

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

DOCKET #: 03-E-106
In Re Liquidator Number: 2007-HICIL-29
Proof of Claim #: INTL46002
Claimant Name: QBE INSURANCE (AUSTRALIA) LTD.
Claimant No.: INTL46002

**STATEMENT OF QBE INSURANCE (AUSTRALIA) LTD.
OF CONTESTED ISSUES OF FACT AND LAW**

NOW COMES QBE Insurance (Australia) Ltd., by and through its counsel, Robert D. Hunt and Edward K. Lenci, and respectfully submits this statement of the contested issues of fact and law pursuant to Rule 15 of the Order governing this Liquidation:

1. QBE filed its Proof of Claim with The Home Insurance Company in Liquidation ("The Home") in December 2003. Before the Liquidator of The Home made a determination with respect to that claim, QBE withdrew it by letter from its counsel to the Liquidator dated October 13, 2006, receipt of which the Liquidator duly acknowledged on October 16, 2006. Almost four months after QBE withdrew its claim, the Liquidator finally purported to take formal action with respect to it by issuing a Notice of Determination in which the Liquidator, *inter alia*, refused to recognize QBE's withdrawal of its claim. These undisputed facts raise the following issues: a) in a liquidation proceeding, does a claimant have a right to withdraw its claim where, as here, the liquidator had not yet taken any formal action with respect to it? b) is this particularly so where, as here, the liquidator had previously asserted on several occasions that the claimant had no claim?

2. It is undisputed that there are various written communications the Liquidator sent to QBE, between December 2003 and March 2006, asserting that

QBE did not have a reinsurance contract with The Home and, thus, did not have any claim against The Home. In those communications, the Liquidator advised QBE to seek redress, instead, from Trygg Hansa Spp ("Trygg Hansa"), now known as Zurich Insurance Ireland Limited, Swedish Branch, because, as the Liquidator asserted on several occasions, QBE's reinsurance contract was with Trygg Hansa, not The Home. These facts raise the following issues: a) given the Liquidator's various admissions that QBE had no claim against The Home because QBE's contract was with Trygg Hansa, was QBE within its rights to withdraw its claim? b) if there was no contract of reinsurance between QBE and The Home, should QBE's claim be dismissed even apart from QBE's withdrawal of it?

3. Even assuming, *arguendo*, that US International Reinsurance Company, an affiliate of The Home that is the subject of a separate liquidation proceeding, is QBE's reinsurer (which is denied; Trygg Hansa is QBE's reinsurer), and given, therefore, that the Proof of Claim should have been, but was not, filed in that other liquidation, the issues raised are as follows: a) should the claim that was filed in this liquidation be dismissed even apart from QBE's withdrawal of it? b) should QBE's withdrawal of that claim be confirmed on the basis of the foregoing?

Dated: August 8, 2007

Respectfully submitted,
QBE Insurance (Australia) Ltd.
By its attorneys,
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LEGAL BRIEF OF QBE INSURANCE (AUSTRALIA) LTD.

NOW COMES QBE Insurance (Australia) Ltd. ("QBE"), by and through its counsel, Robert D. Hunt and Edward K. Lenci, and respectfully submits this Legal Brief pursuant to Rule 15 of the Order governing this Liquidation:

Preliminary Statement

1. QBE respectfully seeks a declaration that it withdrew the claim it filed with The Home Insurance Company in Liquidation ("The Home") or that that claim is dismissed even apart from QBE's withdrawal of it.

2. QBE filed its Proof of Claim with The Home's Liquidator ("the Liquidator") in December 2003. Before the Liquidator made a formal determination with respect to that claim, QBE withdrew it by letter from its counsel to the Liquidator dated October 13, 2006, receipt of which the Liquidator duly acknowledged on October 16, 2006.¹ Almost four months after QBE withdrew its claim, the Liquidator finally purported to take its first formal action with respect to it by issuing a Notice of Determination in which the Liquidator, *inter alia*, refused to

¹A copy of QBE's Proof of Claim accompanies this Legal Brief as Exhibit A, a copy of QBE's counsel's letter dated October 13, 2006, withdrawing QBE's claim accompanies this Brief as Exhibit B, a copy of the Liquidator's acknowledgement dated October 16, 2006, accompanies this Brief as Exhibit C, and a copy of the Liquidator's Notice of Determination dated February 6, 2007 accompanies this Brief as Exhibit D.

recognize QBE's withdrawal of its claim. Since the Liquidator refuses to accept QBE's rightful withdrawal of its claim, QBE seeks a declaration confirming its withdrawal.

