

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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

Claimant	Century Indemnity Company (“CIC”)
Proof of Claim Nos.	AMBC 465096 AMBC 464386 INTL 277878 AMBC 465074
Proceeding:	2005-HICIL-14
Account:	Kentile Floors, Inc. (“Kentile”)

LIQUIDATOR’S RESPONSE TO CIC’S POSITION PAPER

The Liquidator submits this response (1) to briefly address three points advanced in the letter from Ellen M. Farrell, counsel for CIC, to the Referee dated May 13, 2013 (“CIC’s Position Paper”) in accordance with the Referee’s order of April 2, 2013, and (2) to provide Metex’s comments on CIC’s Position Paper, set forth in the letter from Paul E. Breene, counsel for Metex, dated May 24, 2013 and attached as Exhibit A.¹

1. In its filing, CIC takes the position that Metex “has confirmed its view that this proceeding may go forward.” CIC Position Paper at 2. That is an oversimplification. As set forth in Metex’s motion papers in the bankruptcy proceeding, Metex believes that the New Hampshire court is the appropriate forum to adjudicate CIC’s claims “provided [Metex] is given an opportunity to appear and be heard therein.” Liq. Ex. 4(B) at 9 (¶ 29) (emphasis added). See Liq. Ex. 4(C) at 3-5. Metex’s papers also contend that CIC’s actions to reduce Metex’s recovery under the Home policies “are in contravention of the automatic stay,” Liq. Ex. 4(C) at 4, and advise that if Metex is not allowed to intervene, it “intends to seek to impose the automatic stay

¹ This response uses terms as defined in the Liquidator’s Position Paper dated May 13, 2013.

to prevent [CIC] from interfering with [Metex's] rights under The Home Policies.” *Id.* Since Metex's motion in the Bankruptcy Court should be determined on or before June 5, 2013 (see Liq. Ex. 4(A)), and Metex is expected to move to intervene here promptly thereafter, the Liquidator submits that the Referee should wait for that motion and any opposition before determining how to proceed.

Metex confirms its position that the automatic stay applies in its letter. Exhibit A at 1. Metex also requests that nothing proceed in this matter until a reasonable time after its motion in the bankruptcy court is decided on June 5, 2013. Exhibit A at 2.

2. CIC also asserts that “by signing the [CIC/Metex] agreement, Metex acknowledged that it (and therefore, its bankruptcy estate) had no interest in any portion of the proceeds of the Home policies that is the subject of CIC's claim against the Home.” CIC Position Paper at 2. That mischaracterizes the CIC/Metex agreement. The agreement provides that CIC does not assign and retains “any and all rights, Claims, and proceeds relating to Claims against [Home] for reimbursement of any payments or portions of payments by [CIC] on behalf of Kentile.” CIC Ex. 3 at 27 (Art. VII.B.2). That language does not say that Metex has no interest in the proceeds of the Home policies that are the subject of CIC's claim, or even that Metex knew CIC had asserted a claim. Metex did not agree that any CIC claim was valid, only that CIC could assert one against Home, if it had one, notwithstanding the CIC/Metex agreement. CIC conflates the ability to assert a claim (which it retained) with the result of a claim (which remains to be determined). If, as the Liquidator contends, CIC has no valid contribution claim, then the entire remaining Home policy limits will be paid to the asbestos trust by the New York Liquidation Bureau pursuant to the NYLB/Liquidator/Metex agreement. Liq. Ex. 3 at 20 (§II.RR defining “Settlement Amount” as the \$10.9 million remaining policy limits “less . . . (ii) the final allowed amount of the Century Indemnity Claim, if any, as reflected in a final court order”).

Metex confirms that the CIC/Metex agreement did not in any way recognize that CIC's claim is valid in its letter. Exhibit A at 1-2.

3. CIC finally suggests that, if the automatic stay applies or may apply to this disputed claim proceeding, then the Referee should issue an order staying approvals and/or distributions by the Liquidator under the Home/Kentile policies. CIC Position Paper at 3. CIC implies that the Liquidator would ignore the automatic stay as well as the terms of the NYLB/Liquidator/Metex agreement in an effort to resolve other claims under the Kentile policies and thereby exhaust the policy limits to CIC's detriment.

