EXHIBIT 3

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-12
Proof of Claim Number: INTL 700616
Claimant Name: Century Indemnity Company

AFFIDAVIT OF THOMAS J. WAMSER

Thomas J. Wamser, being duly sworn, deposes and states the following:

1. I am Associate General Counsel of ACE-INA and submit this affidavit in support of the submission of Century Indemnity Company ("CIC") regarding the "Rutty Pool" claim, INTL 700616 (the "Claim"). Unless otherwise indicated herein, this affidavit is based upon my personal knowledge and a review of the records maintained by CIC and its agent ACE INA Services U.K. Ltd. ("AISUK") regarding the Claim.

2. The Claim arises out of Home's reinsurance contract (Contract R) with members of the M.E. Rutty Pool (the "Rutty Pool Cedents"), attached as Exhibit A. Pursuant to the Insurance and Reinsurance Assumption Agreement (the "Assumption Agreement"), attached as Exhibit B, CIC reinsures Home's liabilities arising from Home's reinsurance of the Rutty Pool Cedents under Contract R.

3. The contractual connection is between CIC and Home under the Assumption Agreement; the Rutty Pool Cedents are not parties to the Assumption Agreement, and there is no privity between CIC and the Rutty Pool Cedents. Indeed, the Rutty Pool Cedents have no rights under the Assumption Agreement. Rather, the Rutty Pool Cedents' sole recourse is to Home under Contract R. The United States Court of Appeals for the Sixth Circuit affirmed this

position in Nationwide Mutual Insurance Co. v. Home Insurance Co., 150 F.3d 545 (6th Cir. 1998), attached as Exhibit C.

4. Under the Assumption Agreement, CIC has the obligation to administer and service the "AFIA Liabilities" on Home's behalf. In 1996, AISUK, acting as the disclosed agent for CIC (and as the successor to CIGNA Services U.K. Limited), began to take on and administer Home's Rutty Pool business on behalf of Home under a full reservation of rights pending determination of various arbitration disputes concerning Home's obligations to the Rutty Pool members it reinsured.

5. Pursuant to the Assumption Agreement, CIC made multiple payments through and on behalf of Home to various entities to which Home was liable as regards the Rutty Pool. Those payments were processed by AISUK, acting as agent for CIC, but were made out of Home's account, rather than CIC's account. In fact, the checks bore Home's name. The payments were made on a full "without prejudice," "reservation of rights" basis, given that the Rutty Pool Cedents and Home were engaged in litigation and arbitration over the scope of Home's liability to the Rutty Pool. Some of these payments turned out to be in excess of the amount of Home's actual liability because, in the face of the on-going litigation and arbitration between the Rutty Pool Cedents and Home, CIC determined that it should, for Home's benefit, pay amounts sufficient to cover Home's additional liability in the event the Rutty Pool members prevailed. Otherwise, Home could be subject to additional damages, including bad faith damages.

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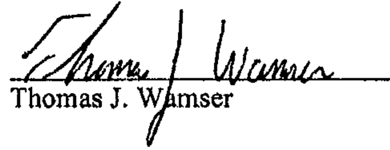
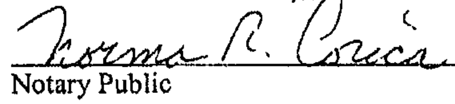


Thomas J. Wamser

Sworn to before me this 15 day of May, 2006



Notary Public

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Norma R. Corica, Notary Public
City Of Philadelphia, Philadelphia County
My Commission Expires Nov. 29, 2008
Member, Pennsylvania Association Of Notaries

Wamser Aff.
EXHIBIT A

REINSURANCE CONTRACT NO.R.

made between

NATIONWIDE MUTUAL INSURANCE COMPANY

for the account of

NATIONWIDE GENERAL INSURANCE COMPANY of

P.O.BOX 1881, Columbus, Ohio, 43216

(hereinafter referred to as the "Reassured")

as underwritten for by

M.E.RUTTY UNDERWRITING AGENCIES LTD. of

5-7 Ireland Yard, London EC4

(hereinafter referred to as the "Agent")

and

HOME INSURANCE COMPANY of New York

acting through its branch office at

26/28 Fenchurch Street, London, EC3

(hereinafter referred to as the "Reinsurers")

RECITALS

(1) WHEREAS under agreements dated July 1, 1962 and December 17, 1963 between the Agent and the Reassured, the Agent accepted insurance and reinsurance business on behalf of the Reassured for the underwriting years 1962/3, 1964, 1965 and 1966 and

(2) WHEREAS the Agent ceased to write new business after 31st January, 1967 and

(3) WHEREAS the Reassured desire to effect reinsurance in respect of their liability under any and/or all policies and/or contracts of insurance and/or reinsurance written by the Agent on their behalf (hereinafter referred to as the "Original Policies") and

(4) WHEREAS the Reinsurers having had full disclosure and inspection of the Agent's records and accounts relating to the Original Policies and all claims and outstanding matters thereunder have agreed to afford such reinsurance to the Reassured in accordance with the terms and conditions of this Contract, NOW it is hereby agreed as follows:

ARTICLE 1

This Contract is in respect of all losses which the Reassured may be or may become liable to pay, arising out of risks written for the Reassured by the Agent during 1962/3, 1964, 1965 and 1966 underwriting years of account,

Cont/..............

excluding however "Stop and Shop" Losses arising from or consequent upon a fire on 5th August, 1969, but including the Reassured's participation in the 1963/4 First Surplus Treaty.

The Reinsurers hereon shall follow all terms, conditions and settlements as agreed by or on behalf of the Reassured under the Original Policies included in the accounts reinsured hereby.

ARTICLE II

This Contract covers all claims due for payment on or after 1st January 1977 as hereinbefore defined and shall remain in force until all the liability hereunder shall have been exhausted, subject however to such cancellation provision as hereinafter defined in ARTICLE IX.