3. There are three independent bases for granting QBE relief. The first is found in the various written communications the Liquidator sent to QBE, between December 2003 and March 2006, asserting that QBE did not have a reinsurance contract with The Home and, thus, did not have any claim against The Home. In those communications, the Liquidator advised QBE to seek redress, instead, from Trygg Hansa Spp ("Trygg Hansa"), now known as Zurich Insurance Ireland Limited, Swedish Branch ("Zurich"), because, as the Liquidator asserted on several occasions, QBE's reinsurance contract was with Trygg Hansa, not The Home. (These communications are exhibits to this Legal Brief and are discussed in detail in the Statement of Facts, *infra*).

4. A second reason to grant QBE's relief is that, in a liquidation proceeding, a claimant has a fundamental right to withdraw its claim where, as here, the liquidator had not yet taken any formal action with respect to it. See Exhibits A-D. Indeed, the only action the Liquidator had taken before QBE withdrew its claim was, as indicated, to assert on several occasions that QBE had no claim.

5. Yet a third reason to grant QBE relief is that even assuming, *arguendo*, the entity with the Hong Kong address identified in the Facultative Reinsurance Proposal (Exhibit E accompanying this Legal Brief) is QBE's reinsurer (which is denied; Trygg Hansa is QBE's reinsurer), documents the Liquidator himself has provided to QBE show that the entity in question was not The Home but, instead, was The Home's affiliate, US International Reinsurance Company ("US International

Re”), which is the subject of a separate liquidation proceeding in which the Proof of Claim should have been, but was not, filed.²

6. QBE finds it necessary to seek relief because QBE’s actual reinsurer, Zurich, as successor of Trygg Hansa, has agreed to pay QBE what is due under their reinsurance contract if, *inter alia*, QBE’s claim against The Home is withdrawn or dismissed. Zurich has made this a condition precedent to paying QBE because Zurich fears having to pay twice for the same claim. Zurich has this concern because the Liquidator has threatened that Zurich “run[s] the risk of double payment” if it pays QBE. See the Liquidator’s Case File, at H0144 & H0148.³

7. QBE submits that The Liquidator’s present course of action is of dubious validity and, indeed, that the Liquidator is acting in bad faith. Be that as it may, QBE respectfully requests relief in the form of a declaration either confirming that its claim is withdrawn or dismissing that claim.

²This point will be further elaborated in Point III, *infra*. For now, the following evidence should suffice as an introduction to it:

An excerpt from The Home’s Annual Statement for 1995, which the Liquidator provided to QBE’s counsel, is entitled Schedule Y, Information Concerning Activities of Insurer Members of a Holding Company Group, Part 1, Organizational Chart (“Schedule Y”). Schedule Y accompanies this Legal Brief as Exhibit F. Schedule Y shows that Home International Services (HK) Ltd. (HK obviously meaning Hong Kong) was, in 1995, a subsidiary of US International Re, not The Home. Significantly, the address of the entity identified in the Facultative Reinsurance Proposal (Exh. E) is in Hong Kong.

In an email dated March 4, 2004 from the Home’s Liquidator to QBE, a copy of which accompanies this Legal Brief as Exhibit G, the Liquidator advised QBE as follows: “I believe all business in Hong Kong was written by USI Re (formally [sic] Home Re) and is subject to a separate liquidation from Home Insurance Company. As such a [Proof of Claim] should be filed in the USI Re estate not Home’s.” (NB: QBE is in Australia, so when an email from its files is dated, for example, 04/03/04, that means March 4, 2004, not April 3, 2004).

