

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**

**LIQUIDATOR'S MOTION FOR INTEREST ON AMOUNTS WITHHELD BY
CENTURY INDEMNITY COMPANY BASED ON IMPROPER SETOFF**

Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby moves for an order awarding Home interest on amounts due Home but withheld by Century Indemnity Company ("CIC") based upon setoff of a contribution claim regarding PECO Energy Company ("PECO") that the New Hampshire Supreme Court has determined was impermissible under RSA 402-C:34, II(b). As reasons therefor, the Liquidator states:

Background

1. As set forth in the New Hampshire Supreme Court's decision In the Matter of the Liquidation of The Home Ins. Co., No. 2008-407 (N.H. May 7, 2009) ("Home IV") (attached as Exhibit 1), CIC is a reinsurer of Home with respect to contracts between Home and other insurers. As claims under these contracts are allowed against Home in liquidation, CIC remits funds to Home pursuant to an agreed-upon claims protocol. Home IV, slip op. at 2. A copy of the Claims Protocol is attached as Exhibit 2. It was approved by the Court on November 12, 2004.

2. In addition to being a reinsurer of Home, CIC is a co-insurer with Home of PECO. In 2005, CIC and PECO settled certain of PECO's claims against CIC for a payment of \$13 million. The settlement agreement contained a provision barring CIC from pursuing

contribution and/or subrogation claims against other insurers of PECO. In 2007, CIC and PECO entered into a separate agreement concerning asbestos liabilities and, for “collective consideration” amended the 2005 agreement to allow CIC to pursue contribution/subrogation claims against “any currently insolvent insurer of PECO.” Home IV, slip op. at 2-3.

3. On August 29, 2007, CIC asserted a claim against Home contending that Home owed CIC \$8 million of the \$13 million settlement with PECO under the doctrines of subrogation and contribution. CIC asserted that this \$8 million could be setoff against reinsurance amounts due from CIC to Home. See Home IV, slip op. at 3; Joint Request to Deem CIC’s Claim Regarding PECO a Matter in a Disputed Claim Proceeding ¶ 1 (2005-HICIL-14, October 18, 2007) (the “Joint Request,” attached as Exhibit 3).

4. In a letter dated October 12, 2007, the Liquidator notified CIC of his determination to disallow setoff of CIC’s PECO claim on the ground that the setoff was prohibited by RSA 402-C:34, II(b). A redacted copy of the letter is attached as Exhibit 4¹; see Joint Request ¶ 2. The letter also requested that CIC join in a request to deem the issue a matter in a disputed claim proceeding pursuant to the Joint Report in 2005-HICIL-14 (March 31, 2006). On October 18, 2007, the Liquidator and CIC jointly requested that the issue be deemed a matter in a disputed claim proceeding and treated as such as part of 2005-HICIL-14. See Joint Request ¶ 4. The Referee granted the request on October 23, 2007. Referee’s Ruling (2005-HICIL-14, October 23, 2007) (attached as Exhibit 5). The Liquidator and CIC then litigated the matter before the Referee, the Superior Court, and the Supreme Court. See Home IV, slip op. at 3.

5. On May 7, 2009, the Supreme Court ruled that CIC’s contribution/subrogation claims against Home regarding PECO could not be setoff against amounts due and owing to

¹ The letter is redacted to remove material designated as Confidential Material under the Confidentiality Order entered in 2005-HICIL-14.

Home because the underlying 2007 transaction was “the ‘purchase’ or ‘transfer’ of Home’s obligation to provide contribution, and/or CIC’s right to enforce this obligation, within the meaning of RSA 402-C:34, II(b).” Home IV, slip op. at 5. The Supreme Court denied CIC’s motion for reconsideration by order issued June 10, 2009.

6. CIC has used the improper PECO setoff to reduce its payments to the Liquidator since August 29, 2007. Under the Claims Protocol, CIC provides the Liquidator with monthly statements showing the amounts “payable” to Home by CIC and “any amounts claimed in offset” by CIC against “amounts due to” Home. See Claims Protocol ¶ 3.3. Under the Claims Protocol, CIC is obligated to make wire transfers of the net “payable” amounts to the Liquidator within thirty business days of the end of the statement month. Id.

7. The \$8 million PECO setoff that the Supreme Court has now held impermissible was included on each of CIC’s monthly statements since the July 2007 statement was provided to the Liquidator on August 29, 2007. The PECO claim amount is included in the amounts under “CIC” in the “OTHER SET-OFF” section of each of the monthly setoff statements for July 2007 through the most recent setoff statement, that for April 2009. The monthly statements for July, August, and September 2007 are attached as Exhibit 6.

8. Removal of the PECO claim from the amount setoff by CIC would have required CIC to make additional payments to the Liquidator totaling \$8 million on the July, August and September 2007 statements. See Ex. 6. Based on the dollar amounts reported in CIC’s monthly statements, CIC would have paid:

- an additional \$657,273.50 for July 2007 (the \$7,342,727.50 “net due” to ACE less the claimed \$8,000,000 PECO setoff);
- an additional \$6,204,609.22 for August 2007 (the \$1,138,118.72 “net due” to ACE less the remaining \$7,342,727.50 of the PECO setoff after the \$657,273 July payment); and

- an additional \$1,138,117.28 for September 2007 (the amount remaining from the PECO setoff after the July and August payments, which would be added to the \$68,027.67 “net due” from ACE).

Absent the impermissible PECO setoff, CIC would have been obligated to make wire transfers of these “payable” amounts to the Liquidator within thirty business days of the end of July, August and September 2007. See Claims Protocol ¶ 3.3.

9. By letter dated July 9, 2007, the Liquidator advised CIC that the Liquidator would seek interest on account of improper setoffs. A redacted copy of the letter is attached as Exhibit 7.

10. Before the Referee and Superior Court, the Liquidator contended that Home’s estate is entitled to interest on payments that CIC withheld based upon the PECO setoff. The Referee and Superior Court did not address the issue in view of their rulings. In its decision, the Supreme Court “decline[d] to decide this issue in the first instance, without prejudice to the liquidator making this argument to the trial court.” Home IV, slip op. at 6. The Liquidator accordingly files this motion to address the issue.

ARGUMENT

11. The Liquidator is entitled to statutory interest on the \$8 million due Home in 2007 but improperly withheld by CIC based on its assertion of the PECO setoff prohibited by RSA 402-C:34, II(b). The Supreme Court’s final decision rejecting CIC’s asserted setoff is the equivalent of a judgment in Home’s favor for the improperly withheld amount. Alternatively, interest can be awarded on amounts improperly withheld by CIC because CIC was unjustly enriched by its assertion of the prohibited setoff.

I. CIC Should Be Required To Pay Interest Under RSA 524:1-a On The Amounts Due But Withheld By CIC Based On The Improper Setoff.

12. The Liquidator is entitled to statutory interest on the \$8 million improperly withheld by CIC under RSA 524:1-a, which provides for interest in actions “on a debt or account stated or where liquidated damages are sought.”² The purpose of the statute is “to make plain that in all cases where the trial court awarded money to the party entitled to be compensated, interest at the legal rate is to be added to the award, either from the date upon which the parties had contracted that interest was due, or, ‘in the absence of a demand’, from the date upon which legal action was started.” Nault v. N&L Dev. Co., 146 N.H. 35, 38 (2001), quoting N.H.S. Jour. 478-79 (1963) (emphasis in original).

13. In this case, the Claims Protocol agreed between CIC and the Liquidator specifies in paragraph 3.3 when amounts are due and to be paid to Home. As set forth in paragraph 8 above, \$8 million was due and payable to the Liquidator in three payments in 2007 but was withheld by CIC on account of the PECO setoff that the Supreme Court has held to have been prohibited by RSA 402-C:34, II(b). Home V. slip op. at 4-6. CIC acknowledged that the amounts were due to Home in the monthly statements pursuant to the Claims Protocol, in which CIC also applied the improper setoff. See Ex. 6.

14. The disputed claim proceedings challenging the PECO setoff asserted by CIC on the monthly setoff statements constitute an action on a debt or account stated. The final disallowance of an asserted setoff is the equivalent of an award of money – the amounts due but improperly withheld based on the setoff. Accordingly, when the courts finally determine that a setoff is not valid, interest should be awarded on the improperly withheld amount under RSA

² “In the absence of a demand prior to the institution of suit, in any action on a debt or account stated or where liquidated damages are sought, interest shall commence to run from the time of the institution of suit.” RSA 524:1-a.

524:1-a. Cf. In the Matter of Monique D. Aube and Raymond N. Aube, 969 A.2d 338, 343 (N.H. 2009) (“a property division set forth in a divorce decree that has proceeded to final judgment is a ‘judgment’ subject to statutory post-judgment interest”).

