

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Liquidation of Home Insurance Company

No. 03-E-106

ORDER

The claimant, Century Indemnity Company ("CIC"), moves to recommit the referee's ruling on Kentile Floors, Inc. ("Kentile"), which upheld the liquidator's denial of CIC's request for set off of amounts that CIC asserts it paid for defense and indemnity for certain asbestos claims. The liquidator objects. Intervenor Metex Mfg. Corporation ("Metex") joins in the liquidator's objection. The court heard argument on March 6, 2015. Because the referee's order is reasonable and consistent with law, the claimant's motion to recommit is DENIED.

The standard for this court's review is well established. The court reviews the referee's legal conclusions *de novo*. *In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 546 (2008). "The standard of judicial review for findings of fact made by a judicial referee is whether a reasonable person could reach the same conclusion based upon the evidence presented." *Bianco, P.A. v. Home Ins. Co.*, 147 N.H. 249, 253 (2001), citing *Drucker's Case*, 133 N.H. 326, 329 (1990). In this context, the court will start with the facts set forth in the referee's decision.

Kentile was a manufacturer of floor tiles. For a period of time, it used products that contained asbestos. In the 1970s, Kentile was named as a defendant in lawsuits alleging liability for injury arising out of exposure to Kentile products that contained asbestos.

From January 1, 1977 through January 1, 1982, Home Insurance Company ("Home") issued five first layer excess policies to Kentile. Each policy had a limit of \$5,000,000, with defense costs included in the liability limit. CIC also issued first layer excess policies to Kentile.

Policy XBC1710, which was in effect from June 30, 1965 to June 30, 1968, provided limits of liability of \$5,000,000 per year, with defense costs either included in or eroding the liability limits. Thereafter, CIC issued policy XBC41938, which was in effect from June 30, 1968 to June 30, 1971. This policy had a limit of liability of \$5,000,000 per year, but defense costs paid were in addition to the liability limits.

Kentile's primary insurers initially paid and defended the claims against Kentile. By July 2003, Kentile's primary insurers had exhausted the limits of their policies. As a result, certain first layer excess carriers, including CIC, began to pay on the underlying claims. CIC increased its shares of defense and indemnity due to Home's insolvency. It has paid more than [REDACTED] as a result. According to CIC, it paid [REDACTED] on Home's behalf, of which [REDACTED] was indemnity. The remainder was for defense costs, with [REDACTED] paid under policy XBC1710 and [REDACTED] paid under policy XBC41938.

On November 20, 1992, Kentile filed a Chapter 11 petition in the United States Bankruptcy Court for the Southern District of New York. In 1998, the bankruptcy court confirmed a plan of reorganization, at which point Kentile became Metex. In September 2003, Home's insolvency triggered potential obligations of the Security Fund to respond to claims under policies issued by Home. The New York Liquidation Bureau ("NYLB") received claims from Metex, asbestos claimants, and other insurers under the Home insurance policies issued to Kentile.

In 2012, Metex negotiated a plan of reorganization, which included formation of a trust that would manage and pay the asbestos related claims. Additionally, Metex negotiated settlements with eight solvent insurers of Kentile, including CIC. The settlement agreement between CIC and Metex provides that CIC would pay an additional \$12,000,000 to the Metex asbestos personal injury trust, in exchange for termination of the policy contracts. The agreement allows

CIC to proceed with its contribution claim against the liquidator. This plan was not approved by the requisite percentage of asbestos claimants; therefore, the settlement agreement was not approved. On November 7, 2012, Metex filed a Chapter 11 petition in the United States Bankruptcy Court for the Southern District of New York.

In 2013, Metex, the liquidator and the NYLB settled the claims against Home policies by Metex and NYLB. The liquidator filed a motion for approval of the settlement agreement between Metex and NYLB, which would be effective after approval by this court, the bankruptcy court overseeing the bankruptcy proceeding, and the New York court overseeing the ancillary receivership for Home in New York. Additionally, the agreement was contingent on a plan of reorganization for Metex, which established an asbestos personal injury trust and provided for the issuance of several injunctions by the bankruptcy court.

Following Home's placement in liquidation, the New Hampshire Supreme Court approved a structure with respect to the Home estate and cedents to the American Foreign Insurance Association ("AFIA") pool, under which: (1) AFIA cedents submit their claims to the Home estate; (2) the estate recovers 100% of the allowed claims from CIC; and (3) the estate pays part of the cedents' claims and keeps the rest. CIC and the liquidator agreed on a protocol for CIC's handling and payment of AFIA pool claims. Under this protocol, payments to Home in liquidation are net of the setoff in compliance with RSA 402-C:34 or otherwise allowed by New Hampshire law. As a result, CIC provides the liquidator with a statement each month showing all payments by CIC to HICL for the preceding month, the amount of funds paid by CIC with respect to such payments and any amounts claimed in offset, along with documentation of the basis for the asserted offset.

CIC followed the protocol and asserted that it was entitled to contribution for defense expenses that it paid between 2003 and 2010. The liquidator initially allowed CIC's claim for defense costs paid under policy XBC41938; however, he subsequently denied that portion of the disputed claim. The liquidator took the position that because CIC had exhausted its policies, it would have paid the defense expenses on its own behalf; thus, it is not entitled to recover them from Home. CIC disagreed and took its dispute to the referee. It argued that it is entitled to additional defense costs in excess of the policy limits.

