

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

**CIC'S OBJECTION TO LIQUIDATOR'S REPORT OF
CLAIMS AND RECOMMENDATIONS AS OF SEPTEMBER 26, 2005**

Century Indemnity Company ("CIC"), by its attorneys, Orr & Reno P.A. and Lovells, hereby submits this Objection to the Liquidator's Report of Claims and Recommendations as of September 26, 2005 (the "Report and Recommendation") and respectfully states as follows:

Summary

1. In the Report and Recommendation, the Liquidator has recommended that the Court partially allow Proof of Claim # RAHM 700581 filed by Excess and Treaty Management Corporation (the "ETMC Proof of Claim") in the amount of \$314,876.91.
2. The Court should not decide now whether to allow the ETMC Proof of Claim because an allowance could affect several issues that are currently being decided in the disputed claim proceeding (2005-HICIL-2) before Referee Rogers as a result of CIC's objection filed on June 7, 2005 (the "CIC Claims Objection"). As set forth below, the Liquidator is improperly attempting to use the Report and Recommendation to support his motion to dismiss the CIC Claims Objection on mootness grounds and thereby foreclose the Referee's full consideration of the legal and factual issues. The questions before the Referee in the disputed claim proceeding include the issue of when setoff arises under New Hampshire law, a matter on which the Liquidator has taken inconsistent positions.
3. The Liquidator has not identified any reason why the recommended allowance of the ETMC Proof of Claim must be decided by the Court now. Prior to filing this Objection,

counsel for CIC contacted counsel for the Liquidator and requested a deferral on the proposed allowance of the ETMC Proof of Claim. Counsel for the Liquidator refused. The only conclusion to be drawn is that the Liquidator is trying to use the report and recommendation process for tactical purposes.

4. Accordingly, CIC respectfully submits that the Court should deny the Report and Recommendation as it relates to the ETMC Proof of Claim.

Background

5. Both the ETMC Proof of Claim and Proof of Claim #AMBC 700308 filed by CIC (the “CIC Proof of Claim”) relate to balances arising out of CIC’s involvement with the Excess and Casualty Reinsurance Association (the “ECRA Pool”). CIC, however, was unaware of the ETMC Proof of Claim until after it was filed.

6. ETMC is not an insurer or reinsurer; it acts as the manager for the ECRA Pool. As a participant in the ECRA Pool, CIC is the risk-bearing entity and should receive the direct benefit of any ECRA Pool balances that The Home Insurance Company (“Home”) owes CIC.

7. In a series of determinations and re-determinations in January and April 2005, respectively, the Liquidator stated that the recommended allowance for the CIC Proof of Claim would be zero. (*See* CIC’s Mandatory Disclosures, annexed as Ex. 1 hereto, at ¶¶ 3-5, 10-11; April 2005 Notices of Re-Determination, annexed as Ex. 2 hereto.) In the April 2005 re-determinations, the Liquidator recommended the partial allowance of the ETMC Proof of Claim instead of the CIC Proof of Claim, even though Home has admitted that the ECRA Pool balances belong to CIC rather than ETMC. (*See id.*)

8. The Liquidator has also denied that CIC may claim an offset for ECRA Pool balances as soon as they arise, arguing that CIC may assert an offset against amounts claimed by Home only when the ECRA Pool balances are allowed by the Court pursuant to RSA 402-C:45. It is CIC’s position that under the law and the facts here — including several admissions by the

Liquidator in the claims determination process — CIC is entitled to take an offset for the ECRA Pool balances before Court allowance. (*See* Ex. 1 at ¶¶ 12-15.)

9. CIC filed the CIC Claims Objection in order to invoke the disputed claims procedures and obtain a resolution of these issues (as well as any other issues relating to the CIC Proof of Claim and the ETMC Proof of Claim). Accordingly, the CIC Claims Objection refers to both the CIC Proof of Claim and the ETMC Proof of Claim. (*See* CIC Claims Objection, annexed hereto as Ex. 3.)

10. On July 26, 2005, the Liquidator issued another set of determinations (the “July 2005 NODs”) in which he once again denied the CIC Proof of Claim and recommended a partial allowance of the ETMC Proof of Claim in the amount of \$314,876.91. (*See* Ex. 1 at ¶ 7; July 2005 NODs, annexed hereto as Ex. 4.)

11. CIC filed a Supplemental Objection to the July 2005 NODs on September 23, 2005, which was within sixty days after the determination. (*See* Ex. 5 annexed hereto.)¹ The Supplemental Objection, like the CIC Claims Objection, refers to both the CIC Proof of Claim and the ETMC Proof of Claim. CIC objects to the July 2005 NODs on the same grounds that are set forth in paragraphs six through eight above with regard to the earlier determinations, and further notes that the Liquidator has not provided back-up documentation for the recommended allowance of the ETMC Proof of Claim.

