

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

**CENTURY INDEMNITY COMPANY'S SUBMISSION REGARDING  
RUTTY POOL CLAIM**

Century Indemnity Company ("CIC"), pursuant to RSA 402-C:41, Paragraph 15 of the Restated and Revised Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company in Liquidation, dated January 19, 2005 (the "Claims Procedures"), and the Referee's Order of March 16, 2006, hereby files this Submission concerning CIC's Claim INTL 700616 (the "Claim"):

**I.  
PRELIMINARY STATEMENT**

1. Home reinsured four members of the M.E. Ruddy Pool ("Ruddy Pool") under Contract R. CIC, in turn, reinsured these Ruddy Pool liabilities of Home under the Insurance and Reinsurance Assumption Agreement (the "Assumption Agreement").<sup>1</sup> Pursuant to the Assumption Agreement, CIC made payments on Home's behalf and in Home's name to various entities to which Home was liable as regards the Ruddy Pool. Some of the payments made by CIC on Home's behalf and in Home's name turned out to be in excess of the amount of Home's true liability. Home is now liable to CIC in the amount of these excess payments.

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<sup>1</sup> The four Ruddy Pool members reinsured by Home and at issue here (the "Ruddy Pool Cedents") were Agrippina Versicherung Aktiengesellschaft ("Agrippina"), Nationwide Mutual Insurance Company ("Nationwide"), Wüstenrot & Württembergische AG ("Württembergische") and FAI Insurance Company ("FAI").

2. At the March 10, 2006 hearing on the Claim (the "Hearing"), the Liquidator represented that the Claim was "denied for exactly the same reason that [2005-HICIL-11] was denied and that's because CIC seeks to assert a liability against the Home with respect to the obligations of others." Transcript of March 10, 2006 Hearing Regarding 2005-HICIL-12 ("Hearing Transcript"), attached as Exhibit 1, at 6:16-21. Indeed, the Liquidator conceded that CIC may offset its liabilities to Home for claims submitted into the Home estate by Agrippina, but only "[a]s those claims are allowed"; this appears to be the same argument asserted by the Liquidator with respect to Nationwide at the hearing regarding HICIL-11. *See* Hearing Transcript at 8:17-20; Transcript of March 10, 2006 Hearing regarding 2005-HICIL-11 (the "HICIL-11 Hearing Transcript"), attached as Exhibit 2, at 8:16-21, 12:14-15, 21-24. Accordingly, the Liquidator's sole stated grounds at the Hearing for disallowing the Claim were (1) that the payments made by CIC on Home's behalf as to any Ruddy Pool Cedent's business may only be set off against that Ruddy Pool Cedent's claims against Home, and (2) that CIC's set off right does not arise until that particular Ruddy Pool Cedent's claims are admitted into the Home estate.<sup>2</sup> Hearing Transcript at 6:16-24, 8:17-20, 9:4-6.

3. But the Liquidator's arguments run counter to the basic law of set off. The simple fact is that this Claim is against Home for amounts paid by CIC through and on behalf of Home. It is black letter law that parties may set off mutual debts, no matter how those debts arose—CIC may set off amounts it paid for (and through) Home against *any* debt CIC owes to Home, not just amounts that may one day arise out of the corresponding Ruddy Pool Cedent's claims against Home. It is equally well-settled that a reinsurer's set off right accrues as soon as the insolvent

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<sup>2</sup> In the event the Liquidator raises any other arguments in support for his disallowing the Claim, CIC reserves the right to amend, supplement or modify the arguments and positions contained herein, and to supplement this Submission as necessary. CIC notes that it and the Referee (in making her ruling of March 16, 2006), relied on the Liquidator's explanation of his position in relation to HICIL-12.

