

ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE

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CONCORD, NEW HAMPSHIRE 03301-6397

PETER W. HEED  
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October 8, 2003

RECEIVED

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N.H. INSURANCE DEPARTMENT

William S. McGraw, Clerk  
Merrimack County Superior Court  
4 Court Street  
Concord, NH 03301

Re: *Roger A. Sevigny, Insurance Commissioner  
As Liquidator of The Home Insurance Company v.  
Employers Insurance of Wausau, A Mutual Company*

Dear Mr. McGraw:

Enclosed for filing in the above-referenced matter, is an original and two copies of *Complaint Seeking Declaratory Judgment with Respect to Offsets*.

Please issue Orders of Notice and return to the undersigned so that this office can have the Complaint served upon Employers Insurance of Wausau.

If you have any questions, please feel free to contact me. Thank you for your assistance in this matter.

Very truly yours,

//Peter C. L. Roth\\

Peter C.L. Roth  
Senior Assistant Attorney General  
Environmental Protection Bureau  
(603) 271-3979

Enclosures

cc: Roger A. Sevigny, Commissioner, New Hampshire Department of Insurance  
Alex Feldvebal, Deputy Commissioner, New Hampshire Department of Insurance  
Pete Bengelsdorf, Special Deputy Liquidator  
Jonathan Rosen, Esq.  
Russell G. Bogen, Esq.  
J. David Leslie, Esq.  
Eric Smith, Esq.

STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

-----X  
ROGER A. SEVIGNY, INSURANCE COMMISSIONER  
as LIQUIDATOR OF THE HOME INSURANCE COMPANY,

Petitioner,

- against -

EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL  
COMPANY,

Respondent.

-----X  
**COMPLAINT SEEKING DECLARATORY  
JUDGMENT WITH RESPECT TO OFFSETS**

Petitioner, Roger A. Sevigny, Insurance Commissioner, as Liquidator of The Home Insurance Company ("Home"), acting solely in this capacity, by his attorneys, the Office of the Attorney General, brings this Complaint Seeking Declaratory Judgment With Respect to Offsets pursuant to RSA 491:22 and RSA 402-C:5 and :25(VI), as and for his Complaint, alleges upon information and belief as follows:

1. Home is incorporated under the laws of the State of New Hampshire and has its principal places of business at 59 Maiden Lane, New York, New York 10038.

2. Respondent Employers Insurance of Wausau, a Mutual Company ("Wausau") is incorporated under the laws of Wisconsin and has its principal place of business in Wausau, Wisconsin.

3. The Court has personal jurisdiction over Wausau as Wausau is licensed to and does conduct business in New Hampshire. In addition, the Court has personal jurisdiction over Wausau pursuant to RSA 402-C:4(V).

4. Venue is proper pursuant to RSA 402:c:4 and :20 because Home is incorporated under the laws of New Hampshire and is the subject of Liquidation proceedings pending before this Court.

5. Wausau is a reinsurer of Home pursuant to certain reinsurance agreements whereby Home obtained reinsurance coverage from Wausau (the "Home Outwards Reinsurance Agreements"). The Home Outwards Reinsurance Agreements include, among others, Home's Casualty Surplus Reinsurance Agreement ("Treaty 978"), High Level Quota Share Treaty ("Treaty 987") and Third Excess of Loss Reinsurance Agreement ("Treaty 949"). Wausau and Home also entered into certain reinsurance agreements whereby Wausau obtained reinsurance coverage from Home (the "Home Inwards Reinsurance Agreements").

6. In addition to the reinsurance relationships between Home and Wausau, Wausau and US International Reinsurance Company ("USI Re") entered into certain reinsurance agreements whereby Wausau obtained reinsurance coverage from USI Re (the "USI Re Inwards Reinsurance Agreements").

7. USI Re is incorporated under the laws of New Hampshire and is the subject of a Liquidation proceeding that is separate and distinct from the Home Liquidation proceeding, both of which are pending before this Court. The USI Re Liquidation proceeding is being conducted under Docket No. 03-E-0112.

8. Commencing in or about 1995, Wausau began offsetting balances due under the Home Outwards Reinsurance Agreements against amounts USI Re ostensibly owed to Wausau pursuant to the USI Re Inwards Reinsurance Agreements. In addition, Wausau began offsetting balances due under the Home Outwards Reinsurance Agreements against balances allegedly due under the Home Inwards Reinsurance Agreements. The continued set-

off of these latter balances is not in dispute and is not part of the instant declaratory judgment action. None of the contracts between Home and Wausau or USI Re and Wausau contains any provision addressing offset rights.

9. Home and USI Re disputed Wausau's unilateral offset of balances due under the Home Outwards Reinsurance Agreements against balances allegedly due under the USI Re Inwards Reinsurance Agreements and the offset issue became the subject of arbitration between Home and Wausau with respect to Treaty 949, Treaty 978 and Treaty 987. The arbitrators in these matters issued rulings in 1999 that permitted Wausau to offset amounts owed to Home under the Home Outwards Reinsurance Agreements against amounts USI Re owed to Wausau under the USI Re Inwards Reinsurance Agreements. Although Wausau did not judicially confirm these rulings, as a matter of business practice Home, Wausau and USI Re thereafter conducted tripartite offsets of agreed reinsurance balances.