³The Liquidator’s theory is that, if it is determined that The Home reinsured QBE and Zurich reinsured The Home, the Liquidator can pay QBE nothing as a Class V creditor and thereafter collect reinsurance monies from Zurich as if The Home had actually paid QBE.

Statement of Facts

A. The Fronting Arrangement Between QBE and Trygg Hansa

8. The genesis of this dispute goes back to 1995, when Trygg Hansa, a Swedish insurer, was the global liability insurer of Telefonaktiebolaget LM Ericsson (“Ericsson Sweden”), the Swedish telecommunications giant. As Trygg Hansa was not licensed to write insurance policies in Australia, where Ericsson Sweden had a subsidiary called Ericsson Australia Pty Limited (“Ericsson Australia”), Trygg Hansa entered into a fronting arrangement⁴ with QBE Mercantile Mutual Limited, a predecessor of QBE. Pursuant to that fronting arrangement, QBE issued an insurance policy to Ericsson Australia and its associated companies (a copy of the policy QBE issued to Ericsson Australia accompanies this Legal Brief as Exhibit H) and also issued the Facultative Reinsurance Proposal (Exhibit E) in which “The Home Insurance Company,” for reasons unknown, was mistakenly named as the reinsurer instead of Trygg Hansa, which was the intended reinsurer of the fronting arrangement. (The Home did not even have an office in Hong Kong, which is the address specified as that of the “issuing branch” in the Facultative Reinsurance Proposal.)

9. That the fronting arrangement was intended to be wholly between QBE and Trygg Hansa and that Trygg Hansa, and not The Home, should have been named as the reinsurer in the Facultative Reinsurance Proposal, is demonstrated by the following:

⁴In a fronting arrangement, an insurer licensed to do business in a particular jurisdiction (the fronting insurer) issues an insurance policy on behalf of another insurer that is not licensed to do business in that jurisdiction. The fronting insurer then fully reinsures the risk with the latter and passes to the latter much, but not all, of the premium it received from the policyholder. Fronting arrangements, which are quite common in the insurance business, allow an insurer to do business in a jurisdiction in which it is not licensed. See generally Barry R. Ostrager & Mary Kay Vyskocil, *Modern Reinsurance Law & Practice (Second Edition)*, § 1.05 (Glasser 2000).

a) various communications (accompanying this Legal Brief as Exhibit I) exchanged between the brokers for QBE and Trygg Hansa in April 1995, showing that the fronting arrangement was intended to be between QBE and Trygg Hansa;

b) the evidence that none of the reinsurance premium the Hong Kong entity received from QBE was kept by The Home or US International Re but, instead, was transferred in full to Trygg Hansa (this evidence will be addressed in the next subsection); and

c) the various admissions the Liquidator made that QBE's reinsurer was Trygg Hansa and that QBE did not have a contract of reinsurance with The Home (this evidence, too, will be addressed in the next subsection).

B. The Hong Kong Entity Was, At Most, A Conduit

10. It is not entirely clear how The Home's affiliate, US International Re, became involved in this transaction, but it appears to have become involved in it as a conduit or liaison only. This is demonstrated by various statements the Liquidator made concerning the investigation it conducted between December 2003, when QBE filed its Proof of Claim,⁵ and March 2006, as well as by the contemporaneous documents from 1995 that the Liquidator provided to QBE with the communications in which the Liquidator shared the results of its investigation.

11. The first such communication from The Liquidator is an email dated May 8, 2004 to QBE. A copy of the Liquidator's May 8, 2004 email accompanies this Legal Brief as Exhibit J. It provides as follows:

⁵As more fully elaborated in its Proof of Claim (Exhibit A), QBE sought AUD \$501,288.15, or about US \$373,000 at the then current exchange rate, for two claims QBE paid to Carole Dickinson and Louis Piscopo under the insurance policy QBE had issued to Ericsson Australia in or about April 1995 (Exh. H) on behalf of Trygg Hansa, for which QBE was fronting.