15. Interest should run from October 12, 2007. On that date, the Liquidator advised CIC that he had determined that the PECO setoff was improper and requested that CIC join in a request to deem the issue a matter in disputed claim proceeding. Ex. 4. This letter constituted a demand within RSA 524:1-a. (The Liquidator had previously advised CIC that he would seek interest on amounts improperly withheld on account of inappropriate setoffs by letter dated July 9, 2007. See Ex. 7.)

16. “The annual simple rate of interest on judgments, including prejudgment interest, shall be determined by the state treasurer [on the basis of a basket of government bonds].” RSA 336:1(b). The New Hampshire State Treasurer’s website reports that the statutory rates of interest applicable 2007, 2008, and 2009 are, respectively, 6.8%, 6.0% and 3.5%. See Linteau v. Gauthier, 142 N.H. 460, 461-62 (1997) (“the intent of the legislature is to apply to each new year the then-current interest rate”). As set forth on Exhibit 8, using these rates, the Liquidator should be awarded a total of \$725,517.51 in interest through June 30, 2009, with an additional \$767.12 for each day thereafter until the \$8 million is paid.

17. The interest statutes are plainly intended to compensate for the loss of use of money where a party is forced to pursue litigation to collect amounts due. Here, CIC has withheld payment of amounts due to the Liquidator based on the improper PECO setoff, and Home’s estate was deprived of \$8 million during the disputed claims proceedings before the Referee, the Superior Court, and the Supreme Court that were necessary to obtain the determination that the setoff was prohibited by RSA 402-C:34, II(b). CIC’s improper setoff

delayed the Liquidator's collection of reinsurance for the benefit of creditors and deprived the estate and its creditors of the investment income that might be earned on amounts collected. In these circumstances, an award of statutory interest is proper to compensate Home's estate and to provide appropriate incentives concerning the assertion of future setoffs.

II. CIC Should Be Required To Pay Interest Because It Has Been Unjustly Enriched By Withholding Payment From The Liquidator Based On The Improper PECO Setoff.

18. In the alternative, Home's estate is entitled to interest on amounts withheld by CIC because CIC was unjustly enriched by its improper assertion of setoff. "A trial court may require an individual to make restitution for unjust enrichment if he has received a benefit which would be unconscionable for him to retain." Kowalski v. Cedars of Portsmouth Condominium Assoc., 146 N.H. 130, 133 (2001), quoting R. Zoppo Co., Inc. v. City of Manchester, 122 N.H. 1109, 1113 (1982). "To entitle one to restitution, it must be shown that there was unjust enrichment either through wrongful acts or passive acceptance of a benefit that would be unconscionable to retain." Id., quoting Cohen v. Frank Developers, Inc., 118 N.H. 512, 518 (1978). See R. Zoppo Co., 122 N.H. at 1113. Interest may be allowed under principles of unjust enrichment. See Appeal of Granite State Elec. Co., 120 N.H. 536, 541 (1980) ("[T]he utility may be unjustly enriched if no interest is required with the payment of refunds derived from charges under improper rates."); Petition of Gunzel, 124 N.H. 495, 499 (1984) ("We do not foreclose the trial court's imposition of interest should it determine that the insurance carrier was unjustly enriched by reason of neglect of any duty it may have owed to the plaintiff.").

19. CIC was unjustly enriched by its assertion of improper setoff because the assertion allowed it to retain and use \$8 million, which should have been paid to Home's estate, for a period of at least twenty-one months. See Home IV, slip op. at 6 (CIC's setoff was impermissible). The enrichment was accomplished through CIC's affirmative acts. First, CIC

entered the 2007 transaction with PECO to acquire the setoff. See *id.* at 4 (noting that “CIC concedes that it entered into the 2007 transaction for the purpose of obtaining a setoff.”).

Second, CIC then asserted the PECO claim as a setoff on the monthly statements to reduce payments to Home. See Ex. 6. CIC’s assertion of the setoff served to give it the benefit of retaining and using \$8 million, instead of paying it to the Liquidator. Where the Supreme Court has now held that the setoff was prohibited by RSA 402-C:34, II(b), it would be unconscionable to permit CIC to retain the benefit of the interest earned by CIC on \$8 million during the period it was improperly withheld.

20. An award of interest based on unjust enrichment is particularly appropriate here, where the purpose of RSA 402-C:34, II(b) “is to prevent debtors of insolvent insurers from acquiring claims for use as setoffs to reduce their obligations to the detriment of the insurer’s creditors.” Home IV, slip op. at 6. More generally, the purpose of RSA 402-C is to “protect[] ‘preferred creditors by reserving assets for them’” and to “obtain full payment from reinsurers despite an insurer’s insolvency.” *Id.* at 3, quoting In the Matter of the Liquidation of Home Ins. Co., 154 N.H. 472, 488 (2006). CIC’s assertion of the improper setoff beginning in August 2007 permitted it to use the money and simultaneously deprived Home’s estate and its creditors of use of the money. Allowing CIC to retain the benefit of asserting an improper setoff is contrary to the legislative purposes of RSA 402-C. It would be unconscionable to allow CIC, as a “party violating public policy,” to “benefit in any way as a result of its wrongdoing.” Kowalski, 146 N.H. at 133.

21. As the Granite State and Gunzel cases suggest, the simplest method of proceeding would be to award interest at the legal rates under RSA 336:1(b) to compensate Home and prevent unjust enrichment of CIC. The Liquidator requests that unjust enrichment interest be

awarded on this basis. CIC may contend, however, that the proper measure of unjust enrichment is “the value of what was actually received by [CIC].” R. Zoppo Co., 122 N.H. at 1113. If so, discovery and analysis would be necessary regarding how CIC invested funds and its return on investments from the dates when payment was due under the Claims Protocol in 2007 through the date the \$8 million is paid to the Liquidator. Since CIC has had the use of the money during this period and could invest it, compound interest is appropriate. Cf. Singer Asset Finance Co., LLC v. Wyner, 156 N.H. 468, 477 (2007) (affirming denial of compound interest where defendant spent money “as opposed to having invested it”).

WHEREFORE, the Liquidator requests that the Court:

- (a) Grant this motion;
- (b) Award the Liquidator interest on the \$8 million withheld from Home's estate by CIC based on the improper PECO setoff; and
- (c) Grant such other relief as justice and equity may require.

Respectfully submitted,

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June 29, 2009

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Motion for Interest on Amounts Withheld by Century Indemnity Company Based on Improper Setoff was sent, this 29th day of June, 2009, by first class mail to all persons on the attached service list.



Eric A. Smith

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 03-E-0106

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THE SUPREME COURT OF NEW HAMPSHIRE

Merrimack
No. 2008-407

IN THE MATTER OF THE LIQUIDATION OF
THE HOME INSURANCE COMPANY

Argued: March 12, 2009
Opinion Issued: May 7, 2009

Kelly A. Ayotte, attorney general (J. Christopher Marshall, attorney, on the brief), and Rackemann, Sawyer & Brewster P.C., of Boston, Massachusetts (J. David Leslie and Eric A. Smith on the brief, and Mr. Leslie orally), for the respondent.

Orr & Reno, P.A., of Concord (Lisa Snow Wade on the brief), and Morrison & Foerster LLP, of New York, New York (Gary S. Lee & a. on the brief, and Brian R. Matsui orally), for the appellee.

DALIANIS, J. The respondent, Roger A. Sevigny, Commissioner of Insurance of the State of New Hampshire, as liquidator of The Home Insurance Company (the liquidator), appeals an order of the Superior Court (Conboy, J.) sustaining a referee's ruling granting a setoff claim asserted by the appellee, Century Indemnity Company (CIC), in the liquidation of The Home Insurance Company (Home). We reverse and remand.

This is the fourth in a series of opinions we have issued in connection with the liquidation of Home. See In the Matter of Liquidation of Home Ins. Co., 154 N.H. 472 (2006) (Home I); In the Matter of Liquidation of Home Ins. Co., 157 N.H. 543 (2008) (Home II); In the Matter of Liquidation of Home Ins. Co., 158 N.H. ___, 965 A.2d 1143 (2009) (Home III). The following facts either are drawn from our prior opinions or are supported by the record in the instant appeal.

Home is an insurance company, organized under the laws of New Hampshire, which was declared insolvent and placed in liquidation in 2003. Home II, 157 N.H. at 544. The liquidator is vested with title to and charged with administering and collecting Home's assets for distribution to Home's creditors. Home I, 154 N.H. at 475. All persons asserting claims against Home must file proofs of claim in the New Hampshire liquidation proceeding. Id.

CIC is an insurance company organized under the laws of Pennsylvania, which reinsures Home with respect to certain contracts between Home and other insurers. Home II, 157 N.H. at 544-45. As claims under these contracts are allowed against Home in liquidation, CIC remits funds to Home pursuant to an agreed-upon claims protocol. Id. at 545. This means that for the purposes of the liquidation proceeding, CIC is a debtor of Home. The claims protocol provides that these payments "shall be net of set off in compliance with" RSA 402-C:34 (2006), or as otherwise allowed under New Hampshire law. Id.

