

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.

RULING ON QBE INSURANCE (AUSTRALIA) LTD.'S  
REQUEST FOR WITHDRAWAL OR DISMISSAL OF ITS PENDING CLAIM

*Background:*

QBE Insurance (Australia) Ltd. ("QBE") seeks to withdraw a 2003 claim it filed with The Home Insurance Company in Liquidation. QBE filed its claim in relation to a facultative reinsurance cover secured back in 1995 by its predecessor, QBE Mercantile Mutual Limited, in relation to an underlying policy issued to Ericsson Australia Pty. Limited ("Ericsson Australia") under a fronting arrangement that predecessor had with Trygg Hansa Spp ("Trygg"). The fronting arrangement addressed the fact that Trygg, the global liability insurer of Telefonaktiebolaget LM Ericsson, was not then licensed to write in Australia.

QBE gave email notice of its withdrawal of the 2003 claim to liquidation personnel on October, 13 2006. A responsive email of that same date advised QBE that the Liquidator would oppose QBE's withdrawal of the claim and in February 2007 the Liquidator proceeded to issue a related Notice of Determination in the amount of US \$332,789.67. QBE then initiated this disputed claim proceeding.

*Positions of the Parties:*

QBE first argues that it is entitled to withdrawal of its claim as a matter of right. In noting that it "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", QBE offers two rationales for allowing it to do so, one relying upon an analogy to federal bankruptcy proceedings, and the other upon standards for allowance of nonsuit or voluntary dismissal in civil actions. In advancing that argument, QBE takes the position that liquidation personnel exerted little formal effort relating to the claim at issue between the filing of

the claim and the October 13, 2006 emails, and that allowance of the claim's withdrawal would create no undue prejudice.

QBE goes on to argue that, entitlement aside, it should be allowed to withdraw its claim because the facts of this matter do not establish that QBE was actually reinsured by Home on the liabilities at issue. QBE notes that until 2006 it had been advised by personnel charged with processing Home claims prior to liquidation, and later by liquidation personnel, that there was no Home record of a contract or an account number involving QBE or QBE's original insureds, Teleric Pty Ltd ("Teleric") and Ericsson Australia Pty Ltd ("Ericsson").

The Liquidator addresses QBE's argument that it may withdraw its claim as a matter of right by noting that the New Hampshire Act does not expressly grant such a right and adds that allowing a withdrawal of the claim would "permit QBE to circumvent the liquidation" and deal directly with Zurich Insurance Ireland Ltd., Swedish Branch (Zurich"), Trygg's successor. To allow such a circumvention, says the Liquidator, would prejudice preferred creditors of Home who would otherwise be the beneficiaries of the value which the collection of claim-related reinsurance would bring to the estate.

Turning to the facts of this disputed matter, the Liquidator argues that none of the back and forth communications between QBE personnel and Home personnel, pre-liquidation or post-liquidation, which suggested that there was no reinsurance contract between Home and QBE, are relevant. Instead of focusing upon those communications, the Liquidator asks the Referee to focus upon what the Liquidator calls "the critical document", the Facultative Reinsurance Proposal signed by QBE and dated June 5, 1995, which specifies Teleric and Ericsson as original insureds. The Liquidator also draws the Referee's attention to a second Proposal dated June 19, 1995 regarding a QBE policy issued to Nira Pty Ltd., another original insured, and documentation that a QBE's check in the amount of A\$66,432.28 made payable to Home was deposited in a Home Citibank account on July 18, 1995. Finally, the Liquidator relies on a document unearthed in August 2006, the June 1992 Partnership Agreement of Reinsurance between Home and Trygg Hansa Spp ("Trygg"), also known as the "Reverse Flow Agreement". Within that agreement, argues the Liquidator, lies the basis for concluding that the QBE risk in question did indeed find its way onto Home's books and not Trygg's.

*Discussion:*

As previously noted QBE relies on two rationales to support its right to withdraw: standards outlined in federal bankruptcy proceedings and standards for allowing nonsuit or voluntary dismissal in civil actions. And, while the Liquidator is generally dismissive of the cases that QBE cites in support of its position on this point, he does agree that application of the New Hampshire standards for withdrawal of a lawsuit to the facts here would be proper.

While undue prejudice to the interests of the representatives of the Liquidator working on this file, or to the preferred creditors of Home, might arguably arise if the Referee were to

dismiss a *valid* Class V claim, the circumstances pertinent to this claim raise doubt as to whether QBE ever had any claim in this liquidation at all. Therefore, the Referee instead focuses upon the factual issues raised by QBE relating to this claim and countered by the Liquidator.

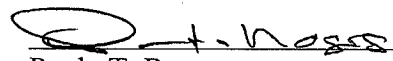
As the Liquidator suggests, the Facultative Reinsurance Proposals and the reference in the various documents to a premium check in the amount of A\$66,432.28 made payable to Home would generally lead to the conclusion that Home was the reinsurer; however, other circumstances create significant uncertainty. Those circumstances include the following: the June 5, 1995 Proposal, the earlier of the two proposals upon which the Liquidator focuses, was executed just one week prior to when Home was to cease writing new business<sup>1</sup>, and the other proposal was executed just after that date; the QBE premium check, while initially deposited in Home's account, was later transferred in its *entirety* to Trygg; and, no one within the liquidation operation has been able to produce a covernote, contract, endorsement or memorandum which reflects that Home actually took any portion of QBE's Ericsson related risk.

While the Liquidator offers the "reverse flow agreement" and its "one-off provision"<sup>2</sup> as the explanatory rationale for the wire transfer of the entire premium from a Home account to Trygg account, significant uncertainty remains. One might conclude just as well that, because the transaction in question straddled the date upon which Home was to stop writing new business, a general sensitivity to that prohibition simply led to the use of the existing Home/Trygg network in place under the 1992 reverse flow agreement to facilitate transmittal of payment *through* Home and on to Trygg. This would be consistent with the "follow the money" analysis that QBE advances when arguing that it is unreasonable to conclude that Home took the risk while retaining no portion of the premium.

Given the uncertainty about what actually transpired, the Referee has concluded that on the facts of this matter, it would be inequitable to tie QBE's hands and require it to submit to the Liquidator's claim determination. Therefore, the Referee finds for QBE, and dismisses the pending claim.

So Ruled:

Dated: October 26 2007

  
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Paula T. Rogers  
Referee

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<sup>1</sup> Under a recapitalization plan presented to and approved by the New Hampshire regulator in 1995, The Home Insurance Company was to cease writing new business as of June 12, 1995.

<sup>2</sup> Article V of the 1992 Partnership Agreement of Reinsurance between Home and Trygg Hansa Forsakrings.AB ("Trygg") provides for instances where Trygg and Home could agree to terms other than outlined by the partnership agreement.