ARTICLE III

Notwithstanding anything contained herein to the contrary, this Contract shall exclude:

a) Any loss or liability accruing to the Reassured directly or indirectly and whether as Insurer or Reinsurer from any Pool or Insurers or Reinsurers formed for the purposes of covering Atomic or Nuclear Energy Risk.

Furthermore, this Contract is also subject to the following Nuclear Incident Exclusion Clauses which are attached hereto and shall form an integral part hereof:

i) NUCLEAR INCIDENT EXCLUSION CLAUSES - LIABILITY - REINSURANCE - U.S.A./CANADA.

ii) NUCLEAR INCIDENT EXCLUSION CLAUSES - PHYSICAL DAMAGE - REINSURANCE - U.S.A./CANADA.

b) Life, Financial Guarantee and Insolvency Risks.

c) Furthermore, it is understood and agreed that:

i) As regards Non-Marine business accepted by the Reassured this Contract shall exclude loss or damage directly caused by War and/or Civil War but this exclusion shall not apply to such business which is permitted under the terms of the United Kingdom Market War and/or Civil War Risks Exclusion Agreement.

CI1000096

11) As regards Marine and Aviation business accepted by the Reassured this Contract shall include loss, damage, liability or expense caused by or resulting from the risks of War, as covered in the Original Policy(ies) provided that such loss, damage, liability or expense would be recoverable under the terms and conditions of the relevant Institute War and Strikes Clauses or War sections of the relevant Institute War and Strikes Clauses or relevant London Aviation Clauses in current use at the inception of this Contract or at the time when the War Risks cover would have commenced under the original Insurance or Reinsurance within the terms of these clauses, whichever is the earlier; except that if the risks of War are covered in the Original Policy(ies) under clauses approved by the London Hull War Risks Joint Sub-Committee, or in respect of Cargo interest under the Standard War Risks Clause of any country which complies with the limitation of the United Kingdom Waterborne Agreement, the foregoing proviso shall not apply.

The Reinsurers warrant that they are unaware as at the date hereof that any business has been placed by the Agent which is excluded under the terms of this clause.

ARTICLE IV

The Consideration to be paid by the Reassured to the Reinsurers for this Contract shall be £100,393.00 plus U.S.$224,691.00 plus Can$1,372.00 payable at inception.

The Reinsurers hereon shall have the right to receive any payments under any reinsurance placed by the Agent on behalf of the Reassured and any other income, derived from any source that otherwise would have been payable to the Reassured. The Reinsurers shall bear all expenses of whatever nature which would otherwise have been claimed or requested from the Reassured by the Agent during the run off period.

ARTICLE V

It is understood and agreed that settlement of all claims; refunds, returns Premiums and original Profit Commission and administration of all premiums, additional premiums and policy adjustments shall be effected on behalf of the Reinsured by the Agent and/or their appointed agents.

It is further understood and agreed that the Reinsurers hereon will receive all premium adjustments due on the Original Policies without deduction of overriding commission and all recoveries under surplus, excess loss, "stop loss" and other reinsurances effected for joint account, payable to the Reassured on or after 1st January 1977 and will be responsible for payment of all returns of premium and reinsurance premiums payable thereafter.

ARTICLE VI

In the event of losses exceeding pounds 25,000 which may give rise to claims under this Contract the Agent shall give immediate notice to the Reinsurers, but inadvertent error in or omission of such notification shall not in any way prejudice the rights of the Reassured under this Contract.

ARTICLE VII

Reinsurers shall be bound unconditionally by all loss settlements made by the Agent, including compromise settlements, where such settlements are within the terms and conditions of the Original Policies and of this Contract. The Reinsurers' contribution to any other loss settlement shall be conditional upon prior notification of such settlement being given to the Reinsurers by the Agent and to their agreement thereto which agreement shall not be unreasonably withheld.

The Agent will conduct the settlement of or resistance to claims as conscientiously as if they were liable for the whole amount of the claim or claims that arise.

ARTICLE VIII

The Reinsurers and/or their nominees shall at all reasonable times be entitled to inspect all books, relevant records, correspondence, documents and vouchers in the possession of or accessible to the Agent, and in any way connected with the adjustment of a loss applying to this Agreement, it being understood that the Agent or the Reassured cannot be called upon to supply documentary evidence other than that which they themselves have received.

ARTICLE IX

Should the Reinsurers

I) Lose the whole or part of its paid up capital, or

II) Go into liquidation or a receiver be appointed,

the Reassured have the right to terminate their participation in this Contract forthwith by giving notice in writing to the Reinsurers, ~~and the Reinsurers shall have the same right vis-a-vis the Reassured.~~

NATIONWIDE MUTUAL INSURANCE CO.

In order to secure the Reassured in the event of liquidation, either voluntary or compulsory of the Reinsurers, or in the event of any default by the Reinsurers in performance of any of their obligations under this contract, any further monies which may after the occurrence of any of the events contemplated in this clause be available for or credited to or claimable by the Reinsurers shall be held upon trust for the Reassured as sole and absolute beneficiaries.

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ARTICLE X

It is hereby understood and agreed that any amendments and/or alterations to this Contract that are agreed either by correspondence and/or Brokers Slip Endorsements shall be automatically binding hereon and shall be considered as forming an integral part hereof.

ARTICLE XI

This Contract is negotiated through Harrington, Austin Limited, 2/12 Wilson Street, London EC2M 2TJ through whom all correspondence between parties hereto shall be addressed.

ARTICLE XII

It is hereby declared and agreed that any inadvertent delays, errors or omissions made in connection with this Contract shall not be held to relieve either of the parties hereto from any liability which would have attached to them hereunder if such delay, error or omission had not occured and it is further agreed that in all things coming within the scope of this Contract the Reinsurers shall share to the extent of their interest the fortunes of the Reassured.