"Setoff is the process by which two contracting parties reduce mutual debts and credits to arrive at a net balance." Branum & a., Setoffs, Recoupments, & Voidable Preferences - In the Insolvency Process, in American Bar Association, Law and Practice of Insurance Company Insolvency Revisited 909 (Semaya ed. 1989). Setoff "allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A." Citizens Bank of Md. v. Strumpf, 516 U.S. 16, 18 (1995) (quotation omitted).

In addition to being a reinsurer of Home, CIC is a co-insurer with Home of Pacific Energy Company (PECO), meaning that both CIC and Home are primary insurers of PECO. The disputed setoff claim arose in connection with a 2005 confidential settlement agreement between PECO and CIC to which Home was not a party. Under this agreement, governed by Pennsylvania law, CIC paid PECO \$13 million to settle certain environmental coverage claims and agreed, among other things, not to "seek indemnification for, reimbursement of, contribution toward or subrogation rights concerning" amounts it paid under the agreement from "any other insurer or alleged insurer of PECO." CIC was allowed, however, to pursue its rights for indemnification, reimbursement, contribution or subrogation against its own reinsurers and against any insurer that sought contribution from it.

In 2007, CIC and PECO entered into another agreement, concerning asbestos liabilities, and, for “collective consideration,” also amended the 2005 agreement. (Emphasis omitted.) The amendment specifically allowed CIC, at its own expense, to “seek indemnification for, reimbursement of, contribution toward or subrogation rights concerning, or exercise any other rights it may have to recover” amounts it paid to PECO under the 2005 agreement “from any currently insolvent insurer of PECO.” Home was not a party either to the 2007 agreement or to the amendment to the 2005 agreement.

Thereafter, CIC filed a claim under the claims protocol, seeking to setoff \$8 million of the \$13 million PECO settlement against reinsurance amounts the liquidator was asserting against CIC. CIC argued that Home owed it \$8 million out of the \$13 million settlement with PECO under the doctrines of subrogation and contribution.

The liquidator disagreed with the validity of the asserted setoff and the parties jointly requested that the referee deem the matter a disputed claim proceeding to be resolved in accordance with RSA chapter 402-C and an established claim procedure order. See Home II, 157 N.H. at 546. The referee granted the setoff. The trial court sustained this decision, and this appeal followed.

On appeal, the liquidator argues that RSA 402-C:34, II(b) precludes the asserted setoff. The interpretation of a statute is a question of law, which we review de novo. Id. We are the final arbiters of the legislature’s intent as expressed in the words of the statute considered as a whole. Id. We first examine the language of the statute, and, where possible, ascribe the plain and ordinary meanings to the words used. Id. Our 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. at 547.

The right of setoff with respect to debts owed to an insolvent insurer is typically governed by statute. Dassenko, Obligations and Duties of the Liquidator to Reinsurers: A Liquidator’s Perspective, in American Bar Association, supra at 663. Such statutes generally allow persons, including reinsurers, to set off mutual debts or mutual credits against the insolvent party, except under certain circumstances. Id. In New Hampshire, setoff against an insolvent insurer is governed by RSA 402-C:34.

RSA chapter 402-C is a broad remedial statute aimed at protecting “preferred creditors by reserving assets for them, including people insured by Home, and people with claims against those insured by Home.” Home I, 154 N.H. at 488; see RSA 402-C:1, IV (2006). Another legislative purpose is to “obtain[] full payment from reinsurers despite an insurer’s insolvency.” Home I, 154 N.H. 488; see RSA 402-C:36, :49 (2006). RSA 402-C:1, III (2006) directs

that RSA chapter 402-C be “liberally construed” to effect its purposes. Home I, 154 N.H. at 488.

RSA 402-C:34, I, provides: “SETOFFS ALLOWED IN GENERAL. Mutual 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.” This provision is mandatory. It grants the liquidator no discretion to disallow a setoff that meets all of the statutory requirements. Home II, 157 N.H. at 553-54. Because “setoff is an exception to the orderly procedures for discharging claims against an insolvent debtor,” Koken v. Legion Ins. Co., 900 A.2d 418, 423 (Pa. Commw. Ct. 2006), RSA 402-C:34, I, allows setoff only where mutuality of obligation exists. To be mutual, debts to be set off must be due to and from the same persons in the same capacity. Home II, 157 N.H. at 547.

RSA 402-C:34, II sets forth three exceptions to the setoff mandate. We are concerned with RSA 402-C:34, II(b), which provides: “No setoff shall be allowed in favor of any person where[] . . . [t]he obligation of the insurer to the person was purchased by or transferred to the person with a view to its being used as a setoff.” RSA 402-C:3, XVII (2006) defines a “transfer” to include “the sale and every other method, direct or indirect, of disposing of or parting with property or with an interest therein or with possession thereof.”

In this case, for the purposes of RSA 402-C:34, II(b), Home is the “insurer” and CIC is the “person” seeking setoff. See RSA 402-C:2, :3, III (2006). The “obligation” at issue is Home’s obligation to provide contribution to CIC. Thus, RSA 402-C:34, II(b) precludes a setoff in CIC’s favor where it purchased, or had transferred to it, Home’s obligation to provide contribution to it with a view to using this as a setoff against amounts it owes to Home as Home’s reinsurer. Because CIC concedes that it entered into the 2007 transaction for the purpose of obtaining a setoff, the issue before us is whether this transaction constituted the “purchase” or “transfer” of Home’s obligation to provide contribution.

CIC contends that it never purchased, or had transferred to it, Home’s obligation to provide contribution because this obligation arose in 2005 as a matter of law under the doctrine of joint and several liability. Under Pennsylvania law, which governed the 2005 agreement, CIC was jointly and severally liable to PECO for the entirety of its claim. See J.H. France Refractories v. Allstate, 626 A.2d 502, 509 (Pa. 1993). As CIC contends that it paid more than it owed, it obtained a right to seek contribution from Home. See id.; see also 15 L. Russ & T. Segalla, Couch on Insurance 3d § 217:4, at 217-12 (1999) (right to contribution among insurers arises when “single insured is covered by concurrent . . . insurance, and one insurer paid all, or greater than its share, of a loss”).

Despite its 2005 agreement with PECO not to seek contribution from PECO's other insurers, CIC contends that Home's obligation to it and its right to enforce the obligation remained intact. CIC argues that, in 2007, when it paid PECO consideration to amend the 2005 agreement, it merely obtained the right to pursue Home for contribution unfettered by a potential breach of contract action by PECO. CIC asserts that the consideration it paid PECO for the amendment to the 2005 agreement was the "purchase" of the right to be relieved of its prior promise not to seek contribution from Home and of the threat of a breach of contract action for doing so. RSA 402-C:34, II(b), CIC contends, does not preclude this "purchase" because it was not a "purchase" of Home's obligation to provide contribution.

CIC's argument has some appeal, as it rests upon the literal, plain meaning of RSA 402-C:34, II(b). We must reject this narrow construction of RSA 402-C:34, II(b), however, because we are mandated by statute to construe RSA chapter 402-C liberally to effectuate its purposes.

A principal purpose of RSA chapter 402-C is to reserve assets for preferred creditors. Home I, 154 N.H. at 488. An additional purpose is to ensure that Home's reinsurers make full payment despite Home's insolvency. Id.; see RSA 402-C:36, :49 (2006). Construing the exceptions to the setoff mandate narrowly is contrary to these purposes. We must, therefore, construe the exceptions to the setoff mandate broadly to achieve the purposes of RSA chapter 402-C. Cf. Home I, 154 N.H. at 488 (discussing need to liberally construe another provision of RSA chapter 402-C).

Here, CIC agreed with PECO in 2005 that it would not seek contribution from Home. In 2007, CIC paid PECO consideration in exchange for the ability to assert such a claim. CIC conceded that it entered into this arrangement with a view to using the claim as a setoff. While before the 2007 amendment, CIC had contracted not to bring a contribution claim against Home, after it paid PECO consideration to amend the 2005 agreement, which it did with a view to using its contribution claim as a setoff, it was free to bring such a claim. We believe that this transaction is the "purchase" or "transfer" of Home's obligation to provide contribution, and/or CIC's right to enforce this obligation, within the meaning of RSA 402-C:34, II(b). As the liquidator aptly observes, "CIC's distinction between a claim and the right to assert the claim is too fine. Where CIC paid specifically to obtain the ability to setoff, . . . the 2007 transaction is comprehended within RSA 402-C:34, II(b)."

At the very least, as a result of the 2007 transaction, PECO "part[ed] with" its interest in preventing CIC from enforcing Home's obligation to provide contribution. As CIC concedes, the 2007 amendment "extinguish[ed] PECO's right to prevent CIC from collecting or setting off the Home Contribution." This

constitutes a "transfer" within the meaning of RSA 402-C:34, II(b). See RSA 402-C:3, XVII.

