

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-11
Proof of Claim Number: INTL 700617
Claimant Name: Century Indemnity Company

**CENTURY INDEMNITY COMPANY'S REPLY TO LIQUIDATOR'S OBJECTION
REQUEST FOR EVIDENTIARY HEARING REGARDING
"NATIONWIDE AWARDS" CLAIM**

Century Indemnity Company ("CIC"), by its attorneys Lovells, respectfully submits this reply to the objection (the "Objection") of Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator (the "Liquidator") of the Home Insurance Company ("Home") to CIC's Request for Evidentiary Hearing (the "Motion")¹, dated January 23, 2006, in respect of CIC Proof of Claim Number INTL 700617 (the "Claim"):

**I.
PRELIMINARY STATEMENT**

1. The Claim involves an intricate set of relationships, and arises out of years of complex arbitration and litigation dealing with a complicated reinsurance pool. In light of this factual and legal complexity, CIC believes that an evidentiary hearing provides the Referee with the most efficient means of resolving the Claim. In the Objection, the Liquidator attempts to unfairly hamstring CIC in its proof of the Claim, and in so doing he ignores both the facts and circumstances underlying the Claim and the controlling provisions of the Claims Procedures (as defined below) and applicable law. The Liquidator maintains that he may unilaterally hold a

¹ While CIC does not accept the Liquidator's characterization of CIC's Request for Evidentiary Hearing as a "motion," it adopts the Liquidator's definition for ease of reference.

claimant such as CIC to the strictest standards of disclosure and proof, selectively use the claimant's documents and statements when reviewing and denying the claim, and then, once an objection is filed with the Court and a disputed claim proceeding is commenced, bar the claimant from taking discovery as to the reasons for his decision on the claim and other relevant, admissible evidence in the Liquidator's possession. Neither New Hampshire law nor the Claim Procedures sanction dealing such a loaded deck to claimants. Despite the Liquidator's attempt to rewrite the rules governing this claim dispute, he has not challenged CIC's showing that an evidentiary hearing is the only fair and practical process for resolving the issues in dispute, and is necessary as a means of presenting and clarifying the relevant facts to the Referee.

II. BRIEF BACKGROUND

2. On January 19, 2005, the Court entered the Restated and Revised Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company (the "Claims Procedures").

3. CIC timely filed its Claim, which is based on CIC's reinsurance pursuant to the Insurance and Reinsurance Assumption Agreement (the "Assumption Agreement") of Home and the requirement thereunder that CIC administer and service the "AFIA Liabilities." Long before Home's insolvency, CIC assumed Home's obligation to administer certain insurance business underwritten by Nationwide Mutual Insurance Company ("Nationwide"), which was a member of the M.E. Ruddy Pool. As a result, CIC incurred significant administration costs. Nationwide instituted arbitration proceedings against Home, alleging that Home violated its duties, including the duty to administer the Nationwide business. This Claim relates to costs incurred by CIC that the arbitration panel found to be in excess of Home's obligations (and thus in excess of CIC's

obligations under the Assumption Agreement). To the extent that Home has benefited as a result of the arbitration awards (the "Nationwide Awards"), that benefit must be passed along to CIC.²

4. In response to the Claim, the Liquidator sent a Notice of Determination to CIC, dated August 23, 2005 (the "NOD"), in which he rejected the Claim and valued it at \$0.

5. In its Request for Review, dated September 20, 2005 (the "RFR"), CIC contested the Liquidator's position as stated in the NOD. On September 29, 2005, the Liquidator issued his Notice of Redetermination (the "NOR"). Like the NOD, the NOR rejected the Claim and valued it at \$0. The NOR apprised CIC of its right to object to the NOR by filing an objection with the Court and thereby "bypass the Request for Review procedures... ." The NOR informed CIC that "[a] timely filed objection will be treated as a Disputed Claim and referred to the Liquidation Clerk's Office for adjudication in accordance with the [Claims Procedures]."