Nevertheless it is understood and agreed that any such delay, error or omission shall be rectified as soon after its discovery as possible.

The Reinsurers acknowledge having made the enquiries and inspections referred to in RECITAL (4) hereof unconditionally waive and release any present or future right to avoid or terminate this Contract, for non-disclosure, misrepresentation or any other cause whatever.

ARTICLE XIII

As a precedent to any right of action hereunder, if any dispute shall arise between the Reassured and the Reinsurers with reference to the interpretation of this Contract or their rights with respect to any transaction involved, whether such dispute arises before or after termination of this Contract, such dispute, upon the written request of either party, shall be submitted to three arbitrators, one to be chosen by each party, and the third by the two so chosen. If either party refuses or neglects to appoint an arbitrator within thirty days after the receipt of written notice from the other party requesting it to do so, the requesting party may appoint two arbitrators. If the two arbitrators fail to agree in the selection of a third arbitrator within thirty days of their appointment, each of them shall name two, of whom the other shall decline one and the decision shall be made by drawing lots. All arbitrators shall be executive officers of insurance or reinsurance companies or Underwriters at Lloyd's, London not under the control of either party to this Contract.

The arbitrators shall interpret this Contract as an honourable engagement and not as merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law, and they shall make their award with a view of effecting the general purpose of this Contract in a reasonable manner rather than in accordance with a literal interpretation of the language. Each party shall submit its case to its arbitrator within thirty days of the appoinment of the third arbitrator.

Cont/... ......

CI1000099

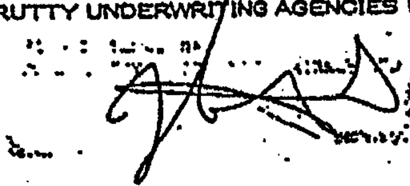
The decision in writing of any two arbitrators, when filed with the parties hereto, shall be final and binding on both parties. Judgement may be entered upon the final decision of the arbitrators in any court having jurisdiction. Each party shall bear the expense of its own arbitrator and shall jointly and equally bear with the other party the expense of the third arbitrator and of the arbitration. Said arbitration shall take place in Columbus, Ohio unless some other place is mutually agreed upon by the Reassured and the Reinsurers.

Signed: NATIONWIDE MUTUAL INSURANCE COMPANY
NATIONWIDE GENERAL INSURANCE COMPANY

Dated: June 22, 1977
HOME INSURANCE COMPANY

We acknowledge that we are fully aware of and (having been so requested by the Reassured and the Reinsurers) consent to the arrangements proposed in this Contract. We undertake to carry out the obligations under this Contract which fall on ourselves and to send accounts to the Home Insurance Company and to deal with them in all respects.

Signed: M.E.RUTTY UNDERWRITING AGENCIES LIMITED.



We will from now on deal only with M.E.RUTTY UNDERWRITING AGENCIES LIMITED.

Signed: HOME INSURANCE COMPANY

Wamser Aff.
EXHIBIT B

Item III.B.1(a)

INSURANCE AND REINSURANCE ASSUMPTION AGREEMENT

This Assumption Agreement dated January 31, 1984, (hereinafter referred to as the "Assumption Agreement") between FIREMAN'S FUND INSURANCE COMPANY, a California corporation, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Minnesota insurance corporation, THE AMERICAN INSURANCE COMPANY, a New Jersey insurance corporation, HARTFORD FIRE INSURANCE COMPANY, a Connecticut insurance corporation, THE HOME INSURANCE COMPANY, a New Hampshire insurance corporation and AETNA INSURANCE COMPANY, a Connecticut insurance corporation (hereinafter referred to collectively as the "Sellers"), and INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania insurance corporation (herein "INA") is executed and takes effect simultaneously with the Closing of the Purchase Agreement No. 1 and Purchase Agreement No. 2, each as amended (the "Purchase Agreements"), each dated and entered into on December 30, 1983.

1. Except as provided herein, terms used and entities referred to in this Assumption Agreement shall have the same definitions and identifications as in the Purchase Agreements.

2. In consideration of the transfer by the Total Sellers of the assets (including both ledger and non-ledger) shown on the statutory balance sheet of AFIA as of the closing date, and all other tangible assets owned directly by AFIA, or tangible assets in which AFIA has beneficial ownership, to the Purchasers, as designated by CIGNA, or any of them, INA hereby assumes as its direct obligation and agrees to pay on behalf of each Seller when payment thereof is due all insurance and reinsurance liabilities of each of the Assigning Sellers arising under or related to the business of AFIA described in Section 1.1(c)(ii) of the Purchase Agreements and included in AFIA Obligations (herein the "AFIA Liabilities") (it being understood that AFIA Liabilities do not include obligations arising as holders of Stock or liabilities for income taxes). The parties confirm and agree that, since none of the AFIA Liabilities assumed hereby by INA has been written or accepted in the name of INA through or by AFIA, none of the AFIA Liabilities as so assumed shall be subject to the provisions of Article XI of the Constitution of AFIA.

3. INA shall (1) administer and service the AFIA Liabilities including their investigation, payment, settlement, defense and the processing and collection of any reinsurance related thereto, (2) have all authority to act in the name of a Seller as may be required to perform such administration and service, and (3) bear all costs and

expenses related to the AFIA Liabilities and their administration and service. INA shall comply in such administration with commercially reasonable standards in the insurance industry and the standards prescribed by, or by practice of, any governmental authority having jurisdiction and shall be responsible for all penalties and claims in tort actions or otherwise arising from the failure or alleged failure to comply with such standards.

