

THE STATE OF NEW HAMPSHIRE
BEFORE THE COURT APPOINTED REFEREE
IN THE MATTER OF THE LIQUIDATION OF THE HOME INSURANCE COMPANY
DISPUTED CLAIMS DOCKET

In re Liquidator Number: 2019-HICIL-62
Proof of Claim Numbers: INSU703957-1 and INSU703968
Claimant Name: PolyOne Corporation

CLAIMANT'S MANDATORY DISCLOSURES

Pursuant to Paragraph 14.b of the January 19, 2005 Restated and Revised Order Establishing Procedures Regarding Claims Filed with the Home Insurance Company in Liquidation, Claimant PolyOne Corporation ("PolyOne") states the following:

I. The Amount the Claimant Asserts Is Due:

PolyOne is entitled to \$40,000,000 under the following Home Insurance Company ("Home") policies, pursuant to controlling Ohio law:

- HEC 4356627 (1/1/1973-1/1/1975), \$5,000,000 part of \$20,000,000 excess of \$40,000,000;
- HEC 4356857 (3/21/1973-1/1/1975), \$15,000,000 part of \$40,000,000 excess of \$60,000,000;
- HEC 4495806 (7/1/1974-7/1/1975), \$10,000,000 part of \$80,000,000 excess of \$20,000,000; and
- HEC 9006524 (7/1/1975-7/1/1977), \$10,000,000 part of \$80,000,000 excess of \$20,000,000.

(PolyOne has already documented past and projected future investigation and remediation costs to support a payment of \$36,265,945.73. Future natural resource damage costs, a projection of which will be documented later, are expected to exhaust the remaining coverage available under those policies.)

Alternatively, although PolyOne believes that the applicability of Ohio law is clear, if the Court were to accept the Liquidator's position and rule Kentucky law were to apply, PolyOne remains entitled to at least \$2,599,637, recoverable as follows under the following policies:

- \$866,546 recoverable under policy number HEC 4495806 (7/1/1974-7/1/1975), \$10,000,000 part of \$80,000,000 excess of \$20,000,000; and
- \$1,733,091 recoverable under policy number HEC 9006524 (7/1/1975-7/1/1977), \$10,000,000 part of \$80,000,000 excess of \$20,000,000.

(Future natural resource damage costs will increase the recovery in this situation as well.)

II. The Method of Calculation of the Amounts Owed and the Allocation Methodology:

As PolyOne has previously stated, the Home policies at issue are properly governed by Ohio law, in that:

- The policies were delivered to the Ohio headquarters of The B.F. Goodrich Company ("Goodrich," now named Goodrich Corporation).
- They were negotiated and procured by Goodrich personnel at its Ohio offices.
- Premiums were paid by Goodrich from its Ohio headquarters.
- Payments from the Home Insurance Company would have been made to Goodrich at its Ohio offices.
- The policies intended to protect Goodrich from liabilities that may arise anywhere in the world, wherever they may arise, as a result of Goodrich's far-flung operations; nonetheless, any such liabilities would ultimately impact Goodrich's Ohio-based corporate treasury.

Under these circumstances, Ohio is clearly the location which has the most significant relationship to the parties and issues, and is also the principal location of the insured risk (that is, the risk that Goodrich would incur a financial consequence on account of alleged bodily injury or

property damage).¹ To paraphrase the New Hampshire Supreme Court, the Home policies were “intended to insure” Goodrich, “rather than its customers, from liability.” *Marston v. U.S. Fid. & Guar. Co.*, 135 N.H. 706, 711 (1992). In the context of environmental liabilities such as those at issue here, and involving an entity with manufacturing facilities located throughout the country, the “most significant relationship” is not where the contaminating substances may have come to rest. Rather, “[i]n view of the act that the policies were negotiated and issued in [Ohio], it is far more likely that the parties intended the consistent application of [Ohio] law to any controversies arising under these contracts.” *K.J. Quinn & Co. v. Continental Cas. Co.*, 806 F. Supp. 1037, 1041 (D.N.H. 1992).² Indeed, the involvement of any jurisdiction in which a liability may arise is purely fortuitous, and it is impossible to envision that the parties to these contracts would have expected, at the time of their negotiation and placement, that their application would vary dramatically depending upon where a liability happened to arise.

Importantly, the Home has already conceded – correctly – that these policies are governed by Ohio law, in pleadings filed in the Court of Common Pleas of Summit County in

¹ Any other states have much a more attenuated relationship to the matters at issue. The only contact with Illinois is the location of the brokerage facilitating placement of the policy. The only contacts with New York are that it was the headquarters of the Home at the time and is the state of Goodrich’s incorporation. The only contact with New Hampshire is that it was the Home’s state of incorporation. And Kentucky is only the location out of which the liability arose – the parties have no other contacts with that jurisdiction.

