

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: 2006-HICIL-18 and 21(Consolidated)
Proof of Claim Number: INTL278096
INTL278096-02
Claimant Name: Winterthur Swiss Insurance Company

**CENTURTY INDEMNITY COMPANY'S MOTION TO STRIKE WINTERTHUR
SWISS INSURANCE COMPANY'S CORRESPONDENCE WITH REFEREE-
APPOINTED ENGLISH LAW EXPERT AND FOR DIRECTION THAT
WINTERTHUR NOT SUBMIT REPLY BRIEF**

Century Indemnity Company ("CIC") submits this motion to strike (the "Motion") in response to the letter of Winterthur Swiss Insurance Company ("Winterthur"), dated October 27, 2006, to Colin Edelman, Q.C., the English law expert appointed by the Referee in these disputed claim proceedings, and to the Liquidation Clerk. In its letter, Winterthur indicates that it plans to submit a "formal" reply on November 8, 2006 and requests confirmation that Mr. Edelman will not issue his Report and Recommendation until he has reviewed Winterthur's reply.

For the reasons set forth below, the Referee should (i) strike Winterthur's letter of October 27 and direct Mr. Edelman not to consider it in making his Report and Recommendation; and (ii) direct Winterthur not to submit a reply brief.

I.
Winterthur's Letter and Reply Brief are Unauthorized Under the Claims Procedures Order and Claims Protocol.

Both Winterthur's letter and the "formal reply" it plans submit on November 8 are wholly unauthorized under the New Hampshire Superior Court's Claims Procedures Order, which governs the adjudication of these disputed claim proceedings. Section 15(a) of the Claims Procedures Order provides that in each disputed claim proceeding, "The Claimant (here, Winterthur) shall have thirty (30) days after the Structuring Conference Order is entered to submit a written submission in support of its Proof of Claim, unless the Court or the Referee, as the case may be, directs otherwise. The Liquidator and other persons or entities who are participating will then have thirty (30) days from the filing of the Claimant's submission in which to respond. ... *The Participants shall make no other submissions unless specifically requested by the Court or the Referee.*" (emphasis added).¹

Further, in referring these disputed claim proceedings to Mr. Edelman for his report and recommendation pursuant to Section 2.15 of the Court-ordered Claims Protocol agreed upon between CIC and the Home for resolution of AFIA-related claims (the "Claims Protocol"), the Referee set out a briefing schedule for Winterthur's written submission and CIC's response thereto alone. The Referee did not provide for the submission of any additional briefs. *See* Further Structuring Order, dated July 14, 2006. Until the Referee requests additional briefing, any additional submissions by Winterthur are unauthorized.

With all respect to Mr. Edelman, he is without authority to, as Winterthur requests, confirm that he will review Winterthur's reply and defer preparation of his report and recommendation until he has done so. Mr. Edelman was appointed pursuant to Section 2.15 of the Claims Protocol, and derives his authority from the Referee, who, in turn, is bound by the Claims Procedures Order. Since the Referee has not requested additional briefing under

¹ In these disputed claim proceedings, Century Indemnity Company ("CIC"), which was granted the right to participate, assumed responsibility for responding to Winterthur's written submission instead of the Liquidator because the Liquidator denied Winterthur's claims based on CIC's recommendation. Further, at the parties' request, the Referee ordered that each side would have forty-five (45) days to submit their respective briefs, rather than the thirty (30) days provided for in Section 15(a) of the Claims Procedures Order.

the Claims Procedures Order, Mr. Edelman may not accept it under the Claims Protocol. (CIC assumes Winterthur is simply not adequately familiar with the Claims Protocol and Claims Procedures Order; otherwise its October 27 letter is a bare attempt to circumvent the Referee's control over these proceedings.)

In short, neither the Court nor the Referee has requested that Winterthur make an additional submission. In the absence of such express request, Winterthur's letter must be struck and the Referee should instruct Mr. Edelman that Winterthur's letter was unauthorized and that he should not consider it in making his report and recommendation. The Referee should further direct Winterthur not to submit a reply brief. In the event Winterthur nonetheless serves a reply, that brief should also be struck and Mr. Edelman should be similarly instructed not to review or consider it.²

II.

Winterthur Raised Numerous Factual Issues in its Written Submission and CIC was Required to Address those Questions and Winterthur's Failure to Substantiate its Factual Claims.

Because further argument is not authorized by the Claims Procedures Order, CIC will not engage here in a lengthy substantive refutation of arguments raised by Winterthur in its October 27 letter. CIC must, however, respond to Winterthur's allegation that CIC improperly raised factual issues in this proceeding. Quite to the contrary, as CIC detailed in its response to Winterthur's written submission, it was *Winterthur* that has raised numerous factual questions. And, despite Winterthur's insistence that it addresses only a question of law as agreed by the parties in the Joint Status Report, it builds its analysis of the law on a foundation of these unresolved factual points. Winterthur has submitted nothing—neither statements, reports, invoices, notes, nor memoranda—to substantiate its factual claims that the London Representative Fees at issue were incurred by London Market Representatives in the

² It goes without saying that if Winterthur submits a reply brief, CIC will be compelled to not only to move to strike it, but also substantively to respond to Winterthur's reply to preserve its position. Winterthur, in turn, will no doubt seek to counter CIC's sur-reply, and so on and on. Just when would the process stop?

adjustment of Winterthur's settled claims.³ In that sense, despite the factual issues raised by Winterthur, there is no factual dispute because Winterthur has not presented any evidence of fact.

Further, although maintaining that Winterthur raised multiple factual issues in its Written Submission and challenging Winterthur's substantiation of its factual claims, CIC nonetheless demonstrated that consideration of the point of law involved—*i.e.*, whether matters not specifically identified as recoverable under the Ultimate Nett Loss (“UNL”) clause of the applicable reinsurance policies are recoverable—resolves the dispute. Under Section 2.14 of the Claims Protocol, 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” Through the legal opinion of Peter Taylor, CIC showed that under principles of English contract interpretation, London Representative Fees are not expressly covered by the UNL clause and that to be recoverable under that clause, claims must be adjustment expenses arising from the settlement of claims. Winterthur failed to provide any evidence that the London Representative Fees it seeks fall within the UNL clause and thus, *as a matter of law*, Winterthur's claim must be denied.

III. Conclusion.

Both parties have staked their ground and the time for briefing is over. The question of the recoverability of London Representative Fees under the English law-governed reinsurance contracts has been well-framed by both parties and is ready for review and recommendation by Mr. Edelman. Heaping replies and opinions on top of one another will not bring these disputed claims closer to resolution. If Mr. Edelman has a question, or would like the parties to submit further briefing on a particular point, he can request it through the

³ CIC acknowledges that documents were provided in these proceedings, both in the Liquidator's Case File and by Winterthur. Yet, as discussed in CIC's response, none of these documents demonstrate that the London Representative Fees at issue are specifically referable to Winterthur's settled claims.

Referee. In the absence of such a request, these disputed claims must be adjudicated based on the submissions already in-hand.

For the reasons set forth above, CIC respectfully requests that the Referee (i) strike Winterthur's letter of October 27 and direct Mr. Edelman not to consider it in making his Report and Recommendation; and (ii) direct Winterthur not to submit a reply brief.

Dated: November 2, 2006
New York, New York

LOVELLS

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