4. INA shall prepare, maintain and preserve indefinitely and permit the Sellers reasonable access to appropriate financial and business records, books of account and documents (including insurance and reinsurance policies and correspondence and proofs of loss, premium collection records, and records of insurance and reinsurance claims and recoveries relating thereto) relating to the AFIA Liabilities, and this Agreement related to the status of any liability or regulatory obligation the Sellers might have or come to have on account of the AFIA Liabilities. INA shall prepare and deliver to each Seller as promptly as practicable but in any event within 75 days after the end of each six month period commencing with that ending June 30, 1984, an account for such period of such Seller's AFIA Liabilities in such detail and covering such matters as the Sellers shall reasonably and timely request and shall allow each Seller at its own expense to conduct or cause auditors

of its choice to conduct an annual audit of such account and the AFIA Liabilities.

5. Each of the Sellers shall cooperate with INA in the above administration of the AFIA Liabilities taking such actions as INA shall reasonably request in writing including instituting or joining in any action or proceeding related to the AFIA Liabilities. None of the Sellers shall make any payment of any AFIA Liability without the prior written approval of INA unless under order of a court of competent jurisdiction or an appropriate action of a proper regulatory body. Each of the Sellers shall give written notice of any process or written claim served upon such Seller in connection with the AFIA Liabilities as promptly as practicable.

6. Except as otherwise specifically provided in this paragraph 6, where an insurance or reinsurance contract included in AFIA Liabilities was issued in the name of a Seller, INA will make direct payment to the insured, or will make payment on behalf of the insured to third parties, as required by such contract regardless of whether this Assumption Agreement is a reinsurance of the Seller's original liability under such contract or is a retrocession of the Seller's liability under a reinsurance agreement reinsuring the liability of another Seller under such other Seller's contract. Where the original contract was not issued in the name of a Seller, INA shall make payment to

the reinsured or retrocedent in accordance with the reinsurance contract or retrocession contract out of which the Seller's liability arises. The provisions of this paragraph shall apply in the event of the continuing solvency of the Seller and also in the event of the insolvency of the Seller where INA with the consent of the direct insured or insureds has assumed policy obligations as provided in clause (b) of the last paragraph of this paragraph 6.

In the event of the insolvency of a Seller, this reinsurance shall be payable directly to such Seller, or to its liquidator, receiver, conservator or statutory successor on the basis of the liability of such Seller without diminution because of the insolvency of such Seller or because the liquidator, receiver, conservator or statutory successor of such Seller has failed to pay all or a portion of any claim. It is agreed, however, that the liquidator, receiver, conservator or statutory successor of a Seller shall give written notice to INA of the pendency of a claim against such Seller indicating the policy or bond reinsured which claim would involve a possible liability on the part of INA within a reasonable time after such claim is filed in the conservation or liquidation proceeding or in the receivership, and that during the pendency of such claim, INA may investigate such claim and interpose, at its own expense, in the proceeding where such claim is to be

adjudicated any defense or defenses that it may deem available to such Seller or its liquidator, receiver, conservator or statutory successor. The expense thus incurred by INA shall be chargeable, subject to the approval of the court, against such Seller as part of the expense of conservation or liquidation to the extent of the pro rata share of the benefit which may accrue to such Seller solely as a result of the defense undertaken by INA.

INA undertakes to indemnify each Seller, not only in form but in fact against the loss or liability arising out of the AFIA Liabilities.

As to all reinsurance made, ceded, renewed or otherwise becoming effective under this Assumption Agreement, the reinsurance shall be payable by INA to each Seller or to its liquidator, receiver, conservator or statutory successor, except as provided by Section 315 of the New York Insurance Law or except (a) where this Assumption Agreement specifically provides another payee of such reinsurance in the event of the insolvency of a Seller, and (b) where INA with the consent of the direct insured or insureds has assumed such policy obligations of such Seller as direct obligations of INA to the payees under such policies and in substitution for the obligations of such Seller to such payees.

7. As a condition precedent to enforcement of any right under this Agreement by judicial proceedings, if any

dispute shall arise between any of the parties to this Agreement with reference to its interpretation or their rights under it, such dispute shall be submitted to arbitration upon the written request of any party to the dispute. Three arbitrators shall be selected by mutual agreement of all parties to the dispute. If within 30 days after request for arbitration the parties to the dispute have not agreed on the choice of all arbitrators, then the arbitrators not then agreed upon shall be selected by the Presiding Judge of the Supreme Court of New York in and for the County of New York. The arbitrators shall be disinterested retired or active executive officers of insurance or reinsurance companies authorized to transact business in the United States of America.

The arbitrators are relieved from all judicial formalities and may abstain from following strict rules of law. They shall interpret this Agreement as an honorable engagement and not merely as a legal obligation; they shall make their award with a view to the general purpose of this Agreement in a reasonable manner rather than in accordance with a literal interpretation of language. A majority decision by the arbitrators shall be final and binding on the parties to such arbitration. Judgment may be entered upon the final decision of the arbitrators in any court having jurisdiction. Each party to the arbitration shall jointly and equally bear with the other parties, the expense

of the arbiters and the arbitration. Such arbitration shall take place in New York, New York or such other location as the parties to the arbitration may agree.

8. The Assigning Sellers and INA shall without further consideration, at any time and from time to time at or after the execution and delivery of this Agreement execute and deliver all such further documents and instruments and take such other action as may be reasonably requested by any other party to this Agreement in order to effectuate the terms of this Agreement or the transactions contemplated by it. INA shall without further consideration, at any time from time to time, execute and deliver any documents or instruments or take such action as may be reasonably requested by any of the Assigning Sellers in order that appropriate recognition be given this Assumption Agreement on the statutory insurance accounting statements of such Assigning Seller.