² This is consistent with the overwhelming weight of precedent from other jurisdictions applying the Restatement’s “most significant relationship” test to disputes under general and excess liability insurance; these states all focus on the contacts associated with the contracting process itself (the place of negotiation, the location of the broker, and *especially* the domicile of the policyholder), and almost invariably give dispositive weight to the location of the policyholder’s principal place of business. *See, e.g., Hammersmith v. TIG Ins. Co.*, 480 F.3d 220 (3d Cir. 2007) (Pennsylvania law); *Certain Underwriters at Lloyd’s v. Foster Wheeler Corp.*, 876 N.E.2d 500 (N.Y. 2007), *aff’g* 822 N.Y.S. 30 (App. Div. 2006). Even states nominally looking primarily to the “principal location of the insured risk,” such as Massachusetts, also emphasize the desirability of having one state’s laws govern all insurance disputes under a general or excess liability policy. *See, e.g., W.R. Grace v. Md. Cas. Co.*, 600 N.E.2d 176 (Mass. App. 1992) (applying New York law to an environmental insurance dispute involving a contaminated site in Massachusetts), *citing W.R. Grace v. Hartford Acc. & Indem. Co.*, 555 N.E.2d 214 (Mass. 1990).

Goodrich Corp. v. Commercial Union Insurance Co., et al., No. 1999-02-0410, and in an ensuing appeal in the Ohio Court of Appeals, Ninth District, Nos. 23585 & 23586. There is no reason to allow the Liquidator to backtrack from that position.³

Under governing Ohio law, a policyholder may select one policy year that is required to respond to the liability *in toto* until exhausted, and then may select one or more additional “towers”⁴ of coverage until the policyholder has been indemnified in full. *See, e.g., Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835 (Ohio 2002).

Pursuant to those principles, PolyOne first elects the policy tower in effect on January 1, 1974 to respond to its Calvert City-related liabilities, and is entitled to \$20,000,000 in coverage under the Home policies in effect at the time, as follows:

PolyOne's unreimbursed past costs ⁵	\$67,327,565.84
Future remediation costs per ROD	\$187,800,000.00
Projected future NRD costs	[forthcoming] ⁶

³ In asserting that Kentucky law should govern this matter, simply because the manufacturing facility at issue is located in Kentucky, the Liquidator has misplaced reliance on cases involving automobile liability risks and insurance, *see, e.g., Cecere v. Aetna Ins. Co.*, 145 N.H. 660 (2001); *Ellis v. Royal Ins. Co.*, 129 N.H. 326 (1987). As the New Hampshire Supreme Court has emphasized, those types of policies have a comprehensive state regulatory overlay, and typically involve “the special statutory forms of the several states involved,” *Ellis*, 129 N.H. at 331 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193, cmt. f), which makes the application of multiple states’ laws to a single policy appropriate, to give effect to each state’s public policy as set out in its motor vehicle financial responsibility laws. Here, by contrast, excess liability insurance policies are involved, and the local interests of the states where liabilities happen to arise are much more attenuated (particularly where, as here, there is a solvent policyholder bearing in the first instance the cost of remediating a contaminated site).

⁴ A “tower” refers to all applicable primary, umbrella and excess insurance available in effect at a given point, sequentially including all layers of insurance as those policies attach.

⁵ *See* Schedule A hereto.

⁶ PolyOne will provide confidential projections, and an updated confidential allocation analysis, following entry of a suitable protective order.

Total costs (not including NRD)	\$255,127,565.84
Unpaid limits underlying HEC 4356627 (first and second layers)	\$25,000,000.00 ⁷
Limits of HEC 4356627	\$5,000,000.00
Remaining limits in third layer	\$15,000,000.00
Limits of HEC 4356857	\$15,000,000.00
Remaining limits in fourth layer and coverage tower	\$25,000,000.00
Unreimbursed costs after exhaustion of 1974 policy tower	\$170,127,565.84

Thereafter, PolyOne elects the policy tower in effect on January 1, 1975, and is entitled to an additional \$10,000,000 in coverage under the Home policy in effect at the time, as follows:

Unreimbursed costs after exhaustion of 1974 policy tower	\$170,127,565.84
Limits underlying HEC 4495806 (first layer)	\$20,000,000.00
Limits of HEC 4495806	\$10,000,000.00
Remaining limits in second layer and coverage tower	\$70,000,000.00
Unreimbursed costs after exhaustion of 1974 and 1975 policy towers	\$70,127,565.84

Thereafter, PolyOne elects the policy tower in effect on January 1, 1976, and is entitled to **at least** \$6,265,946 in coverage under the Home policy in effect at the time, as follows:

Unreimbursed costs after exhaustion of 1974 and 1975 policy towers	\$70,127,565.84
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⁷ Although HEC 4356627 is excess of \$40,000,000, \$15,000,000 of these underlying limits have already been paid by Employers Commercial Union Insurance Company pursuant to the judgment entered in *Goodrich v. Commercial Union*.

