

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Liquidation of Home Insurance Company

No. 03-EQ-106, 2005-HICIL-14

ORDER

This case is another chapter in a dispute between Home Insurance Company (“Home”) and Century Indemnity Company (“CIC”). Having prevailed on a claim against CIC on its entitlement to \$8 million withheld by CIC, Home now seeks an award of statutory interest. CIC objects. Because the \$8 million award is the resolution of a debt dispute culminating in a final judgment, the court concludes that Home is entitled to statutory interest dating from October 12, 2007.

Home and CIC were co-insurers of Pacific Energy Company (“PECO”). CIC was a reinsurer of Home. *In re Liquidation of Home Ins. Co.*, 158 N.H. 677, 679–80 (2009) (“Home IV”). In 2005, PECO and CIC entered into a confidential settlement agreement. *Id.* at 680. Home was not a party. *Id.* CIC paid PECO \$13 million under this agreement, which provided that the settlement funds were not to be used for indemnification, reimbursement, contribution, or subrogation. *Id.* In 2007, PECO and CIC entered into another agreement that amended the 2005 agreement to, *inter alia*, permit CIC to use funds paid to PECO for indemnification, reimbursement, contribution, or subrogation. *Id.* CIC paid additional consideration for this right. *Id.* Home again was not a party. *Id.*

The liquidator in Home’s liquidation proceedings claimed \$13 million from CIC under the reinsurance policy for the cost of the PECO settlement. *Id.* CIC filed a disputed claim seeking a setoff of \$8 million. Home argued this was inappropriate pursuant to the terms of the 2005

agreement with PECO and RSA 402-C:34. The referee disagreed and allowed the setoff. *Id.* at 681. Home appealed to the Superior Court. *Id.* The Superior Court affirmed. *Id.* Home again appealed.

In defending the appeal, CIC argued it was entitled to setoff under RSA 402-C:34, II(b) because CIC believed it had purchased this claim in its 2007 agreement with PECO, and because CIC was purchasing its own claim, it believed this exclusionary section did not apply. *Id.* at 682. The Supreme Court disagreed. The court interpreted RSA 402-C:34 broadly to exclude any claim that had been purchased or transferred. In this context, the court observed that the setoff statute is “broad and remedial” and aimed at “protecting ‘preferred creditors by reserving asserts for them, including people insured by Home, and people with claims against those insured by Home.’” *Id.* at 682–83, citing *In re Liquidation of Home Ins. Co.*, 154 N.H. 472, 488 (2006). Thus, the court reversed the trial court order, which in turn had affirmed the referee. *Id.* at 684.

Home now claims it is entitled to statutory interest pursuant to RSA 524:1-a. CIC argues that even if interest is appropriate—which CIC does not concede—it did not begin to accrue until after the Supreme Court issued its opinion. Specifically, CIC asserts that interest cannot begin to accrue, if at all, until 30 days after the judgment date pursuant to an August 6, 2004 claims-handling protocol the parties had previously negotiated (the “Protocol”). In addition, CIC argues that the Supreme Court disposition is not final because it is directed at the issue of setoff rather than debt.

The Protocol governs the ongoing handling of CIC reinsurance claims. It contains language directed at disputed setoff amounts. Section 3.3 of the Protocol states:

Within thirty (30) business days after the end of each month, CIC shall (a) provide HICIL with a statement showing (i) all amounts payable by CIC to HICIL ... (ii) the amount of funds paid by CIC with respect to such payables; and (iii) any amounts claimed in offset in accordance with paragraph 3.4 against amounts due

to HICIL, together with sufficient detail and an explanation as to the basis for the asserted offset; and (b) subject to the proviso to this paragraph, effect a wire transfer to such accounts as may . . . be designated. . . . CIC agrees and acknowledges that the Liquidator fully reserves all rights in relation to any offset asserted. CIC reserves . . . all rights in respect of any payments made, . . . ; PROVIDED THAT, where the Claimant has submitted a request for Review or an Objection in respect of a Claim disputing the quantum of the Claim or elements of it, CIC shall make remittance in respect of any portions of the Claim allowed in full or agreed between CIC and the Claimant. **CIC shall not be obligated to make remittance in respect of the disputed amount unless and until the relevant proceedings settle the disputed amount or it is negotiated and agreed between the claimant and CIC with the concurrence of the Liquidator, in which event remittance will be made in such amount within thirty business days after the month next following such settlement or agreement.**