9. All notices, requests, consent requests, instructions, approvals and other communications provided for under this Assumption Agreement shall be validly given, made, sent or served, if in writing and delivered personally or sent by telex or by registered or certified first class mail, return receipt requested, postage prepaid to the following address:

If to INA,

Insurance Company of North America
c/o CIGNA Corporation
One Logan Square
Philadelphia, Pennsylvania 19103
Attention: Corporate Secretary
Telex: 834442

If to Hartford,

Hartford Fire Insurance Company
Hartford Plaza
Hartford, Connecticut 06115
Attention: General Counsel
Telex: 99236

If to Home,

The Home Insurance Company
59 Maiden Lane
New York, New York 10038
Attention: General Counsel
Telex: 710 581 5629

If to Aetna,

Aetna Insurance Company
c/o CIGNA Corporation
One Logan Square
Philadelphia, Pennsylvania 19103
Attention: Corporate Secretary
Telex: 834442

If to Fireman's,

Fireman's Fund Insurance Company
777 San Marin Drive
Novato, California 94998
Attention: General Counsel
Telex: 910 482 9507

If to American,

The American Insurance Company
777 San Marin Drive
Novato, California 94998
Attention: General Counsel
Telex 910 482 9507

If to St. Paul,

St. Paul Fire and Marine Insurance Company
685 Washington Street
St. Paul, Minnesota
Attention: Corporate Secretary
Telex: 297082

Each party hereto may by written notice delivered to the other parties change its address for the purpose of any subsequent notice.

10. This Assumption Agreement shall be governed by and construed and enforced in accordance with the laws of the State of New York.

11. No party hereto shall assign its rights or obligations under this Agreement, in whole or in part, without the prior written consent of the other parties hereto; provided, however, that INA may assign its rights and obligations hereunder to any insurance company or companies which are subsidiaries of CIGNA and are reasonably acceptable to each of the Sellers and such assignee assumes in writing the obligations of INA hereunder; and provided, further, however, that no such assignment or assumption shall relieve INA of its obligations hereunder for which with the assignee it shall be jointly and severally liable.

12. Subject to paragraph 11 hereof, this Assumption Agreement shall be binding on and inure to the benefit of the parties hereto and their respective successors and assigns. Nothing in this Assumption Agreement, express or implied, is intended, or shall be

construed, to confer upon or give to any person, firm or corporation (other than the parties hereto and their permitted successors and assigns) any rights or remedies under or by reason of this Assumption Agreement, or any term, provision, condition, undertaking, warranty, representation, indemnity, covenant or agreement contained herein.

13. The terms, provisions and conditions of this Assumption Agreement may not be changed, modified, amended or waived in any manner except by an instrument in writing duly executed by all of the parties hereto.

14. This Assumption Agreement is entered into under the terms of the Purchase Agreements and in any situation where there is a conflict between the terms of this Assumption Agreement and the Purchase Agreements, the terms of the Purchase Agreements shall prevail.

IN WITNESS WHEREOF, the parties hereto have caused this Assumption Agreement to be executed in their respective names by their respective duly authorized officers on the date first above written.

FIREMAN'S FUND INSURANCE COMPANY

By David M. Sorensten

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY

By ____________________

THE AMERICAN INSURANCE COMANY

By ____________________

HARTFORD FIRE INSURANCE COMPANY

By ____________________

THE HOME INSURANCE COMPANY

By ____________________

AETNA INSURANCE COMPANY

By ____________________

INSURANCE COMPANY OF NORTH
AMERICA

By ____________________

Wamser Aff.
EXHIBIT C

H
Briefs and Other Related Documents
1998 Fed.App. 0243P
United States Court of Appeals,Sixth Circuit.
NATIONWIDE MUTUAL INSURANCE COMPANY, Plaintiff-Appellee (97-3325)/Cross-Appellant (97-3405),
v.
HOME INSURANCE COMPANY, Defendant, Insurance Company of North America; INA Corporation; Cigna Corporation; Cigna International Corporation, Defendants-Appellants (97-3325)/Cross-Appellees (97-3405).
Nos. 97-3325, 97-3405.

Argued June 18, 1998.
Decided Aug. 6, 1998.

Insurer brought suit against reinsurer and against assignees that had assumed reinsurer's obligations for breach of reinsurance contract. The United States District Court for the Southern District of Ohio, Edmund A. Sargus, Jr., J., dismissed claims against reinsurer pending arbitration, denied assignees' motion for summary judgment, and dismissed claims against assignees pending arbitration. Assignees appealed, and insurer cross-appealed. The Court of Appeals, Boggs, Circuit Judge, held that: (1) third-party disclaimer in assumption agreement precluded direct suit by insurer against assignees and limited insurer to exercising its rights against reinsurer, and (2) effect of insolvency clause in assumption agreement was not ripe for adjudication.

Reversed.

West Headnotes

[1] Insurance 217 ⟹3621

217 Insurance
217XXXII Reinsurance
217k3621 k. Estoppel and Waiver of Defenses. Most Cited Cases
Under New York law, insurer could not bring suit directly against assignees for breach of reinsurance contracts where agreement by which assignees assumed reinsurer's obligations contained third-party disclaimer, which precluded any person or entity other than parties to assumption agreement from having recourse against assignees if assignees failed to fulfill their obligations under agreement.

[2] Insurance 217 ⟹3621

217 Insurance
217XXXII Reinsurance
217k3621 k. Estoppel and Waiver of Defenses. Most Cited Cases
Under New York law, insurer's potential status as obligee-beneficiary of assumption agreement under which its reinsurer's obligations were assumed by assignees did not allow it to sue assignees directly for breach of reinsurance contracts in face of disclaimer in assumption agreement that precluded any third party from having recourse against assignees for any failure to satisfy obligations under assumption agreement.

