THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In the Matter of the Liquidation of
The Home Insurance Company

No. 2007-0794

Appeal from the Final Decision of the
Merrimack County Superior Court

BRIEF FOR APPELLANT CENTURY INDEMNITY COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

QUESTIONS PRESENTED FOR REVIEW

1. Did the Superior Court err in ruling that the setoff claimed by CIC lacks the mutuality necessary to trigger setoff under RSA 402-C:34? (Century Indemnity Company's Motion to Recommit Referee's Ruling on CIC's Submission Regarding Claims under 100% Reinsurance Agreement, App. at 325-26, ¶¶ 13-15; Century Indemnity Company's Reply to Liquidator's Objection to Motion to Recommit Referee's Ruling on CIC's Submission Regarding Claims under 100% Reinsurance Agreement ("CIC Reply"), App. at 661, ¶ 5.)

2. Did the Superior Court err in ruling that the assignment to CIC of certain reinsurance recoverables was not absolute, thereby defeating the mutuality required for setoff? (CIC Reply, App. at 661, ¶¶ 5-6.)

3. Did the Superior Court err in ruling that the terms of the assignment to CIC require the return of uncollectible reinsurance at face value to CIC affiliates? (CIC Reply, App. at 661-63, ¶¶ 7-9.)

STATUTE INVOLVED

The statute at issue in this appeal is the New Hampshire Insurers Rehabilitation and Liquidation Act (the "Act") and, specifically, the provisions of the Act in RSA 402-C:34, which states:

> I. SETOFFS ALLOWED IN GENERAL. Mutual debts or mutual credits between the insurer and another person in connection with any action or proceeding under this chapter shall be set off and the balance only shall be allowed or paid, except as provided in paragraph II.
>
> II. EXCEPTIONS. No setoff shall be allowed in favor of any person where:
>
> (a) The obligation of the insurer to the person would not at the date of the filing of a petition of liquidation entitle him to share as a claimant in the assets of the insurer;
>
> (b) The obligation of the insurer to the person was purchased by or transferred to the person with a view to its being used as a setoff; or

(c) The obligation of the person is to pay an assessment levied against the members or subscribers of the insurer, or is to pay a balance upon a subscription to the capital stock of the insurer, or is in any other way in the nature of a capital contribution.

STATEMENT OF THE CASE

Appellant Century Indemnity Company ("CIC") appeals from an Order of the Merrimack County Superior Court (Conboy, J.), dated October 18, 2007 (the "Order") (App. at 667), denying CIC's Motion to Recommit Referee's Ruling on CIC's Submission Regarding Claims Under 100% Reinsurance Agreement (App. at 459-67).

In this appeal, CIC seeks review of the Superior Court's interpretation of the Pre-1987 General Liability Reinsurance Agreement between the Remaining Active Companies and Century Indemnity Company (the "Reinsurance Agreement") (App. at 69-82), the contract that unconditionally assigned to CIC the reinsurance claims against the Home Insurance Company ("Home") that CIC seeks to set off here. The Superior Court, like Referee Paula Rogers, denied CIC's setoff on the ground that the assigned claims lacked the mutuality required under RSA 402-C:34. The Order, however, wrongly focused on the fact that CIC's claims once belonged to CIC's affiliated companies, and not on the language of the Reinsurance Agreement or RSA 402-C:34, the statute that permits setoff of assigned claims.

The Superior Court held that there was no mutuality because the assignment "is not absolute and the real parties in interest are CIC's affiliates." (App. at 669). This conclusion, however, ignores the plain language of the Reinsurance Agreement, which unconditionally assigned the claims of CIC's affiliates to CIC. The Superior Court thus disregarded the well-established rule of contract construction that requires a contract be interpreted to give effect to

the parties' intentions as reflected in the contract's language. To correct this error, CIC filed this timely appeal.

STATEMENT OF FACTS

I. OVERVIEW

The facts underlying this appeal are uncontested. The issues arise solely out of the Reinsurance Agreement and the interpretation of the provision in that agreement that assigns reinsurance claims to CIC. The Reinsurance Agreement is not ambiguous or unclear, and the Superior Court simply ignored the language that demonstrates that the assignment is not conditional. A decision in CIC's favor is thus required if the Reinsurance Agreement is read literally and its language is properly construed.

