

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Liquidation of The Home Insurance Company

No. 03-E-106

ORDER

Roger A. Sevigny, the New Hampshire insurance commissioner and liquidator of The Home Insurance Company ("Home"), filed a motion for order governing confidentiality of regulatory documents ("Motion") asking this court to hold that certain regulatory documents sought by parties to a California case are confidential not subject to a subpoena. Zurich Insurance Company ("Zurich") and its affiliates (whose acquisition of Home is contested) as parties in the California litigation also seek certain documents and the commissioner requests this court to issue an identical holding of confidentiality.¹ The California litigation arises out of Home's alleged failure to honor obligations to policyholders and Zurich's potential liability for those alleged failures. The documents sought by the plaintiffs and the defendants in the California litigation were created in the course of Home's regulation by the New Hampshire Insurance Department ("NHID"). The commissioner/liquidator contends the documents are confidential under New Hampshire law. *See* RSA 400-A:37-IV-a, RSA 401-B:7 and RSA 404-F:8. Because the cited statutes require the confidentiality of all documents exchanged with the NHID in the course of its regulation of Home, the court will decline to enforce any subpoenas of the confidential documents requested by the parties.

¹ The commissioner/liquidator also filed an emergency motion for expedited decision or hearing on the Motion. The issuance of this order on this day renders the emergency motion moot.

In 1995, Home undertook a recapitalization process, as a result of which Risk Enterprise Management, Ltd. (“REM”) took control of Home’s business. Zurich sought the commissioner’s approval of a transaction in which Zurich would acquire Home. The commissioner approved the transaction, but required oversight by the NHID. The commissioner also entered a consent order that required on-site monitoring of Home’s day-to-day activities by the NHID. By 1996, Home had no employees and was entirely represented by REM. In 1997, Home notified the NHID that its financial status was at a “mandatory control level,” which required enhanced regulation. The resulting order of supervision included Zurich and “any and all controlling persons of The Home” in the NHID’s enhanced regulation. Motion, Exh. 3 (Order of Supervision) at ¶1. The same order of supervision asserts the confidentiality of “any statements, analyses, models projections, reports and calculations obtained pursuant to this Order and the Consent Order and all other materials obtained in the connection therewith...” under New Hampshire statutes *Id.* at ¶7. A subsequent order of supervision also requires the confidentiality of information obtained by, or disclosed to the NHID representative. Motion, Exh. 4 (Second Supplemental Order of Supervision) at ¶3.

The parties to the California litigation have now requested documents in nineteen categories for which the liquidator has provided privilege logs reflecting the documents’ statutory confidentiality. One of the contested discovery requests requires production of correspondence to or from David Nichols—NHID’s on-site representative at Home. Another requires the production all “prior approval requests.” Both the California plaintiffs and the defendants have agreed that the liquidator may redact the confidential sections of prior approval requests.

When interpreting a statute, the court “first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning.” *Reming-*

ton 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). “If a statute is ambiguous, however, [the court] consider[s] legislative history to aid [its] analysis. [The court’s] goal is to apply statutes in light of the legislature’s intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme.” *Id*; see also *Franklin Lodge of Elks v. Marcoux*, 149 N.H. 581, 585 (2003) (“it is especially appropriate to consider the evil or mischief the statute was designed to remedy”) (citations and quotations omitted). Additionally, “[the court] interpret[s] a statute to lead to a reasonable result and review a particular provision, not in isolation, but together with all associated sections. The legislature will not be presumed to pass an act leading to an absurd result and nullifying, to an appreciable extent, the purpose of the statute.” *Green Crow Corp. v. Town of New Ipswich*, 157 N.H. 344, 346 (2008) (citations omitted).

Here, the liquidator claims that New Hampshire law—specifically RSA 400-A:37 and 401-B:7—shield the information regarding Home sought by the parties to the California litigation. RSA 400-A:37 provides, in pertinent part:

IV-a. Privilege for and Confidentiality of Reports and Ancillary Information.

(a) Except as provided in subparagraph IV(d) and in this subparagraph, all documents, materials, or other information, including, but not limited to, models or products provided by an entity separate from and not under direct or indirect corporate control of the company using the model or product, working papers, complaint logs, and copies thereof created, produced or obtained by or disclosed to the commissioner or any other person in the course of an examination made under this title, or in the course of analysis by the commissioner of the financial condition or market conduct of a company shall not be made public by the commissioner or any other person and shall be confidential by law and privileged, shall not be subject to RSA 91-A, **shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action.** The commissioner is authorized to use the documents, materials, or other

information in the furtherance of any regulatory or legal action brought as part of the commissioner's official duties.

