

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: 2008-HICIL-42
Proof of Claim Number: RAHM 700612-32
Claimant Name: KX Reinsurance Company Limited
Policyholder Account: Various

**CENTURY INDEMNITY COMPANY'S OBJECTION TO
KX REINSURANCE COMPANY LIMITED'S
MOTION TO COMPEL**

Pursuant to the Structuring Conference Order dated June 15, 2009, Rule 14(c) of the Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company in Liquidation (the "Claims Procedures Order"), and New Hampshire Superior Court Rules 35 and 36, Century Indemnity Company ("CIC") submits its objection to KX Reinsurance Company Limited's ("KX Re") Motion to Compel.

BACKGROUND

1. This disputed claim proceeding arises out of the disallowance by the Home Insurance Company in Liquidation ("Home"), acting through ACE INA Services U.K. Limited ("AISUK"),¹ of KX Re's claim for reinsurance arising out of what are referred to as the "Brush Wellman Claims" and the "Norton Company Claims." The Brush Wellman Claims were disallowed on the ground that KX Re's settlement related to a policy buy-back of future liabilities, which are not payable under the subject reinsurance. The Norton Company Claims were not paid because KX Re's settlement

¹ AISUK is an affiliated company of CIC.

was for defense costs only and defense costs absent indemnity are not recoverable under the reinsurance contracts.

I. The Claims Protocol and the Claims Procedures Order

2. This dispute must be viewed in the context of the August 6, 2004 Claims Protocol (the “Protocol”) and the Claim Procedures Order, which control this disputed claim proceeding. Briefly, the Protocol and the Claims Procedures Order envision a summary proceeding in which the parties exchange relevant documents and information in advance of the Structuring Conference, short-circuiting the necessity for traditional discovery.²

3. The Liquidator provided Home’s case file and, on May 1, 2009, after the entry of a negotiated confidentiality agreement and order, KX Re served a Written Description (Mandatory Disclosures) of KX Reinsurance Company Limited, a six-page summary of its position, as well as a binder containing the documents KX Re “contends support the amount claimed due.” (Claims Procedures Order, §14(b)).

II. The Structuring Conference and the Structuring Conference Order

4. On June 15, 2009, a telephone structuring conference was held before the Referee (the “Structuring Conference”). During the Structuring Conference, KX Re requested that CIC submit a narrative summary of its position, similar to the one KX Re provided with its Mandatory Disclosures. Although not required to do so under the Claims Procedures Order, CIC agreed to provide the requested summary. The need for

² Section 14(b) of the Claims Procedures Order requires that Home’s Liquidator and the Claimant exchange “mandatory disclosures,” which encompass the Liquidator’s “Case File” and the Claimant’s “written submission stating the amount the Claimant asserts is due, the method of calculation of the amounts owed and the allocation methodology (if applicable), along with any additional documents or other evidentiary material that the Claimant contends support the amount claimed due.”

discovery was briefly discussed, but, as the Mandatory Disclosures generally included relevant documents, the parties agreed that they would consider whether any further discovery was necessary.

5. The Referee then entered an order based upon the Structuring Conference (the “Structuring Conference Order”), which directed CIC (as it had agreed) to “provide a brief summary of its position, with the documents most pertinent to the issue to KX Re and the Referee.” The Structuring Conference Order also permitted KX Re to serve discovery after receiving CIC’s statement “should KX Re determine that discovery is necessary.”

III. CIC’s Brief Summary

6. CIC provided its summary, attached as KX Re Ex. 1,³ on July 10, 2009 (the “Brief Summary”). The Brief Summary did precisely what the Order anticipated – it outlined the issues and facts that CIC believes are relevant to this dispute. Not only that, however, CIC specifically referred to documents provided by KX Re in its mandatory disclosures in support of the statements contained in the Brief Summary. CIC also included a single additional document: the First Interim Final Award from an arbitration between Unionamerica and Home.⁴

IV. KX Re’s Discovery

7. As permitted by the Structuring Conference Order, KX Re served interrogatories and document requests on CIC. The breadth of this discovery, however, suggests that KX Re requested the Brief Summary not to flesh out Home’s reasons for

³ References to exhibits attached to KX Re’s motion will be “KX Re Ex. ___.”

⁴ In connection with providing this additional document, CIC stated: “Home has previously arbitrated against Unionamerica’s reinsurance presentation obligations, which are equally applicable to KX Re, and will refer to the Award dated March 31, 1998 for its full terms and effect.”

disallowing the Brush Wellman and Norton Company Claims, but to use it as a springboard for oppressive and irrelevant inquiries. Rather than containing well-focused questions that would supplement the already available material, the interrogatories and document requests go far afield of what KX Re could possibly need to prepare its claim.

