THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2007-0794

IN THE MATTER OF THE LIQUIDATION OF THE HOME INSURANCE COMPANY

Appeal Pursuant to Rule 7 from a Final Decision
of the Merrimack County Superior Court

BRIEF FOR THE INSURANCE COMMISSIONER AS LIQUIDATOR OF THE HOME INSURANCE COMPANY

ROGER A. SEVIGNY, COMMISSIONER,
NEW HAMPSHIRE INSURANCE
DEPARTMENT, AS LIQUIDATOR OF
THE HOME INSURANCE COMPANY

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To be argued by
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1. Does CIC's asserted setoff of the claims of its affiliates against its obligations to Home fail for lack of the mutuality required by RSA 402-C:34, I?

2. Does the affiliates' assignment of reinsurance recoverables to CIC, subject to a proviso making the affiliates liable if the reinsurance is uncollectible, create mutuality otherwise lacking?

3. If there were mutuality, is setoff prohibited because the ACE group's decision to have CIC assert claims that under the proviso belong to CIC's affiliates constitutes a transfer "with a view" toward setoff within RSA 402-C:34, II(b)?

4. Was the Referee's decision to deny setoff a sustainable exercise of her discretion where CIC's asserted setoff rights are not well-established and harm the preferred creditors of the Home estate by reducing assets available for distribution?

STATUTES INVOLVED

This appeal involves sections of the Insurers Rehabilitation and Liquidation Act ("Act"), RSA 402-C, in particular RSA 402-C:1, RSA 402-C:34, RSA 402-C:36, RSA 402-C:44, as well as RSA 405:49. See the statutory addendum to this brief.

STATEMENT OF THE CASE

This is an appeal by appellant Century Indemnity Company ("CIC") from an order of the Merrimack County Superior Court (Conboy, J.) dated October 18, 2007 (App. 667) that denied CIC's motion to recommit one part of a ruling by the Referee dated August 31, 2007 (App. 454). These decisions denied CIC's asserted setoff of reinsurance claims of CIC's affiliates ACE Property and Casualty Insurance Company ("ACE P&C") and Pacific Employers Insurance Company ("PEIC") against amounts CIC owes to The Home Insurance Company ("Home"). CIC contends that it may use the claims of these affiliated companies as setoffs because they were assigned to it in a reinsurance agreement. The appellee Roger A Sevigny, Insurance Commissioner, as Liquidator ("Liquidator") of Home, opposes the setoffs because they are "triangular" setoffs that are not mutual as required by RSA 402-C:34, and the assignment does not create mutuality otherwise lacking. Both the Referee and the Superior Court sustained the Liquidator's position and denied the setoffs. The assignment is subject to a proviso that leaves the risk of uncollectibility with ACE P&C and PEIC, so that it is their interests that are at stake in the claims. In these circumstances, setoff would frustrate the Act's purpose of protecting the preferred creditors of Home, and it is not permitted under RSA 402-C:34.

Background

A. Procedural History and the Decisions Below

This appeal arises from CIC's presentation of claims by its affiliates against Home that CIC has subsumed into its own claim submissions. CIC filed proofs of claim with the Liquidator asserting claims against Home, including a proof of claim asserting claims for reinsurance, App. 63 (¶ 11), 118-23, and proofs of claim asserting contribution claims. App. 63 (¶ 10), 106-17.

The Liquidator identified various claims asserted by CIC based on underlying contracts that were not issued by CIC or its corporate predecessor Insurance Company of North America

("INA") but by other companies within CIC's corporate family. The Liquidator asked CIC to explain how it was corporately obligated for the policy obligations of those companies. App. 367-68, 387. While acknowledging that certain obligations were those of other companies, CIC asserted it could set off those companies' contribution claims arising from their policy obligations by virtue of CIC's capacity as a reinsurer subrogee of those companies' claims. App. 360-61, 365.

The Liquidator disagreed with CIC's asserted right to setoff these "reinsurer subrogee" claims. App. 389-91. The Liquidator and CIC then filed a Joint Request to Deem CIC's Claims as Reinsurer Subrogee a Matter in a Disputed Claim Proceeding on May 2, 2007. App. 402.

CIC filed its submission with the Referee on June 21, 2007. In that submission, CIC for the first time characterized a part of the claims as "assignee" claims and contended that the reinsurance claims of its affiliates could be setoff because they had been assigned to CIC. App. 146 (¶ 3). The Liquidator filed a response to CIC's submission. App. 287.

After argument, the Referee issued the Ruling on August 31, 2007. App. 454. In the Ruling, the Referee denied CIC's asserted setoff of claims of CIC's affiliates against CIC's obligations to Home. The Referee noted that mutuality was required for setoff by RSA 402-C:34, and that it is long established under both New Hampshire cases and insurer liquidation cases from other jurisdictions that mutuality means "due to and from the same persons in the same capacity." App. 456. The Referee held that "[w]hile CIC's obligations clearly run directly to Home on AFIA liabilities, the obligations at issue here run facially from Home to CIC's affiliates, not to CIC." Id. The Referee then addressed CIC's arguments that the Referee should "look beyond the facial deficiency" in mutuality. Id.

With respect to CIC's asserted setoff of its affiliates' reinsurance claims, the Referee rejected CIC's attempt to use assignment to "convert[] an otherwise impermissible tripartite setoff into a sustainable one." App. 457-58. The Referee declined to import the two bankruptcy cases cited by CIC into the insurer liquidation context and chose instead to rely on state insurer liquidation cases limiting setoff. App. 458. Acting "with the interests of the preferred creditors of the Home estate in mind" as required by the Act, the Referee denied the setoff. Id.[1]

CIC then filed a motion to recommit with the Superior Court, App. 459, and the Liquidator filed an objection. App. 638. In its October 18, 2007 decision (App. 667), the Superior Court made two assumptions in CIC's favor: first, that "the language of RSA 402-C:34 permits the Court no discretion in allowing setoff if all requirements in the statute are met," and second, that the 1995 assignment of reinsurance recoverables "was not made with a view toward future setoff." App. 669. It then pointed out that "[t]he statute is premised on mutuality" and concluded that, "[r]egardless of the parties' competing characterizations of the subject assignment, . . . the requisite mutuality has not been established." Id.

With respect to the assignment, the Superior Court held that "[t]he terms of the assignment require the return of uncollectible reinsurance at face value to CIC's affiliates. As the Liquidator notes, '[I]f the reinsurance is not collectible, then the amount of the reinsurance recoverable (its 'face value') is returned to the [r]einsured [c]ompany, which is then obligated to pay CIC that amount through the quarterly accounting and setoff mechanism provided in the [r]einsurance [a]greement.'" App. 669. It concluded that "in this triangular situation, the assignment is not absolute and the real parties in interest are CIC's affiliates. The bottom line is

[1] The Referee also denied CIC's asserted setoff, as subrogee, of its affiliates' contribution claims against its obligations to Home. App. 457. CIC did not challenge the Referee's denial of setoff for such claims in its motion to recommit in the Superior Court, and it is not at issue here.

that CIC is asserting claims of its affiliates, and not its own claims. Under these circumstances, mutuality is lacking." Id.

The Superior Court finally noted that the statutory requirement of mutuality must be "strictly construed" in light of one of the "overarching purposes of New Hampshire's Insurers Rehabilitation and Liquidation Act – the protection of creditors." The contractual setoff asserted by CIC "would harm the preferred creditors." App. 669.

B. Factual Background

1. CIC and its affiliates. CIC, ACE P&C, and PEIC are insurance companies organized and existing under the laws of the Commonwealth of Pennsylvania. App. 61-62 (¶¶ 2-4). The companies are members of the ACE group of companies. App. 62 (¶ 6), 67.

CIC is the corporate successor to INA (with respect to INA policy obligations) and California Union Insurance Company ("Cal Union"). App. 63 (¶¶ 12-13). CIGNA Specialty Insurance Company, formerly known as Cal Union, merged into CIC in 1996. App. 63 (¶ 13).

ACE P&C is the corporate successor to Aetna Insurance Company ("Aetna") and the assumed policy obligations of Central National Insurance Company of Omaha ("Central National") underlying the claims at issue here. App. 63 (¶ 14). ACE P&C was formerly known as CIGNA Property & Casualty Insurance Company ("CIGNA P&C"), which was formerly known as Aetna. CIGNA P&C assumed certain obligations of Central National pursuant to an Agreement effective February 1, 1991. Id.; see App. 124.