Disallowing CIC's setoff comports with the overall purpose of the setoff provision, which is to prevent debtors of insolvent insurers from acquiring claims for use as setoffs to reduce their obligations to the detriment of the insurer's creditors. Cf. Continental Trust Co. v. Chi. Title Co., 229 U.S. 435, 444 (1913) (discussing purpose of Section 68 of the Federal Bankruptcy Act of 1898, upon which the parties agree RSA 402-C:34, II(b) was based).

This is not to say that CIC, as a reinsurer of Home, may never use setoff to reduce the amounts it owes Home. RSA 402-C:34 specifically gives CIC this right, provided certain requirements are met, as does the claims protocol. See Home II, 157 N.H. at 553.

In this case, as the liquidator concedes, had CIC not agreed in 2005 to not seek contribution against Home, it could have done so and asserted its contribution claim as a setoff under RSA 402-C:34. The problem here is that not only did CIC agree in 2005 not to assert a contribution claim against Home, but also, in 2007, it paid PECO money to be relieved of this agreement. Such conduct falls within one of the statutorily created exceptions to the setoff mandate, broadly construed.

CIC contends that RSA 402-C:34, II(b) applies only when a liquidated insurer's debtor purchases a claim that belongs to another party. CIC, in effect, purchased its own claim for contribution against Home, not a claim that belonged to another party. RSA 402-C:34, II(b), however, is not limited to the purchase or transfer of claims belonging to other parties. There is nothing in the plain language that precludes applying RSA 402-C:34, II(b) to the instant case.

For all of the above reasons, therefore, we hold that the trial court erred when it ruled that CIC's setoff was permissible. While the liquidator contends that Home's estate is entitled to interest at a legal rate on payments CIC wrongfully withheld based upon setoff, we decline to decide this issue in the first instance, without prejudice to the liquidator making this argument to the trial court.

Reversed and remanded.

BRODERICK, C.J., and DUGGAN and HICKS, JJ., concurred.

**THE HOME
INSURANCE
COMPANY**
In Liquidation



59 Maiden Lane
New York, New York 10038

Pete Bengelsdorf
Special Deputy Liquidator
Tel (212) 530 3741
Fax (212) 530 6143
Peter.Bengelsdorf@homeinsco.com

August 6, 2004

VIA COURIER

Thomas J. Wamser, Esq.
Assistant General Counsel
ACE USA
Law Department
Routing TL35S
1601 Chestnut Street
Philadelphia, Pennsylvania 19101

**Re: The Home Insurance Company ("Home" or "HICIL") – Administration of AFIA
Business**

Dear Tom:

This letter sets out our proposals for the establishment of a protocol for the ongoing handling by Century Indemnity Company ("CIC") of claims in respect of AFIA Liabilities, as defined in an Insurance and Reinsurance Assumption Agreement dated 31 January 1984 (the "I & R Assumption Agreement") between, inter alia, HICIL and Insurance Company of North America (the predecessor of CIC) and in respect of AFIA Licence Business, as defined in a Reinsurance Treaty and Management Agreement dated 31 January 1984 (the "Treaty Management Agreement") between, inter alia, HICIL and Insurance Company of North America (the "Agreements"). Pursuant to the Agreements, CIC undertook certain management, administrative and service obligations in respect of AFIA Liabilities and AFIA Licence Business (each as defined below).

The insolvency of Home creates a number of administrative issues that need to be addressed and this letter is intended to describe the process for the continued performance by CIC of its obligations under the Agreements. The Liquidator recognizes that to the extent CIC provides or causes the provision of services beyond those required under the Agreements, CIC should receive reasonable compensation for such additional services.

In view of the foregoing, and having due regard to the New Hampshire liquidation statutes and the Claims Procedures Order (as defined below), it is desirable to put in place mechanisms and processes to ensure the due, proper, orderly and consistent handling of Claims (as defined below) by and among HICIL and CIC.

This letter, therefore, seeks agreement between HICIL and CIC on the above mechanisms and processes. Following such agreement, as confirmed by signature for CIC below, this letter will be presented to the Court (as defined below) for approval, upon which it will be effective. For the avoidance of doubt, except as may be subsequently agreed by CIC and Home, the terms of this letter will apply solely to paid losses that have been presented pursuant to a POC (as defined below) in the HICIL liquidation and determined in accordance with the Claims Procedures Order (as defined below) and not to any loss reserves (including reserves for losses that are incurred but not reported) that the claimants have established, except as may otherwise be required by law.

1. Definitions

In this letter, the following terms shall have the following meanings:

"ACE-INA" means ACE INA Services U.K. limited or such other agent appointed by CIC that is reasonably acceptable to HICIL;

"AFIA Liabilities" means AFIA Liabilities as defined in the I & R Assumption Agreement and the assumed liabilities of HICIL under AFIA Licence Policies as defined in the Treaty Management Agreement;

"AFIA Licence Business" has the meaning given in the Treaty Management Agreement;

"Agreements" means the I & R Assumption Agreement and the Treaty Management Agreement;

"CIC" means Century Indemnity Company, including its predecessors or successors in title;

"CIRC" means Century International Reinsurance Company, including its predecessors or successors in title;

"Claim" means an inward reinsurance claim against HICIL in respect of an AFIA Liability presented in a POC;

"Claimant" means a person submitting a Claim in the HICIL liquidation;

"Claims Procedures Order" means the order establishing procedures regarding claims entered in the HICIL liquidation made by the Court on December 19, 2003, as otherwise amended and in effect from time to time;

"Court" means the New Hampshire Superior Court for Merrimack County;

"HICIL" or "Home" means The Home Insurance Company, including its predecessors or successors in title;

"Liquidator" means the New Hampshire Insurance Commissioner, acting solely in his capacity as liquidator of HICIL appointed by the Court, the Special Deputy Liquidator and his and their agents and representatives;

"POC" means a proof of claim properly filed pursuant to N.H. RSA 402-C:37 and C:38; and

"Notice of Determination", "Notice of Disputed Claim", "Notice of Redetermination", "Objection", "Request for Review" and "Disputed Claim proceeding" have the meanings given in the Claims Procedures Order.

2. Submission, Adjustment and Adjudication of AFIA Liabilities

- 2.1 CIC shall make available such personnel as are reasonably necessary to perform effectively the management, administration and service obligations undertaken by CIC pursuant to the Agreements. HICIL agrees and confirms that, if, and to the extent that, CIC incurs costs (including internal costs) in providing services pursuant to this letter agreement that are in excess of those incurred by CIC in the fulfillment of CIC's obligations under the Agreements prior to the liquidation of HICIL, such additional costs reasonably incurred by CIC in such management, administration and/or servicing shall (and the Liquidator agrees that they shall) be chargeable by CIC to HICIL, and payable to CIC as an administration cost pursuant to N.H. RSA 402-C:44, I. CIC shall present such additional costs to the Liquidator for determination pursuant to the Claims Procedures Order and RSA 402-C:41.
- 2.2 With respect to Claims that are submitted through the filing by a claimant of a POC in the HICIL estate, HICIL shall provide CIC with a copy thereof and all supplements thereto. In the event that an amendment to the Claims Procedures Order or RSA 402-C materially alters the procedures for the determination of Claims that are submitted by the filing of a POC in the HICIL estate, either party shall have the right to terminate this letter agreement upon written notice to the other party. This provision shall not have and shall not be construed to have any effect on the parties' obligations under the Agreements.
- 2.3 Upon receipt of the POC, CIC (through ACE-INA) shall administer and service the Claim in accordance with the relevant Agreement. HICIL shall determine the order in which Claims are to be administered and serviced. HICIL shall defend and hold harmless CIC (and ACE-INA) against any action or proceeding brought by a Claimant arising from CIC's (or ACE-INA's) compliance with HICIL's determination as to the order in which Claims are to be administered and serviced. Following adjustment of a Claim, CIC (through ACE-INA) shall, within ten (10) business days and in writing, notify HICIL of its recommendations with respect to the agreement or rejection, in whole or in part, of the Claim, together with the reasons for such recommendations.
- 2.4 If the Liquidator concurs with the recommendations of CIC, he shall issue a Notice of Determination to the relevant Claimant, with a copy to CIC. CIC shall effect remittance to HICIL in respect of the Claim to the extent allowed on the Notice of Determination in accordance with paragraphs 3.3 and 3.4.
- 2.5 If the Liquidator disagrees with the recommendations of CIC, he shall notify CIC thereof in writing, and give his reasons for so disagreeing. The Liquidator and CIC shall thereafter promptly confer to attempt mutual resolution of their disagreement. If the parties do not reach such mutual resolution within ten (10) business days, the matter shall be referred (by either party) to a single arbitrator ("Arbitrator") agreed upon by the parties.