We have reviewed the materials you have provided and done an exhaustive search of our records and do not believe this risk was ever bound by Home. Rather we believe that it was bound by Trygg Hansa Spp. If you refer to a fax sent by Grace Lui of Home International Hong Kong to Melinda Gaines of Home International accounting which was included in the package of materials you sent to us, you will see a reference is made to the account being a Trygg Hansa Spp account and that Home sent all the premium to Trygg Hansa. As we can not find any system record of this account being bound by Home our only assumption is that is [sic] was bound by Trygg Hansa. (emphasis added).⁶

12. The next such communications were a series of emails from the Liquidator to in-house counsel at QBE. In the first of those emails, dated January 19, 2006 (a copy of which accompanies this Brief as Exhibit L hereto), the Liquidator reiterated what it had previously advised QBE: “we [that is, the Liquidator] have no record of Home binding the risk rather it appears that it was bound by Trygg Hansa Spp. I sent [QBE] on August 23rd 2004⁷ a Home internal memorandum from our file illustrating that the premium was sent to Trygg Hansa Spp.”

13. The next such communication from the Liquidator was an email dated March 3, 2006 to which the Liquidator attached two wire transfer records from July 1995 that relate to the memorandum from Grace Lui of Home International (the second page of Exhibit K) mentioned in the paragraph quoted above. A copy of the March 3, 2006 email and its attachments constitute Exhibit M accompanying this Brief.

⁶On September 23, 2004, the Liquidator faxed QBE a copy of the memorandum, dated July 10, 1995, from Grace Lui of Home International Hong Kong that was mentioned in the above quotation from the Liquidator's email of May 8, 2004. A copy of that fax accompanies this Legal Brief as Exhibit K, and the July 10, 1995 memorandum from Grace Lui is the second page of the fax.

⁷QBE cannot locate a communication dated August 23, 2004. It believes the Liquidator may have meant the fax dated September 24, 2004 (*see* Exhibit K).

14. Exhibit N accompanying this Brief consists of: a) the July 10, 1995 memorandum from Grace Lui of Home International Hong Kong that the Liquidator sent to QBE on September 23, 2004 (the second page of Exhibit K), and b) the two wire transfer documents from July 1995 attached to the Liquidator's email dated March 3, 2006 (the second and third pages of Exhibit M). The memorandum from Grace Lui of the Home International Hong Kong to The Home International's New York office (the first page of Exhibit N) states that it concerns "Ericsson – Australia." Ms. Lui's memorandum acknowledges The Home International Hong Kong's receipt of QBE's check in the amount of AUD \$66,423.28⁸ for "the Trygg Hansa Spp account" and requests "a wire transfer to Trygg Hansa's bank account." The Home International's "Request for Check" (the second page of Exhibit N) states that the check from QBE "belongs to Trygg Hansa" and requests a wire transfer to Trygg Hansa of AUD \$66,423.28, or US \$49,179.80; and the amount of AUD \$66,423.28 is significant inasmuch as it is the full amount Home International Hong Kong received from QBE, as demonstrated by Grace Lui's memorandum (the first page of Exhibit N). The third document in Exhibit N is The Home's "Worldlink Transfer Initiation Transaction Record," showing a wire transfer on July 20, 1995 to Trygg Hansa in the amount of AUD \$66,423.28, or US \$49,179.80, that is, the full amount Home International Hong Kong received from QBE.

15. In short, Exhibit N, which consists of documents the Liquidator sent to QBE in an effort to prove there was no reinsurance contract between QBE and The Home, demonstrates that Home International Hong Kong received AUD \$66,423.28 in premium from QBE and that that amount was remitted in full to Trygg Hansa. This, in turn, shows that neither The Home nor US International Re was acting as a

⁸AUD means Australian dollars. As noted, QBE is an Australian company.

reinsurer of QBE but, rather, as a mere conduit between QBE and Trygg Hansa because a reinsurer would have kept a portion of the premium for itself.