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insurer becomes indebted to the reinsurer; there simply is no ground for the Liquidator to argue that CIC's right of set off against Home does not accrue until the particular Rutty Pool Cedent's claims against Home are admitted. If the Liquidator's argument were correct, a reinsurer could be forced to wait decades for a set off that it is already entitled to, and the accrual of that set off right would be solely in the hands of the Liquidator, incentivizing the Liquidator to seek a timing windfall by delaying the determination of claims involving set off. It simply cannot be the case that CIC's entitlement to the benefit of payments through and on behalf of Home hinges upon the Rutty Pool Cedents' decision to prosecute their claim(s) against Home and the Liquidator's decision to allow them; CIC's claim is against Home, not against the Rutty Pool Cedents, and Home owes CIC now. Because the Liquidator's arguments for disallowing the Claim are based upon a fundamental misapprehension of the law governing set off, the Claim should be allowed in its entirety. Furthermore, CIC should be entitled to set off the contingent amounts of this Claim as they arise.<sup>3</sup>

## II. STATEMENT OF FACTS

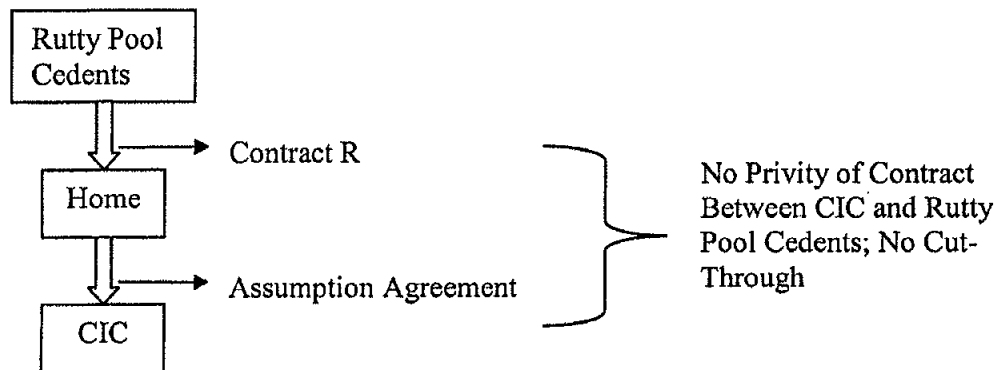
4. At the Hearing, the Liquidator conceded that "there is no disagreement here over [the payments underlying the Claim]." Hearing Transcript at 10:6-8. At the Hearing, the Liquidator represented, "We really don't disagree with the numbers" prepared by AISUK and reflected in Exhibit 4 as described in footnote 4, below. *Id.* at 7:17-18. In addition, the Liquidator indicated that "[a]s to HICIL-12 the question in our mind is not the numbers that are before you. That is not the disputed claim. The disputed claim is whether the Home is legally

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<sup>3</sup> The contingent component of the Claim is minor and corresponds to the interest earned on the payments made by CIC, but only as to the two Rutty Pool cedents reinsured by Home that have not entered into settlement agreements with Home (Nationwide and FAI). Furthermore, if the Referee agrees with the Liquidator's position, the Claim should not be disallowed, but rather should be granted pending set off against future Rutty Pool Cedent claims.

liable to [CIC] with respect to those numbers." *Id.* at 12:17-22.<sup>4</sup> Nonetheless, we set forth the relevant facts below as they relate to CIC's set off rights.

5. The Claim arises out of Contract R, by which Home agreed to reinsure the Rutty Pool Cedents. *See* Affidavit of Thomas J. Wamser, attached as Exhibit 3, at ¶ 2. Pursuant to the Assumption Agreement, CIC reinsures Home's liabilities arising from Contract R. *Id.* (Contract R and the Assumption Agreement are attached as Exhibits A and B to the Wamser Aff.) The following diagram illustrates the contractual obligations among CIC, Home and the Rutty Pool Cedents:



6. As the diagram above shows, 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. *See* Assumption Agreement, Exhibit B to the Wamser Aff. at ¶ 12. 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

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<sup>4</sup> Moreover, on April 25, 2005 and June 17, 2005, counsel for CIC provided Home with 4,147 pages proving these payments and setting forth the calculation of the amounts owed by Home with respect to each Rutty Pool member. A spreadsheet prepared by AISUK, and attached as Exhibit 4, lists the amounts of each component of the Claim. Accordingly, this Submission does not address the calculation of the amount of the Claim in any detail. However, if the Liquidator challenges that calculation, CIC reserves the right to supplement this Submission as necessary.

position in Nationwide Mutual Insurance Co. v. Home Insurance Co., 150 F.3d 545 (6<sup>th</sup> Cir. 1998), attached as Exhibit C to the Wamser Aff.