[3] Insurance 217 ⟹3621

217 Insurance
217XXXII Reinsurance
217k3621 k. Estoppel and Waiver of Defenses. Most Cited Cases
Under New York law, assignee's direct assumption of reinsurer's obligations to insurer, in sense that assignees agreed to make payments directly to insured, did not entitle insurer to bring suit directly against assignees for breach of reinsurance obligations in face of disclaimer in assumption agreement between assignees and reinsurer that barred third parties from enforcing rights under agreement.

[4] Insurance 217 ⟹3621

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217 Insurance
217XXXII Reinsurance
217k3621 k. Estoppel and Waiver of Defenses. Most Cited Cases
Insurer could not directly sue assignee of reinsurer's obligations on theory that it was third-party beneficiary of assumption agreement where agreement contained third-party disclaimer that barred any person or entity other than parties to assumption agreement from enforcing agreement.

[5] Insurance 217 ⇐3633

217 Insurance
217XXXII Reinsurance
217k3632 Actions
217k3633 k. In General. Most Cited Cases
Issues relating to effect of insolvency clause in agreement under which assignees assumed reinsurer's obligations were not ripe for adjudication in insurer's direct suit against assignees for breach of reinsurance obligations where reinsurer was not insolvent.

*546 Randolph Carson Wiseman,Bricker & Eckler, Columbus, OH; Irene C. Keyse-Walker (argued and briefed), Arter & Hadden, Cleveland, OH; Michael L. Cohen, Scanlan, Rosen & Shar, Baltimore, MD, for Plaintiff-Appellee/Cross-Appellant.
Gerald P. Ferguson (briefed), Vorys, Sater, Seymour & Pease, Columbus, OH; Clifford H. Schoenberg (argued and briefed), Harry P. Cohen (briefed), Philip J. Loree (briefed), Rosenman & Colin, New York City, for Defendants-Appellants/Cross-Appellees.

Before: MERRITT, BOGGS, and SUHRHEINRICH, Circuit Judges.

OPINION

BOGGS, Circuit Judge.
Nationwide Mutual Insurance Company (" Nationwide") sued Home Insurance Company (" Home"), INA Corporation, Insurance Company of North America ("INA"), CIGNA Corporation, and CIGNA International Corporation.[FN1] In its complaint, Nationwide alleged that Home and the CIGNA defendants had breached reinsurance contracts under which they were responsible for paying certain claims filed against Nationwide. Nationwide sought declaratory relief as well as compensatory and punitive damages. The district court stayed Nationwide's claims against Home pending arbitration. The parties do not appeal this ruling.

FN1. When discussed collectively, INA Corporation, INA, CIGNA Corporation, and CIGNA International Corporation will be referred to as "the CIGNA defendants."

After the claims against Home were dismissed pending arbitration, the CIGNA defendants sought summary judgment on the claims against them. The district court denied the CIGNA defendants' motion, referred the claims against the CIGNA defendants to arbitration, and dismissed the entire case. This is the ruling that is the subject of the CIGNA defendants' appeal. Nationwide cross-appeals the district court's rejection of its third-party beneficiary argument, which it claims provides an alternative basis for holding that it can bring an action directly against the CIGNA defendants.

I

A. *Nationwide's Reinsurance Agreement With Home*

In the 1960s, Nationwide entered into a reinsurance pool managed by the London firm of M.E. Rutty Underwriting Agency Limited ("Rutty"). As a member of this reinsurance pool, Nationwide authorized Rutty to get, underwrite, and administer direct insurance and reinsurance business. Rutty issued policies and contracts in the name of one of the pool members. The pool member whose name was on the insurance policy or reinsurance contract was directly responsible to the insured. However, the premiums and losses arising from the insurance policies and reinsurance contracts Rutty entered into on behalf of the pool members were divided proportionately among all of the pool members.

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Nationwide and some other members of the Rutty Pool withdrew from the pool in 1966. After it withdrew from the pool, Nationwide still had ongoing obligations for continuing and contingent liabilities under insurance policies and reinsurance contracts Rutty issued in its name while it was a member of the pool. To "cut off" its potential future liabilities for insurance and reinsurance obligations arising from its participation in the pool, on June 22, 1977, Nationwide entered into a reinsurance agreement with Home. Under the agreement, Home reinsured [FN2] Nationwide for " all losses which [Nationwide] *547 may be or may become liable to pay arising out of risks written for" Nationwide through the Rutty Pool. This reinsurance agreement contained a broad arbitration clause, permitting either party to compel arbitration as to any disputes relating to the agreement.

> FN2. Home entered into the reinsurance agreement with Nationwide through an insurance pool of United States-domiciled insurers called the American Foreign Insurance Association ("AFIA"). AFIA engaged in foreign insurance and reinsurance business on behalf of Home and its other members. Like Rutty, AFIA would issue insurance policies or reinsurance contracts in the name of a member company that was directly liable to the insured or reinsured, but all members of the pool divided premiums and losses proportionately among themselves.

B. *The CIGNA Defendants Accept AFIA's Reinsurance Obligations*

On December 31, 1983, the CIGNA defendants entered into purchase and assumption agreements with Home and the other members of AFIA. Under Section 1.1 of the purchase agreement, entitled " Purchase and Sale," the CIGNA defendants agreed to purchase all interests in and rights to the policies and contracts that Home and the other AFIA members entered into through the AFIA pool. This included Home's reinsurance contract with Nationwide for the Rutty Pool liabilities.

In fulfillment of its obligations under Sections 1.1 and 1.4 of the purchase agreement, CIGNA International Corporation caused its subsidiary, INA, to enter into an Insurance and Reinsurance Assumption Agreement ("Assumption Agreement") with Home and the other AFIA members. Under this Assumption Agreement, INA assumed "as its direct obligation and agree[d] to pay on behalf of [Home] when payment thereof is due all insurance and reinsurance liabilities ... included in the AFIA obligations." The Assumption Agreement further provided that "none of the [AFIA members] shall make any payments of any AFIA liability without the prior written approval of INA unless under order of a court...."