12. On July 26, 2005, the Liquidator filed a report of claims and recommendations as of July 19, 2005, which recommended the partial allowance of the ETMC Proof of Claim (up to the amount set forth in the April 2005 re-determinations). CIC did not object to the Liquidator’s recommendation in late July 2005 because it believed such an allowance would not affect its pending claim before the Referee arising out of the CIC Proof of Claim. Moreover, the Liquidator had not argued as of late July 2005 that an allowance of the ETMC Proof of Claim

¹ The July 2005 NODs were already before the Referee in the disputed claim proceeding (*see* Ex. 1), but CIC filed the Supplemental Objection for the avoidance of any doubt.

would bar consideration of any issues relating to the CIC Proof of Claim. The Court partially allowed the ETMC Proof of Claim by order dated August 12, 2005 (the “August 12 Order”).

13. On September 16, 2005, the Liquidator filed a motion to dismiss the CIC Claims Objection. He argued, for the first time, that the August 12 Order partially allowing the ETMC Proof of Claim is somehow determinative of the CIC Proof of Claim (even though CIC did not authorize the filing of the overlapping ETMC Proof of Claim) and that the CIC Claims Objection is moot because CIC obtained the right to assert setoff upon the entry of the August 12 Order.

14. CIC has pointed out that the Court’s allowance of the ETMC Proof of Claim did not determine CIC’s rights under the separate CIC Proof of Claim, and that there is no reason to allow the ETMC Proof of Claim in lieu of the CIC Proof of Claim. CIC has also demonstrated that (1) there is no reason to delay resolution of the offset issue in the disputed claim proceeding involving the ECRA Pool; and (2) there is no basis in law or fact for the Liquidator’s argument that setoff is dependent upon an allowance of claims. CIC has further shown that the Liquidator’s motion should be denied under a well-recognized exception to the mootness doctrine for issues that are capable of repetition but would evade review in the event of dismissal.²

15. On September 30, 2005, after the oral argument on the motion to dismiss, the Liquidator filed the Report and Recommendation. The Report and Recommendation was filed just 8 days after the previous report and recommendation. This timing is particularly suspicious and provides further evidence that the Liquidator is attempting to use the Report and Recommendation to gain a tactical advantage in the disputed claim proceeding.

16. That same day, the Liquidator filed sur-reply papers in support of the motion to dismiss in which he argued that CIC’s objection to the July 2005 NODs will be “imminently” moot because of the Report and Recommendation. Thus, the Liquidator is making the same

² The parties argued the motion to dismiss before the Referee on September 23, 2005, and the motion is currently pending.

argument regarding the July 2005 NODs that he made with respect to the April 2005 re-determinations.

17. In papers filed on October 3, 2005, CIC noted that the Liquidator's mootness argument has no application to the July 2005 NODs because — in contrast to the earlier determinations — the Court has not taken any action on them. If, however, the Court were to accept the recommendation regarding the ETMC Proof of Claim, the Liquidator would undoubtedly argue that the Referee should not reach the merits of the CIC Claims Objection.

Argument

18. CIC believes that the Liquidator has no basis for his motion to dismiss, and that an allowance of the ETMC Proof of Claim in accordance with the July 2005 NODs should not affect the disputed claim proceeding. However, CIC respectfully requests that the Court avoid taking any steps that might interfere with the resolution of the setoff issues before the Referee.

19. In the event of an allowance of the ETMC Proof of Claim, the Liquidator could also argue that the Court has determined that (1) the ETMC Proof of Claim should be allowed instead of the CIC Proof of Claim; and (2) the amount of the recommended allowance for the ETMC Proof of Claim is proper. Once again, CIC does not believe that an allowance should have that effect, but respectfully submits that the Court should avoid complicating the task of the Referee in resolving the various issues presented in the disputed claim proceeding.

20. RSA 402-C:45, I states that “[u]nresolved disputes shall be determined under RSA 402-C:41,” which in turn requires a resolution of any claim where an objection has been filed. Here, CIC has objected to the Liquidator's determinations and re-determinations of both the CIC Proof of Claim and the ETMC Proof of Claim, thereby invoking the disputed claim procedures. A partial allowance of the ETMC Proof of Claim pursuant to the Report and Recommendation would not resolve the issues raised by the CIC Proof of Claim (or the related CIC Claims

Objection). Those issues are properly before the Referee in the ongoing disputed claim proceeding, and they should be adjudicated in that forum without any interference.

21. In sum, there is no reason why the allowance of the ETMC Proof of Claim should be decided by the Court now. The Liquidator is trying to use the request for an allowance to support his motion to dismiss and hence delay an adjudication of the setoff issue. In the interest of a speedy resolution of this critical issue, the Court should reject the Report and Recommendation as it relates to the ETMC Proof of Claim.

WHEREFORE, CIC respectfully requests that the Court deny the Liquidator's recommendation with respect to the ETMC Proof of Claim and defer any allowance until the conclusion of the disputed claim proceeding (or a further order by the Court).

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing pleading has been served on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail on October 5, 2005:

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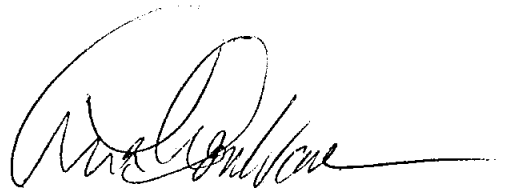
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A handwritten signature in black ink, appearing to read "Lisa Snow Wade", written over a horizontal line.

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