2. Home's reinsurance of ACE P&C and PEIC. The claims asserted as setoffs here are reinsurance claims of ACE P&C or PEIC. Home reinsured those companies or their predecessors as a participant in a reinsurance pool referred to as "ECRA," for Excess Casualty Reinsurance Association. The risks ceded to Home through ECRA included policies

issued by CIGNA P&C, PEIC, and Central National. The CIGNA P&C and Central National policies are now obligations or assumed obligations of ACE P&C, and the PEIC policies remain obligations of PEIC. App. 64 (¶ 20).

3. CIC's reinsurance of its affiliates and the assignment. Pursuant to a Pre-1987 General Liability Reinsurance Agreement effective as of December 31, 1995 (the "Reinsurance Agreement"), CIC reinsured some of its affiliated companies with respect to general liability policies issued by those companies with inception dates prior to January 1, 1987. App. 62 (¶ 7), 69. The affiliated companies include ACE P&C and PEIC. App. 62 (¶ 7). The obligations of ACE P&C and PEIC regarding ECRA are reinsured by CIC under the Reinsurance Agreement. App. 64 (¶ 21).

Under the Reinsurance Agreement (App. 69-82), the Reinsured Companies (ACE P&C and PEIC, among others) are to pay claims and submit quarterly accountings to CIC setting forth paid amounts. CIC is then required to pay the Reinsured Companies the amounts so billed within 15 days, subject to setoff of any amounts due from a Reinsured Company to CIC. The Reinsurance Agreement provides that:

- CIC agrees to "accept a one hundred percent (100%) quota share participation in the Reinsured Companies' liabilities relating to Covered Policies" and "to reimburse the Reinsured Companies for all expenses relating to claims" under those policies. Reinsurance Agreement § 1 (App. 71).

- The Reinsured Companies are to render to CIC not later than thirty days after the close of each quarter "an account summarizing that quarter's (1) total paid losses, [and] (2) paid loss adjustment expenses," together with outstanding reserves and IBNR. "Except as provided in Section 1 hereof,[2] balances shall be due upon paid [sic] within fifteen (15) days after receipt of such quarterly accounts." Reinsurance Agreement § 11 (App. 76).

[2] Section 1 limits CIC's payment obligations in certain circumstances. It provides that CIC's obligations as reinsurer to make payments "shall be suspended" if INA is obligated to make payments under an Aggregate Excess of Loss Reinsurance Agreement between INA and CIC or if CIC has no "Cash Available" (as defined) to make such payment or if the payment would cause CIC's capital and surplus to be less than $25 million. Reinsurance Agreement § 1 (App. 71-72).

- Amounts due under the Reinsurance Agreement or any agreement entered into between CIC and any Reinsured Company from one party to another party "may be offset" but "for all purposes as between the parties hereto, such amounts shall be treated and recorded as if the gross amounts due to either party hereto under this Agreement had been paid." Reinsurance Agreement § 6 (App. 74).

The Reinsurance Agreement also provides for an assignment by the Reinsured Companies (including ACE P&C and PEIC) of rights to reinsurance on the Covered Policies to CIC. The Reinsurance Agreement requires the "assignment of all rights to reinsurance recoverables (and any collateral pertaining thereto) relating to Covered Policies to the Reinsurer by the Reinsured Companies." Reinsurance Agreement § 1 (App. 71). The assignment in Section 1, however, is not absolute. It continues on to provide that the reinsurance is returned to the Reinsured Companies if it is not collectible. Section 1 contains the following proviso:

> provided, however, that the Reinsurer shall return to the respective Reinsured Company for face value, any such assigned reinsurance recoverables that are deemed by the Reinsurer to be uncollectible together with the rights to any related collateral; [App. 71]

CIC acknowledged in its submission to the Referee that "Home will pay nothing now that it is insolvent and CIC cannot recover any of those ceded liabilities where Home is the only reinsurer of those liabilities." App. 154 (¶ 21), quoting the Affidavit of Christopher J. Eskeland (CIC's President), App. 244 (¶ 6).[3]

4. CIC's obligations and asserted setoffs. Pursuant to the Insurance and Reinsurance Assumption Agreement dated January 31, 1984 (the "Assumption Agreement"), CIC reinsures Home with respect to reinsurance contracts between Home and insurers known as "AFIA Cedents." App. 62 (¶ 8), 83. See Liquidation of Home, 154 N.H. at 474-75. CIC is setting off the "reinsurer assignee" claims at issue here against its obligations to Home for AFIA

[3] Claims for reinsurance are Class V claims under RSA 402-C:44, and the Liquidator does not expect to make any distributions to creditors below Class II. See In the Matter of the Liquidation of The Home Ins. Co., 154 N.H. 472, 477 (2006).

Cedents' claims that have been allowed by the Court pursuant to the Claims Protocol (App. 95). These claims are "payable" to Home under ¶ 3.3 of the Claims Protocol (App. 101), and the April 2007 CIC setoff statement shows CIC's obligations of $32.3 million to Home under "NOD's reconciled, agreed and Court approved." App. 406. The ECRA reinsurance claims of ACE P&C and PEIC total approximately $175,000, App. 405, and that amount is included in the $6.1 million under "CIC as Home's cedent (Incl. ECRA)" on the setoff statement. App. 406.

While the amount of CIC's claimed reinsurer assignee setoff is not presently at issue, see App. 403 (¶ 2), it is noteworthy that CIC has asserted additional reinsurance claims of its affiliates as setoffs. When the issue was briefed to the Superior Court, the Liquidator estimated that the reinsurance claims of CIC's affiliates against Home being asserted as setoffs by CIC as assignee under the Reinsurance Agreement totaled approximately $3 million. App. 645-46.

SUMMARY OF ARGUMENT

Subject to certain exceptions, RSA 402-C:34 permits setoff of mutual debts or credits, meaning debts or credits "due to and from the same persons in the same capacity." Triangular setoffs – as where the claims of CIC's affiliates against Home are asserted as setoffs against CIC's obligations to Home – are not mutual and not permitted by the statute. Triangular affiliate setoff has been uniformly rejected by courts in insurer liquidations.

CIC contends the claims are mutual, and can be set off pursuant to RSA 402-C:34, because of an assignment of reinsurance recoverables to it by its affiliates in the Reinsurance Agreement, to which Home is not a party. In contending mutuality is present, however, CIC ignores the express language of a proviso to the assignment, which renders the assignment conditional, and not absolute. This "put back" provision in the Reinsurance Agreement makes the affiliates, and not CIC, liable for the amount of the reinsurance, leaving the beneficial interest in the provisionally assigned rights with the assignors. Under the proviso, uncollectible reinsurance is "return[ed]" to the affiliates at "face value." The Superior Court thus correctly held that the assignment is "not absolute" and that the affiliates are the real parties in interest. This in and of itself prevents mutuality. It is the affiliates' claims and interests that are at stake, and CIC acts as an assignee for collection for the benefit of its affiliates and not in its own individual capacity.

CIC's argument that the Superior Court erred in interpreting the assignment reads the Court's decision too narrowly. The decision did not turn upon whether the put back provision was mandatory or discretionary. The Superior Court held there was no mutuality "regardless" of the parties' dispute on this point, because it focused on the fact that it is the affiliates, not CIC, whose interests are at issue. CIC itself should be neutral over whether Home or ACE P&C and PEIC pay the reinsurance. If these companies were not affiliates of CIC, the reinsurance would

have been put back to them upon Home's insolvency, and this dispute would not have arisen. (In any event, as discussed below, the put back proviso is mandatory in providing that uncollectible reinsurance "shall" be returned to ACE P&C and PEIC. Thus, under the proviso, the claims now belong to the affiliates, and not CIC.)

