

**THE STATE OF NEW HAMPSHIRE**

**MERRIMACK, SS.**

**SUPERIOR COURT**

**BEFORE THE COURT-APPOINTED REFEREE  
IN THE MATTER OF THE LIQUIDATION OF  
THE HOME INSURANCE COMPANY  
DISPUTED CLAIMS DOCKET**

**In Re Liquidation Number: 2013-HICIL-56  
Claimant: Flexible Products Company  
Proof of Claim Number: INSU389339-001**

**FLEXIBLE PRODUCTS COMPANY'S  
RESPONSE TO LIQUIDATOR'S SCHEDULING PROPOSAL**

Claimant Flexible Products Company ("Flexible") hereby submits its Response to the Liquidator's Scheduling Proposal dated July 3, 2013. For the reasons outlined below, the Referee should first decide on written submissions whether Home had a duty to defend Flexible under the relevant insurance policies. Since Flexible's claim is solely for Home's share of defense costs, resolution of this issue may be determinative. No discovery is needed to make this determination, and the result of the Referee's ruling will guide the parties as to what discovery, if any, is thereafter necessary. To allow six or more months of discovery at this stage, as the Liquidator proposes, would be inefficient and, more importantly, no extrinsic evidence could defeat Home's duty to defend if evident from the face of the underlying complaints.

1. In its July 3 Scheduling Proposal, the Liquidator seeks six months in order to conduct written discovery on four issues it contends are necessary before any briefing can be submitted to the Referee concerning Flexible's claim. The Liquidator then proposes the possibility of even more discovery in the form of depositions on these four topics. The issues<sup>1</sup> on which the Liquidator proposes discovery are: (a) the date of first sale of the isocyanate products alleged to have caused bodily injury to the 1500+ underlying claimants; (b) dates of notice to Home and other insurers of the underlying suits and the reasons for any delays; (c) the amount and nature of Flexible's defense costs; and (d) allocation of Flexible's defense costs to its insurers. Six months or more of discovery on these topics is inefficient and unnecessary to resolve the key issue in this case.

2. The issue of whether Home had a duty to defend Flexible is decided by comparing the underlying complaints to the insurance policies. No discovery is necessary, and to proceed with discovery first, particularly as to the date-of-first-sale issue, would be a waste of the parties' time and money.

3. Under well-settled law, an insurer's duty to defend its policyholder is determined by whether a third party alleges facts that bring the claim within the insurer's policy's terms, even if the suit ultimately is meritless. *See, e.g., States Fidelity & Guar. Co. v. Johnson Shoes (Johnson Shoes)*, 461 A.2d 85, 87 (N.H. 1983)(insurer had an obligation to defend the insured based on the allegations of the underlying pleadings and the insurance policy); *Penn-America Ins. Co. v. Disabled American Veterans, Inc.*, 490 S.E.2d 374, 376-77 (Ga. 1997); *American Bumper & Mfg. Co. v. Hartford Fire Ins. Co.*, 550 N.W.2d 475, 481 (Mich. 1996). If even one plaintiff or one cause of action in a complaint alleges facts that bring a complaint within the scope of

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<sup>1</sup> Flexible does not agree with the Liquidator's position on these issues, that these issues are determinative of its claim, nor that discovery is necessary at this time.

coverage, an insurer's duty to defend the entire lawsuit is triggered. *See SIG Arms, Inc. v. Emp'rs Ins.*, 122 F. Supp. 2d 255, 260 (D.N.H. 2000). A complaint without specific occurrence dates may still trigger an insurer's duty to defend. *See Broom v. Cont'l Cas. Co.*, 887 A.2d 1128, 1130 (N.H. 2005) (finding that although "[n]one of these pleadings identified any specific date or time period with regard to the alleged campaign of disparagement," the insurer had a duty to defend).

4. There is little or no dispute that the underlying complaints against Flexible allege bodily injury as a result of exposure to the isocyanate products. The complaints allege either no dates of exposure or dates of exposure during the Home policy periods. The Referee therefore need only compare the complaints to the Home policies to determine Home's duty to defend.

5. Not only should the Referee decide Home's duty to defend based on the policies and complaints, nothing the Liquidator seeks to "discover" would allow Home to avoid its duty to defend. Unlike with the duty to indemnify, an insurer cannot use underlying facts or extrinsic evidence to terminate its duty to defend. *See Windt on Ins. Claims and Disputes* § 4:4 ("Insurers, as a general rule, are not allowed to refuse to defend on the grounds that they are in possession of information establishing that the allegations in the complaint giving rise to coverage are untrue").


6. Accordingly, there is no need for discovery at this point in the proceedings. If the Referee finds a duty to defend exists by comparing the complaints and the policies, there is no need for discovery into extrinsic evidence on issue (a) above concerning the dates of sale of Flexible's products, and the parties can proceed to other matters such as defense costs, allocation and any late notice defense. On the other hand, if there is no duty to defend, Flexible's claim was properly denied and no further proceedings are necessary. This approach is more likely to

yield expeditious results and potentially productive settlement discussions, while avoiding time and expense of unnecessary discovery proceedings.

THEREFORE, Claimant Flexible respectfully requests the Referee to set a briefing schedule on Home's duty to defend and defer any discovery until after ruling.

Respectfully submitted,

FLEXIBLE PRODUCTS COMPANY

By:   
One of its attorneys

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