

**The State of New Hampshire**  
Superior Court

Merrimack County Courthouse  
163 N. Main Street, P.O. Box 2880  
Concord, NH 03302-2880  
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No. 03-E-106

In the Matter of

The Liquidation of The Home Insurance Company

**ORDER ON CENTURY INDEMNITY COMPANY'S  
MOTION TO LIFT STAY AND COMPEL ARBITRATION**

Before the Court is a motion by Century Indemnity Company ("CIC") to lift the 2003 court-ordered litigation stay in this matter and to compel arbitration, to which motion the Liquidator of The Home Insurance Company ("Home") objects. The Court heard oral argument on the motion and has reviewed the parties' voluminous pleadings in connection with the motion.

CIC's motion stems from its April 1, 2008 demand for arbitration pursuant to Paragraph 7 of a 1984 Insurance and Reinsurance Assumption Agreement ("Insurance and Reinsurance Agreement") between Home and The Insurance Company of North America ("INA"), CIC's predecessor in interest. At issue are the same CIC liabilities to Home that were the focus of a January 2004 agreement ("the AFIA Agreement") between

the Liquidator and certain of Home's cedents ("AFIA Cedents"). Following execution of the AFIA Agreement, the so-called ACE companies—including CIC—challenged the Liquidator's actions with regard to the AFIA Agreement, arguing that the Liquidator had no authority to enter into the agreement, and that payments to AFIA Cedents as Class V claimants under the agreement were contrary to the mandatory distribution requirements of RSA 402-C:44. Despite this challenge, the AFIA Agreement was approved by this Court on September 22, 2005 and affirmed by the New Hampshire Supreme Court on December 5, 2006. In the Matter of the Liquidation of the Home Ins. Co., 154 N.H. 472 (2006).

By its motion, CIC now seeks the opportunity to challenge the Liquidator's actions regarding the 2004 AFIA Agreement from a different perspective, arguing that the Liquidator's actions in negotiating the AFIA Agreement were in violation of contractual duties owed to CIC by the Liquidator under the 1984 Insurance and Reinsurance Agreement. CIC's request for relief comes at a time when its liabilities to Home have exceeded available setoff.

In support of its request, CIC distinguishes between its earlier challenge to the AFIA Agreement and its present pursuit of an opportunity to raise defensive breach of contract claims against the Liquidator. CIC suggests that the focus of the earlier challenge was somehow limited to questioning whether the Liquidator had statutory authority to enter into such an agreement, and whether the agreement violated the mandatory distribution provisions of RSA 402-C:44. In staking its position, CIC notes that it consistently advised both the Court and the Liquidator of its reservation of rights to

pursue the claims it now wishes to pursue. Further, asserts CIC, its breach of contract claims are only now ripe because its setoff position has evaporated.

In opposing CIC's motion, the Liquidator asserts that CIC is drawing "artificial distinctions" between its previous challenge to the AFIA Agreement and its "purported claim in arbitration." In effect, says the Liquidator, CIC is seeking a "nullification" of the order which approved the AFIA Agreement. The Liquidator points out that CIC made a decision to participate in the AFIA Agreement approval proceedings, neither expressly raising its interest in arbitration in that proceeding, nor demanding arbitration at that time; instead, says the Liquidator, CIC has been "sitting on its asserted arbitration claim only to raise the matter years after the adverse result in litigation."

The June 13, 2003 Order of Liquidation enjoins all persons from commencing or continuing any proceeding against Home or the Liquidator. Order of Liquidation at 31. In weighing whether CIC's request to lift the 2003 stay should be granted, the Court looks to whether CIC has established "good cause." The essence of CIC's argument for lifting the stay is that if the stay is not lifted, CIC will be permanently barred from moving forward on its claim that the Liquidator breached a duty of "utmost good faith" owed to CIC under the 1984 Insurance and Reinsurance Agreement. The duty of utmost good faith, unique to the relationship between an insurer and its reinsurer, requires that a ceding insurer place its reinsurer "in the same situation as himself." Unigard Sec. Ins. Co. v. North River Ins. Co., 4 F.3d 1049, 1066, 1069 (2d Cir. 1993).

In considering this matter the Court looks to the issues raised in the challenge to the AFIA Agreement and the issues addressed in the related orders. CIC correctly points

out that the contractual claims it now outlines were neither specifically articulated in the earlier challenge to the AFIA Agreement, nor directly addressed in the September 22, 2005 order approving it ("the Approval Order"). Nonetheless, going directly to the effect of the AFIA Agreement on CIC, the Approval Order states, amongst other things, that the AFIA Agreement was "fair and reasonable to ACE [including CIC]" and that, "[T]he obligations of ACE are not increased over what they would have been had Home remained solvent...." Approval Order at 31 and 34. Importantly, the Court also rejected ACE's argument that the Liquidator "had not acted in 'good faith' when deciding to negotiate with the AFIA Cedents after initial discussions over a commercial resolution with ACE." Approval Order at 14-15.

CIC was aware in 2004 that, under terms of the AFIA Agreement, exposure to AFIA Cedents' claims would likely exhaust its setoff position with Home. CIC's contractual interests under the 1984 Insurance and Reinsurance Agreement, and the prospect that CIC would become an active net debtor to Home under the terms of the AFIA Agreement, served as both the motivation for CIC's intervention and the basis of the Court's favorable ruling on CIC's motion to intervene in the proceedings regarding the AFIA Agreement. While CIC indicates that its contractual challenge is only now "ripe" because its setoff position has been completely leveraged, there were no apparent procedural barriers preventing CIC from advancing its contractual argument and/or arbitration rights coincident within its previous challenge to the Liquidator's request for approval of the AFIA Agreement. CIC had ample opportunity to raise contractual challenges to the Liquidator's actions at the time the AFIA Agreement was under active

review. Providing an additional opportunity for CIC to litigate the validity of the AFIA Agreement would be contrary to the public interest.

In addition, even if CIC were able to demonstrate that it had effectively reserved its rights and preserved an opportunity to arbitrate matters at issue, CIC's litigation-related conduct stands in the way. Both New Hampshire courts and federal courts recognize that whether a party has waived a right to arbitrate by engaging in litigation-related conduct, is "usually a question for the court to decide." Tohill v. Richey Ins. Agency Inc., 117 N.H. 449, 454 (1977); Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 10-12 (1st Cir. 2005). While waiver is not to be lightly inferred, it is apparent from the record that at the time the AFIA proceedings were initiated, CIC enjoyed a broad opportunity to raise any available challenges to the Liquidator's actions in negotiating the AFIA Agreement. Why CIC failed to assert its arbitration rights at that time remains unclear. That it did not do so, however, constitutes a waiver of those rights.

Accordingly, CIC's Motion to Lift Stay and Compel Arbitration is DENIED.

So Ordered.

Nov. 13, 2008  
Date

Carol Ann Conboy  
CAROL ANN CONBOY  
Presiding Justice