16. The next communication from the Liquidator admitting there was no contract between QBE and The Home is an email dated March 9, 2006, a copy of which accompanies this Legal Brief as Exhibit O. Exhibit O offers the Liquidator's fullest explanation of the lack of a reinsurance relationship between The Home and QBE. Moreover, it specifically denies that the Facultative Reinsurance Proposal (Exhibit E) is a contract between The Home and QBE. Exhibit O provides as follows:

... As discussed in review of the information provided to date including the copy of a reinsurance proposal listing Home Insurance on the risk,⁹ at the time in question Home had ceased writing new business and what we believed happened was that ultimately Trygg Hansa bound the risk. This is reaffirmed by the point that no formal slip or contract has been produced bearing Home' [sic] name as well as the fact that the entire premium was sent to Trygg Hansa. (emphasis supplied).

In answer to your questions as to why the Routing number at the bottom of "World Link Transfer Form is 00000000000000 and what the Account No. of 2650 represents,¹⁰ unfortunately in both cases after discussing it internally I am unable to answer you. However, I believe that this form clearly illustrates that a wire transfer was made to Trygg Hansa's bank which is referenced by the Beneficiary's Bank name and address sections of the form. Also, you will note that Trygg Hansa's Bank account No. is listed as 5544-10 017 47 under the Beneficiary's address.

If you contact Trygg Hansa with this information, they should be able to confirm that they received the money and have bound the risk.

⁹This reference to "the copy of a reinsurance proposal listing Home Insurance on the risk" is obviously a reference to the Facultative Reinsurance Proposal (Exhibit E).

¹⁰This reference to a "World Link Transfer Form" is obviously a reference to what accompanies this Brief as the third pages of both Exhibits M and N.

Please advise if I can be of further assistance. We shall diary our file 30 days and 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. (emphasis supplied).¹¹

C. **The Liquidator's "About-Face" and Its Bad Faith**

17. In or about April 2006, QBE retained Edward K. Lenci, a reinsurance lawyer practicing in New York City, to pursue its claim. During the course of negotiations several months later between representatives of Zurich and Attorney Lenci, Zurich made it clear that, because QBE had a claim pending in The Home liquidation, Zurich had concerns about paying QBE. In an effort to assuage Zurich's concerns, Attorney Lenci made contact with the Liquidator in order to obtain further confirmation from the Liquidator that there was no contract between The Home and QBE.

18. On October 11, 2006, Attorney Lenci met with Jonathan Rosen, Esq., of the Liquidator's office, and Mr. Rosen proceeded to make a complete "about-face" from the position the Liquidator had consistently taken since QBE filed its Proof of Claim. Mr. Rosen insisted that, The Liquidator's various written admissions notwithstanding, QBE and The Home had a contract; namely, the same Facultative Reinsurance Proposal that the Liquidator had already admitted was not a contract between The Home and QBE.¹²

¹¹As more fully explained in Point III, *infra*, The Home's Annual Statement for 1995 (Exhibit R) confirms the statement in the email of March 9, 2006 that The Home, in fact, had ceased writing new business at the time of the Facultative Reinsurance Proposal.

¹²As noted, in its email dated March 9, 2006, the Liquidator admitted the Facultative Reinsurance Proposal was not contract between QBE and The Home. *See* Exhibit O (admitting to having reviewed "the copy of a reinsurance proposal listing Home Insurance on the risk" and "reaffirm[ing] ... that no formal slip or contract has been produced bearing Home'[s] name as well as the fact that the entire premium was sent to Trygg Hansa.").

19. At his meeting with Attorney Lenci, Mr. Rosen provided Attorney Lenci with a copy of the so-called Partnership Agreement of Reinsurance (the "PAR"), a copy of which accompanies this Legal Brief as Exhibit P. The PAR appears to have purportedly existed between The Home and Trygg Hansa at some point in the early 1990s. Mr. Rosen further claimed that, based on the PAR and the purported existence of a reinsurance contract between QBE and The Home, the Liquidator could and would allow QBE's claim but pay QBE nothing as a Class V creditor and then pursue Zurich for reinsurance as if QBE had actually been paid by The Home.