Furthermore, even if there were mutuality (which the Liquidator disputes), CIC's assertion of the claims as setoffs is barred by RSA 402-C:34, II(b), which prohibits setoff of claims transferred "with a view" toward setoff. CIC's assertion of the claims reflects a decision today to have CIC, not ACE P&C or PEIC, assert the claims to enable CIC to make immediate use of them as asserted setoffs. In light of the proviso mandating return of uncollectible reinsurance at "face value" to ACE P&C and PEIC, this is a present transfer "with a view" toward setoff. CIC's focus on CIC's alleged discretion based upon the phrase "deemed by the Reinsurer to be uncollectible" is misplaced. CIC has already deemed the reinsurance to be uncollectible as shown by the affidavit of its President acknowledging that "Home will pay nothing now it is insolvent and CIC cannot recover any of those ceded liabilities where Home is the only reinsurer of those liabilities." Contrary to CIC's assertion, the plain meaning of "deemed" does not mean "affirmatively declared" but only "think" or "conclude." CIC's interpretation also distorts the intent of the "deemed" language. That phrase serves to ensure that the affiliates cannot avoid the charge back, not to permit CIC to decide not to return uncollectible reinsurance. The claims accordingly are "returned" to CIC's affiliates. Moreover, even if, as CIC claims, CIC has an "option" to return the claims, it is presently choosing not to do so and to keep, solely to avail itself of setoff, claims otherwise subject to mandatory return. Setoff should not be permitted under the statute in these circumstances as it would frustrate the purpose of protecting preferred creditors.

Finally, although the Superior Court did not address the issue, the record shows that the Referee was within her discretion in denying setoff, and this Court should sustain the Referee's decision. CIC's statutory arguments disregard the stated purpose and the history of the Act. RSA 402-C:34 is based on a Bankruptcy Act provision long ago held to be permissive, not mandatory, and the Act expressly provides that it is to be interpreted to protect preferred creditors. Setoff is thus discretionary and subject to equitable considerations. In the circumstances – where there is no well-established right to affiliate setoff by assignment and setoff harms creditors – setoff was properly denied.

ARGUMENT

Standard of Review

The Superior Court's interpretation of statutes such as RSA 402-C:34 is reviewed de novo. Blackthorne Group, Inc. v. Pines of Newmarket, Inc., 150 N.H. 804, 806 (2004). Similarly, the interpretation of contracts such as the Reinsurance Agreement is a question of law subject to de novo review. Czumack v. New Hampshire Div. of Developmental Services, 155 N.H. 368, 373 (2007). If the Court were to reach the issue, the Referee's denial of setoff as a matter of discretion is reviewed under the unsustainable exercise of discretion standard, under which the appellant must show that the ruling was unreasonable, and the Court decides whether the record establishes an objective basis sufficient to sustain the discretionary judgment made. See Poland v. Twomey, 937 A.2d 934, 937 (N.H. 2007); State v. Lambert, 147 N.H. 295, 296 (2001).

I. THE SUPERIOR COURT CORRECTLY HELD THAT CIC'S ASSERTED SETOFF OF THE CLAIMS OF ACE P&C AND PEIC AGAINST THE OBLIGATIONS OF CIC TO HOME FAILS FOR LACK OF MUTUALITY.

The Court should affirm the Superior Court's order holding that CIC cannot setoff the reinsurance claims of its affiliates against CIC's acknowledged obligations to Home because the mutuality required by RSA 402-C:34, I, is lacking. CIC is facially asserting the claims of separate companies, so there is no mutuality of capacity. The assertion of ACE P&C's and PEIC's claims as setoffs against CIC's obligations to Home presents a "triangular" setoff that has been uniformly rejected for lack of mutuality in insurer liquidation cases. The assignment of the claims from its affiliates to CIC does not create the mutuality that is otherwise lacking. The assignment is subject to the proviso making the affiliates responsible for the reinsurance if is not collectible, so the Superior Court correctly held that the assignment is not absolute and the

affiliates are the real parties in interest. In this situation, CIC is acting as agent or trustee for others, and not for itself.

A. CIC's Asserted Triangular Setoff Of Its Affiliates' Claims Against Its Obligations To Home Is Not Mutual.

As the Superior Court noted, the New Hampshire Act's setoff provision is "premised on mutuality." The setoff question in this case must thus be considered in light of longstanding mutuality principles and case law. It is well established that "triangular" setoffs (where one party – such as CIC – uses the claims of third parties – ACE P&C and PEIC – as setoffs against its own obligations to another – Home) are not permitted.

The Act expressly requires mutuality for setoffs by providing that:

> 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.

RSA 402-C:34, I (emphasis added). It has been long established in New Hampshire that "mutual" means "due to and from the same persons in the same capacity." Plante v. M. Shortell & Son, Inc., 92 N.H. 38, 40 (1942); Dole v. Chattabriga, 82 N.H. 396, 397 (1926).

This mutuality rule is also universally applied in insurer liquidation cases, including cases under statutes essentially identical to RSA 402-C:34, I. See, e.g., Prudential Reinsurance Co. v. Superior Court, 3 Cal. 4th 1118, 1127, 842 P.2d 48, 53 (1992) (under Cal. Ins. Law § 1031) ("debts must exist between the same persons or entities in order to establish mutuality of identities"); Matter of Liquidation of Midland Ins. Co., 79 N.Y.2d 253, 259, 590 N.E.2d 1186, 1189 (1992) (under N.Y. Ins. Law § 7427) (debts and credits are mutual "when they are due to and from the same person in the same capacity") (internal quotations omitted); In the Matter of the Liquidation of American Mut. Liab. Ins. Co., 434 Mass. 272, 292, 747 N.E.2d 1215, 1229-30

(2001) ("AMLICO") (at common law, obligations "must be mutual, that is, the same part[ies] in both claims") (internal quotations omitted).[4]

Applying this rule, the courts addressing "triangular" affiliate setoff in the insurer liquidation context have expressly rejected it. AMLICO, 434 Mass. at 292-94, 747 N.E.2d at 1230; Prudential, 3 Cal. 4th at 1137, 842 P.2d at 60; Quackenbush v. Imperial Cas. & Indemn. Co., 41 Cal. App. 4th 828, 836-37, 48 Cal. Rptr. 2d 209, 214 (1994) (under Cal. Ins. Code § 1031); Koken v. Reliance Ins. Co., 846 A.2d 778, 782 (Pa. Commw. 2004) (under 40 Pa. Stat. § 221.32). Accordingly, CIC's asserted setoff of the reinsurance claims of its affiliates against its obligations to Home fails for lack of mutuality unless the requisite mutuality is created by the assignment.

B. The Assignment Provision In The Reinsurance Agreement Between CIC And Its Affiliates Does Not Create Mutuality That Is Otherwise Absent.

CIC contends that mutuality exists because the claims of CIC's affiliates were assigned to it in the Reinsurance Agreement. The Superior Court, however, correctly held that the assignment is "not absolute and the real parties in interest are CIC's affiliates" and that "[u]nder these circumstances, mutuality is lacking." App. 669. The Superior Court's decision rests upon the CIC affiliates' retention of ultimate liability for their assigned claims as reflected in the proviso to the assignment. It is this interest that prevents the assignment from being absolute and makes CIC's affiliates the stakeholders and pertinent entities for mutuality purposes. In any event, CIC misconstrues the proviso, which when read using the plain meaning of the words used in their context, provides for the mandatory return of the claims here to CIC's affiliates.

[4] The rule also applied under § 68 of the Bankruptcy Act of 1898, as amended, the statute that was the ultimate source for insurer liquidation setoff provisions like RSA 402-C:34. See Prudential Reins. Co., 3 Cal. 4th at 1123-24, 842 P.2d at 50; Koken v. Legion Ins. Co., 900 A.2d 418, 422 n.12 (Pa. Commw. 2006) (noting the 14th edition of Collier on Bankruptcy is "the relevant treatise"), aff'd, 587 Pa. 301, 899 A.2d 351 (2006). "To be mutual, the debts or credits must be in the same right and between the same parties, standing in the same capacity." 4 Collier on Bankruptcy ¶ 68.04[2.1] at 867 (14th ed. 1978) (citing cases).

1. The assignment is not absolute, and CIC's affiliates are the real parties in interest in CIC's collection efforts.

The assignment provision of the Reinsurance Agreement contains the proviso:

> provided, however, that the Reinsurer shall return to the respective Reinsured Company for face value, any such assigned reinsurance recoverables that are deemed by the Reinsurer to be uncollectible together with the rights to any related collateral;

Reinsurance Agreement § 1 (emphasis added) (App. 71). "When interpreting a written agreement, [the courts] 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." Czumack, 155 N.H. at 373. See Greenhalgh v. Presstek, Inc., 152 N.H. 695, 698 (2005). The plain meaning and intent of the proviso is to condition the assignment on the collectibility of the reinsurance.