(Emphasis added). Additionally, RSA 401-B:7, applying to Insurance Holding Companies, provides:

401-B:7 Confidential Treatment. – All information, documents and copies thereof obtained by or disclosed to the commissioner or any other person in the course of an examination or investigation made pursuant to RSA 401-B:6 and all information reported pursuant to RSA 401-B:4 shall be given confidential treatment and **shall not be subject to subpoena** and shall not be made public by the commissioner or any other person, except to insurance departments of other states, without the prior written consent of the insurer to which it pertains unless the commissioner, after giving the insurer and its affiliates who would be affected thereby, notice and opportunity to be heard, determines that the interests of policyholders, shareholders or the public will be served by the publication thereof, in which event he may publish all or any part thereof in such manner as he may deem appropriate.

(Emphasis added). The liquidator also cites RSA 404-F:8,I regarding Risk-Based Capital for Insurers. This statute shields from subpoena information gathered pursuant to any corrective order by the commissioner. This is important because such information would be damaging if made available to competitors.

The language of RSA 400-A:37, 401-B:7 and 404-F:8, I, is clear and unambiguous. It provides that information used and maintained by the commissioner in the course of his oversight of insurers and insurance holding companies, such as Home and REM, cannot be subject to subpoena and cannot be used in civil litigation. While the California litigants contend that a redacted version of the documents sought may be sufficient, the statutory language provides that no information gathered as a result of NHID regulation is subject to discovery in these circumstances. Therefore, a redacted version of the documents would violate New Hampshire law. The three statutory sections interpreted together clearly manifest an intent to protect the free flow of information between the NHID and companies it is regulating. Consequently, the documents re-

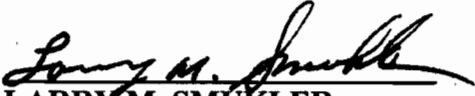
quested by the parties to the California litigation are confidential under RSA 400-A:37, 401-B:7 and 404-F:8, I and, therefore, are undiscoverable.

In addition to seeking an order providing that the requested information and documents are not subject to discovery, the liquidator requested this court to issue an order directing the California parties to refrain from seeking such information and documents. As indicated above, the court is persuaded that New Hampshire law precludes the discovery of the prior approval requests and the communications to and from Mr. Nichols regarding Home. Thus, this court cannot enforce a subpoena because the material is confidential under state law. It does not follow, however, that the this court has the authority to govern the conduct of parties to litigation in a different jurisdiction. Accordingly, the court declines the commissioner/liquidator's invitation to issue such an order.

Based on the foregoing, the commissioner/liquidator's Motion is GRANTED only to the extent that the court holds that the information and documents sought by the California plaintiffs and Zurich are confidential and not subject to discovery in New Hampshire. Thus, the court cannot enforce a subpoena or other process seeking such discovery.

So ORDERED.

Date: February 19, 2010


LARRY M. SMUKLER
PRESIDING JUSTICE

THE STATE OF NEW HAMPSHIRE
Merrimack County Superior Court

163 N. Main Street
P. O. Box 2880
Concord, NH 03301 2880
603 225-5501

NOTICE OF DECISION

PETER C L ROTH ESQ
ATTORNEY GENERAL OFFICE
33 CAPITOL STREET
CONCORD NH 03301-6397

03-E-0106 In the Matter of Rehabilitation of TheHome Insurance Company

Enclosed please find a copy of the Court's Order dated 2/19/2010
relative to:

Court Order

02/19/2010

William McGraw
Clerk of Court

Court Copy (cpe)

cc: Roger A. Sevigny, Commissioner of Ins.
J. David Leslie, Esq.
Gary S. Lee, Esq.
Gail M. Goering, Esq.
Peter G. Callaghan, Esq.
David H. Simmons, Esq.
David M. Spector, Esq.
George T. Campbell, III, Esq.
Lisa S. Wade, Esq.
Michael Cohen, Esq.
James J. DeCristofaro, Esq.
John F. O'Connor, Esq.
Lawrence J. Eisenstein, Esq.
Gerald J. Petros, Esq.
Melinda S. Gehris, Esq.
Edmond J. Ford, Esq.
Richard Mancino, Esq.
Albert P. Bedecarre, Esq.

Peter Bengelsdorf
Pieter Van Tol, Esq.
Adam Goodman, Esq.
Eric A. Haab, Esq.
Mary Ann Etzler, Esq.
Thomas M. McHugh, Esq.
Dennis G. LaGory, Esq.
Kober, Esq., Thomas W.
Stephan P. Parks, Esq.
J. Christopher Marshall, Esq.
Kathleen E. Schaff, Esq.
Carey Almond, Esq.
Jim Darnell, Esq.
Christopher H.M. Carter, Esq.
John A. Hubbard
Martin P. Honigberg, Esq
Joseph G. Davis, Esq.
Adebowale Osijo, MBA