20. Apart from the dubious validity of such a scheme, Mr. Rosen seemed at that meeting to suggest that, because the PAR purportedly shows that The Home was retroceding¹³ reinsurance risks to Trygg Hansa, the PAR somehow proves also that The Home actually was QBE's reinsurer. That argument is logically flawed for at least three reasons: First, it is *non sequitur* to contend that the PAR proves there was a reinsurance agreement between The Home and QBE. Second, assuming, *arguendo*, the PAR existed at some point in the early 1990s, it cannot have applied to the fronting arrangement established in 1995 because, as the Liquidator has admitted, "at the time in question [1995] Home had ceased writing new business" (Exhibit O; *see also* Point III, *infra*, and Exhibit R).

21. A third reason Mr. Rosen's contention is logically flawed is that, even assuming, *arguendo*, the PAR existed and that The Home was writing business in 1995 (which is denied), the PAR itself refutes what Mr. Rosen asserted based upon it. Per the terms of the PAR, The Home was to keep a portion (typically 20%, and at least 5%) of any premium it received for all transactions subject to the PAR (*see*

Exhibit P, at Articles III(e), IV and VI.1 of the PAR). Yet, the Liquidator has admitted, and the contemporaneous evidence shows in any event, that 100% of the premium Home International Hong Kong received from QBE was remitted to Trygg Hansa (*see* Exhibits L-O). In other words, if the PAR truly applied, Trygg Hansa would not have received all the premium.

22. In view of the foregoing, QBE submits that Mr. Rosen is not only wrong but that he is now attempting, in bad faith, to exploit what is obviously an error in the Facultative Reinsurance Proposal.

D. QBE Withdrew Its Claim In October 2006, Over Three Months Before The Liquidator First Took Formal Action

23. On October 13, 2006, two days after Attorney Lenci met with Mr. Rosen, QBE formally withdrew its claim and the Liquidator acknowledged receipt of that withdrawal on October 16, 2006. *See* Exhibits B and C. As noted already, the only action the Liquidator had taken before then was to assert repeatedly that there was no contract of reinsurance between QBE and The Home and that the Liquidator was going to recommend denial of QBE's claim. *See, e.g.*, Exhibit O.

24. Despite the Liquidator's prior admissions and QBE's withdrawal of its claim some four months before the Liquidator took any formal action with respect to it, the Liquidator issued a Notice of Determination on February 6, 2007, purporting to allow QBE's claim and advising that payment of any amount to QBE from The Home estate is unlikely. *See* Exhibit D.

¹³A reinsurer retrocedes a risk when it reinsures it with yet another reinsurer.

Legal Arguments

POINT I

**THE COURT SHOULD GRANT QBE RELIEF
BECAUSE THE LIQUIDATOR HAS ADMITTED
THERE WAS NO CONTRACT OF REINSURANCE
BETWEEN QBE AND THE HOME AND IS,
IN BAD FAITH, SEEKING TO EXPLOIT A MISTAKE
IN THE FACULTATIVE REINSURANCE PROPOSAL**

25. As explained in detail above, the Liquidator made repeated statements, and offered detailed explanations, that QBE had no contract with The Home and that, therefore, QBE has no claim against The Home. Those statements constitute admissions that QBE had no contract with The Home and that, therefore, QBE has no claim against The Home. *See e.g., In re Brittany L.*, 144 N.H. 139, 144, 737 A.2d 670, 675 (1999) (out-of-court statement qualified as an admission of a party-opponent, admissible for both substantive and impeachment purposes.); *Tullgren v. Phil Lamoy Realty Corp.*, 125 N.H. 604, 608, 484 A.2d 1144, 1147 (1984) (“Admissions are received in evidence upon the assumption that what a party admits to be true, may reasonably be presumed to be so.”).

26. As is clear, what is happening here is that the Liquidator is now in bad faith exploiting what it had previously conceded was a mistake in the Facultative Reinsurance Proposal naming The Home as the reinsurer of QBE. In addition to ignoring its own admissions, the Liquidator has now also conveniently forgotten that all the contemporaneous evidence shows conclusively that Trygg Hansa was the intended reinsurer of QBE -- and it is the intended parties that are the true parties to any contract. *See In re: Stafford's in the Field, Inc.*, 192 B.R. 29, 34 (D. N.H. 1996) (where identity of parties to a contract was ambiguous, court looked at all facts and circumstances surrounding transaction to find intended parties); *Lawrence v. U.S.*, 378

F.2d 452, 461 (5th Cir. 1967) (“A person is not made a party to a contract merely by being named and described in it or merely by the fact that such a contract is referred to in a second instrument in a way to evidence that such person is a party in another contract”).