II. CIC'S CLAIMS AGAINST HOME AS ASSIGNEE UNDER THE REINSURANCE AGREEMENT

A. The Reinsurance Agreement

Under the Reinsurance Agreement, CIC is the assignee of the claims that it seeks to set off here (the "Assigned Reinsurance Claim"). The assignment also establishes the requisite mutuality under RSA 402-C:34.

In 1996, CIGNA Insurance Group (CIC's parent company) was restructured under the supervision of the Pennsylvania Insurance Department. (App. at 173, ¶ 4). In connection with the restructuring, CIC agreed to reinsure the general liability policies that certain CIC affiliates issued prior to January 1, 1987. (App. at 62, ¶ 7). Specifically, the Reinsurance Agreement provides:

> Upon...assignment of all rights to reinsurance recoverables... relating to Covered Policies to [CIC] by the Reinsured Companies to the extent held by the Reinsured Companies..., [CIC] agrees...to

> accept a one hundred percent (100%) quota share participation in the Reinsured Companies' liabilities relating to Covered Policies...

(App. at 71, ¶ 1). In other words, in exchange for CIC's promise to pay their pre-1987 liabilities, the reinsured companies – including ACE Property & Casualty Company ("ACE P&C") and Pacific Employers Insurance Company ("PEIC") (collectively, the "Cedents") – agreed unconditionally to assign the reinsurance for those liabilities to CIC.

The arrangement is straightforward: CIC assumes all of the Cedents' pre-1987 liabilities and receives the benefit of the Cedents' reinsurance. The assignment includes reinsurance that Home had provided to the Cedents, and which Home, but for its insolvency, would have paid. CIC, as the assignee of the reinsurance claims, is now seeking to set off the amounts that Home owes under the reinsurance it provided to the Cedents against amounts that Home claims are due from CIC.

The Reinsurance Agreement also states that CIC "shall return to the respective Reinsured Company for face value, any such assigned reinsurance recoverables *that are deemed by [CIC] to be uncollectible.*" (App. at 71, ¶ 1; emphasis added). This provision allows CIC to charge back to the Cedents the face value of any assigned reinsurance claim that CIC decides is "uncollectible" from the reinsurer. This is not a condition to the assignment, which is unconditional once CIC agreed "to accept a one hundred percent (100%) quota share participation in the Reinsured Companies' liabilities." Instead, it provides an alternate way for CIC to be reimbursed for its payments on the Cedents' behalf. The option to return the assigned claims to the Cedents belongs solely to CIC and the transfer of the reinsurance claims to CIC is not affected unless CIC affirmatively declares that they cannot be collected. Not only has CIC

not declared the reinsurance uncollectible, this appeal is itself part of CIC's continuing efforts to collect from Home's estate.[1]

Since 1996, CIC has been discharging its liabilities to the Cedents and collecting the reinsurance that now belongs to CIC. (App. at 244, ¶ 7). CIC's and the Cedents' statutory filings also reflect the parties' arrangement, in that CIC takes credit for the Cedents' reinsurance while the Cedents do not. (App. at 175, ¶ 9.) CIC's effort to set off the amounts Home owes is completely in line with CIC's rights under the Reinsurance Agreement and with Home's reinsurance obligations.

B. CIC's Setoff of the Assigned Reinsurance Claim

1. The Protocol and the Joint Report

Anticipating that CIC and Home would likely owe mutual debts to one another, CIC and the Liquidator entered into a claims handling protocol (the "Protocol") that provided that "payments to HICIL shall be net of set-off in compliance with N.H. RSA 402-C:34 or otherwise allowed by New Hampshire law." (App. at 8, ¶ 3.4). The Protocol was approved by the Liquidation Court on November 12, 2004.

On March 31, 2006, CIC and the Liquidator submitted a joint report to Referee Rogers (the "Joint Report"), setting forth an agreed procedure for substantiating CIC's claims against Home, including claims for setoff. (App. at 38-39, ¶ 6). The Joint Report also contains CIC's and the Liquidator's agreement to jointly request that the Referee deem any disallowed claim a disputed claim proceeding under the RSA and the Restated and Revised Claims Procedures Order. (*Id.*).

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[1] The Cedents, on the other hand, are prevented by the assignment from filing a claim against Home's estate or attempting to collect from Home in any way.

2. The Assigned Reinsurance Claim

CIC submitted and substantiated various claims to the Liquidator that arose out of CIC's role as a reinsurer of ACE P&C and PEIC. Pursuant to the Joint Report, the Liquidator requested further information about the claims, which CIC provided. (*See*, *generally*, App. at 56-57, ¶ 1). On April 9, 2007, the Liquidator objected to the setoff claimed by CIC as a reinsurer and, on April 26, 2007, the parties agreed that the reinsurance setoff issue should be resolved in a disputed claim proceeding under 2005-HICIL-14. (App. at 56, ¶ 2).