6. CIC timely filed the Objection to Denial of Claim, disputing the NOR in its entirety.

7. On November 28, 2005, the Liquidation Clerk filed its Notice of Disputed Claim, commencing a "Disputed Claim" proceeding under the Claims Procedures. By letter dated December 23, 2005, the Liquidator served the Case File (as defined in the Claims Procedures) upon counsel to CIC.

8. On January 23, 2006, CIC timely filed the Motion and its Initial Mandatory Disclosures (the "Mandatory Disclosures").

9. On February 16, 2006, the Liquidator filed the Objection.

² A more detailed background of the Claim is contained in CIC's Objection to Denial of Claim Relating to Nationwide Awards, filed on Home's Disputed Claims Docket on November 28, 2005 (the "Objection to Denial of Claim"), which is incorporated herein in its entirety.

III. ARGUMENT

A. *An Evidentiary Hearing Will Not "Lack Focus"*

10. The Liquidator's first argument—that without "clarity" as to the grounds of the Claim, this Disputed Claim proceeding will "lack focus" and be "unnecessarily prolonged and expensive"—simply misses the point. Objection at ¶ 3. CIC has already set forth the grounds for the Claim, not only in the Objection to Denial of Claim, the Mandatory Disclosures and the RFR, but also in correspondence with Liquidator preceding the Objection to Denial of Claim. The mere fact that the Liquidator disagrees with CIC's position does not mean that CIC's position has not been set forth with "clarity." In fact, in the Objection, the Liquidator claims to know exactly what the "contested issues of law and fact" are: "The *essential issue* in this claim proceeding is whether Home has any liability to CIC arising from the arbitration panel's phase two and three awards against Nationwide... ." Objection at ¶ 5 (emphasis added). Because CIC has already provided the grounds for the Claim, any purported advantage of an ordinary Section 15 proceeding, as set forth by the Liquidator, is nonexistent here.

B. *An Evidentiary Hearing Is the Most Effective and Efficient Way To Resolve this Disputed Claim*

11. While the Liquidator extols the presumed "simplicity" of adjudicating this Disputed Claim on written submissions pursuant to Section 15 of the Claims Procedures, he overlooks the fact that the test for whether an evidentiary hearing should be held is its ability to assist the Referee, not abstract simplicity. An evidentiary hearing here would clarify the facts at issue and "bring them to life" through live testimony, and would allow CIC and Home to cross-examine each other's expert and fact witnesses, thereby enabling the parties and the Referee to more meaningfully assess witness credibility. In addition, an evidentiary hearing would permit

the Referee to ask questions both of counsel and of the testifying fact and expert witnesses, and thus assist her in structuring the arguments and testimony so as to elicit the information most relevant to her analysis of the Claim.

12. Further, the Section 15 process would not maximize the Referee's consideration of all the evidence necessary to properly adjudicate this Disputed Claim. In particular, the Liquidator suggests that the facts underlying the Claim could be set forth in affidavits, but affidavits without the ability to cross-examine the affiant (which is only available via an evidentiary hearing) are of very limited value. A Section 15 review of this Disputed Claim on written submissions alone could readily require the Referee to expend considerable time wading through documents, transcripts and briefs in search of the information and analysis most relevant to her, whereas an evidentiary hearing would permit her to focus the proceedings much more quickly on the substantive issues.

13. In short, "simpler" does not mean "more efficient" where, as here, the simpler mechanism means the Referee's loss of valuable, potentially dispositive information and the unnecessary expenditure of time. Simplicity is not an end in itself; what is important is for the Referee to resolve this claim dispute correctly. The Liquidator cannot seriously argue that constraining the Referee's consideration of the Claim in the name of simplicity furthers the purposes of the insolvency statute and the Claims Procedures, when such an approach may impede the Referee's ability to accurately and fairly resolve the Claim. It is well-settled that the protection of the interests of creditors like CIC is central to the purposes of a liquidation proceeding. *See, e.g.*, Claims Procedures at 7 (a purpose of Claims Procedures is "to assist all Claimants worldwide in the orderly presentation of their claims against the Home"); *In re Transit Cas. Co.*, 580 N.Y.S.2d 140, 143 (1992) (purpose of liquidation statutes is to "protect *creditors*,