27. On the basis of either the Liquidator’s admissions or the contemporaneous evidence, or both, QBE is entitled to relief because it is clear there never was a contract between QBE and The Home, nor was one intended.

POINT II

IT IS QBE’S RIGHT TO WITHDRAW ITS CLAIM

28. QBE is not aware of any case directly on point regarding the question of whether a party can withdraw a claim already submitted in an insurance liquidation, but several cases from other states make reference to withdrawals having occurred. *See, e.g., Hemisphere Nat’l Bank, v. District of Columbia Ins. Guaranty Ass’n*, 412 A.2d 31, 33 (D.C. 1980); *Cogliano v. Ferguson*, 245 Mass. 364, 369, 139 N.E. 527 (Mass. 1923); *Hahn, v. General American Life Ins. Co.*, 132 Neb. 509, 514, 272 N.W. 321 (Neb. 1937); *In re Liquidation of New York Title and Mortgage Co.* 170 Misc. 109, 111, 9 N.Y.S.2d 994, 997 (N.Y. Sup. Ct. 1939).

29. Moreover, two analogies support QBE’s right to withdraw its claim. First, by way of analogy to a federal bankruptcy proceeding, a creditor can withdraw a claim against a debtor’s estate as of right until an objection is filed or a complaint is filed against that creditor in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the bankruptcy case. *See* Rule 3006 of the Federal Rules of Bankruptcy Procedure; *In re Cruisehone*, 278 B.R. 325, 330-331 (E.D.N.Y. 2002); *In re Lazo*, 1994 U.S. App. LEXIS 16405 at *7-

8 (9th Cir. 1994). As noted earlier, the Liquidator did not issue its Notice of Determination until after QBE withdrew its claim.

30. A second analogy can be made to New Hampshire's procedure for "nonsuit" in a civil action, which roughly corresponds to voluntary dismissal under Rule 41 of the Federal Rules of Civil Procedure. *See Dorney v. Dorney*, 98 N.H. 159, 160, 96 A.2d 198, 199 (1953) ("The plaintiff's motion that his [complaint] be dismissed without prejudice was filed before any hearing had begun on the merits and before any answer or cross petition seeking affirmative relief had been filed. Under these circumstances, the plaintiff was entitled to a granting of this motion as a matter of right."); *see also Bennett v. Hartford Group, Inc.*, 150 N.H. 753, 759, 846 A.2d 56, 565 (2004) ("The 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.'"), *quoting* New Hampshire Practice, Civil Practice and Procedure § 32.11.

POINT III

**ASSUMING, ARGUENDO, TRYGG HANSA WAS
NOT QBE'S REINSURER, RELIEF SHOULD BE GRANTED
BECAUSE THE PROOF OF CLAIM SHOULD HAVE BEEN,
BUT WAS NOT, FILED IN THE SEPARATE
US INTERNATIONAL RE LIQUIDATION**

31. As noted at the beginning of this Legal Brief, a third reason to grant QBE relief is that assuming, *arguendo*, the Hong Kong entity whose address appears in the Facultative Reinsurance Proposal is, in fact, the reinsurer of QBE (which is denied), that entity was US International Re, d/b/a in Hong Kong as Home Insurance Hong Kong or Home International Services (HK) Ltd., which is the subject of a separate liquidation proceeding in which the proof of claim should have been filed.

By way of analogy to bankruptcy practice, a proof of claim must be timely filed against the correct debtor. *See Matter of Stuart*, 31 B.R. 18 (D. Ct. 1983) (creditor not permitted to amend claim against wife-debtor to state claim against husband-debtor). Because the claim was not filed in the US International Re liquidation and the time to file it there has lapsed, the claim filed in this liquidation should be deemed a nullity and the withdrawal of it confirmed.