7. Under the Assumption Agreement, CIC has the obligation to administer and service the "AFIA Liabilities" on Home's behalf. *See* Exhibit B to the Wamser Aff. at ¶ 3. In 1996, ACE INA Services U.K. Limited ("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 Ruddy Pool business on behalf of Home under a full reservation of rights pending determination of various arbitration disputes concerning Home's obligations to the Ruddy Pool members it reinsured. *See* Wamser Aff. at ¶ 4; Services Agreement between AFIA and CIGNA Services U.K. Limited, attached as Exhibit 5 at § 2.

8. 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 Ruddy 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. *See* Wamser Aff. at ¶ 5. The payments were made on a full "without prejudice," "reservation of rights" basis, given that Ruddy Pool Cedents and Home were engaged in litigations and arbitrations over the scope of Home's liability to the Ruddy Pool. *Id.* Some of these payments turned out to be in excess of the amount of Home's true liability because, in the face of the litigations and arbitrations between Ruddy 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 Ruddy Pool members prevailed. *Id.* Otherwise, Home could be subject to additional damages, including bad faith damages. *Id.*

9. On February 7, 2005, the Court approved Home's Settlement Agreement with Agrippina (the "Agrippina Agreement"), under which, *inter alia*, Agrippina's successor Zurich

Versicherung Aktiengesellschaft ("Zurich") agreed to "reimburse Home for all balances in excess of Agrippina's Fixed Pool Share of liabilities on Agrippina fronted policies...."

Agrippina Agreement, attached as Exhibit 7, at 7. The Liquidator has conceded that this obligation on the part of Agrippina is to "pay back the amounts paid (by [AISUK] with funding by [CIC])...." Liquidator's Motion for Approval of Settlement Agreement with Agrippina, dated December 30, 2004, attached as Exhibit 7, at ¶ 17. The Liquidator also has conceded that CIC's Ruty Pool payments with regards to Agrippina were made "on Home's behalf" and "under a reservation of rights." *Id.* at ¶ 16.

10. On March 21, 2006, the Court approved Home's Settlement Agreement with Württembergische (the "Württembergische Agreement"), under which, *inter alia*, Württembergische agreed to reimburse Home "[i]n full and final settlement of all claims which Home may have for sums in excess of Württembergische's Fixed Pool Share...that Home has funded on behalf of Württembergische...." Württembergische Agreement, attached without appendices as Exhibit 8, at § 18.1. Jonathan Rosen, Chief Operating Officer of Home, conceded that this obligation on the part of Agrippina is to "pay back the amount overpaid by AISUK...."<sup>5</sup> Confidential Affidavit of Jonathan Rosen in Support of Motion for Approval of Settlement Agreement with Württembergische, dated February 23, 2006, attached as Exhibit 9, at ¶ 18. Mr. Rosen also has conceded that CIC's Ruty Pool payments with regards to Agrippina were made "on Home's behalf" and "under a reservation of rights." *Id.* at ¶ 17.

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<sup>5</sup> The Liquidator does not contest that, although the Ruty Pool payments were made by AISUK, AISUK was acting as the disclosed agent for CIC, such that CIC is the party that may assert offset. *See, e.g.*, Hearing Transcript at 8:17-20 ("As those claims are allowed, [CIC] may offset them."); HICIL-11 Hearing Transcript at 6:18-23 ("We begin from the proof of claim itself which was submitted by AISUK on behalf of [CIC] and we don't dispute that the claim was validly submitted. There's no technical argument here about the AISUK aspect.").

### III. ARGUMENT

#### A. **CIC May Set Off the Rutty Pool Payments Made For and On Home's Behalf Against Any Debt Owed to Home**

11. There is no legal basis for the Liquidator's contention that the payments made by CIC on Home's behalf as to any Rutty Pool Cedent's business may only be set off against that Rutty Pool Cedent's claims against Home. CIC's claim is against *Home* for amounts paid through and on behalf of *Home* -- whether any Rutty Pool Cedent files and prosecutes its claim(s) against Home, and whether those claims are allowed, is and should be utterly irrelevant to when CIC's claim against Home arose. The liquidation statute plainly provides that "[m]utual debts or mutual credits between the insurer and another person" shall be set off, without specifying a particular kind of debt against which "another person" may assert set off. *See* RSA 402-C:34. RSA 402-C:34 only lists three exceptions to the rule that mutual debts may be set off, and does not include an exception for debts arising out of unrelated transactions. Accordingly, by the plain terms of the statute, CIC may claim set off against *any* debt it owes to Home, not just against any liability it may (or may not) have one day to Home arising from the corresponding Rutty Pool Cedent's claims against Home if or whenever they are admitted.