policyholders and the general public by providing a comprehensive and efficient means for collecting the insolvent's assets and *equitably paying the claims of creditors*") (emphasis supplied). Indeed, the statute that governs this Disputed Claim proceeding could not be more clear: "The purpose of this chapter is the protection of the interests of insureds, *creditors*, and the public generally... ." RSA 402-C:1(IV) (emphasis supplied).

C. *CIC Bears No Burden of Showing the Existence of "Disputed Facts"*

14. The Liquidator does not, and cannot, cite to any authority for his proposition that the claimant bears the burden of identifying disputed facts "that require resolution through an evidentiary hearing." Objection at ¶ 8. In both the Request and this reply, CIC demonstrates that the Request should be granted because an evidentiary hearing would greatly assist the Referee in adjudicating this Disputed Claim. Indeed, the Referee's October 21, 2005 Report concerning the claim 2005-HICIL-2 suggests that the dispositive criterion for conducting an evidentiary hearing is whether it will assist the Referee in reaching her determination; there is simply no requirement that the Request be based upon the existence of disputed facts. *See* Referee's Report, dated October 21, 2005, at 3.

D. *CIC Is Entitled To Take Discovery Regarding the Liquidator's Claim Denial*

15. The Liquidator also argues that CIC is not entitled to testimony or discovery from the Liquidator regarding denial of the Claim because the Liquidator's determinations are not relevant. Objection at ¶¶ 9-10. But now that the Claim is unquestionably disputed, the procedure for adjudicating them is governed by the New Hampshire court rules on discovery, which are not one-sided. Claim Procedures at 17. Indeed, bilateral discovery and testimony is only fair: the Liquidator cannot, on one hand, claim that CIC has the burden of proving the Claim, and on the other assert that CIC has no right to take discovery on why the Claim was

denied. Requiring full discovery from CIC without equivalent production and testimony from the Liquidator would fully arm the Liquidator while depriving CIC of the ability to prove its claim and counteract the Liquidator's defenses—the perfect example of a trial by ambush. CIC's right to file a claim is meaningless without the right to prove it and to challenge the Liquidator's defenses.

16. Not surprisingly, the Liquidator does not cite any authority for his claim that this Disputed Claim proceeding is "*not* a review of the Liquidator's determination" but a *de novo* review of CIC's stated bases for the Claim. Even if CIC bears the initial burden of proving its Claim,³ the standard of review that may apply is not relevant to the scope of permissible discovery. It almost appears as if the Liquidator is the party seeking a protective order from discovery, in which case he ought to file a motion and affidavit under the applicable New Hampshire court rules.

17. The Liquidator's position also must fail because the insolvency statute and the Claims Procedures embody the well-settled purposes of the claim dispute resolution process -- to allow *claimants* judicial review of the Liquidator's decision to disallow their claims. *See* RSA 402-C:1(IV); *In re Transit*, 580 N.Y.S.2d at 143. If, in adjudicating a Disputed Claim, the Referee does not review the Liquidator's decision-making process and the information in his possession related to his decision on the Claim, then the Referee becomes nothing more than a

³ In the bankruptcy context, while the claimant has the ultimate burden of persuasion by a preponderance of the evidence, the debtor shares the burden of going forward. *See In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173-74 (3d Cir. 1992) (citations omitted, emphasis in original) ("The burden of proof for claims . . . rests on different parties at different times. . . . [A] claim that alleges facts sufficient to support a legal liability to the claimant satisfies the claimant's initial obligation to go forward. The burden of going forward then shifts to the objector to produce evidence sufficient to negate the *prima facie* validity of the filed claim. It is often said that the objector must produce evidence equal in force to the *prima facie* case.").