- 2.6 Where the contract underlying the Claim at issue is not governed by English law, the Arbitrator shall be chosen from the panel of arbitrators maintained by ARIAS (US). If the parties cannot agree on the identity of the Arbitrator within five (5) business days, each party shall submit the names of three (3) candidates, each of whom shall be chosen from the panel of arbitrators maintained by ARIAS (US). Within three (3) business days of the exchange of the lists of candidates, the parties shall either agree on the Arbitrator from the six (6) candidates selected or each party shall delete two (2) of the other party's candidates and the Arbitrator shall be chosen by lot from the remaining two (2) candidates. The Arbitrator shall resolve the disagreement between the parties as to whether the Claim should be agreed or rejected, in whole or in part, on written submissions by the parties, which the parties shall be entitled to supplement with information and documentation relating to the Claim, and shall issue a ruling promptly after receiving such submissions; provided that, if the Arbitrator considers that the decision required of him cannot be made on the basis of the written submissions provided, the Arbitrator shall be entitled to call for such other submissions as he considers necessary in order for him to reach a decision.
- 2.7 Where the contract underlying the Claim at issue is governed by English law, the Arbitrator shall have the qualifications required by Rule 6.3 of the Arias (UK) Arbitration Rules, 2ed 1997. If the parties cannot agree on the identity of the Arbitrator within five (5) business days, the Arbitrator shall be chosen by the Chairman of ARIAS (UK). The Arbitrator appointed shall have the qualifications required by Rule 6.3. The parties agree that the Arbitrator is entitled and bound to resolve and determine by declaration any disagreement between the parties as to whether the Claim should be agreed or rejected, in whole or in part. The Arbitrator's award shall be based on written submissions by the parties, which the parties shall be entitled to supplement with information and documentation relating to the Claim. The Arbitrator shall issue his award promptly after receiving such submissions. If, however, the Arbitrator considers that he cannot make an award on the basis of such submissions, he shall be entitled to call for such additional submissions and information that he considers necessary in order for him to make his award. In resolving the disagreement between the parties, the Arbitrator will solely interpret the terms and conditions of the contract entered into between Home and the Claimant. The Arbitrator will apply the proper law of the contract, without regard to the law of any other legal system, in resolving the disagreement between the parties.
- 2.8 The cost of the Arbitration shall be apportioned equally between the parties. The Liquidator shall issue a Notice of Determination in accordance with the Arbitrator's ruling, and shall not, unless the ruling is subject to being vacated on a ground specified in N.H. RSA 542:8, in any proceeding before the Court take a position contrary to the Arbitrator's ruling. The Liquidator will seek approval to seal the ruling to prevent disclosure to any third party. CIC shall thereafter effect remittance to HICIL in respect of the Claim, to the extent allowed on the Notice of Determination, in accordance with paragraphs 3.3 and 3.4.
- 2.9 The parties acknowledge that, should a Claimant disagree with a Notice of Determination, the Claimant may, at its option, submit a Request for Review to the Liquidator in accordance with the Claims Procedures Order. In such event, the Liquidator

shall promptly provide CIC with a copy of the Request for Review and within twenty (20) business days thereafter, CIC shall in writing notify HICIL of its recommendations in relation to that AFIA Liability, together with the reasons for such recommendations.

- 2.10 If the Liquidator concurs with the recommendations of CIC, he shall issue a Notice of Redetermination to the relevant Claimant consistent with those recommendations, with a copy to CIC. CIC shall effect remittance to HICIL in respect of the Claim to the extent allowed on the Notice of Redetermination in accordance with paragraphs 3.3 and 3.4
- 2.11 If the Liquidator disagrees with the recommendations of CIC, he shall notify CIC thereof in writing, and give his reasons for disagreeing. The parties shall thereafter promptly confer to attempt mutual resolution of their disagreement.
- 2.12 If the parties are unable to reach such mutual resolution within ten (10) business days, the matter shall be referred (by either party) to an Arbitrator and the provisions of paragraphs 2.5 to 2.8 inclusive shall apply; provided that in the event that the parties have, pursuant to paragraphs 2.6 or 2.7, as the case may be, already arbitrated specific issues raised in the Request for Review, the parties shall not be entitled to re-arbitrate such issues and the rulings rendered with respect thereto shall have a preclusive effect and shall be and remain binding on the parties.
- 2.13 The parties further acknowledge that, should a Claimant disagree with a Notice of Determination, the Claimant is not obliged to submit a Request for Review but may, at its option, file an Objection with the Court in accordance with the Claims Procedures Order. A Claimant that disagrees with a Notice of Redetermination may also file an Objection with the Court in accordance with the Claims Procedures Order. In either event, the Liquidator shall promptly provide CIC with a copy of the Objection so filed and shall provide CIC with a copy of the Notice of Disputed Claim sent by the Liquidation Clerk to the claimant in response to the filing of the Objection, so as to avail CIC of its right under the Agreements to interpose defenses in the ensuing Disputed Claim proceeding. If CIC elects to interpose defenses in the Disputed Claim proceeding it shall, at its own cost and expense, seek leave to so participate by filing a Motion to Participate with the Referee no later than thirty (30) days after the date of mailing to the claimant of the Notice of Disputed Claim, identifying the contract in question and stating that it has a contractual right to interpose defenses. The Liquidator agrees that CIC has the right to participate in Disputed Claims proceedings and to raise any defense or defenses available to HICIL, and shall assent to CIC's participation.
- 2.14 The Disputed Claim proceedings procedures shall be governed by New Hampshire law. Questions of contractual construction and interpretation with respect to the Disputed Claim shall be governed by applicable law in accordance with the express terms of the contract, without regard to the law of any other legal system. Where the contract is silent as to its governing law and English law may apply, the Referee shall appoint an expert (with the qualifications and in the manner provided for below) and consult with such expert to determine which law is applicable. The Referee's decision on choice of law shall be final and binding on the parties.

- 2.15 The Disputed Claim proceedings shall be conducted by the Referee, who may appoint an expert to assist the Referee. Where the law applicable to the contract is English law (or where it has been determined as above stated that the contract is to be construed in accordance with English law), the Referee shall appoint an expert (or, as applicable, retain and be assisted by the expert appointed as stated above) with knowledge of the law of insurance and reinsurance in England as well as industry custom and practice. Such expert shall be either a retired English judge or a Queen's Counsel of the English bar and, in either case, shall be a person disinterested in the subject matter of the Disputed Claim proceeding. HICIL and CIC shall attempt to jointly propose a person to be appointed as such expert by the Referee, provided that, if HICIL and CIC do not agree on a person to be jointly proposed, HICIL and CIC shall each be entitled to submit to the Referee the names of three candidates fulfilling the above requirements. The Referee shall choose the expert. The Referee may prescribe such further reasonable procedures and provisions as the Referee, in the exercise of discretion, deems appropriate to assist in the adjudication of Disputed Claims. The foregoing includes, but is not limited to, the receipt of documents and other information relating to the Disputed Claim and the taking of evidence. The expert shall issue a Report and Recommendation to the Referee after the evidence has closed whereupon the Referee shall provide a copy of the Report and Recommendation to each of the Claimant, HICIL and CIC. The Referee may use the Report and Recommendation as the Referee deems appropriate and shall attach a copy of the Report and Recommendation as an exhibit to the Referee's Report to the Court. The costs of the Referee and the expert shall be chargeable against HICIL as part of the expense of the HICIL liquidation.
- 2.16 Should CIC participate in Disputed Claim proceedings, it shall, at its own cost and expense, interpose any defense or defenses that it may deem available to HICIL, although the cost or expense so incurred shall be (and the Liquidator acknowledges and agrees that they shall be) chargeable, subject to approval by the Court, against HICIL as part of the expense of the HICIL liquidation as an administration cost pursuant to N.H. RSA 402-C:44, I, to the extent of the pro rata share of the benefit which may accrue to HICIL solely as a result of the defense undertaken by CIC and to the extent not otherwise received by CIC under paragraph 2.17.
- 2.17 The Referee shall make an award of costs in every Disputed Claim proceeding in which CIC participates involving a contract governed by English law. If an order for costs is made against CIC, CIC shall bear those costs without recourse to HICIL. If an order for costs is made against the claimant, CIC, to the extent that CIC has incurred those costs, shall (and the Liquidator acknowledges and agrees that CIC shall) be entitled to the benefit of such order, and to receive and retain payment of such costs in full without diminution or set-off of any kind whatsoever, as administration costs pursuant to N.H. RSA 402-C:44, I.
- 2.18 The Liquidator and/or HICIL and CIC shall fully cooperate with each other (including in this ACE-INA) in relation to the matters covered by this letter and in particular information relating to notices, Requests for Review and/or Objections and the defense of Claims. Once CIC has commenced administering and servicing a Claim, the Liquidator and/or HICIL shall provide CIC with a copy of any written communication between the Liquidator and/or HICIL and the Claimant concerning the Claim and shall share the

substance of any other communication between the Liquidator and/or HICIL and the Claimant concerning the Claim with CIC.