The language of Section 1 plainly expresses an intent to qualify the assignment. See Reinsurance Agreement § 1 (reinsurance recoverables are assigned; "provided, however . . . "). The proviso expressly requires ("shall return") the return of uncollectible reinsurance to CIC's affiliates. The evident purpose of this provision is to allocate the credit risk on the reinsurance to the Reinsured Companies. If the reinsurance is not collectible, then the amount of the reinsurance recoverable (its "face value") is returned to the Reinsured Company, which is then obligated to pay CIC that amount through the quarterly accounting and setoff mechanism provided in the Reinsurance Agreement §§ 6, 11 (App. 74, 75). This makes sense as the consideration paid by the affiliates for the reinsurance by CIC (the affiliates' "net carried

reserves," Reinsurance Agreement § 1, App. 71) reflected a deduction for the reserves ceded under the assigned reinsurance.[5]

The effect of the proviso is to make CIC's affiliates, and not CIC, the persons with a stake in recovery from Home on the affiliates' claims. The Superior Court was thus correct in concluding that the assignment was "not absolute." An "absolute assignment" is "[a]n assignment that leaves the assignee no interest in the assigned property or right." Black's Law Dictionary 128 (8th ed. 2004). If the assignment were absolute, the assignee CIC would have taken the assigned claim for what it is worth, regardless of collectibility. See Restatement (Second) of Contracts § 333(2) (1981) ("An assignment does not of itself operate as a warranty that the obligor is solvent or that he will perform his obligation."). Under the Reinsurance Agreement, however, CIC has not taken the reinsurance claims absolutely, it has taken them only if they are collectible. If not, they are returned" to its affiliates for "face value." The affiliates thus remain liable. CIC's assertion that "unless and until CIC deems the reinsurance uncollectible, the assignment is absolute" (CIC Br. 12) makes the point. An assignment that is effective "unless" or "until" an event occurs is conditional or qualified, not absolute.

The Superior Court properly held that CIC's affiliates are the stakeholders in CIC's assertion of the claims. CIC itself is neutral, in light of the proviso, because it will collect either from Home or from its affiliates. In asserting the affiliates' claims, then, CIC is not asserting its own interests but those of the affiliates. Such a triangular setoff is not mutual.

[5] The parties disagree over whether the proviso is mandatory or discretionary, but the Superior Court did not view this dispute (which is addressed at pages 18-19 and 23-24 below) as material. See App. 669 (finding no mutuality "[r]egardless of the parties' competing characterizations of the subject assignment").

2. There is no mutuality where CIC acts as an agent for collection.

Where the affiliates are liable for the recoverables if they are uncollectible and CIC will be paid either way, it does not matter whether the claims have been somehow formally "returned" to CIC's affiliates or not. It is the affiliates whose claims and economic interests are at stake in CIC's collection efforts. CIC is thus an assignee for purposes of collection, and it accordingly acts in a capacity as trustee or agent for its affiliates, not in its individual capacity.

It is well established that claims asserted in a trustee or agency capacity cannot be setoff against obligations owed in an individual capacity. See Dole, 82 N.H. at 398 (claims against defendants asserted by savings department of bank as trustee for benefit of depositors are not mutual with defendants' claims against bank); Prudential, 3 Cal. 4th at 1127, 842 P.2d at 53 ("setoff can occur only between persons or entities of equal capacity; debts owed in a fiduciary, agency, trustee, or partnership capacity are not subject to setoff"); Midland, 79 N.Y.2d at 264, 590 N.E.2d at 1192 ("'Capacity' means legal capacity (e.g., principal, agent, trustee, beneficiary)."). In this case, CIC is asserting the assigned reinsurance claims as an assignee for collection – an assignee that collects the amounts for the benefit of others, here the affiliates.

In these circumstances, there is no mutuality of capacity, and setoff should be denied. "[T]o allow a . . . debtor [CIC] to set off a claim assigned to him for collection would be violative of the rule requiring mutuality of parties." Harrison v. Adams, 20 Cal. 2d 646, 650, 128 P.2d 9, 12 (1942) ("Such an assignee has been referred to as the trustee or agent of the assignor."). Accord, Norman v. Berney, 235 Cal. App. 2d. 424, 434, 45 Cal. Rptr. 467, 474 (1965) ("Since mutuality is essential, the debtor must be the beneficial owner of the claim . . . which he seeks to set off and not merely a trustee on behalf of an assignor who has retained the

equitable interest in the thing assigned."). See 80 C.J.S. Set-off and Counterclaim, § 97 (2000) ("A claim incompletely assigned is not available as a setoff.").

3. Denial of the asserted setoff furthers the purposes of the Act.

Application of the mutuality requirement to exclude conditionally assigned claims is appropriate. As the Superior Court noted, the mutuality requirement must be "strictly construed" in light of the purpose of the Act to protect preferred creditors. App. 669. The Referee similarly concluded that "an expansive construction" of the mutuality requirement would have "adverse implication" for the preferred creditors." App. 457. This Court recently held that the purpose of the Act is "to protect preferred creditors by reserving assets for them" and that the statute should be liberally construed "to effectuate this purpose." Liquidation of Home, 154 N.H. at 488, citing RSA 402-C:1, III and IV. The Court further noted "the legislative purpose of obtaining full payment from reinsurers despite an insurer's insolvency." Id., citing RSA 402-C:36 and RSA 405:49, I. These legislative purposes would be frustrated if the setoff provision were applied as CIC advocates, because enlarging setoff rights necessarily disadvantages preferred creditors by depriving the estate of reinsurance assets for distribution. See Koken v. Legion, 900 A.2d at 427 ("[T]he mutuality requirements of setoff must be strictly construed because setoff is an exception to the principle that no creditor receive preferential treatment.").[6]

4. The Court need not reach CIC's argument that the proviso is discretionary, not mandatory, in considering mutuality.

The Court need not decide the parties' dispute over whether the proviso requires return of the claims to the affiliates because of Home's insolvency. It is sufficient to hold, as the Superior

[6] CIC's suggestion (CIC Br. 11) that the Superior Court's denial of setoff "extinguished" Home's reinsurance liability "since it rejected the Assigned Reinsurance Claim and the filing deadline for Cedent's claims against Home's estate has long since past" is erroneous. The issue before the Superior Court was setoff, not the merits of the claim. ACE P&C and PEIC have filed proofs of claim, and even if they had not, they could file late proofs of claim under RSA 402-C:37, II or III. Home's liability would then not be extinguished. The problem, from the ACE group's perspective, is not Home's liability but the fact that the reinsurance claims fall in priority class V under RSA 402-C:44. No distribution is expected to that class.

Court did, that there is no mutuality because the affiliates have the residual liability for their claims and thus the relevant interest. App. 669. The Superior Court thus properly did not address CIC's argument that CIC holds the claims because the proviso gave it discretion over whether to return them. If this Court were to reach the issue in addressing mutuality, however, the Court should reject CIC's position. As set forth in greater detail at pages 23-24 below, CIC misconstrues the proviso by ignoring both its purpose and the reasonable meaning of its words.

CIC contends that it has discretion based on the word "deemed" to retain claims until it "affirmatively declares that they cannot be collected." CIC Br. 4. This disregards the plain meaning of the proviso. The word "deemed" does not mean "affirmatively declared," and CIC provides no authority for that proposition. Further, the evident purpose of the "deemed" language was to ensure that CIC can put back the claims to its affiliates by avoiding any argument by them that CIC had not made sufficient efforts to collect. In context, the reasonable meaning of the language chosen by the parties to the Reinsurance Agreement does not give CIC discretion to retain uncollectible claims. See Czumak, 155 N.H. at 373. Here, the reinsurance claims are "uncollectible" because Home's insolvency and liquidation prevent payment. Contrary to CIC's assertion that the record is "devoid" of evidence that CIC deemed the reinsurance uncollectible, CIC Br. 11, CIC has plainly "deemed" the claims uncollectible by acknowledging they cannot be recovered from Home in the affidavit of its own President. App. 244 (¶ 6) ("Home will pay nothing now that it is insolvent and CIC cannot recover any of those ceded liabilities where Home is the only reinsurer of those liabilities.").

