

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:** INTL700616  
**Claimant Name:** Century Indemnity Company

REFEREE'S RULING

As is the case in 2005-HICIL-11, this dispute arises out of the assumption by Century Indemnity Company ("CIC") of M.E. Rutty Pool liabilities previously reinsured by The Home Insurance Company ("Home"). The actual extent of Home's obligations to pool members under Contract R<sup>1</sup> has been the subject of considerable dispute, with all four Home reinsured pool members litigating and/or arbitrating matters relating to it.

While the Nationwide Mutual Insurance Company ("Nationwide") dispute with Home over Contract R went to lengthy arbitration and a confirmed award at the Sixth Circuit in 2005, the Agrippina Versicherung Aktiengesellschaft ("Agrippina") and Wüstenrot & Württembergische ("Württembergische") disputes were resolved through settlements effected after entry of the Home order of liquidation. Matters relating to the fourth pool member, FAI, are still in dispute, though the dollar amounts at issue are much less significant than those at issue with the other three members.

In this dispute, CIC requests recognition of its right to setoff the value of overpayments it made to the three M.E. Rutty Pool members other than Nationwide, and to setoff the value of overpayments additional to those asserted in 2005-HICIL-11. However, having addressed the matter of Nationwide overpayments in 2005-HICIL-11, and agreeing with the Liquidator that the arbitration award settled M.E. Rutty Pool overpayment matters as to Nationwide, the Referee declines to give further consideration to CIC's claim for additional setoff on Nationwide overpayments. Therefore, the Referee focuses only upon matters relating to Agrippina, Württembergische, and FAI.

**Settlements with Agrippina and Württembergische:**

Pursuant to a 2005 settlement agreement, the Liquidator and Agrippina settled matters in dispute regarding Home's obligations under Contract R. The agreement was submitted to the Court for review and approved on February 17, 2005. A similar agreement with Württembergische was approved by the Court on March 21, 2006. CIC and ACE INA Services UK ("AISUK") were fully engaged in both the Agrippina and Württembergische settlement negotiations.

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<sup>1</sup> Apparently not all Home reinsured Rutty Pool members executed the same version of Contract R/Treaty R.

Each agreement establishes a Reimbursement Trust Account to address the overpayment issue. The pool member's funding into the account is calculated to reflect the payments received in excess of Home's actual liabilities under Contract R. In each case, once funded, the pool member is to draw from the Reimbursement Trust Account as the member's claims are allowed in the Home estate. Apparently, Agrippina has funded its account. While Württembergische has reportedly yet to do so, an initial deposit has been requested based upon a calculation provided by AISUK.

Of further significance, are ongoing discussions between CIC and pool members to substantiate overpayments additional to those which informed the funding of the Agrippina account and the pending Württembergische funding previously referenced. CIC indicates that further discussion could well trigger agreed additional deposits to the reimbursement accounts. In reference to these ongoing discussions, CIC claims neither agreement forecloses such discussions, nor places a ceiling upon deposits to the reimbursement accounts. The Liquidator takes no direct issue with these assertions, but indicates that he has no specific information on discussions between CIC and either of the pool members, and does not believe that any agreement has been reached on the issue of further deposits to either account.

#### **Positions of the Parties to this Dispute:**

In support of its claim, CIC argues, as it did in 2005-HICIL-11, that under the terms of the Insurance and Reinsurance Assumption Agreement and the related Services Agreement, it made payments to both Agrippina and Württembergische "through and on behalf" of Home "and in its name". CIC again points out that, under an express reservation of rights pending legal resolution of disputed matters under Contract R, it chose to make payments to all Home reinsured pool members on the more generous fronted pool share basis rather than expose Home to bad faith claims for failure to perform on Contract R obligations. It is within this context, CIC argues that Home is immediately indebted to CIC for any payments CIC made in excess of Home's obligation.

And here again, the Liquidator, while acknowledging that CIC is positioned to claim a future entitlement to an "economic benefit" on matters underlying this claim, argues that Home is not indebted to CIC and therefore CIC is not entitled to setoff. The Liquidator points out, however, that when Agrippina and Württembergische claims are allowed in the estate and withdrawals are made from the reimbursement accounts, CIC will benefit because it will not be tapped for reinsurance on such claims. The Liquidator also notes that CIC was actively involved in the discussions and negotiations regarding each of the settlements, agreed to the terms and did not object to either of the agreements when they were submitted to the Court for approval.<sup>2</sup> Because the Liquidator believes that CIC has

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<sup>2</sup> While there is an assertion in reference to the timing of CIC's credit on Württembergische overpayments in a pleading under seal, the Referee finds nothing in either settlement agreement which directly addresses the timing issue as to CIC.

failed to establish the liability he says is necessary to support setoff, he requests a dismissal of this disputed claim proceeding.

**Analysis / Discussion:**

In light of the ruling on 2005-HICIL-11, the matter requiring consideration here is whether the settlements with Agrippina and Württembergische require a different disposition.

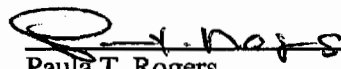
CIC's overpayments to Ruddy Pool members were made under reservations of rights pending resolution of the various disputes over Contract R. The reimbursement accounts exist only because CIC overpaid Ruddy pool members and the liquidation of Home foreclosed a rebalancing of accounts in the normal course. In essence, the accounts are segregated claim-payment accounts, held jointly by the pool member and the Liquidator and drawn down by the pool member as its claims are allowed in the estate. By the terms of the agreements, Agrippina and Württembergische are each obligated to pay interest on the amounts retained in their reimbursement account at the rate of five (5) per cent per annum, with the Liquidator entitled to withdraw interest for the estate's benefit on a monthly basis.

Applying the same general analysis as was relied upon in 2005-HICIL-II, the Referee rejects the Liquidator's proposition that CIC's recoupment of overpayments on Ruddy Pool liabilities as to Agrippina and Württembergische must be delayed until the respective pool member's claim are allowed. The Referee instead focuses upon the funding of the reimbursement accounts as an appropriate trigger for CIC's entitlement to a credit for its overpayments. The parties have apparently engaged in an aggressive review of systems and records with the purpose of coming to some finality on the total sum of overpayments. The Referee regards the funding of the reimbursement accounts as evidence that a certain level of overpayment has been confirmed between AISUK and the pool member, and that the Liquidator is comfortable with the funding amount. With that in mind, The Referee concludes that CIC's setoff entitlement arises as to Agrippina and Württembergische overpayments when the respective reimbursement account is funded. Therefore, setoff shall be timed by and limited to amounts equal to actual funding, inclusive of additional overpayment amounts agreed to and funded into either account resulting from any ongoing discussions.

Assertions of setoff covered by this dispute which relate to overpayments to FAI and setoff assertions as to Agrippina and Württembergische that are not specifically related to overpayment issues are not addressed herein as the Referee has inadequate information upon which to issue a ruling. The parties are encouraged to resolve any such matters.

So ruled:

Dated: August 15 2006

  
Paula T. Rogers  
Referee