- 2.19 If a Disputed Claim proceeding results in a final determination of the relevant AFIA Liability adverse to HICIL, CIC shall effect remittance on the basis of such determination to HICIL in accordance with paragraphs 3.3 and 3.4.

3. Reports, Remittances and Inspection of Records

- 3.1 CIC (through ACE-INA) shall within ten (10) business days after the end of each three month period, provide to HICIL copies of the *brokers' forms* relating to each Claim being handled by CIC or, where the details of the Claim are not the subject of a *broker's form*, copies of the relative *cedant's form*, supplemented, where those *forms* are not adequate for the purpose, by information from CIC, disclosing, on a by-cedent basis (a) the name of the underlying insured; (b) the nature and amount of each Claim; (c) the date each Claim was presented to CIC; (e) the adjustment status of each Claim, and where a Claim is the subject of legal action, details of (i) the nature of the action; (ii) the forum in which it is being conducted; (iii) the amount at issue; and (iv) material developments (if any) in it since the previous such report; and (f) a summary of Claims adjusted in the preceding three month period indicating for each Claim (i) the amount agreed; (ii) the amount disputed; and (iii) the reason for the amount disputed; and (g) a summary of all payments made by CIC to HICIL in that three month period.
- 3.2 The reasonable costs incurred by CIC (and/or ACE-INA) in collecting and compiling the reports called for by paragraph 3.1 (including the internal and staff costs of CIC and/or ACE-INA) and of providing the same to HICIL shall (and the Liquidator agrees that they shall) be chargeable by CIC to HICIL, and payable to CIC as an administration cost pursuant to N.H. RSA 402-C:44, I. CIC will not charge HICIL for any systems enhancements necessary to produce any report required by paragraph 3.1.
- 3.3 Within thirty (30) business days after the end of each month, CIC shall (a) provide HICIL with a statement showing (i) all amounts payable by CIC to HICIL pursuant to paragraphs 2.4, 2.8, 2.10, 2.19 and 3.7 for the preceding month; (ii) the amount of funds paid by CIC with respect to such payables; and (iii) any amounts claimed in offset in accordance with paragraph 3.4 against amounts due to HICIL, together with sufficient detail and an explanation as to the basis for the asserted offset; and (b) subject to the proviso to this paragraph, effect a wire transfer to such account as may, from time to time, be designated by the Liquidator for the balance. CIC agrees and acknowledges that the Liquidator fully reserves all rights in relation to any offset asserted. CIC reserves (and the Liquidator acknowledges that CIC so reserves) all rights in respect of any payments made, including as to amount and as to the obligation of CIC to make the same; PROVIDED THAT, where the Claimant has submitted a request for Review or an Objection in respect of a Claim disputing the quantum of the Claim or elements of it, CIC shall make remittance in respect of any portions of the Claim allowed in full or agreed between CIC and the Claimant. CIC shall not be obliged to make remittance in respect of the disputed amount unless and until the relevant proceedings settle the disputed amount or it is negotiated and agreed between the claimant and CIC with the concurrence of the

Liquidator, in which event remittance will be made in such amount within thirty (30) business days after the month next following such settlement or agreement.

- 3.4 Notwithstanding anything herein to the contrary, payments to HICIL shall be net of set-off in compliance with N.H. RSA 402-C:34 or otherwise allowed by New Hampshire law.
- 3.5 CIC will not be liable to make payment in respect of any AFIA Liability unless the relevant Claim has been allowed in the HICIL liquidation. The Liquidator will consent to CIC's standing to object to the Liquidator's decision to permit a late filed Claim to receive dividends pursuant to N.H. RSA 402-C:37, II or III. Where on such objection the late filed Claim is not permitted to receive dividends pursuant to N.H. RSA 402-C:37, II or III, CIC shall be entitled to recover the amount in fact paid by it in respect of any such Claim, whether by way of deduction from subsequent payments or otherwise.
- 3.6 In the event that HICIL considers that CIC has ceased to administer and service a Claim, including failing to notify HICIL of its recommendations in accordance with paragraphs 2.3 and/or 2.9, the Liquidator shall give written notice to CIC specifying and giving details of the failure complained of and the actions that the Liquidator considers required of CIC to cure the alleged failure and requesting CIC to effect such action within twenty (20) business days from receipt by CIC of the notice. If CIC disputes that there is a failure on its part or that the steps specified in the notice are necessary and appropriate, CIC shall so advise HICIL in writing within twenty (20) business days of its receipt of the notice. If CIC considers that the notice does disclose a failure on its part, CIC shall cure the same within twenty (20) business days of its receipt of the notice.
- 3.7 If CIC fails to timely file a Motion to Participate as described in paragraph 2.13 or, having timely filed a Motion to Participate, CIC fails to participate in a Disputed Claim proceeding (CIC having previously administered and serviced the Claim and notified HICIL of its recommendations in accordance with paragraph 2.3 and, if applicable, notified HICIL of its recommendations in accordance with paragraph 2.9), the Liquidator shall not be obliged to defend the Claim and shall be entitled, at his sole discretion, to consent to the entry of judgment in relation to it. This consent will be final and binding on CIC. Should the Liquidator decide to defend the AFIA Liability notwithstanding the election of CIC to refrain from participating in the Disputed Claim proceeding or the failure of CIC to file in timely fashion a Motion to Participate therein and a determination of the relevant AFIA Liability at issue is, in the first instance, determined adverse to HICIL, the Liquidator shall not be obliged to appeal the determination. That determination will then be final and binding on CIC.
- 3.8 Upon reasonable advance notice and at all reasonable times, CIC shall confer with and place at the disposal of HICIL, either directly or through its authorized representatives, the financial and business records, books of account and documents maintained by CIC (or ACE-INA) relative to AFIA Liabilities and AFIA Licence Business. HICIL shall have the right at its own cost to inspect and copy any such records and books of account.

4. Commutations

- 4.1 CIC acknowledges that inwards reinsurance commutations involving AFIA Liabilities and AFIA Licence Business are constrained by the Claims Procedures Order. As a result, while CIC may negotiate inwards commutations with Home's AFIA cedents, CIC may consummate no commutation agreements with any such cedent absent the Liquidator's express written authority to that effect. In that regard, CIC shall advise HICIL of the details of any commutation discussions in progress and shall provide such assistance and cooperation as the Liquidator may reasonably deem necessary or expedient to assess the propriety of any commutation proposal and, where appropriate, to obtain Court approval for it.

5. Ruty Pool Business

- 5.1 CIC (through ACE-INA) shall, at the sole cost of CIC, to the extent determined through litigation, arbitration or an agreement approved by HICIL with each affected Ruty Pool member (a) administer and service the inwards liabilities of each affected Ruty Pool member, including the investigation, appraisal and adjustment of such liabilities; (b) effect timely notification to each affected Ruty Pool member and HICIL of the results of such investigation, appraisal and adjustment; and (c) pay on HICIL's behalf such unallocated loss adjustment expenses that are determined as the obligations of HICIL related to the inwards liabilities of each affected Ruty Pool member.

6. Role of ACE-INA

- 6.1 The parties acknowledge that ACE-INA is the agent of CIC. CIC undertakes that it will procure that ACE-INA will at all times perform CIC's obligations hereunder or, in the alternative, CIC will perform those obligations itself.

7. Reservation of Rights

- 7.1 Nothing in this letter shall be construed so as to prejudice, negate or otherwise interfere with the rights of HICIL under the Agreements or any other contractual arrangements involving or relating to Home's AFIA business as against any other party thereto (including their successors or assigns). In particular, but without derogating from the generality of the foregoing, the Liquidator reserves the right to assert that each or both of CIC and CIRC and/or any other person or entity having contractual obligations to indemnify HICIL with respect to Home's AFIA business are liable to indemnify HICIL thereunder.
- 7.2 Nothing in this letter shall be construed so as to prejudice, negate or otherwise interfere with the rights of CIC, CIRC or any other company within the ACE group of insurance undertakings as against HICIL whether under the Agreements or otherwise including the right to assert that neither CIC nor CIRC has any contractual obligation to indemnify HICIL with respect to AFIA Liabilities or AFIA Licence Business, and in particular, but without derogating from the generality of the foregoing: (i) if and to the extent that HICIL takes any action (or fails to take any action) the effect of which, subject to paragraph 2.8, is to undermine or interfere with defenses raised by CIC to a Claim, CIC reserves all of its rights in relation to any reinsurance or other indemnity or payment obligation (including pursuant to this letter agreement) regarding that Claim; and (ii) the payment

obligations stated in this letter agreement are predicated upon (and are not separate and independent from) a payment obligation under the Agreements and, accordingly, CIC reserves all its rights to argue that any action taken (or not taken) by HICIL and/or the Liquidator that would vitiate the payment obligation under the relevant Agreement does vitiate that obligation and such shall apply equally to vitiate the corresponding obligation under this letter agreement.