II. EVEN IF THERE WERE MUTUALITY, SETOFF SHOULD BE DENIED.

Even if the assignment created mutuality (which the Liquidator disputes), the Court should affirm the Superior Court and Referee either because the setoff is prohibited by RSA 402-C:34, II(b) or because the Referee properly exercised her discretion to deny setoff. CIC has acknowledged that the reinsurance claims are not recoverable, and under the plain language of the proviso they are accordingly "returned" to CIC's affiliates ACE P&C and PEIC "for face value." Thus, CIC's assertion of the claims reflects a present transfer "with a view" to setoff that is prohibited by RSA 402-C:34, II(b). Even if, as CIC contends, the return of the claims to its affiliates is an "option" that rests in CIC's discretion, then the ACE group is choosing today to have CIC assert the claims in order to obtain the benefit of immediate setoff for the group as a whole. Such a setoff is barred by RSA 402-C:34, II(b). Finally, the setoff provision of the Act is permissive, not mandatory, and the Referee sustainably exercised her discretion to disallow setoff. The setoff asserted by CIC is triangular, not well established but contrary to insurer liquidation cases elsewhere, and would frustrate both the stated purpose of the Act and equitable principles that protect the creditors of insolvent insurers.

A. RSA 402-C:34, II(b), Bars CIC From Using The Affiliates' Reinsurance Claims As Setoffs Because They Are Being Transferred To CIC With A View To Setoff.

The Superior Court denied CIC's affiliate setoffs for lack of mutuality, and so it did not need to reach the exception to setoff of RSA 402-C:34, II(b). Even if there were mutuality, however, CIC's setoffs are barred by that statute. By asserting the claims, and not returning them to its affiliates as uncollectible as recognized by its President, CIC or the ACE group is making a decision today (in 2007 and 2008) as to what entity can most beneficially (for the ACE group as a whole) assert the claims. This present decision is contrary to RSA 402-C:34, II(b), which prohibits setoff of claims transferred "with a view" toward setoff.

The statute provides an exception to setoff where the insolvent insurer's obligation is transferred to the claimant to be used as a setoff:

> 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; . . .

RSA 402-C:34, II(b). The Legislature unmistakably barred all setoffs ("No setoff shall be allowed") of the prohibited character. Moreover, it used broad, inclusive language ("purchased by or transferred to") to describe the types of transactions that lead to the prohibited setoffs. The Act defines "transfer" in the widest sense possible by providing that the term:

> includes the sale and every other method, direct or indirect, of disposing of or parting with property or with an interest therein or with possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings. The retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by the debtor.

RSA 402-C:3, XVII (emphasis added).

The evident purpose of the exception of RSA 402-C:34, II(b), is to prevent debtors of insolvents from obtaining setoffs to reduce their obligations to the detriment of the creditors of the estate. This point is confirmed by cases concerning § 68 of the Bankruptcy Act of 1898, as amended, which was the source of insurer liquidation setoff provisions such as RSA 402-C:34.[7] As stated by Collier:

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[7] See page 14 note 4, above. Section 68, former 11 U.S.C. § 108 (1976), provided in pertinent part:

a. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.
b. A setoff or counterclaim shall not be allowed in favor of any debtor of the bankrupt which . . . (2) was purchased by or transferred to him after the filing of the petition or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy.

Where a New Hampshire provision is based upon one in the federal Bankruptcy Act, the Court may look to federal decisions construing the Bankruptcy Act provision. The Court has recognized that where New Hampshire enacts a statute modeled on another statute, the Court may properly look to cases construing the source statute. See Benson v. New Hampshire Ins. Guar. Ass'n, 151 N.H. 590, 595 (2004); Sagendorph v. Marvin, 101 N.H. 79, 81-82 (1957); Mann v. Carter, 74 N.H. 345, 347 (1907).

> The principal object of clause (2) of § 68(b) [the provision analogous to RSA 402-C:34, II(b)] is to prevent debtors of the bankrupt from acquiring claims against him for use by way of set-off and reduction of their indebtedness to the estate. This is necessary in order to insure that the doctrine of set-off will not be a cloak for abuses whereby the assets of the bankrupt estate are diminished.

4 Collier on Bankruptcy ¶ 68.12 at 903-904 (14th ed. 1978). See Continental & Comm. Trust & Sav. Bank v. Chicago Title & Trust Co., 229 U.S. 435, 444 (1913) ("It is the main purpose of this statute, as its terms show, to prevent debtors of the bankruptcy from acquiring claims against the bankruptcy for use by way of set-off and reduction of their indebtedness to the estate.").

Where, as here, the facts reveal that a debtor company is conducting its affairs so as to obtain a setoff against an insolvent, the claims have been transferred "with a view" toward using them as setoffs, and the setoff must be denied. See Tucson House Const. Co. v. Fulford, 378 F.2d 734, 737-38 (9th Cir. 1967). New Hampshire cases are in accord, as they hold that equity requires denying setoff where claims are assigned to create setoffs. See Plante, 92 N.H. at 41 ("[A] partial assignment will not be given effect in equity when, as here, the sole purpose of the party claiming it is to defeat a defence [sic] which the debtor, and through him the plaintiff, had against a claim of set-off."); Wolf Klein & Sons, Inc. v. Bronstein, 91 N.H. 42, 43 (1940) (denying setoff where defendant took an assignment of a claim from his brother "to embarrass the plaintiff in the collection of an undisputed claim").

CIC's reliance on the date of the 1995 Reinsurance Agreement simply ignores the salient fact that the agreement did not unconditionally assign the affiliates' reinsurance claims to CIC. It subjected them to the proviso that the claims are to be returned to the affiliates if they are uncollectible. Reinsurance Agreement § 1 (App. 71). In light of the proviso, CIC's assertion of the claims as a setoff today represents a present transfer "with a view" toward setoff within the exception of RSA 402-C:34, II(b).

1. Under the mandatory language of the proviso, the reinsurance claims are returned to CIC's affiliates so CIC's assertion of the claims as a setoff falls within RSA 402-C:34, II(b).

Properly construed, the proviso mandates return of the claims of CIC's affiliates to the affiliates when the claims are uncollectible. Since CIC has acknowledged uncollectibility, the claims properly belong to ACE P&C and PEIC. Accordingly, CIC's present assertion of the claims as setoffs constitutes a transfer of the claims from the affiliates "with a view" to setoff.

As an initial matter, the reinsurance claims are "uncollectible" because Home will not pay them due to its insolvency. The plain meaning of the word "uncollectible" is an inability to make the obligor pay the amount of a claim. See Webster's New Universal Unabridged Dictionary 355 (2d ed. 1983) ("collect" definition 4: "to receive or compel payment of, as debts"); Black's Law Dictionary 280 ("collectability" is "[t]he ability of a judgment creditor to make a judgment debtor pay the amount of the judgment; the degree to which a judgment can be satisfied through collection efforts against the defendant."). Home's insolvency and liquidation prevent payment, as reinsurance claims have Class V priority under RSA 402-C:44 and are not expected to be paid. See Liquidation of Home, 154 N.H. at 477. CIC itself has acknowledged this. In its papers and its President's affidavit, CIC stated that "Home will pay nothing now that it is insolvent and CIC cannot recover any of those ceded liabilities where Home is the only reinsurer of those liabilities." App. 154 (¶ 21), quoting the Affidavit of Christopher J. Eskeland (CIC's President) (emphasis added), App. 244 (¶ 6).

The proviso states that CIC "shall return" for "face value" claims that are "deemed" by it to be uncollectible. CIC's principal contention is that it has discretion based on the word "deemed" to retain such uncollectible claims until it "affirmatively declares that they cannot be collected." CIC Br. 4. This is wrong because "deemed" does not mean "affirmatively declared."

See Webster's New Universal Unabridged Dictionary 474 ("deem" definition 1 "to think; to judge; to hold in opinion; to conclude on consideration"); Black's Law Dictionary 446 ("deem" definition 2: "[t]o consider, think, or judge"). CIC has so "deemed" the claims uncollectible by stating that they cannot be recovered from Home in the affidavit of its President. App. 244 (¶ 6).

Moreover, the discretion CIC finds in the word "deems" does not reasonably mean that CIC can keep uncollectible claims for setoff purposes. In the context of the proviso, "deemed" was intended to serve a wholly different purpose: to make clear that CIC may dictate return of the claims. It prevents the affiliates from refusing to take back a claim based on assertions that the CIC has made insufficient efforts at collection. CIC distorts the plain meaning of the proviso when it strives to use it as basis for retaining uncollectible claims instead of returning them to the affiliates as the proviso contemplates. CIC's assertion of the claims thus represents a present transfer from the affiliates to CIC. The claims, which under the proviso properly reside with ACE P&C and PEIC, are being transferred to CIC "with a view" to being used as a setoff. This choice to have CIC assume the uncollectible claims to obtain setoff rights and reduce estate assets is precisely the conduct subject to the exception in RSA 402-C:34, II(b).