12. Indeed, "[t]he defining characteristic of setoff is that 'the mutual debt and claim...are generally those arising from *different* transactions.'" *Newbury Corp. v. Fireman's Fund Ins. Co.*, 95 F.3d 1392, 1398 (9th Cir. 1995) (emphasis in original) (quoting 4 *Collier on Bankruptcy* ¶ 553.03, at 553-14 (15th ed. 1995)). *See Malinowski v. New York State Dept. of Labor*, 156 F.3d 131, 133 (2d Cir. 1998) ("In set-off, the mutual debts arise from different transactions."); *In re Public Serv. Co. of New Hampshire*, 107 B.R. 441, 444 (Bankr. D. N.H. 1989) ("Setoff...allows a mutual pre-petition claim of a creditor to be setoff against a pre-petition claim of the debtor which arose out of a *different transaction* than the creditor's claim.")



(emphases added). Mutual debts must "involve *fungible* operations which can be set-off against each other."<sup>6</sup> *United States v. Ameco Elec. Found.*, 224 F. Supp. 783, 786 (E.D.N.Y. 1963) (emphasis added). New Hampshire courts have long recognized a right of set off where the parties' debts arise from different, unrelated transactions. *See, e.g., Arcadia Knitting Mills, Inc. v. Elliott Mfg. Co.*, 89 N.H. 188, 195 A. 681, 681-83 (1937). By contrast, the Liquidator cannot cite to any New Hampshire case limiting set off in the way he urges here.

13. The rule that set off is available for *all* mutual debts applies with full force in insurance insolvency proceedings. Courts have repeatedly allowed set off against insurers in insolvency or receivership proceedings where the mutual debts arise from wholly unrelated transactions. *See, e.g., Scammon v. Kimball*, 92 U.S. 362, 367 (1875); *Transit Cas. Co. v. Selective Ins. Co.*, 137 F.3d 540, 545-46 (8th Cir. 1998); *In re Midland Ins. Co.*, 582 N.Y.S.2d 58, 61-63 (1992). When the claimant is a reinsurer, the rule is the same. *See, e.g., Transit*, 137 F.3d at 545-46; *Midland Ins. Co.*, 582 N.Y.S.2d at 61-63; *Comm'r of Ins. v. Munich American Reins. Co.*, 429 Mass. 140, 143-45 (1999) (upholding reinsurers' right of set off against insolvent insurers). Thus, the Liquidator's argument runs counter to the liquidation statute and the law of set off, and should be rejected.

#### **B. CIC Is Entitled to Immediate Set Off**

14. The Liquidator also argues that CIC's set off right does not accrue until the Ruddy Pool Cedent's claims against Home are allowed into the Home estate. However, it is well settled that a reinsurer's set off arises when the insolvent insurer's debt to the reinsurer becomes due and owing, even if the insolvent insurer's debt to the reinsurer is not yet presently due. That is, the availability of any reinsurer setoff should be determined *before* any general distribution of the

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<sup>6</sup> The Liquidator, in fact, has conceded that payments made in cash by CIC and Home's debts to CIC are fungible. *See, e.g., HICIL-11 Hearing Transcript* at 10:2-5 ("So, [CIC] paid over 3.2 million dollars. We don't dispute that, they did and are entitled to deduct that.").

insolvent insurer's assets. *See, e.g., Stamp v. Ins. Co. of North America*, 908 F.2d 1375, 1380 (7th Cir. 1990); *Prudential Reins. Co. v. Superior Ct.*, 3 Cal. 4th 1118, 1128-32 (1992). That is because the insolvent insurer's debt to the reinsurer "may exist even though it has not been valued conclusively...." The right of set-off may be asserted...even though at the time the petition is filed one of the debts involved is absolutely owing but not presently due, or where a definite liability has accrued but is as yet unliquidated." *Stamp*, 908 F.2d at 1380 (*quoting 4 Collier on Bankruptcy* ¶ 68.10[2] (14th ed. 1977)). Indeed, it is black letter law that "debts and credits of an insolvent insurer amount[] to mutual obligations for purposes of equitable setoff even if the obligations [are] technically not payable until closing of the insolvency estate." *Prudential*, 3 Cal. 4th at 1128 (*citing, inter alia, Carr v. Hamilton*, 129 U.S. 252 (1889); *Scammon*, 92 U.S. 362).