8. CIRC Reinsurance Recovery

- 8.1 Unless CIC invokes paragraph 7.2 and provided that CIC performs its obligations under this letter agreement, including without limitation paragraph 3.3 (b), HICIL agrees not to seek reinsurance recovery from CIRC.

9. No variation

No amendment, variation or supplement to this letter or the agreements contained in it shall be effective unless made in writing and signed on behalf of HICIL and CIC and approved by the Court.

10. Material Breach

In the event that either party considers that the other party has materially breached this letter agreement, the party shall give written notice to the other party specifying and giving details of the matter complained of and the actions that it considers required to cure the alleged material breach and requesting the other party to effect such action within twenty (20) business days from receipt of the notice. If the receiving party disputes that there is a material breach on its part or that the steps specified in the notice are necessary and appropriate, it shall so advise the notifying party in writing within twenty (20) business days of its receipt of the notice. If the receiving party considers that the notice does disclose a material breach on its part, it shall cure the same within twenty (20) business days of its receipt of the notice.

11. Notices

- 11.1 Any notice, consent or other communication ("notice") provided for under or given, made or served in connection with this letter shall be validly given, made or served if in writing and delivered personally or sent by registered or certified pre-paid first class post or by facsimile to the address or facsimile number (and marked for the attention of the person stated) below:

If to HICIL:

Home Insurance Company in Liquidation

59 Maiden Lane

New York, New York 10038

Attention: Jonathan Rosen

Facsimile Number: (212) 530 3100

If to CIC:

Thomas J. Wamser, Esq.
August 6, 2004
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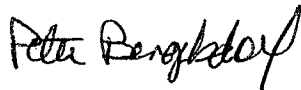
Century Indemnity Company
c/o ACE USA
Law Department
Routing TL35S
1601 Chestnut Street
Philadelphia, Pennsylvania 19101
Attention: Thomas Wamser
Facsimile Number: (215) 640 5571

11.2 A party may by written notice, served in accordance with this paragraph, change its address for the purpose of any subsequent notice.

* * *

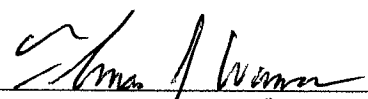
If CIC is in agreement with the foregoing, please have a duly authorized representative confirm same by signing and returning to me a counterpart of this letter. I appreciate your consideration and assistance.

Sincerely,



Pete Bengelsdorf
Special Deputy Liquidator

AGREED AND ACCEPTED
CENTURY INDEMNITY COMPANY

By: 
Title: Assistant General Counsel
Date: 8/10/04

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: 2005-HICIL-14
Proof of Claim Number: AMBC 465096
AMBC 464386
INTL 277878
AMBC 465074
Claimant Name: Century Indemnity Company
Policyholder account PECO Energy Company f/k/a
Philadelphia Electric Company
("PECO")

**JOINT REQUEST TO DEEM CIC'S CLAIM REGARDING
PECO A MATTER IN A DISPUTED CLAIM PROCEEDING**

In accordance with paragraph 6 of the Joint Report dated March 31, 2006, Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), and Century Indemnity Company ("CIC"), jointly request that the Referee order that the question whether, under New Hampshire law, CIC's claim regarding PECO may properly be setoff be deemed a matter in a disputed claim proceeding and treated as such under the RSA and the Claims Procedures Order and that a structuring conference be scheduled on the matter. As reasons therefor, the parties state:

1. CIC presented its claim regarding PECO to the Liquidator in a letter dated August 29, 2007. In the letter, CIC asserted the right to setoff its PECO claim. The Liquidator asked questions regarding the PECO claim in a letter dated September 13, 2007. CIC responded in a letter dated October 11, 2007.

2. In a letter dated October 12, 2007, the Liquidator disagreed with CIC's setoff of its PECO claim and reserved all rights with respect to other issues concerning the claim. The Liquidator and CIC agree that the propriety of the setoff should be determined in a disputed claim proceeding. The Liquidator and CIC otherwise reserve all their rights respecting the PECO claim.

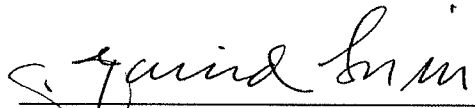
3. Paragraph 6 of the Joint Report provides in pertinent part that should the Liquidator disallow or partially disallow any claim "it is agreed that the parties will jointly seek an order from the Referee that this matter be deemed a disputed claim proceeding and treated as such under the RSA and the Claims Procedures Order."

4. The parties agree that the question whether CIC's claim regarding PECO may be setoff should be deemed a matter in a disputed claim proceeding and treated as such under the RSA and the Claims Procedures Order. Accordingly, a structuring conference should be scheduled regarding the matter under section 14 of the Claims Procedures Order.

WHEREFORE, the parties jointly request that the Referee (1) issue an order that the question whether CIC's claim regarding PECO may properly be setoff be deemed a matter in a disputed claim proceeding and treated as such under the RSA and the Claims Procedures Order, and (2) schedule a structuring conference on the matter in accordance with section 14 of the Claims Procedures Order.

ROGER A. SEVIGNY,
COMMISSIONER OF INSURANCE OF
THE STATE OF NEW HAMPSHIRE
SOLELY AS LIQUIDATOR OF THE HOME
INSURANCE COMPANY,

By his attorneys,



J. David Leslie
Eric A. Smith
Rackemann, Sawyer & Brewster
One Financial Center
Boston, MA 02111
(617) 542-2300

CENTURY INDEMNITY COMPANY

By its attorneys



Gary S. Lee
Kathleen E. Schaaf
James J. DeCristofaro
Julie D. Dyas
Morrison & Foerster
1290 Avenue of the Americas
New York, NY 10104
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October 12, 2007

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J. DAVID LESLIE
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October 12, 2007

BY EMAIL

Gary S. Lee, Esq.
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0050

CLAIM DETERMINATION

Re: Claimant: Century Indemnity Company ("CIC")
Proof of Claim Nos.: AMBC465096, AMBC464386, INTL277878
and AMBC465074 (2005-HICIL-14)
Policyholder Account: PECO Energy Company, f/k/a Philadelphia Electric
Company ("PECO")

Dear Gary:

CIC, through Morrison & Forster, has provided submissions to Roger A Sevigny, New Hampshire Commissioner of Insurance, as Liquidator ("Liquidator") of The Home Insurance Company ("Home") in support of CIC's asserted contribution/subrogation claim against The Home Insurance Company ("Home") with respect to the PECO policyholder account. In accordance with Paragraph 6 of the Joint Report filed by the Liquidator and CIC in HICIL-14 on March 31, 2006, this letter will advise CIC of the Liquidator's determination to disallow CIC's claim regarding PECO and provide CIC with the reasons for the disallowal.

A. Background

REDACTED

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Gary S. Lee, Esq.

October 12, 2007

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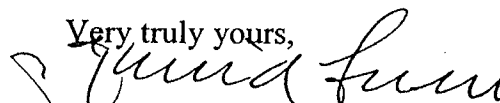
B. Determination

On consideration of CIC's submissions, the Liquidator disallows setoff of CIC's claim against Home regarding PECO because the setoff is prohibited by RSA 402-C:34, II(b).

REDACTED

In accordance with Paragraph 6 of the Joint Report, the Liquidator is prepared to jointly seek an order from the Referee that CIC's asserted setoff of its claim regarding PECO be deemed a disputed claim proceeding and treated as such. I would appreciate your prompt confirmation in that regard.

Very truly yours,


J. David Leslie

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: 2005-HICIL-14

Proof of Claim Number: AMBC465096

AMBC464386

INTL277878

AMBC465074

Claimant Name: Century Indemnity Company

Policy Holder Account: PECO Energy Company

REFEREE'S RULING

The parties' joint request to deem CIC's claim regarding PECO a matter in a disputed claim proceeding is granted.

The parties in this matter shall confer and advise the Office of the Liquidation Clerk of a mutually agreeable date for the scheduling of a structuring conference.

