assertion that this is unfair simply reflects a disagreement with the legislative choice to prefer direct insureds, who are given Class II priority, over reinsureds, who fall in the "all other claims" Class V priority. Liquidation of Home, 154 N.H. at 477, citing RSA 402-C:44, V. This reflects "the wide-spread and longstanding policy of distinguishing direct insureds from reinsureds for the purpose of determining priorities of claims against insolvent insurance companies." In re Liquidation of Sussex Mut. Ins. Co., 301 N.J. Super. 595, 606, 694 A.2d 312, 317 (N.J. Super. App. Div. 1997).

48. Direct dealing would also "frustrate the legislative purpose of obtaining full payment from reinsurers despite an insurer's insolvency." Liquidation of Home, 154 N.H. at 488, citing RSA 402-C:36 and RSA 405:49, I. If QBE were to enter into an agreement with Zurich and circumvent Home's liquidation, it would deprive Home's estate of an asset that would have then been available to Home's preferred creditors. In sum, the prejudice to Home's preferred creditors warrants denial of QBE's attempt to withdraw its claim.

CONCLUSION

For the reasons stated, the Referee should deny QBE's request to withdraw its proof of claim and affirm the Liquidator's allowance of QBE's claim in the amount of \$332,789.67.

ROGER A. SEVIGNY, COMMISSIONER
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September 7, 2007

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Response to QBE's Submission Regarding Its Ericsson Claim, and the Affidavit of Russell Bogin were sent, this 7th day of September, 2007, by email to all persons on the following service list.



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