The Assumption Agreement between the CIGNA defendants and the AFIA members also contained an arbitration clause nearly identical to the one in the reinsurance agreement between Home and Nationwide, and it included a choice of law clause providing that New York law would govern the agreement. Finally, the Assumption Agreement also stated:

> Nothing in this Assumption Agreement, express or implied, is intended, or shall be construed, to confer upon or give to any person, firm or corporation (other than the parties hereto ...) any rights or remedies under or by reason of this Assumption Agreement, or any term, provision, condition, undertaking, warranty, representation, indemnity, covenant or agreement contained herein....

Some time after the Assumption Agreement was entered into, claims were made on policies Rutty had written in the name of Nationwide. These policies were among those reinsured by Home. The reinsurance on them had passed to the CIGNA defendants through the Assumption Agreement.

C. *The District Court's Ruling*

In 1995, Nationwide sued Home and the CIGNA defendants, alleging that they had breached contracts under which they were required to cover the claims against Nationwide arising from the policies and contracts from the Rutty Pool. After the

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claims against Home were stayed pending arbitration, the CIGNA defendants sought summary judgment on the claims against them.

The district court held that Nationwide was not a third-party beneficiary to the agreements between the members of AFIA and the CIGNA defendants. The district court did, however, conclude that Nationwide was an obligee-beneficiary of these agreements and, as such, could pursue a claim directly against the CIGNA defendants for breach of contract under the terms of the Assumption Agreement between Home and the CIGNA defendants. The court reasoned that the CIGNA defendants stood in the shoes of Home as a direct obligor to Nationwide for purposes of the reinsurance contract between Nationwide and Home. The district court further reasoned that the CIGNA defendants had assumed the reinsurance contract between Home and Nationwide and thus were bound by the arbitration provision in that agreement (the same one the district court relied upon to order arbitration of Nationwide's claims against Home). Therefore, the district court denied the CIGNA defendants' motion for summary judgment, referred Nationwide's claims against them to arbitration, and dismissed the entire case.

***548 II**

The central issue on appeal is whether the district court erred in concluding that Nationwide could bring a claim directly against the CIGNA defendants by virtue of the CIGNA defendants' assumption of the reinsurance contract between Nationwide and Home, or whether Nationwide is limited to exercising its rights against Home with respect to payments under this reinsurance contract. The CIGNA defendants argue that Nationwide is precluded from suing them for reinsurance coverage because of the following language:

Nothing in this Assumption Agreement, express or implied, is intended, or shall be construed, to confer upon or give to any person, firm or corporation (other than the parties hereto ...) any rights or remedies under or by reason of this Assumption Agreement, or any term, provision, condition, undertaking, warranty, representation, indemnity, covenant or agreement contained herein....

The CIGNA defendants also contend that Nationwide's status as an obligee-beneficiary does not allow them to avoid the preclusive effect of the above-quoted disclaimer.

Nationwide cross-appeals the district court's ruling that it is not a third-party beneficiary of the agreements between Home and the CIGNA defendants. It raises the third-party beneficiary theory only as an alternative basis for allowing it to pursue a claim directly against the CIGNA defendants and does not seek to reverse the court's ruling that the CIGNA defendants are liable under an assumption theory. Nor does Nationwide challenge the district court's order submitting all of the claims against the CIGNA defendants to arbitration.

We hold that the CIGNA defendants are correct in asserting that Nationwide cannot bring suit directly against them (under either a third-party beneficiary theory or an assumption theory) to recover reinsurance benefits they assumed in their agreements with Home and the other members of AFIA.

A. *Nationwide Cannot Bring a Claim Directly Against the CIGNA Defendants*

[1] Under New York law, "where a contract's language expressly bars any contractual liability to a third party, no third party right to enforce the contract may be found." *Rosier v. Brown,* 158 Misc.2d 748, 601 N.Y.S.2d 554, 557 (N.Y.Sup.Ct.1993) (citing *Nepco Forged Prods., Inc., v. Consolidated,* 99 A.D.2d 508, 470 N.Y.S.2d 680, 681 (N.Y.App.Div.1984)). This is exactly what the third-party disclaimer provision in the Assumption Agreement between the CIGNA defendants and the members of AFIA does.

Despite Nationwide's valiant efforts to concoct alternative meanings of the third-party disclaimer language that would not preclude it from suing the CIGNA defendants on the reinsurance contract they assumed from Home, we hold that the third-party

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disclaimer language is clear and unequivocal. It bars any person or entity, except the parties to the Assumption Agreement (the members of AFIA and the CIGNA defendants), from suing on any of the obligations undertaken pursuant to the Assumption Agreement, including the CIGNA defendants' obligation to make payments on the reinsurance contract between Nationwide and Home. Under New York law, contract language is ambiguous " when it is reasonably susceptible to more than one reading." *Haber v. St. Paul Guardian Ins. Co.,* 137 F.3d 691, 695 (2d Cir.1998). We do not find reasonable any construction of the disclaimer at issue that seeks to qualify or limit its broad, simple, and absolute language preventing *any* third party from enforcing the Assumption Agreement.

When the members of AFIA assigned their policies and contracts to the CIGNA defendants, they were free to negotiate an agreement under which the CIGNA defendants as assignees would permit direct recourse against themselves if they did not fulfill their obligations under the reinsurance contracts of Home and other members of AFIA. The AFIA members did not do this. Instead, they signed an agreement that expressly excluded insureds from having recourse against the assignees if those assignees failed to satisfy their obligations under ***549** the Assumption Agreement. This left the insureds with exactly the same recourse they would have had if Home and the other members of AFIA had never entered into the Assumption Agreement.