This is a needless concern. The NYLB/Liquidator/Metex agreement provides for the NYLB to pay the remaining Home policy limits to the asbestos trust, but only after the CIC contribution claim is finally resolved and after deduction of any amount CIC succeeds in having allowed. See Liq. Ex. 3 at 20-21 (§ III.A.1.b providing that NYLB will make final payment only after "final determination of the allowed amount of the Century Indemnity Claim pursuant to a final, non-appealable court order"; § II.RR defining "Settlement Amount" as the remaining policy limits "less . . . (ii) the final allowed amount if the Century Indemnity Claim, if any, as reflected in a final court order"). The remaining policy limits thus will be paid only to the asbestos trust, and only after CIC's claim is determined. Other claims will be denied. After noting that Asbestos PI Claims "have been filed or asserted against Home in the Home Liquidation and against the NYLB," the agreement provides that "[a]fter the Effective Date, the Liquidator and NYLB will deny such Asbestos PI Claims" in reliance on the bankruptcy injunctions. Liq. Ex. 3 at 26 (§ V.C) (emphasis added).² Obviously, the Liquidator will not

² The bankruptcy injunctions will not prevent the NYLB from asserting claims in the Home liquidation, see Liq. Ex. 3 at 29 (§ VII.B.1 & 2), Ex. E at 11 (¶ 13), but since those claims arise from amounts that the NYLB itself pays under the Home policies they do not independently impair the Home policy limits.

ignore the automatic stay. There is accordingly no reason to consider CIC's request, even if it were otherwise appropriate.

Respectfully submitted,

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

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May 24, 2013

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Position Paper was emailed to counsel for CIC this 24th day of May, 2013.



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May 24, 2013

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Re: CIC May 13, 2013 Letter to Referee Melinda Gehris (the "CIC Letter")

Dear Mr. Smith:

Thank you for sending me the CIC Letter. Having reviewed it, I would like to point out that several statements made in the Letter are either factually incorrect or make logical and factual leaps that are not warranted.

First, the CIC Letter states that the automatic stay does not apply to the Disputed Claim Proceeding because the debtor, Metex Mfg. Corporation ("Metex"), has no rights to the \$5 Million of Kentile's Home Insurance Company policy limits claimed by CIC. This is patently false. The Home policies themselves, and all of their limits, are property of Metex's estate as a matter of established law. *See* Metex's "Motion For An Order Authorizing the debtor To Use Estate assets To Seek Intervention In The Home Insurance Company's Liquidation Proceeding In Order The Debtor's Policy Rights" ("Metex's Motion"), attached as Exhibit 4(A-D) to the Liquidator's May 13, 2013 Position Paper. Thus, any payment of CIC's claim in the Disputed Claim Proceeding will, of necessity, deplete Metex's estate and reduce the amount of its insurance coverage that would otherwise be available to pay asbestos claimants' claims.

Second, CIC's assertion, that an e-mailed confirmation from Metex's bankruptcy counsel that no separate motion was contemplated to extend the automatic stay to Kentile's insurance policies and their proceeds, was somehow confirmation that Metex did not believe that the stay applied or that Metex had property rights in those policies and proceeds, is nothing short of bizarre. Clearly, no separate motion for an order "extending the stay" was contemplated because none was needed. It is, and always has been, Metex's position—and black letter law—that the insurance policies and their proceeds are property of the estate and that any attempt to deplete that property, as CIC is doing in the Disputed Claim Proceeding, is subject to the automatic stay as a matter of law.

Third, CIC's attempt to rely on its settlement agreement with Metex which provided that CIC would "retain any and all rights, Claims, and proceeds relating to Claims against" the Home, is unavailing. That language merely allowed CIC to maintain the status quo with respect to claims not being settled and released in the settlement agreement. It did not in any way recognize that those claims were valid and should be paid. The inclusion of the word "any" in the quoted language actually acknowledges and confirms this point. The quoted language further did not prevent Metex from doing


Eric A. Smith, Esq.
May 24, 2013
Page 2

exactly what it has now sought, in its Bankruptcy Court Motion, to do, intervene in the Disputed Claim Proceeding to oppose CIC's claim and preserve an important asset of its bankrupt estate.

Fourth, as you know, we do not believe that any part of CIC's claim should be granted over Metex, the policyholder's, claim, a result that frankly would turn the purpose of the Home Liquidation and New Hampshire law establishing the liquidation process on its head. We also believe¹ that CIC's claim is hugely inflated by the inclusion of amounts paid by CIC for the defense of Kentile asbestos claims. As we intend to ultimately demonstrate if allowed to intervene in the Disputed Claim Proceeding, Home had no duty to defend any such claims, and so CIC could not possibly have a contribution claim against Home for those defense costs.

Finally, we hope that you will convey to the Referee our request that nothing further proceed in this matter until a reasonable time after Metex's Motion is decided on June 5, 2013. Assuming that Motion is granted, and there is no opposition of which we are currently aware, Metex would move expeditiously to retain New Hampshire counsel and to intervene in the Disputed Claim Proceeding to oppose all aspects of CIC's claim therein.

Very truly yours,



Paul E. Breene

¹ We are constrained to rely on our own records since we have not been granted access to CIC's claim.