rubber stamp for the Liquidator's decisions. That cannot be the Referee's role.⁴ Indeed, as noted above, even in the absence of an evidentiary hearing, the Claims Procedures expressly provide for discovery under the New Hampshire court rules. See Claims Procedures at 17; N.H. Super. Ct. R. 35(b)(1) (permitting party to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party..."). The Liquidator's position, then, is belied by the plain terms of the Claims Procedures, which explicitly allow CIC both to develop the bases for the Claim through the discovery and to take discovery (including by deposition) on any of the Liquidator's defenses. The Liquidator is not a black box into which questions are put and answers spat out, with claimants given no ability to inquire as to his process or to examine the information in his possession on which he may have relied. Unless the Liquidator intends to withdraw all assertable defenses to the Claim, the reasons for the Liquidator's denial of the Claim are properly discoverable and are proper subjects of testimony.

18. The Liquidator's approach would be particularly unfair here, where CIC has received few, if any, documents that shed any light on the Liquidator's denial of the Claim. The Claim File contains little more than some relevant contracts and the correspondence between the Liquidator and CIC. The Liquidator has not explained whether any documents have been withheld on privilege grounds, and, if documents have been withheld, he has not provided any bases for withholding them. Accordingly, the Referee should reject the Liquidator's attempt to

⁴ The Liquidator's position, moreover, appears contradictory: if this Disputed Claim proceeding is only a matter between CIC and the Referee, then the Liquidator should have no position on whether an evidentiary hearing is held. But clearly the Liquidator is no mere spectator here, and will assert a counter-position once CIC presents its case.

ambush CIC by withholding discovery and testimony that would be indispensable to the Referee's consideration of the merits of the Claim.

E. *CIC Is Entitled to Develop New Evidence*

19. In light of the Liquidator's effort to make the Referee's determination a foregone conclusion, the Liquidator's final argument—that allowing claimants to develop new evidence "would be inefficient and promote attempts to 'game' the system"—is hypocritical. Objection at ¶¶ 11-12. Indeed, it is the Liquidator who tries to game the system here. In accordance with the Liquidator's requests, CIC sent letters in support of the Claim, but the Liquidator responded with vague, perfunctory denials. Now that the Liquidator has received explanations from CIC which he will no doubt rely upon in this Disputed Claim proceeding, he asks the Referee to jettison CIC's reciprocal rights. The Liquidator's argument that there should be no "new evidence" fails for the same reason as his attempt to shield himself from all discovery: the Referee is to review all evidence that sheds light on the merits of the Claim. Why would the Claims Procedures expressly provide for discovery if claimants were not entitled to present "new evidence"? If, as the Liquidator suggests, the Referee is obligated to accept his assurances that the case file "should contain the information critical to any determination of the claim," then there would be no discovery provision in the Claims Procedures at all. Indeed, "new evidence" is critical to a fair consideration of any claim—otherwise a claimant would only be entitled to review whatever documents the Liquidator chooses to include in the case file. Representatives of the Liquidator might engage in lengthy, non-privileged deliberations concerning a claim, but under the Liquidator's approach, as long as the Liquidator assured the Referee that the case file includes the "critical" documents, then the claimant and the Referee would be cut off from discovery and

testimony that may be central to the merits of the claim. The insolvency statute and the Claims Procedures contemplate a far more balanced adjudication of the Claim.

**IV.
CONCLUSION**

WHEREFORE, for the foregoing reasons, CIC respectfully requests that the Objection be overruled and its Request for an Evidentiary Hearing be granted in this Claim Dispute pursuant to Section 11 of the Claims Procedures.

Dated: March 8, 2006

Respectfully submitted,



Gary S. Lee

Matthew P. Morris

Ryan Littrell

LOVELLS

590 Madison Avenue

New York, New York 10022

Telephone (212) 909-0600

Facsimile (212) 909-0666

Attorneys for Century Indemnity Company