8. For example, despite knowing that AISUK was the company that determined KX Re's Brush Wellman and Norton Company Claims, KX Re nevertheless stated in its "Definitions and Instructions," that "you" and "CIC" "means Century Indemnity Company and all of its past or present agents, representatives, employees, attorneys, accountants, and investigators." (KX Re Ex. A, p. 2). Similarly, KX Re defined "document" to mean:

all writings of any kind, including originals and all nonidentical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including without limitation correspondence, email, memoranda, notes, diaries, statistics, letters, telegrams, minutes, contracts, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books, prospectuses, certificates, drawings, plans, specifications, blueprints, interoffice and intraoffice communications, or offers; notations in any form made of conversations, telephone calls, meetings or other communications; bulletins, printed matter (including newspapers, magazines and other publications, and articles and clippings therefrom), press releases, computer printouts, teletypes, telecopies, invoices, orders, confirmations, shipping or delivery advices, ledgers, worksheets (and all drafts, alterations, modifications, changes and amendments of any of the foregoing), graphic or oral records or representations of any kind (including without limitation photographs, charts, graphs, and microfiche, microfilm, videotape, or film recordings), and electronic, mechanical or electrical records or representations of any kind (including without limitation tapes, cassettes, discs, recordings), or transcriptions thereof.

(*Id.*, p. 3). And, according to KX Re, "state the basis" means that CIC should:

(a) identify each and every document (and where pertinent, the section, article, or subparagraph thereof), which forms any part of your source of information regarding the alleged facts or legal conclusions referred to by the interrogatory;

(b) identify each and every communication which forms any part of the source of your information regarding the alleged facts or legal conclusions referred to by this interrogatory;

(c) state separately the acts or omissions to act by stating their nature, time, and place and identifying the persons involved which form any part of your information regarding the alleged facts or legal conclusions referred to in this interrogatory; and

(d) state separately any other fact which forms the basis of your information regarding the alleged facts or conclusions referred to in the interrogatory.

(*Id.*, p. 4). These so-called “definitions” alone are clear evidence that KX Re’s intent is something other than an attempt to develop relevant information in support of its claims for reinsurance.

9. CIC now will address the specific issues raised by KX Re.

A. “State the Basis”

10. CIC’s objection to “state the basis” is well founded for two reasons. First, “state the basis” is a classic form of contention interrogatory which has no place in this expedited proceeding, which not only will be submitted on papers (and perhaps oral argument), but also is legal in nature. CIC is not obligated to explain – in advance of the briefing – what the legal basis of its defense to payment is.

11. Second, to the extent that facts underlie CIC’s legal position, the bases have been adequately set forth in the Brief Summary. For example, in paragraphs 1, 3-7, and 9-11, CIC refers to specific documents which support its position. Thus, to the extent

that KX Re's request that CIC "state the basis" for its position is not improper, CIC has already responded.

12. Apart from insisting that its definition of "state the basis" is proper and widely used" (KX Re Motion at 3), KX Re has failed to explain why the bases set forth in the Brief Summary are inadequate. KX Re's motion to compel further answers to Interrogatories 1, 2, 5, 6 and 7 should therefore be denied.

B. "Paid Liabilities"

13. In response to Interrogatory 5, CIC stated that "there have been some small amounts paid" on the Brush Wellman Claims. (KX Re Ex. B, p. 6). These paid claims, however, are included within KX Re's retention and are therefore not relevant to the Brush Wellman Claims that are at issue in this disputed claim proceeding. Those claims are entirely in respect of future potential liability (namely IBNR and OSLR)⁵ and thus not recoverable under the reinsurance agreement.

C. Interrogatory 6

14. In its Brief Summary, CIC took the position that a previous arbitration between Home and Unionamerica may have included certain issues that are relevant to this disputed claim proceeding. Whether, and to what extent, there may be issue identity and/or preclusion as a result of the findings in that arbitration is a legal question that will be subject to briefing at the appropriate time. Again, KX Re cannot insist on a preview of CIC's legal analysis by couching its request as "factual." KX Re can review the award

⁵ "IBNR" is a reserve for claims that have been "incurred by not reported." "OSLR" are reserves for outstanding claims, that is, claims that have been reported but not paid. It is CIC's position that such future claims are not recoverable under the relevant reinsurance contracts.

– just as it would reported any case – and determine on its own the award’s applicability to this disputed claim.

D. Interrogatory 7

15. Again, KX Re has ignored the factual bases for CIC’s position on the Brush Wellman Claims as set out in the Brief Summary. For example, in paragraph 4, CIC states that “it can find no evidence of any paid liability.” (KX Re Ex. C, ¶ 4). In paragraph 5, CIC explains that certain documents on which KX Re relies “merely describe the London Market reinsurers’ settlement allocation,” and that this is inadequate to prove “the amount of and/or nature of the payments by the insured.” (*Id.*, ¶ 5). Paragraph 6 explains that “the documents that KX Re provided after the original collection request (WS/A3)...do not evidence any payment in respect of KX Re’s underlying liability on the underlying insurance contracts insuring Brush Wellman.” (*Id.*, ¶ 6). Paragraph 7 identifies additional documents that “confirm AISUK’s position.” (*Id.*, ¶ 7).