32. There can be no doubt that, if the entity identified in the Facultative Reinsurance Proposal was the intended reinsurer of QBE (which is denied), it was US International Re, not The Home.

33. The Liquidator has provided QBE's counsel with the Directors' Report and Account for the Home International Services (HK) Ltd. for the Year Ended December 31, 1994 ("the 1994 HK Report," a copy of which accompanies this Legal Brief as Exhibit Q). The 1994 HK Report establishes that Home International Services (HK) Ltd. is a part of US International Re, not The Home. At the bottom of page 6 of the 1994 HK Report, the "immediate holding company" of Home International Services (HK) Ltd. is identified as US International Reinsurance Company. This is consistent with Schedule Y of The Home's 1995 Annual Statement (Exhibit F), which shows that Home International Services (HK) Ltd. is a subsidiary of US International Re, not The Home. *See also* the Liquidator's email dated February 12, 2007, to QBE's counsel (H0173 in the Liquidator's Case File) stating that "Home did not have a separate Hong Kong corporate entity[.]"¹⁴

34. Significantly, the address of the entity named as the reinsurer, albeit mistakenly, in the Facultative Reinsurance Proposal (Exhibit E) has the address of

¹⁴While that same email asserts that the "risk ... was bound in New York[.]" the evidence shows that the only event that took place in New York was the transmission of the premium

Home International Services (HK) Ltd., which, as just explained, is US International Re's subsidiary. Additionally, that same address is on the memo dated July 10, 1995 from Grace Lui (in Exhibit N), which refers to her entity as Home International Hong Kong.

35. Furthermore, the Liquidator, as noted, has provided QBE's counsel with The Home's 1995 Annual Statement and the "special note" from that Annual Statement explains that, due to a complex Recapitalization Agreement dated February 9, 1995 involving Trygg Hansa, The Home "ceased writing new and renewal business[.]" That "special note" from The Home's 1995 Annual Statement accompanies this Legal Brief as Exhibit R. The statement in the "special note" that The Home "ceased writing new and renewal business" is consistent with the email dated March 9, 2006 to QBE from the Liquidator (Exhibit O) stating that "at the time in question Home had ceased writing new business[.]" See also the Liquidator's internal email dated May 16, 2006, at H0074 in the Liquidator's Case File ("this was at the time in 1995 when the Home ceased underwriting").

36. Accordingly, even assuming, *arguendo*, the entity located in Hong Kong was the reinsurer of QBE for purposes of the transaction in question (which is denied), the documents show that that entity was US International Re, not The Home.

37. The truth, however, is that neither US International Re nor The Home reinsured QBE in this transaction. Trygg Hansa did. Yet to the extent an entity other than Trygg Hansa may have reinsured QBE (which is denied), the evidence is that US International Re, not The Home, is that entity. Since US International Re is the subject of a separate liquidation proceeding, the Proof of Claim filed in this

in full to Trygg Hansa. See Exhibit N. The Liquidator simply has no proof that the risk was ever bound in New York – and that is because it was not.

liquidation is a nullity. Accordingly, either that claim should be dismissed or QBE's withdrawal of it should be confirmed.

38. All prior pleadings, objections, affidavits, exhibits and attachments, including QBE's Objection to Liquidator's Determination of Claim and Request for Further Equitable Relief and the Affidavit of Vivienne Webster, are hereby incorporated by reference.

Conclusion

39. For the foregoing reasons, QBE respectfully requests a declaration confirming that its claim is withdrawn and/or dismissing that claim.

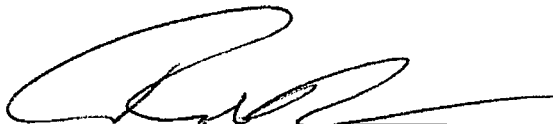
Oral Argument

40. The referee has scheduled oral argument of this submission for September 28, 2007.

WHEREFORE, QBE prays that the relief requested be granted, together with such other and further relief as is deemed just and proper.

Respectfully submitted,
QBE Insurance (Australia) Ltd.
By its Attorneys,
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Dated: August 8, 2007


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