There is nothing wrong with this. Nationwide is not without recourse. It can pursue its claims against Home. If coverage is due, Home will be forced to meet its obligation to Nationwide and then seek indemnification from the CIGNA defendants or Home may implead the CIGNA defendants as third-party defendants to Nationwide's action for reinsurance payments. The insolvency of Home could affect this. However, as we explain below, we need not consider the effects that insolvency may have on the parties' respective rights and obligations because this issue is not yet ripe for review.

[2] The district court's holding that Nationwide was entitled to pursue its claims for breach of the assignment agreement directly against the CIGNA defendants was premised on a legally erroneous distinction between obligee-beneficiaries and third-party beneficiaries. Obligee-beneficiaries are simply one type of third-party beneficiaries. 4 Corbin on Contracts § 774 at 6 (7th ed.1989). Therefore, whether or not Nationwide is an obligee-beneficiary is of no legal significance. It is still not a party to the agreement between the members of AFIA and the CIGNA defendants and thus is precluded from bringing a claim directly against the CIGNA defendants to enforce the reinsurance obligations the CIGNA defendants assumed from Home.

Our conclusion that under the circumstances of this case Nationwide cannot be considered a party to the agreement between the members of AFIA and the CIGNA defendants is supported by *Nicholson v. 300 Broadway Realty Corp.,* 7 N.Y.2d 240, 196 N.Y.S.2d 945, 164 N.E.2d 832, 836 (1959). In *Nicholson,* an embossing company entered into an agreement with an adjoining building owner, Nicholson, to furnish steam heat to Nicholson's building. *Id.* 164 N.E.2d at 833. Some years later, the embossing company assigned this obligation to 300 Broadway Realty, which expressly assumed the obligation to provide steam heat to Nicholson's building, but failed to do so. *Id* 164 N.E.2d 832 at 834-36. Nicholson then sued 300 Broadway Realty under the contract Broadway had assumed. The New York Court of Appeals held that, for purposes of the assumption contract, the embossing company was the promisee, 300 Broadway Realty was the promissor, and Nicholson was a " third-party beneficiary." FN3 *id.*

FN3. Although Nationwide is a third party to the Assumption Agreement in the sense that it is not a party to it, for reasons explained below, unlike Nicholson, Nationwide cannot be classified as a third-party *beneficiary* entitled to bring suit to enforce an agreement to which it is not a party.

[3] It is clear that the disclaimer barring third parties from enforcing rights under the contract

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applies to Nationwide. Nationwide argues that it should be deemed beyond the scope of the disclaimer because the CIGNA defendants directly assumed Home's reinsurance obligation to Nationwide in the sense that they agreed to make payments directly to Nationwide and other insureds. This argument fails, however, because whether or not there was a direct assumption does not alter the decisive fact that Nationwide is a stranger to the Assumption Agreement through which it seeks to impose liability upon the CIGNA defendants.

Since Nationwide cannot bring suit directly against the CIGNA defendants on the Assumption Agreement or any obligations assumed therein, it cannot compel the CIGNA defendants to submit to arbitration under the terms of a contract they assumed in the Assumption Agreement with the members of AFIA.

B. *Nationwide's Cross-Appeal*

[4] Our resolution of the CIGNA defendants' appeal also disposes of Nationwide's cross-appeal regarding the district court's holding that Nationwide is not entitled to bring a claim directly against the CIGNA defendants under a third-party beneficiary theory. Nationwide is a third party to the Assumption Agreement in the same generic sense as every individual and entity on earth (other than the members of AFIA and the CIGNA defendants), in that it is not a party ***550** to the agreement. As such, the disclaimer provision precludes it and all other third parties to the contract from enforcing it. By precluding any third party from enforcing the agreement, this same disclaimer defeats Nationwide's claim that it belongs to the discrete subset of generic third parties referred to as third-party beneficiaries, whose distinguishing characteristic is their legal right to enforce contracts to which they are not a party. *See Rosier v. Brown,* 158 Misc.2d 748, 601 N.Y.S.2d 554, 557 (N.Y.Sup.Ct.1993) (citing *Nepco Forged Prods., Inc. v. Consolidated,* 99 A.D.2d 508, 470 N.Y.S.2d 680, 681 (N.Y.App.Div.1984)). Accordingly the district court was correct to hold that Nationwide is not a third-party beneficiary.

C. *Issues Relating to the Insolvency Clause are not Ripe for Decision*

[5] Finally, we refuse the CIGNA defendants' invitation to rule on the effects the insolvency clause of the Assumption Agreement may have on Nationwide's ability to pursue coverage under its reinsurance agreement with Home. Issues related to insolvency are not yet ripe for consideration on the merits. Home is not insolvent at this time. A basic tenet of the doctrine of ripeness is that "a matter is considered premature for judicial review when the alleged injury is speculative or may never occur." *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1068 (6th Cir.1998) (citing *O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)).

III

The judgment of the district court submitting Nationwide's claims against the CIGNA defendants to arbitration and dismissing the case is REVERSED. The claims against the CIGNA defendants cannot be submitted to arbitration because the express disclaimer in the Assumption Agreement prevents Nationwide from suing the CIGNA defendants to enforce the reinsurance obligations the CIGNA defendants assumed from Home. We remand the case to the district court to enter an order dismissing Nationwide's claims against the CIGNA defendants.

C.A.6 (Ohio),1998.
Nationwide Mut. Ins. Co. v. Home Ins. Co.
150 F.3d 545, 1998 Fed.App. 0243P

Briefs and Other Related Documents (Back to top)

- 97-3405 (Docket) (Apr. 29, 1997)
- 97-3325 (Docket) (Apr. 08, 1997)

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