(Emphasis added). Section 3.4 goes on to state: “Notwithstanding anything here to the contrary, payments to HICIL shall be net of setoff in compliance with N.H. RSA 402-C:34 or otherwise allowed by New Hampshire law.”

When interpreting a written agreement, we give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole. Absent ambiguity, the parties’ intent will be determined from the plain meaning of the language used in the contract.

*In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 546 (2008).

Here, the Protocol clearly states that, with respect to disputed setoff amounts, CIC does not have to pay until the dispute is settled by a court or relevant forum. The parties could alternatively negotiate a settlement. If the parties settle, then CIC has longer to pay the disputed amount—30 days after the end of the month in which a settlement is reached. In this case, the parties did not settle; rather, Home continued to litigate adverse rulings until the Supreme Court resolved the issue in its favor on the disputed setoff. Thus, CIC owes Home the disputed setoff amount. The Protocol does not govern the date interest began accruing or contemplate an interest rate. The section regarding disputes only dictates a timeline for payment on **settled** disputes; it does not establish a final procedure for handling **litigated** disputes. It is silent on the issue of in-

terest. In the absence of an agreement to the contrary, the court must look to the statute providing for interest.

RSA 524:1-a (1957) states:

**In the absence of a demand** prior to the institution of suit, **in any action on a debt or account** stated or where liquidated damages are sought, **interest shall commence to run from the time of the institution of suit.** This statute shall be inapplicable where the party to be charged pays the money into court in accordance with the rules of the superior court.

(Emphasis added). When interpreting a statute, the court “first examine[s] the language of the statute, and, where possible, ascribe[s] the plain and ordinary meanings to the words used.” *J & M Lumber and Const. Co., Inc. v. Smyjunas*, 161 N.H. 714, 727 (2011). In this context, the New Hampshire Supreme Court has interpreted the statute to mean that if a plaintiff sends a defendant a demand letter seeking payment of the relevant debt before instituting an action, then the date of the demand letter is the date interest begins accruing. *J & M Lumber*, 161 N.H. at 729. If a plaintiff does not send a demand letter, then the entry date of the writ is the date interest begins accruing. *Id.*

Here, Home sent CIC a letter advising “the Liquidator will seek to recover interest (and any other appropriate amounts) from CIC based on CIC’s setoffs against its obligations under the Claims Protocol, where the asserted setoff is found to be improper.” Liquidator’s Mot. for Interest on Amounts Withheld Exh. 7, at 1 (“Liquidator’s Mot.”). The letter goes on to state:

CIC has been avoiding paying its obligations by the assertion of setoffs. The Claims Protocol only permits setoffs that are in compliance with RSA § 402-C:34 or otherwise allowed by New Hampshire Law. It has become increasingly clear that CIC’s approach is to advance any potential setoff and wait for the Liquidator to challenge it. ... CIC’s asserted setoffs are delaying payment of amounts otherwise due to the liquidator. To the extent those setoffs are found to be improper ... CIC is obligated to pay interest....