So ruled:

Dated: Oct. 23, 2007



Paula T. Rogers
Referee

The Home Insurance Company - UK Branch (WP/FROR)					
Summary of Cash payments to Home PL, NOD's received and reconciled by ACE, and set-off effected by ACE - July 2007					
	GBP	US\$	CAD\$	EURO	
NOD's received from HICIL to date - (Information only)	1,011.00	39,626,395.34	0.00	0.00	
Nod's reconciled, agreed and Court Approved	-195,529.40	-36,278,465.53	-68,414.63	-18,218.07	
Difference in Kwelm NOD's Court Approved figure of \$1,230,320, (no agreed CP13's to reconcile against)		-1,167,173.40			
Less previously paid WP/ROr in January 2004	50,000.00	3,232,550.00			
Home Sellers Payable to ACE		5,504,802.00			
Kumy	-145,529.40	-28,708,286.93	-68,414.63	-18,218.07	
Agrippina (A 06293)	19,545.51	2,486,961.82	0.00		
(1) - indemnity					
(2) - Interest	6,224.92	793,711.10	75.75		
Nationwide (A 06133)	0.00	1,250,000.00	0.00		
(3) - Arbitration Award (dated 17/07/2003)					
(6) - Unrecoverable Reinsurance		0.00			
Wurtembergische(A 06134)	12,097.23	1,243,074.27	311.31		
(5) - Reimbursement Trust Account (dated 25/07/2006 & 13/07/2007)					
	-107,662.34	-22,934,539.74	-68,027.57	-18,218.07	
OTHER SET-OFF					
(4) CIC		25,023,301.86			
(4) CIC as Home's cedant (Incl. ECRA)		6,301,853.54			
(4) less ETMC Home Credit		-195,652.00			
(4) less Reinsurance Claim against CIC - Eli Lilly & Co (May 2007)		-852,236.16			
Net Due to/(from) ACE	-107,662.34	7,342,727.50	-68,027.57	-18,218.07	

The Home Insurance Company - UK Branch (WP/FROR)				
Summary of Cash payments to Home PL, NOD's received and reconciled by ACE, and set-off effected by ACE - August 2007				
	GBP	US\$	CAD\$	EURO
NOD's received from HICIL to date - (Information only)	1,010.94	40,702,102.59	0.00	0.00
Nod's reconciled, agreed and Court Approved	-216,522.58	-37,138,490.23	-68,414.63	-18,218.07
Difference in Kwelm NOD's Court Approved figure of \$1,230,320, (no agreed CP13's to reconcile against)		-1,167,173.40		
Unione Italiana offset fro 3Q TR06 (as per Nick Tyndall's letter dated 25/07/2007)		236,740.60		
Less previously paid WP/FROR in January 2004	50,000.00	3,232,550.00		
Home Sellers Payable to ACE		5,504,802.00		
Rutty:	-166,522.58	-29,331,571.03	-68,414.63	-18,218.07
Agrippina (A106293)	19,545.51	2,486,961.82	0.00	
(1) - Indemnity				
(2) - Interest	6,224.32	793,711.10	75.75	
(6) - Reimbursement Trust Account (dated 29/08/2007)		619,856.45		
Nationwide (A106133)	0.00	1,250,000.00	0.00	
(3) - Arbitration Award (dated 17/07/2003)				
Wurtembergische(A106134)	12,097.23	1,243,074.27	311.31	
(5) - Reimbursement Trust Account (dated 25/10/2006 & 13/02/2007)				
OTHER SET-OFF	-128,655.52	-22,937,967.39	-68,027.57	-18,218.07
(4) CIC		18,822,120.73		
(4) CIC as Home's cedant (Incl. ECRA)		6,301,853.54		
(4) less ETMC Home Credit		-195,652.00		
(4) less Reinsurance Claim against CIC - Eli Lilly & Co (May 2007)		-852,236.16		
Net Due to/(from) ACE	-128,655.52	1,138,118.72	-68,027.57	-18,218.07

	GBP	US\$	CAD\$	EURO	Total converted to STG
NOD's received from HICIL to date - (Information only)	1,010.91	40,846,612.53	0.00	0.00	19,863,306.64
Nod's reconciled, agreed and Court Approved	-296,467.22	-37,374,951.59	-68,414.63	-18,218.07	-18,514,669.78
Difference in Kweilm NOD's Court Approved figure of \$1,230,320, (no agreed CPI3's to reconcile against)		-1,167,173.40			-567,556.08
Less previously paid WP/ROD in January 2004	50,000.00	3,232,560.00			1,621,877.33
Home Sellers Payable to ACE		5,504,802.00			2,676,794.93
Rutty:	-246,467.22	-29,804,772.99	-68,414.63	-18,218.07	-14,783,563.61
Agrippina (AT06293) (1) - Indemnity	19,545.51	2,486,961.82	0.00		1,228,869.08
(2) - Interest	6,224.32	793,711.10	75.75		392,213.83
(4) - Reimbursement Trust Account (dated 29/08/2007)		619,856.45			301,414.77
Nationwide (AT06133) (3) - Arbitration Award (dated 17/07/2003)	0.00	1,250,000.00	0.00		607,831.79
(6) - Unrecoverable Reinsurance					0.00
Wuerttembergische(AT08134) (5) - Reimbursement Trust Account (dated 25/10/2006 & 13/02/2007)	12,097.23	1,243,074.27	311.31		616,706.10
OTHER SET-OFF	-208,600.16	-23,411,169.35	-68,027.57	-18,218.07	-11,636,518.05
(4) CIC		18,822,121.00			9,152,546.82
(4) CIC as Home's cedant (incl. ECRA)		6,180,055.00			3,005,147.12
(4) less E TMC Home Credit		-195,652.00			-95,138.80
(4) less Reinsurance Claim against CIC - Eli Lilly & Co (May 2007)		-852,236.16			-414,412.99
Net Due to/(from) ACE	-208,600.16	543,118.49	-68,027.57	-18,218.07	11,624.10

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dleslie@rackemann.com

July 9, 2007

BY EMAIL

Gary S. Lee, Esq.
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0050

Re: Improper CIC Setoffs -- Interest

Dear Gary:

This letter is to advise CIC that the Liquidator will seek to recover interest (and any other appropriate amounts) from CIC based on CIC's setoffs against its obligations under the Claims Protocol, where the asserted setoff is found to be improper.

In the Claims Protocol, CIC and the Liquidator agreed on a process for handling claims by AFIA Cedents, and CIC acknowledged its obligation to pay the claims of AFIA Cedents that are allowed by the Court after going through that process. These acknowledged liabilities are reflected on the monthly setoff statements provided to the Liquidator by CIC. The May 2007 setoff statement reported the amount as \$36,292,249 (including [REDACTED]). The setoff statements also include other acknowledged CIC liabilities, such as the amount of [REDACTED]; and - after the Liquidator provided CIC with a proposed complaint - the [REDACTED] in reinsurance obligations for [REDACTED].

CIC has been avoiding paying its obligations by the assertion of setoffs. The Claims Protocol only permits setoffs that are in compliance with RSA § 402-C:34 or otherwise allowed by New Hampshire law. It has become increasingly clear that CIC's approach is to advance any potential setoff and wait for the Liquidator to challenge it. In particular, CIC asserted a series of setoffs in late April 2007 with little or no explanation. These setoffs included asserted amounts for [REDACTED] and [REDACTED] increased amounts for [REDACTED] and [REDACTED], and a collection of reinsurance claims [REDACTED]

RACKEMANN, SAWYER & BREWSTER

Gary S. Lee, Esq.

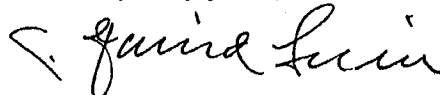
July 9, 2007

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[REDACTED]. The ad hoc nature of
CIC's assertions is apparent from CIC's subsequent withdrawal of [REDACTED]
[REDACTED], its own revision of the [REDACTED]
[REDACTED], and its making a
dramatically different and increased [REDACTED] coverage argument (from its original April 23, 2007
presentation) in response to the Liquidator's inquiries. CIC is continuing to assert setoffs even
where the Referee has determined that is improper (as in [REDACTED] or where
they are in active dispute (as in [REDACTED]). Also, CIC
has been unable to promptly answer basic questions about its claims, which we would assume
had been considered as part of evaluating and presenting the claims in the first instance.

CIC's asserted setoffs are delaying payment of amounts otherwise due to the Liquidator.
To the extent those setoffs are found to be improper, either because the underlying claim is
unfounded in whole or in part or because the setoff is not permitted under New Hampshire law,
the Home estate is being deprived of the use of amounts CIC should have paid to the Liquidator.
In the circumstances, CIC is obligated to pay interest on these improperly withheld amounts.

Very truly yours,



J. David Leslie

cc: Kathleen E. Schaaf, Esq.
James J. DeCristofaro, Esq.

EXHIBIT 8

Invoices and Due Dates

<u>Statement Period</u>	<u>Date Due</u>	<u>Amount Due</u>
July 2007	9/13/07	\$ 657,273.50
August 2007	10/17/07	\$ 6,204,609.22
September 2007	11/13/07	<u>\$ 1,138,117.28</u>
		\$ 8,000,000

Interest Due

Period Start	10/12/2007*	10/17/2007	11/13/2007	12/31/2007	12/31/2008
Period End	10/17/2007	11/13/2007	12/31/2007	12/31/2008	6/30/2009
Rate	6.8%	6.8%	6.8%	6.0%	3.5%
Days Elapsed	5	27	48	366	181
Amount due:	\$ 657,273.50	\$ 6,861,882.72	\$8,000,000.00	\$8,000,000	\$8,000,000
Interest due	\$ 612.25	\$ 34,516.21	\$ 71,539.73	\$ 480,000.00	\$ 138,849.32

* Date of Partial Notice of Determination

Sum of Interest due: \$ **725,517.51**

Interest per day in 2009: \$ **767.12**