2. Even under CIC's view of the proviso, CIC's retaining of uncollectible reinsurance claims it is entitled to return to its affiliates is within the statutory exception to setoff.

CIC contends that under the proviso it has an "option" to put back the claims to its affiliates that it is choosing not to exercise. See CIC Br. 4. Even if this were a correct reading of the Reinsurance Agreement (which the Liquidator disputes), the statutory exception applies. CIC has no obligation to pay the amount of the claims to its affiliates and pursue Home. It is choosing to do so to obtain setoffs and advantage its affiliates. The word "transfer" is broad; indeed, the definition in RSA 402-C:3, XVII specifies only that it "includes . . . every other

method, direct or indirect, of disposing of or of parting with" an interest in property (emphasis added). The exception should be read in light of the substance of what is occurring to encompass the circumstances here, in furtherance of the purpose of the Act "to protect preferred creditors by reserving assets for them" and the liberal construction the Legislature intended. Liquidation of Home, 154 N.H. at 488; RSA 402-C:1, III, IV. See Handley v. Town of Hooksett, 147 N.H. 184, 188 (2001) (courts "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result"). Since CIC will be whole either way, the decision to have it retain the claims is being made on behalf of others – the affiliates – and constitutes an indirect method by which they part with their reinsurance claims. "[T]here is no good explanation" for CIC's retention and assertion of the reinsurance claims against Home "except the design to get the benefit of a set-off." Tucson, 378 F.2d at 737, quoting McLaughlin, Amendment of the Bankruptcy Act, 40 Harv. L. Rev. 583, 603 (1927).

B. The Referee Properly Exercised Her Discretion To Deny Setoff.

The Superior Court expressly "assume[d], without deciding," that RSA 402-C:34 permits no discretion, and did not reach the issue. App. 669. However, the Referee appears to have considered equitable principles in denying setoff, App. 457-58, and the denial of setoff also may be affirmed on that ground.

RSA 402-C:34 contains no language requiring setoff of assigned claims, and CIC's attempt to infer such a conclusion from its structure disregards the stated purpose and history of the New Hampshire Act. The Court should look to the Act as a whole, its history and its purpose in order to apply it "in light of the legislature's intent in enacting [it], and in light of the policy sought to be advanced by the entire statutory scheme." Cloutier v. City of Berlin, 154 N.H. 13,

17 (2006). Where, as here, a statute is based on similar statutes elsewhere, the courts will look to cases construing those statutes. See page 21 note 7, above.

RSA 402-C:34, I is permissive only. As was long ago held regarding § 68 of the Bankruptcy Act, on which RSA 402-C:34 was based:

> The provision is permissive rather than mandatory, and does not enlarge the doctrine of set-off, and cannot be invoked in cases where the general principles of set-off would not justify it. The matter is placed within the control of the bankruptcy court, which exercises its discretion in these cases upon the general principles of equity.

Cumberland Glass Mfg. Co. v. deWitt & Co., 237 U.S. 447, 455 (1915) (citations omitted). See Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 n.2 (1974) (in Cumberland Glass, "the Court construed § 68 as 'permissive rather than mandatory'"). The point is echoed by Collier: "Despite the seemingly mandatory language of § 68a, it has been stated frequently that the privilege of setoff under § 68a is permissive, not mandatory; and that its application, when invoked, before a court, rests in the discretion of that court, which exercises such discretion under the general principles of equity." 4 Collier on Bankruptcy ¶ 68.02[1] at 851.[8]

The Referee's decision should be sustained as properly within her discretion based on three factors. First, the asserted setoffs here are effectively triangular setoffs of the type that have been universally rejected in the insurer liquidation context. See AMLICO, 434 Mass. at 292-94, 747 N.E.2d at 1229-30 (at common law); Prudential, 3 Cal. 4th at 1137, 842 P.2d at 60 (1992) (under Cal. Ins. Law § 1031); Quackenbush, 41 Cal. App. 4th at 836-37, 48 Cal. Rptr. 2d at 214 (1994) (same); Koken v. Reliance, 846 A.2d at 782 (under 40 Pa. Stat. § 221.32). CIC should not be allowed to render otherwise impermissible setoffs permissible by contract. See

[8] The courts have made similar points about the setoff provision of the Bankruptcy Code, 11 U.S.C. § 553. Discretion under the statute "runs one way only" because "[e]very setoff is a preference among creditors." Boston & Maine Corp. v. Chicago Pac. Corp., 785 F.2d 562, 566 (7th Cir. 1986). See In re Public Serv. Co. of N.H., 884 F.2d 11, 13, 16 (1st Cir. 1989). Setoff is not automatic, but "may be denied to do equity, prevent injustice, and achieve the goals of procedural fairness." Adams v. Zimmerman, 73 F.3d 1164, 1173 n.10 (1st Cir. 1996) (internal quotations omitted).

AMLICO, 434 Mass. at 293-94, 747 N.E.2d at 1230-31 (pooling agreement among affiliates does not create mutuality). "[S]uch an unwarranted expansion of the setoff doctrine would permit an exponential increase in the amount subsidiaries could set off to the detriment of liquidation estates." Prudential, 3 Cal. 4th at 1137, 842 P.2d at 60. See AMLICO, 434 Mass. at 293 n.23, 747 N.E.2d at 1230 n.23; Quackenbush, 41 Cal. App. 4th at 837, 48 Cal. Rptr. 2d at 214.[9] The Referee read Prudential and AMLICO as supporting denial of setoff. App. 458.

Second, as both the Superior Court and the Referee recognized, the setoff advocated by CIC would harm the interests of the creditors of Home by depriving the estate of reinsurance recoverables contrary to the purpose of the Act. App. 457, 458, 669. Both the purpose of the Act "to protect preferred creditors by reserving assets for them," Liquidation of Home, 154 N.H. at 488 (citing RSA 402-C:1, III and IV), and "the legislative purpose of obtaining full payment from reinsurers despite an insurer's insolvency," id. (citing RSA 402-C:36 and RSA 405:49, I), support a discretionary denial of setoff to avoid prejudice to preferred creditors by depriving the estate of reinsurance assets for distribution. The Referee expressly considered the interests of preferred creditors. App. 457, 458.

Third, such a discretionary denial is consistent with equitable setoff principles. The Court long ago recognized that the interests of other creditors need to be considered in determining how far to allow setoffs against insolvent entities. Petition of Leon Keyser, Inc., 98 N.H. 198, 201 (1953). The Court there stated that "[t]he right to set-off where there are mutual debts both of which are due on the determinative date is of long standing and well recognized,"

[9] Just like the reinsurers in AMLICO, Prudential, and Quackenbush, CIC effectively seeks to disregard the separate corporate existences of affiliated companies. However, despite many mergers and acquisitions (see App. 63-64 (¶¶ 12-15), 67), ACE P&C and PEIC have continued their separate corporate existences and chosen to structure their relationship with CIC through reinsurance, not merger. See App. 61-62 (¶¶ 2-4). This is controlling. "Corporations may not 'assume the benefits of the corporate form and then disavow that form when it is to their and the[ir] stockholders' advantage.'" AMLICO, 434 Mass. at 293, 747 N.E.2d at 1230 (citations omitted). Accord, Koken v. Reliance, 846 A.2d at 782 (two affiliated companies "organized at law as independent business entities . . . cannot now be allowed to come in, and for purposes that are profitable to them, say they are in fact one company").

but it rejected a setoff which was not "so recognized or understood," stating that "[t]he power of the court in the appointment of a receiver is exercised principally 'for the benefit of creditors.'" Id., quoting Munsey v. G.H. Tilton & Son Co., 91 N.H. 51, 53 (1940).