*Id.* 1–2. This letter is dated July 9, 2007. Thereafter on August 29, 2007, CIC sent Home a monthly claim pursuant to the Protocol, asserting that CIC was entitled to a setoff of \$8 million it received in its settlement with PECO against amounts it would otherwise owe to Home. Liquidator’s Mot. ¶ 3. On October 12, 2007, Home notified CIC of the Liquidator’s determination to disallow the claim. Liquidator’s Mot. Exh. 4, at 1. The letter is heavily redacted but states: “On consideration of CIC’s submissions, the Liquidator disallows setoff of CIC’s claims against Home regarding PECO because the setoff is prohibited by RSA 402-C:34, II(b).” *Id.* at 2. The letter concludes: “In accordance with paragraph 6 of the Joint Report, the Liquidator is prepared to jointly seek an order from the Referee that CIC’s asserted setoff of its claim regarding PECO be deemed a disputed claim proceeding and treated as such.” *Id.*

Considering the above correspondence as a whole, the October 12, 2007 letter from Home to CIC is clearly a demand letter. CIC was on notice that Home disagreed with CIC’s conduct under the Protocol. In addition to disputing CIC’s asserted a setoff, Home communicated its intent to refer the matter to the quasi-judicial liquidation proceedings. Although these actions are in accordance with to the terms of the Protocol, this letter nevertheless clearly constitutes a demand letter. Thus, interest on the \$8 million setoff began accruing on October 12, 2007. In any event, the entry date of the “writ” in this case was October 18, 2007—only six days later. This is the date on which the parties requested the Superior Court to deem the setoff issue a “disputed claim” to be handled through the liquidation procedure.

Finally, CIC argues that because the Supreme Court ruling in this case is a decision disallowing a setoff, it is not a “final judgment” for purposes of statutory interest. Objection of CIC to Liquidator’s Mot. 1 (“Objection”). As CIC asserts, there is a distinction between an action for setoff and an action on a debt or account. Objection at 7. It is true that the Supreme Court re-

manded the matter to this court, *Home IV*, 158 N.H. at 684, and that this court has yet to enter final judgment. This, however, does not avail CIC. The action before this court is not a setoff.

A “[s]etoff is the process by which two contracting parties reduce mutual debts and credits to arrive at a net balance.” *Home IV*, 158 N.H. at 680 (citation and quotation omitted). Where a setoff is permissible, the underlying claims giving rise to the mutual debts and credits are irrelevant to the parties’ rights to setoff. *See* P. V. Smith, Annotation, *Setoff as Between Judgments*, 121 A.L.R. 478 (1939).

Although CIC and Home agreed to resolve the disputed setoff amount pursuant to the liquidation proceedings, the nature of this case is not one for setoff. This action is more akin to a debt claim or contract dispute. This case does not involve two parties asserting alternative final judgments to determine a net outcome; rather, CIC never possessed a final judgment against which to set off any obligations because Home contested CIC’s claim. For a setoff to be permissible, **both** of the contracting parties must have final judgments. *See* P. V. Smith, Annotation, *Setoff as Between Judgments*, 121 A.L.R. 478 (1939). CIC and Home disputed the validity of CIC’s proposed \$8 million setoff from the moment CIC claimed it. This “setoff” then, has never been final. Neither this court nor the Supreme Court resolved a “setoff” action—it was a dispute on a debt pursuant to the Protocol.


Thus, the entry of final judgment on the disputed \$8 million will trigger a concomitant requirement that CIC pay statutory interest. *See N. Country Env'tl. Servs., Inc. v. Town of Bethlehem*, 150 N.H. 606, 620 (2004) (in the context of *res judicata*, “a final judgment by a court of competent jurisdiction is conclusive upon the parties in a subsequent litigation involving the same cause of action”); *see also In re Aube*, 158 N.H. 459, 462 (2008) (final property division is “judgment” for statutory interest purposes). Here, CIC improperly withheld \$8 million claiming

setoff. The parties disputed the propriety of the setoff and upon the resolution of the remanded instant statutory issue, final judgment will be entered. Because CIC never paid that money to the custody of the court pursuant to RSA 402-C:34 and because Home can be deemed the victorious party for purposes of interest, Home is entitled to pre-judgment statutory interest.

Accordingly, Home's motion seeking statutory pre-judgment interest is GRANTED. The court enters judgment in favor of Home in the amount of \$8,000,000 plus statutory interest dating to Home's demand letter of October 12, 2007.

**So ORDERED.**

**Date: August 3, 2012**

  
**LARRY M. SMUKLER**  
**PRESIDING JUSTICE**