16. The only thing that CIC has refused to provide in response to Interrogatory 7 is the legal basis for its position that the documents provided to AISUK by KX Re fail to show payment of anything other than a future loss, which is not recoverable under the subject contracts. CIC is not attempting to “mask the facts on which its legal theories are based” (KX Re Motion, p. 5); rather KX Re is trying to discover CIC’s legal theory by ignoring the facts that CIC has provided. KX Re is not entitled to any further answer to Interrogatory 7.

E. Document Request 6

17. CIC has previously advised KX Re that it has produced all documents contained in its file for the Brush Wellman and Norton Company Claims. As described above, it has also identified those documents produced by KX Re that demonstrate that the Brush Wellman Claims are for unrecoverable future liabilities. Paragraphs 9-12 of the Brief Summary lay out the factual bases for AISUK's denial of the Norton Company Claims and identify the KX Re documents on which AISUK relied in reaching its conclusion that the settlement was in respect of defense costs, not liability. Accordingly, CIC has produced all documents responsive to Request 6.

F. Interrogatories 3 and 4 and Document Requests 3 and 4

18. Interrogatory 3 – which seeks the identity of other insurers that have made Brush Wellman or Norton Company reinsurance claims against Home – and Interrogatory 4 – which asks whether CIC has sought reinsurance for its own payments (if any) to Brush Wellman or Norton Company – are classic examples of discovery run amuck. Indeed, KX Re has utterly failed to explain how payments made by Home to *other* cedents on *other* claims under *other* insurance policies to Brush Wellman or Norton Company under *other* reinsurance contracts could possibly lead to admissible evidence in *these* claims for *this* cedent under *these* policies under *these* reinsurance contracts.

19. Even further afield is Interrogatory 4, which seeks information about CIC's – and, by definition, any of CIC's affiliated companies' – reinsurance claims to other unidentified reinsurers under other unidentified reinsurance contracts for claims

under unidentified policies issued to Brush Wellman or the Norton Company. There is simply no justification for this discovery. It should be rejected in its entirety.⁶

G. Document Request 2

20. CIC has previously advised KX Re that it has produced all documents in AISUK's Brush Wellman and Norton Company claims files. Accordingly, this part of KX Re's motion is resolved.

H. Document Request 5

21. CIC has previously advised KX Re that it has produced all documents in AISUK's Brush Wellman and Norton Company claims files. To the extent that this request can be read to relate to Brush Wellman and Norton Company claims other than those at issue here, this issue has been addressed in paragraphs 18 and 19, above, and the documents, if any, are not discoverable.

CONCLUSION

CIC has responded fully to all of KX Re's proper inquiries. In addition, CIC's objections are valid, insofar as the interrogatories are overbroad and seek information unlikely to lead to the discovery of admissible evidence. Finally, KX Re is not entitled to the legal basis for CIC's position that the Brush Wellman and Norton Company Claims are not recoverable under the applicable reinsurance contracts.

Therefore, for all the foregoing reasons, KX Re's motion to compel should be, in all respects, denied.

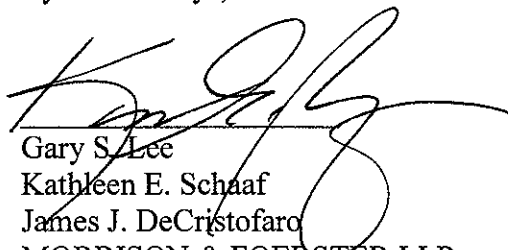
⁶ Document Request Nos. 3 and 4 simply request documents relating to Interrogatory 3 and 4. For the same reasons stated in paragraphs 18 and 19, these requests are entirely improper.

Dated: November 16, 2009

Respectfully submitted,

CENTURY INDEMNITY COMPANY

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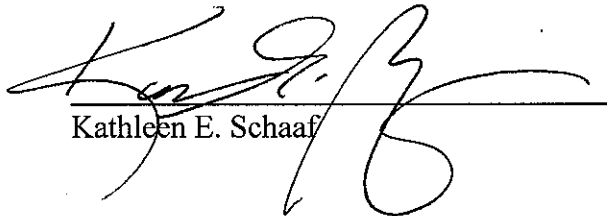
CERTIFICATE OF SERVICE

I, Kathleen E. Schaaf, hereby certify that, on November 16, 2009, a copy of the foregoing Century Indemnity Company's Objection to KX Reinsurance Company Limited's Motion to Compel has been electronically forwarded to the following counsel:

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