As shown by the insurer insolvency cases cited above, affiliate setoff as advocated by CIC is not a well recognized right of setoff and would harm the preferred creditors by depriving them of assets. Further, there is no "long standing and well established" right to use assigned claims to create setoffs against insolvent entities and diminish their assets. Before the Referee and Superior Court, CIC cited only to two Bankruptcy Code (not Act) decisions in support of its position: In re Assured Fastener Prods. Corp., 773 F.2d 105 (7th Cir. 1985), and In re U.S. Aeroteam, 327 B.R. 852 (Bankr. S.D. Ohio 2005). App. 160, 458, 465 n.2. Even under the Code, "some courts have taken a dim view of setoff rights arising against an insolvent debtor through the voluntary assignment of a claim." 5 Collier on Bankruptcy ¶ 553.03[3][h] (15th ed. 2006), citing Modern Settings, Inc. v. Prudential-Bache Sec., Inc., 936 F.2d 640, 648 (2d Cir. 1991). Courts in other settings have also declined to find mutuality based on assignment where it would allow setoff to the detriment of creditors of an insolvent estate. See U.S. Fidelity & Guar. Co. v. Wooldridge, 268 U.S. 234, 238 (1925) (denying setoff of a subrogated/assigned claim: "The doctrine of relation is a legal fiction invented to promote the ends of justice. . . . It is never allowed to defeat the collateral rights of third persons, lawfully acquired.") (internal quotations omitted). The Eighth Circuit has found that mutuality was lacking for assigned claims under the Ohio analogue of RSA 402-C:34: "No mutuality exists between the assigned unearned premiums held by Premium and the note owing to Manchester." Manchester Premium Budget Corp. v. Manchester Ins. & Indemn. Co., 612 F.2d 389, 391-92 (8th Cir. 1980) (under

Ohio Rev. Code Ann. § 3903.19; noting "the inequity of allowing a set-off in this situation"). The Referee properly exercised her discretion and denied setoff.

CONCLUSION

For the reasons stated, the Court should affirm the order of the Superior Court sustaining the Referee's Ruling denying setoff of the reinsurance claims of CIC's affiliates against CIC's obligations to Home.

REQUEST FOR ORAL ARGUMENT

The Liquidator requests oral argument before the full court of 15 minutes to be presented by J. Christopher Marshall.

Respectfully submitted,

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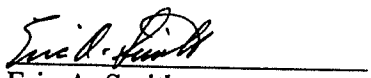
February 4, 2008

Certificate of Service

I, Eric A. Smith, hereby certify that two copies of the foregoing brief have been forwarded to counsel of record in this appeal by overnight mail on February 4, 2008.



Eric A. Smith

Statutory Addendum

402-C:1 Title, Construction and Purpose.

I. Short Title. This chapter may be cited as the "Insurers Rehabilitation and Liquidation Act."

II. Construction: No Limitation of Powers. This chapter shall not be interpreted to limit the powers granted the commissioner by other provisions of the law.

III. Liberal Construction. This chapter shall be liberally construed to effect the purpose stated in paragraph IV.

IV. Purpose. The purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally, with minimum interference with the normal prerogatives of proprietors, through:

(a) Early detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures, neither unduly harsh nor subject to the kind of publicity that would needlessly damage or destroy the insurer;

(b) Improved methods for rehabilitating insurers, by enlisting the advice and management expertise of the insurance industry;

(c) Enhanced efficiency and economy of liquidation, through clarification and specification of the law, to minimize legal uncertainty and litigation;

(d) Equitable apportionment of any unavoidable loss;

(e) Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process, and by extension of the scope of personal jurisdiction over debtors of the insurer outside this state; and

(f) Regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business.

History

Source. 1969, 272:1, eff. June 23, 1969.

402–C:3 Definitions. For the purposes of this chapter:

I. "Commissioner" means the commissioner of insurance or equivalent insurance supervisory official.

II. "Receiver" means receiver, liquidator, rehabilitator or conservator, as the context requires.

III. "Insurer" means any person who is doing, has done, purports to do or is licensed to do an insurance business and is or has been subject to the authority of, or to liquidation, rehabilitation, reorganization or conservation by, a commissioner. For purposes of this chapter, all other persons included under this section shall be deemed to be insurers.

IV. "Delinquency proceeding" means any proceeding commenced against an insurer for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer, and any summary proceeding under RSA 402–C:11–14.

V. "State" means any state of the United States and the Panama Canal Zone.

VI. "Foreign country" means territory not in any state.

VII. "Domiciliary state" means the state in which an insurer is incorporated or organized or, in the case of an alien insurer, the state in which the insurer has, at the commencement of delinquency proceedings, the largest amount of its assets held in trust and on deposit for the benefit of policyholders and creditors in the United States.

VIII. "Ancillary state" means any state other than a domiciliary state.

IX. "Reciprocal state" means any state other than this state in which in substance and effect RSA 402–C:21, I, RSA 402–C:54, I and II and RSA 402–C:55, 57, and 60 are in force, and in which provisions are in force requiring that the commissioner be the receiver of a delinquent insurer, and in which some provision exists for the avoidance of fraudulent conveyances and preferential transfers.

X. "General assets" means all property, real, personal or otherwise, not specifically mortgaged, pledged, deposited or otherwise encumbered for the security or benefit of specified persons or limited classes of persons, and as to specifically encumbered property the term includes all such property or its proceeds in excess of the amount necessary to discharge the sums secured thereby. Assets held in trust and on deposit for the security or benefit of all policyholders or all policyholders and creditors, in more than a single state, shall be treated as general assets.

XI. "Preferred claim" means any claim with respect to which the law accords priority of payment from the general assets of the insurer.

XII. "Special deposit claim" means any claim secured by a deposit made pursuant to law for the security or benefit of one or more limited classes of persons, but not including any claim secured by general assets.

XIII. "Secured claim" means any claim secured by mortgage, trust deed, pledge, deposit as security, escrow or otherwise, but not including special deposit claims or claims against general assets. The term also includes claims which have become liens upon specific assets by reason of judicial process, except where they have been invalidated.

XIV. "Insolvency" means:

(a) For an insurer organized as a town or county mutual, the inability to pay any loss within 30 days after the due date specified in the first assessment notice issued after the date of the loss, or any other uncontested debt as it becomes due.

(b) For any other insurer, that it is unable to pay its debts or meet its obligations as they mature or that its assets do not exceed its liabilities plus the greater of (1) any capital and surplus required by law to be constantly maintained, or (2) its authorized and issued capital stock. For purposes of this subparagraph, "assets" includes ½ of the maximum total assessment liability of the policyholders of the insurer, and "liabilities" includes reserves required by law. For policies issued on the basis of unlimited assessment liability, the maximum total liability, for purposes of determining solvency only, shall be deemed to be that amount that could be obtained if there were 100 percent collection of an assessment at the rate of 10 mills.

XV. "Fair consideration" is given for property or an obligation:

(a) When in exchange for such property or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or services are rendered or obligation is incurred or an antecedent debt is satisfied; or

(b) When such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared to the value of the property or obligation obtained.

XVI. "Creditor" is a person having any claim, whether matured or unmatured, liquidated or unliquidated, secured or unsecured, absolute, fixed or contingent.

XVII. "Transfer" includes the sale and every other method, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings. The retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by the debtor.

XVIII. "Doing business" has the meaning designated in RSA 406–B:2.

XIX. "Association" means either the New Hampshire insurance guaranty association created under RSA 404–B:6 or the New Hampshire life and health insurance guaranty association created under RSA 404–D:6.

History

Source. 1969, 272:1. 1975, 348:10, eff. Aug. 6, 1975.

Amendments—1975. Paragraph XIX: Added.

Revision note. Substituted "(1)" for "1.)" and "(2)" for "2.)" in the first sentence of par. XIV(b) to conform to style of New Hampshire Revised Statutes Annotated.

402-C:34 Setoffs.

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 for 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;

(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; or

(d) [Repealed.]

History

Source. 1969, 272:1. 2003, 218:1, 2, 4, eff. Aug. 30, 2003.

Amendments—2003. Deleted "and Counterclaims" following "Setoffs" in the catchline.

Paragraph II: Deleted "or counterclaim" following "setoff" in the introductory clause.

Paragraph II(d): Repealed.

402-C:36 Liability of Insurer. The amount recoverable by the liquidator from a reinsurer shall not be reduced as a result of delinquency proceedings regardless of whether the reinsurance contract provides, in substance, that in the event of the insolvency of the ceding insurer, the reinsurance shall be payable by the assuming insurer on the basis of the claims allowed against the ceding insurer in the insolvency proceedings, under contract or contracts reinsured without diminution because of the insolvency of the ceding insurer. Such payments shall be made directly to the ceding insurer or to its domiciliary liquidator or receiver except:

I. Where the contract specifically provides another payee of such reinsurance in the event of the insolvency of the ceding insurer; or

II. Where the assuming insurer with the consent of the direct insured or insured has assumed such policy obligations of the ceding insurer as direct obligations of the assuming insurer to the payees under such policies and in substitution for the obligations of the ceding insurer to such payees.