C. The Proceedings before Referee Rogers

1. The Submission of the Assigned Reinsurance Claim

A Joint Request to Deem CIC's Claims as Reinsurer Subrogee a Matter in a Disputed Claim Proceeding was filed jointly by CIC and the Liquidator on May 2, 2007 (App. at 56-57), and Referee Rogers granted the request on May 10, 2007 (App. at 60). CIC and the Liquidator filed stipulated facts in connection with the submission. (App. at 61-65).

CIC articulated its Assigned Reinsurance Claim in its submission, explaining that the Reinsurance Agreement assigned the Cedents' reinsurance claims against Home to CIC. Because of the assignment, the money Home owed to the Cedents as their reinsurer was now owed to CIC, and CIC asserted that it could set off that amount against billings that Home claimed were due from CIC. CIC relied on the language of RSA 402-C:34, II, which permits setoff of assigned claims unless they are acquired for the purpose of setoff. Since the Reinsurance Agreement was executed on December 31, 1995 – years before Home was declared insolvent – CIC demonstrated that the reinsurance claims could not have been acquired for the purpose of setoff and the assignment thus does not run afoul of RSA 402-C:34, II.

2. The August 31 Ruling

Referee Rogers rejected all of CIC's claims in her ruling of August 31, 2007 (the "August 31 Ruling"). (App. at 454-58). She refused to recognize CIC's right to set off the Assigned Reinsurance Claim, denying setoff "with the interests of the preferred creditors of the Home estate in mind." (App. at 458).

D. The Motion to Recommit and the Order

On September 14, 2007, CIC moved to recommit the August 31 Ruling, requesting that the Superior Court decline to adopt the August 31 Ruling to the extent that it denied the Assigned Reinsurance Claim. (App. at 459-67). CIC argued that (1) the Cedents had assigned valid reinsurance claims against Home to CIC; (2) RSA 402-C:34 allows setoffs "in general"; and (3) while setoff of assigned claims is not permitted when the claim was purchased or transferred with a view to its being used as a setoff, the Cedents' 1995 assignment to CIC of the right to collect reinsurance from Home – years before Home was declared insolvent – could not be for the purpose of setoff. CIC demonstrated that, since the Assigned Reinsurance Claim did not fall within the exception to setoff in RSA 402-C:34, II, it should have been allowed by Referee Rogers. CIC also explained that the Reinsurance Agreement's assignment of the right to collect reinsurance from Home was not conditional, but absolute.

The Superior Court sustained the August 31 Ruling and rejected the Assigned Reinsurance Claim, wrongly holding "that CIC is asserting claims of its affiliates, and not its own claims. Under these circumstances, mutuality is lacking." (App. at 669). This appeal followed.

SUMMARY OF ARGUMENT

The Superior Court ignored well-established principles of contract construction when it held that CIC's offset of the Assigned Reinsurance Claim lacked "mutuality" because the assignment of the Cedents' reinsurance in the Reinsurance Agreement "is not absolute, and the real parties in interest are CIC's affiliates." (App. at 669). This holding is based upon a misreading of the Reinsurance Agreement, which unambiguously requires assignment of the Cedents' rights to recover from their reinsurers – including Home – as a *quid pro quo* to CIC's agreement "to accept a one hundred percent (100%) quota share participation in the Reinsured Companies' liabilities." (App. at 71, ¶ 1). The assignment is at the heart of the Reinsurance Agreement, and completes the circle of the arrangement: CIC agrees, in essence, to step into the Cedents' shoes, both as to their liability under the pre-1987 policies[2] and as to their right to collect reinsurance for those liabilities.

The assignment cannot be revoked and the Cedents retain no rights in the reinsurance. Only if CIC "deems" the reinsurance uncollectible do the reinsurance claims revert to the Cedents. (*Id.*). In holding that CIC was "asserting claims of its affiliates," the Superior Court impermissibly ignored not only the unambiguous language of this provision, but also the well-established principle that contracts are to be interpreted to give effect to the parties' intent as expressed in the language used. A court is not free to superimpose a meaning that does not reflect the parties' intent or to ignore language that may not comport with its view of how the contract should be interpreted. The Superior Court, however, did exactly that when it accepted the Liquidator's characterization of the Reinsurance Agreement and wrote out of the Reinsurance Agreement the requirement that CIC must "deem" the reinsurance uncollectible before the

[2] The Cedents did not assign the liabilities to CIC, nor was there a novation of the policies. In practice, however, CIC pays the Cedents' liabilities directly. (App. at 244, ¶ 4).

claims revert to the Cedents. Only by doing so could the Superior Court have rejected CIC's offset as lacking mutuality.