10. On March 6, 2003, this Court, upon the Petition of the New Hampshire Insurance Department, issued an Order of Rehabilitation with respect to Home. The Order of Rehabilitation, as amended by the Court's Order of April 30, 2003, prohibited "the setoff of any debt owing to The Home; provided, however, that notwithstanding anything in this Order to the contrary, nothing herein is intended nor shall it be deemed to stay any right of setoff of mutual debts or mutual credits by reinsurers as provided in and in accordance with RSA 402-C:34."

11. On March 12, 2003, this Court, upon the Petition of the New Hampshire Insurance Department, issued an Order of Rehabilitation with respect to USI Re. The Order of Rehabilitation, as amended pursuant to the Court's Order of April 30, 2003, prohibited "the setoff of any debt owing to USI Re; provided, however, that notwithstanding anything in this Order to the contrary, nothing herein is intended nor shall it be deemed to stay any right of setoff of mutual debts or mutual credits by reinsurers as provided in and in accordance with RSA 402-C:34."

12. RSA 402-C:34 states in pertinent part, “[m]utual debts or mutual credits between the insurer and another person in connection with any action or proceeding under this chapter shall be set off and the balance only shall be allowed or paid, except as provided in paragraph II.”

13. On March 20, 2003, subsequent to the Orders of Rehabilitation referenced above, Home received an arbitration award arising from Wausau’s denial of certain amounts billed to it by Home with respect to an underlying insurance loss settlement with ACandS, Inc. (“ACandS”). That award, issued by a duly constituted arbitration panel, provided that Wausau was to make payment to Home in the amount calculated to be \$465,093, plus interest accruing at 9% until the date that payment is made (the “ACandS Arbitration Award”).

14. On June 13, 2003, this Court, upon the Petition of the New Hampshire Insurance Department, issued an Order of Liquidation with respect to Home. The Order of Liquidation contains the same provision with respect to offsets as does the Order of Rehabilitation quoted in paragraph 10 above.

15. On June 13, 2003, this Court, upon the Petition of the New Hampshire Insurance Department, also issued an Order of Liquidation with respect to USI Re. The USI Re Order of Liquidation contains the same provision with respect to offsets as does the Order of Rehabilitation quoted in paragraph 11 above.

16. Consistent with RSA 402-C:34, which prohibits the offset of balances involving companies in rehabilitation or liquidation absent mutuality between parties, the Orders of Rehabilitation and the Orders of Liquidation preclude Wausau from offsetting amounts due to Home against amounts due to Wausau from USI Re. Wausau, however, refuses to recognize that preclusion and contends that it is entitled to offset balances owed to Home under the Home Outwards Reinsurance Agreements against alleged balances due to Wausau from USI Re under the USI Re Inwards Reinsurance Agreements. As such, Wausau has refused to pay the award issued in the ACandS arbitration.



17. In addition to the balances due under the ACandS Arbitration Award, Home has submitted billings totaling \$1,060,166.87 that Wausau has failed, neglected and/or refused to pay, again claiming a right to offset balances due to Home under the Home Outwards Reinsurance Agreements against balances allegedly due from USI Re under the USI Re Inwards Reinsurance Agreements.

18. In order to assure the proper and orderly administration of the estate of Home and to prevent Wausau from obtaining an undue preference in the Liquidation proceedings pending before this Court consistent with the statutory scheme governing the liquidation of insurance companies in New Hampshire, Home seeks a declaration from the Court that Wausau is not entitled to offset balances it owes to Home under the Home Outwards Reinsurance Agreements against balances allegedly owed under the USI Re Inwards Reinsurance Agreements.

WHEREFORE, the Liquidator of Home respectfully requests that the Court:

1. Issue a judgment that, pursuant to the Order of Liquidation and RSA 402-C:34, offsets are only appropriate, for purposes of the Home Liquidation proceedings, when mutual debts and credits owed between the insurer and another person are sought to be set-off;
2. Issue a judgment that no mutuality exists between the Home Outwards Reinsurance Agreements and the USI Re Inwards Reinsurance Agreements so as to entitle Wausau to set-off debts owed to Home against credits it may allegedly have with USI Re;
3. Order such other and further relief as the Court deems just and proper in the circumstances.

Respectfully submitted,

**ROGER A. SEVIGNY, INSURANCE  
COMMISSIONER, AS LIQUIDATOR OF THE  
HOME INSURANCE COMPANY,**

By his attorneys

**PETER W. HEED, ATTORNEY GENERAL**

//Peter C. L. Roth\\

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**Peter C.L. Roth  
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**Of Counsel:**

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**October 8, 2003**