The referee agreed with the liquidator and determined that CIC could not prove the amount of defense costs it paid in addition to its own fair share without additional information regarding defense bills and payments within the 2003 to 2010 time period. Additionally, the referee determined that Home did not benefit from CIC's payment of additional defense costs on behalf of Kentile. CIC's instant motion to recommit followed.

In its motion, CIC asks this court to reject the portion of the referee's ruling denying its contribution claim against Home for [REDACTED]. CIC asserts that it is entitled to contribution for these defense costs under both New York and New Hampshire law because it has paid more than its fair share of those costs under the policies, that Home benefited from these payments, and that the equities mandate granting this component of its claim.² In their objections, the liquidator and Metex assert that the court must uphold the referee's legal rulings because the claimant cannot establish that it overpaid and that Home was unjustly enriched. The court agrees with the liquidator and Metex.

¹ The referee also denied CIC's contribution claim for indemnity amounts that CIC paid on Home's behalf under policies XBC1710 and XBC41938, as well as for defense costs CIC paid on Home Insurance's behalf under policy XBC1710. Although CIC disagrees with this part of the referee's ruling, it is not asking the court to reject it.

² The parties agree that New York or New Hampshire law leads to the same outcome. Thus, no choice of law analysis is required.

A right of contribution between insurers “hinges on equitable principles.” *E.g.*, *Maryland Cas. Co. v. W.R. Grace & Co.*, 218 F.3d 204, 210 (2d Cir. 2000). “[W]hatever contribution rights exist do so because an insurer that insures a common risk with other carriers can demonstrate that it paid more than its fair share of the relevant costs.” *Id.* at 212; *see also Travelers Ins. Co. v. General Acc. Fire & Liab. Assur. Corp.*, 271 N.E.2d 542, 544 (N.Y. 1971). An insurer seeking contribution must also prove that the other party from whom contribution is sought was unjustly enriched. *See Maryland Cas. Co.*, 218 F.3d at 212. Thus, in this case, CIC bears the burden of proving that it paid more than its fair share of relevant costs and that Home was unjustly enriched.

CIC first asserts that the referee incorrectly determined that it did not pay more than its fair share of defense costs under policy XBC41938. [REDACTED]

[REDACTED] While the liquidator initially allowed CIC’s claim for these defense costs in September 2010, he later reversed his allowance when he submitted his pre-hearing brief based on his determination that CIC benefitted from paying a share of Home’s defense costs, as this would have allowed the policy to exhaust faster. The referee agreed.

CIC has not sustained its burden of showing that the referee’s determination was incorrect. The referee determined that CIC could not prove the exact amount of the defense costs it would have paid. Moreover, the referee determined that CIC exhausted its policy limits earlier and, thus, cut off its ongoing defense obligation sooner than would have occurred had Home not been insolvent. In so doing, CIC likely paid a lower total amount in defense costs. In an analogous case, the second circuit court of appeals held:

The early settlement left Royal and General exposed to these later defense costs and spared Maryland and CAN liability for them. By the same token, if Royal and General had from the outset been contributing pro rata to indemnity and defense payments, the indemnity limits of the Maryland and CAN policies would have been paid out over a longer period before exhaustion, during which extended period Maryland and CAN would have become responsible for shares of the rapidly escalating defense costs. It is therefore possible that Maryland and CAN benefitted because (without contributions by Royal and General) their policy limits were exhausted before the associated defense costs became crushing.

Maryland Cas. Co., 218 F.3d at 213. Based on the facts of the instant action, the court agrees that this principle is applicable here.

[REDACTED]

[REDACTED] The court agrees with the referee that these calculations did not take into account the premature exhaustion of the CIC policy resulting from Home's insolvency. Therefore, the referee's decision was reasonable and supported by law.

CIC next argues that the referee incorrectly determined that Home was not unjustly enriched by its payments. According to CIC, Home was unjustly enriched because it paid less than its fair share of defense costs. The referee disagreed, finding that CIC failed to demonstrate "that Home benefitted from the possible additional defense costs CIC incurred on behalf of Kentile." Ref.'s Order at 6. Home, through the NYLB, has agreed to exhaust its policy limits by settlement with Metex, and Home's defense obligations to Kentile are included within its \$25,000,000 policy limits. Thus, the referee reasonably determined that the payments made by CIC did not unjustly enrich Home because Home paid its policy limits regardless.

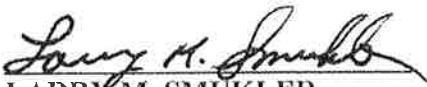
Finally, CIC argues that the "equities as a whole mandate granting this component of [its] claim." Claimant's Mot. to Recommit at 9. The court disagrees. Permitting the contribution claim would harm the policyholder and the underlying asbestos claimants. As discussed above, the first layer of excess insurance has been completely exhausted. If CIC's claim is allowed, then [REDACTED] of the Home policy limits available to Metex—and, in turn, the asbestos claim-

ants—will instead go to CIC. As the liquidator states in his brief, this result would conflict with the principles underlying contribution, which contemplate a fair allocation of a common burden among insurers without any effect on the policyholder. Under this circumstance, the equities do not favor CIC.

Based on the foregoing, the court concludes that CIC has not sustained its burden of showing that it paid more than its fair share of relevant costs and that Home was unjustly enriched. Accordingly, CIC's motion to recommit is DENIED.

So ORDERED.

Date: June 9, 2015


LARRY M. SMUKLER
PRESIDING JUSTICE