The Superior Court recognized that RSA 402-C:34 permits setoff if all statutory requirements are met, but the Order suggests that the court impermissibly exercised its discretion in denying setoff here. The Superior Court, noting "that the statutory requirement of mutuality must be strictly construed in light of one of the overarching purposes of New Hampshire's Insurers Rehabilitation Act – the protection of creditors," held that "[t]o sustain this asserted contractual setoff would harm the preferred creditors." (App. at 669). In protecting those creditors, the Order sidestepped the statutory mandate that setoff be allowed by reading out of the Reinsurance Agreement the provision that demonstrates that the requisite mutuality exists. This impermissible effort to increase assets for preferred creditors while depriving CIC of its statutory setoff rights warrants reversal.

ARGUMENT

I. THIS COURT'S STANDARD OF REVIEW

As this Court has repeatedly held, the interpretation of a contract is a question of law and subject to *de novo* review. *Czumak v. N.H. Div. of Developmental Servcs.*, 155 N.H. 368, 373, 923 A.2d 208 (2007) ("The interpretation of a contract is a question of law, which we review *de novo*."); *ACAS Acquisitions (Precitech) Inc. v. Hobert*, 155 N.H. 381, 399, 923 A.2d 1076, 1092 (2007) ("The interpretation of a contract is a question of law, which we review *de novo*."); *Greenhalgh v. Presstek, Inc.*, 152 N.H. 695, 886 A.2d 1000 (2005) ("Because the proper interpretation of a written agreement is ultimately a question of law for this court, we review the Split Dollar Agreement *de novo*."). The Order was based upon the Superior Court's

interpretation of the Reinsurance Agreement and whether its assignment of reinsurance recoverables was conditional. The Order, therefore, is reviewed *de novo*.

To the extent that the Superior Court's interpretation of RSA 402-C:34 is at issue, the interpretation of that statute in the Order is also reviewed *de novo*. *Blackthorne Group, Inc. v. Pines of Newmarket, Inc.*, 150 N.H. 804, 848 A.2d 725 (2004).

II. THE CEDENTS' ASSIGNMENT OF THE REINSURANCE CLAIMS AGAINST HOME IS NOT CONDITIONAL

A. The Rules of Contract Interpretation

The rules of contract interpretation are clear. In the first instance, the court is charged with "seeking to discern the parties' intent at the time the contract was made." *Gulf Ins. Co. v. Amsco, Inc.*, 153 N.H. 28, 34, 889 A.2d 1040 (2005). In doing so, the court is to "give the language used by the parties its reasonable meaning," and, "[a]bsent ambiguity, the parties' intent will be determined from the plain meaning of the language used in the contract." *Czumak*, 155 N.H. at 373, 923 A.2d at 213. *See also Greenhalgh*, 152 N.H. at 698, 886 A.2d at 1003 ("The words and phrases used by the parties will be assigned their common meaning, and we will ascertain the intended purpose of the contract based upon the meaning that would be given to it by a reasonable person."). The court must also interpret the contract "reading the document as a whole" (*Czumak*, 155 N.H. at 373, 923 A.2d at 213); it cannot simply ignore words or phrases that the parties included.

B. The Superior Court Failed Properly to Interpret the Reinsurance Agreement

The Superior Court ignored these rules of interpretation when it held that the assignment of the Cedents' reinsurance claims in the Reinsurance Agreement was conditional.

1. The Reinsurance Agreement Does Not Require CIC to Return the Claims for Reinsurance Unless It Deems Them Uncollectible.

Pursuant to the Reinsurance Agreement, CIC agreed to accept a 100% quota share participation in the Cedents' pre-1987 liabilities in return for, among other things, the assignment to CIC of the Cedents' rights to the reinsurance related to those liabilities. (App. at 71, ¶ 1). This assignment is absolute because there is nothing in the Reinsurance Agreement that permits the Cedents to withdraw it.