History

Source. 1969, 272:1. 2003, 218:3. 2005, 248:4, eff. Sept. 12, 2005.

Amendments—2005. Substituted "regardless of whether" for "unless" in the first sentence, and inserted ". Such payments shall be made" following "insolvency of the ceding insurer" thereby creating a second sentence in the introductory paragraph.

—2003. Amended section generally.

402–C:37 Filing of Claims.

I. Deadline for Filing. Proof of all claims must be filed with the liquidator in the form required by RSA 402–C:38 on or before the last day for filing specified in the notice required under RSA 402–C:26, except that proof of preferred ownership claims and proprietary claims under RSA 402–C:44 need not be filed at all, and proof of claims for cash surrender values or other investment values in life insurance and annuities need not be filed unless the liquidator expressly so requires.

II. Excused Late Filings. For a good cause shown, the liquidator shall recommend and the court shall permit a claimant making a late filing to share in dividends, whether past or future, as if he were not late, to the extent that any such payment will not prejudice the orderly administration of the liquidation. Good cause includes but is not limited to the following:

(a) That existence of a claim was not known to the claimant and that he filed within 30 days after he learned of it;

(b) That a claim for cash surrender values or other investment values in life insurance or annuities which was not required to be filed was omitted from the liquidator's recommendations to the court under RSA 402–C:45, and that it was filed within 30 days after the claimant learned of the omission;

(c) That a transfer to creditor was avoided under RSA 402–C:30–32 or was voluntarily surrendered under RSA 402–C:33, and that the filing satisfies the conditions of RSA 402–C:33;

(d) That valuation under RSA 402–C:43 of security held by a secured creditor shows a deficiency, which is filed within 30 days after the valuation; and

(e) That a claim was contingent and became absolute, and was filed within 30 days after it became absolute.

III. Unexcused Late Filings. The liquidator may consider any claim filed late which is not covered by paragraph II, and permit it to receive dividends, other than the first dividend, which are subsequently declared on any claims of the same or lower priority if the payment does not prejudice the orderly administration of the liquidation. The late-filing claimant shall receive, at each distribution, the same percentage of the amount allowed on his claim as is then being paid to other claimants of the same priority plus the same percentage of the amount allowed on his claim as is then being paid to claimants of any lower priority. This shall continue until his claim has been paid in full.

History

Source. 1969, 272:1. 1975, 348:12, 13, eff. Aug. 6, 1975.

Amendments—1975. Paragraph I: Substituted "the liquidator" for "the court".

Paragraph II(b): Deleted "unearned premiums or for" following "claim for".

402–C:44 Order of Distribution. The order of distribution of claims from the insurer's estate shall be as stated in this section. The first $50 of the amount allowed on each claim in the classes under paragraphs II, V, and VI except claims of the guaranty associations as defined in RSA 404–B, 404–H, 404–D, and 408–B shall be deducted from the claim. Claims may not be cumulated by assignment to avoid application of the $50 deductible provision. Subject to the $50 deductible provision, every claim in each class shall be paid in full or adequate funds retained for the payment before the members of the next class receive any payment. No subclasses shall be established within any class.

I. Administration Costs. The costs and expenses of administration, including but not limited to the following: the actual and necessary costs of preserving or recovering the assets of the insurer; compensation for all services rendered in the liquidation; any necessary filing fees; the fees and mileage payable to witnesses; and reasonable attorney's fees.

II. Policy Related Claims. All claims by policyholders, including claims for unearned premiums in excess of $50, beneficiaries, and insureds arising from and within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company, and liability claims against insureds which claims are within the coverage of and not in excess of the applicable limits of insurance policies and insurance contracts issued by the company and claims of the New Hampshire Insurance Guaranty Association, the New Hampshire Life and Health Insurance Guaranty Association and any similar organization in another state. All claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds or investment values, shall be treated as loss claims. That portion of any loss for which indemnification is provided by other benefits or advantages recovered or recoverable by the claimant shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligations of support or by way of succession at death or as proceeds of life insurance, or as gratuities. No payment made by an employer to an employee shall be treated as a gratuity.

III. Claims of the Federal Government.

IV. Wages.

(a) Debts due to employees for services performed, not to exceed $1,000 to each employee which have been earned within one year before the filing of the petition for liquidation. Officers shall not be entitled to the benefit of this priority.

(b) Such priority shall be in lieu of any other similar priority authorized by law as to wages or compensation of employees.

V. Residual Classification. All other claims including claims of any state or local government, not falling within other classes under this section. Claims, including those of any non-federal governmental body, for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction or proceeding out of which the penalty or forfeiture arose with reasonable and actual costs occasioned thereby. The remainder of such claims shall be postponed to the class of claims under paragraph VIII.

VI. Judgments. Claims based solely on judgments. If a claimant files a claim and bases it both on the judgment and on the underlying facts, the claim shall be considered by the liquidator who shall give the judgment such weight as he deems appropriate. The claim as allowed shall receive the priority it would receive in the absence of the judgment. If the judgment is larger than the allowance on the underlying claim, the remaining portion of the judgment shall be treated as if it were a claim based solely on a judgment.

VII. Interest on Claims Already Paid. Interest at the legal rate compounded annually on all claims in the classes under paragraphs I

through VI from the date of the petition for liquidation or the date on which the claim becomes due, whichever is later, until the date on which the dividend is declared. The liquidator, with the approval of the court, may make reasonable classifications of claims for purposes of computing interest, may make approximate computations and may ignore certain classifications and time periods as de minimis.

VIII. Miscellaneous Subordinated Claims. The remaining claims or portions of claims not already paid, with interest, as in paragraph VII:

(a) Claims under RSA 402–C:39, II;

(b) Claims subordinated by RSA 402–C:61;

(c) Claims filed late;

(d) Portions of claims subordinated under paragraph V;

(e) Claims or portions of claims payment of which is provided by other benefits or advantages recovered or recoverable by the claimant.

IX. Preferred Ownership Claims. Surplus or contribution notes, or similar obligations, and premium refunds on assessable policies. Interest at the legal rate shall be added to each claim, as in paragraphs VII and VIII.

X. Proprietary Claims. The claims of shareholders or other owners.

History

Source. 1969, 272:1. 1975, 348:14. 1977, 499:1. 1998, 99:1. 2005, 248:5, eff. Sept. 12, 2005.

Amendments—2005. Inserted "404–H," following "RSA 404–B," in the second sentence of the introductory paragraph.

—1998. Amended section generally.

—1977. Paragraph III: Amended generally.

—1975. Amended section generally.

405:49 Reinsurance Insolvency.

I. No credit shall be allowed, as an admitted asset or deduction from liability, to any ceding insurer for reinsurance, unless the reinsurance contract provides, in substance, that in the event of the insolvency of the ceding insurer, the reinsurance shall be payable by the assuming insurer on the basis of the claims allowed against the ceding insurer in the insolvency proceedings, under contract or contracts reinsured without diminution because of the insolvency of the ceding insurer directly to the ceding insurer or to its domiciliary liquidator or receiver except:

(a) Where the contract specifically provides another payee of such reinsurance in the event of the insolvency of the ceding insurer; or

(b) Where the assuming insurer with the consent of the direct insured or insured has assumed such policy obligations of the ceding insurer as direct obligations of the assuming insurer to the payees under such policies and in substitution for the obligations of the ceding insurer to such payees.

II. A reinsurance contract may provide that the domiciliary liquidator or receiver of any insolvent ceding insurer shall, within a specified or reasonable time after the claim is filed in court or in the receivership, give written notice to the assuming insurer of all or part of any claim against the ceding insurer on the policy or bond reinsured. During the pendency of the claim, any assuming insurer may investigate the claim and, unless forbidden to do so by the reinsurance agreement, may intervene in the proceeding in which the claim is pending and interpose any defenses it considers available which have not been raised by the ceding insurer, its liquidator or receiver. The expenses incurred by the assuming insurer in this type of action are payable up to the amount of the expenses or the amount of the benefit produced, whichever is less, as expenses of the receivership. If 2 or more assuming insurers have potential liability because of the same claim, the expenses shall be apportioned among them in proportion to the benefit received.

History

Source. 2004, 186:1, eff. July 31, 2004.