15. The Claims Protocol dated August 10, 2004 (the "Claims Protocol"), which the Liquidator negotiated with CIC, reflects the Liquidator's agreement with the principle that CIC is entitled to immediate set off. The Claims Protocol expressly recognizes that any ongoing payment obligation of CIC "shall be net of set-off in compliance with N.H. RSA 402-C:34." Claims Protocol at ¶ 3.4. The Claims Protocol further requires a report by CIC within 30 business days after the end of each month; that report includes a statement of both the amounts payable by CIC to Home *and* amounts claimed by CIC as offset against the amounts payable. *Id.* at ¶ 3.3.

16. Moreover, consistent with RSA 402-C:34, the case law and the Claims Protocol, the Referee has already recognized CIC's entitlement to immediate set off. With regards to claim 2005-HICIL-2, the Liquidator argued, as here, that "setoff is properly delayed until the claim is allowed by the Court." Referee's Report, dated October 21, 2005 ("Report"), at 4. There, as

here, CIC argued that "RSA 402-C:34, the Order of Liquidation and the [Claims Protocol] 'permit immediate assertion of setoff when a debt arises.'" *Id.* The Referee squarely rejected the Liquidator's argument and agreed with CIC, holding that "a plain reading of RSA 402-C:34 clearly supports CIC's position that offsets are to be allowed prior to a claim being 'allowed or paid.'" *Id.* at 5. In her Report, the Referee further specified that CIC's set off right accrues as soon as CIC receives the necessary documentation for "proper calculation of its set off." *Id.* at 6. Here, there can be no doubt that CIC's may immediately set off any of its Rutty Pool payments that have been calculated to be in excess of CIC's obligations to Home under the Assumption Agreement.

17. It is no surprise that the Report, the case law, the Claims Protocol and the liquidation statute all point to immediate reinsurer set off here, given the patent inequity of the Liquidator's argument. CIC has already incurred payments that the Liquidator concedes were in excess of CIC's obligations to Home, and yet the Liquidator would have CIC wait, perhaps for decades, perhaps forever, until the Rutty Pool Cedents' claims are allowed. Under the Liquidator's preferred rule, the Liquidator could seek a timing windfall by delaying the determination of claims involving set off. But CIC's entitlement does not hinge upon whether the Rutty Pool Cedents decide to file and prosecute their claims against Home, and it does not hinge upon the Liquidator's decision to determine claims later rather than sooner. This Claim is against *Home*—what becomes of the Rutty Pool Cedents' claims against Home will not change that simple fact.

18. In order to ameliorate the unfairness of his position, the Liquidator may suggest that, if the corresponding Rutty Pool Cedent's claim against Home is for less than the amount to which CIC is entitled, CIC could sue that Rutty Pool Cedent for the shortfall, and thus fully

recover. However, the Liquidator must know that CIC cannot sue any Ratty Pool Cedent for any shortfall because there is no privity of contract between CIC and the Ratty Pool Cedents with respect to the Ratty Pool business. CIC's obligations under the Assumption Agreement run to Home, and only to Home. The Ratty Pool Cedents are not parties to the Assumption Agreement, and the Assumption Agreement specifies that it confers no rights upon any third party. *See* Exhibit B to the Wamser Aff. at ¶ 12. Just as the Ratty Pool Cedents could not sue CIC, so CIC could not sue the Ratty Pool Cedents, and the Referee should reject the Liquidator's attempt at portraying this matter as a dispute between CIC and the Ratty Pool Cedents.

19. Notwithstanding the Liquidator's claims, the case law, the Claims Protocol, the liquidation statute and the Referee's own past holding all dictate that CIC is entitled to set off the amount of its Ratty Pool payments as soon as those amounts become due and owing to CIC. Because the mutuality requirement of RSA 402-C:34 is satisfied and Home's grounds for disallowing the Claim are baseless, all amounts owed by Home to CIC regarding the Ratty Pool may be set off against CIC's liability to Home.

**IV.  
CONCLUSION**

For the reasons stated above, the Claim should be allowed in its entirety, and CIC should be entitled to set off the contingent amounts of this Claim as they arise.

Respectfully submitted,

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