The Reinsurance Agreement, however, does require CIC to return to the Cedents any claims for reinsurance "that are deemed by [CIC] to be uncollectible." (*Id.*). The record is devoid of any evidence that CIC ever deemed the reinsurance that Home provided to the Cedents uncollectible, as the Reinsurance Agreement provides. To the contrary, CIC has vigorously asserted its rights to the reinsurance in this proceeding and has attempted to collect or set off the reinsurance that was assigned to it.

The Superior Court is thus wrong when it ruled that "[t]he terms of the assignment require the return of uncollectible reinsurance at face value to CIC's affiliates" (App. at 669) because it ignores the contractual predicate for the return of the reinsurance claims – that CIC "deem" them "uncollectible." As described above, the rules of contract interpretation require that the court evaluate all the language the parties use in their agreement, not just part of it. Here, the Superior Court relied only on the purported requirement that the reinsurance claims be returned, not how that requirement is triggered. In effect, the Superior Court extinguished Home's reinsurance liability, since it rejected the Assigned Reinsurance Claim and the filing deadline for the Cedents' claims against Home's estate has long since past.

CIC alone has control over the return of the assigned reinsurance claims to the Cedents, because the Cedents gave up all their rights to collect the reinsurance in the Reinsurance Agreement. It is CIC's right to determine whether the reinsurance is collectible or not, and the Reinsurance Agreement leaves that decision entirely to CIC's discretion. Contrary to the finding of the Superior Court, unless and until CIC deems the reinsurance uncollectible, the assignment is absolute. CIC, not the Cedents, is the "real part[y] in interest." (App. at 669).

2. The Assignment Creates the Mutuality Required by RSA 402-C:34

RSA 402-C:34, the setoff provision of the New Hampshire Insurers Rehabilitation and Liquidation Act, states in relevant part:

> I. SETOFFS ALLOWED IN GENERAL. Mutual debts or mutual credits between the insurer and another person in connection with any action or proceeding under this chapter shall be set off and the balance only shall be allowed or paid, except as provided in paragraph II.
>
> II. EXCEPTIONS. No setoff shall be allowed in favor of any person where:
>
> ...(b) The obligation of the insurer to the person was purchased by or transferred to the person with a view to its being used as a setoff....

The Superior Court held, and CIC does not dispute, that setoff under this statute requires mutuality, that is, the obligations must be "due to and from the same persons in the same capacity." (App. at 669). Mutuality, however, can be established through assignment, so long as the assignment was not "purchased by or transferred to the person with a view to its being used as a setoff." RSA 402-C:34, II.b.

The Superior Court correctly assumed that the assignment of the reinsurance claims to CIC in the Reinsurance Agreement "was not made with a view to future setoff." (App. at 669). Accordingly, so long as the debts are mutual – that is, that they are owed to and from Home and CIC in the same capacity – CIC should be permitted to set off the Assigned Reinsurance Claim.

The Order held that there was no mutuality between CIC and Home because "the assignment is not absolute and the real parties in interest are CIC's affiliates. The bottom line is that CIC is asserting claims of its affiliates, and not its own claims." (*Id.*). This is error. The Assigned Reinsurance Claim belongs to CIC and setoff is permitted by RSA 402-C:34 because *CIC's* reinsurance claims against *Home* are being set off against *Home's* reinsurance claims against *CIC*. Setoff is therefore appropriate because mutuality is created by the assignment under the Reinsurance Agreement and the assignment is valid and absolute. Accordingly, the Order should be reversed.

CONCLUSION

The Superior Court's interpretation of the Reinsurance Agreement is flawed, in that the court ignored the well-settled rule of contract construction that requires the court to give meaning to all the words used by the parties in the contract. In ruling that the assignment under the Reinsurance Agreement was conditional, the Superior Court ignored the phrase "that are deemed by [CIC] to be uncollectible" and necessarily wrote it out of the contract. Because CIC never deemed the reinsurance uncollectible, the claims never reverted to the Cedents and mutuality under RSA 402-C:34 was preserved. CIC therefore requests that this Court (1) reverse the Order, (2) enter an order reinstating the Assigned Reinsurance Claim, and (3) grant such other and further relief as it deems just and proper.

REQUEST FOR ORAL ARGUMENT

CIC requests fifteen minutes for oral argument, which will be presented by Kathleen E. Schaaf.

Dated: January 4, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa Snow Wade, hereby certify that two copies of the foregoing brief and its appendix have been forwarded to counsel of record via overnight mail on January 4, 2008.

Lisa Snow Wade