Limits underlying HEC 9006524 (first, second and third layers)	\$20,000,000.00
Remaining costs allocable to fourth layer (\$80,000,000 excess of \$20,000,000)	\$50,127,565.84
Participation of HEC 9006524	12.50%
Minimum quota share allocable to HEC 9006524 (not including NRD)	\$6,265,945.73

As noted above, some or all of the remaining coverage in this layer will be exhausted by projected future natural resource damages, and PolyOne believes that it will ultimately demonstrate an entitlement to reimbursement of the full limits of HEC 9006524.

Alternatively, if Kentucky law were to apply,⁸ as the Liquidator contends, then PolyOne is entitled to at least \$2,599,637, calculated as follows:

Total past costs ⁹	\$191,963,157.00
Future remediation costs per ROD	\$187,800,000.00
Projected future NRD costs	[forthcoming]
Total costs (not including NRD)	\$379,763,157.00
Less "per occurrence" limits of all policies underlying the \$20,000,000 attachment point of HEC 4495806 and HEC 9006524 ¹⁰	\$175,200,000.00
Less Commercial Union policies/layers	\$100,000,000.00

⁸ Under Kentucky law, liabilities are prorated across available coverage. *See Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830 (Ky. 2006).

⁹ *See* Schedule A hereto.

¹⁰ *See* Schedule B hereto. This includes (i) all policies prior to January 1, 1964; (ii) two first-layer American Motorists Insurance Company policies for January 1, 1964 to November 12, 1975; and (iii) three layers of insurance in effect from November 12, 1975 through August 1, 1986.

Total remaining to allocate to policies attaching excess of \$20MM (other than Commercial Union)	\$104,563,157.00
Policy years to allocate across ¹¹	15.08
Allocation to each policy year	\$6,932,364.17
Total allocation to three years with Home participation	\$20,797,092.00
Home's quota share (\$10MM/\$80MM)	12.50%
Allocation to Home (not including NRD)	\$2,599,636.50
Allocation to HEC 4495806 (1 year)	\$866,545.50
Allocation to HEC 9006524 (2 years)	\$1,733,091.00

III. Additional Documents or Other Evidentiary Material That the Claimant Contends Support the Amount Claimed Due:

In support of the foregoing computations of the amount due, and in support of PolyOne's claims for coverage, PolyOne provides the following documents:

- Invoices for remediation costs (both to demonstrate exhaustion of underlying coverage and to establish unreimbursed amounts currently owed to PolyOne) (produced at PolyOne-HICIL 100001-107986, 120001-126735, 140001-145949, and 170001-170038);
- The September 2018 Record of Decision issued by the United States Environmental Protection Agency (documenting the future remediation costs that

¹¹ Policies attaching at \$20,000,000, and subject to allocation, are for periods from January 1, 1965-January 1, 1968 and from July 1, 1974-August 1, 1986. Policies for the period from January 1, 1968-July 1, 1975 are excluded; with respect to these policies, Employers Liability Assurance Company and Employers Commercial Union Insurance Company have paid what they contend to be their limits of liability, and they have taken the position that their coverage is exhausted. The limits of the 1968-1975 coverage have therefore been deducted prior to allocating remaining costs *pro rata*.

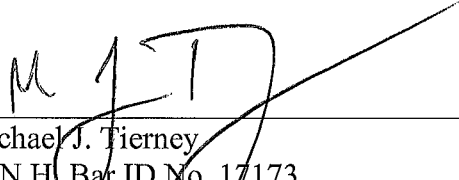
are projected to be incurred in implementing the selected remedy) (produced at PolyOne-HICIL180001-180421);

- Additional documentation related to historical investigation and remediation costs (produced at PolyOne-HICIL 170001-170038);
- Copies of liability insurance policies (and a policy register), to permit the computation of underlying limits (produced at PolyOne-HICIL 200001-206001);
- The trial transcript and trial exhibits from *Goodrich Corp. v. Commercial Union Insurance Co., et al.*, No. 1999-02-0410 (produced at PolyOne-HICIL 300001-301666 and 320001-328228);
- Certain documents filed by Home in connection with Goodrich's Ohio insurance coverage lawsuits, and other potentially-relevant filings in those lawsuits (produced at PolyOne-HICIL 340001-340108 and 360001-360096);¹²
- A collection of administrative orders on consent and related documents establishing a third-party claim against PolyOne in connection with the Calvert City site (produced at PolyOne-HICIL 400001-400161 and 420001-422410); and
- Certain transactional documents establishing PolyOne's status as a successor to Geon Corporation and its entitlement to coverage under Goodrich policies (produced at PolyOne-HICIL 500001-5002610).

PolyOne reserves the right to submit confidential documents related to projected natural resource damage costs following entry of a protective order. PolyOne further reserves the right to submit additional documents as they are located, or as their relevance to the matters at issue becomes apparent. Finally, PolyOne reserves the right to supplement its disclosures and revise its allocation methodology as additional information and analysis becomes available.

¹² There are, on information and belief, additional documents filed by Home in the Ohio litigation that are not at present in PolyOne's possession.

Dated: November 4, 2019



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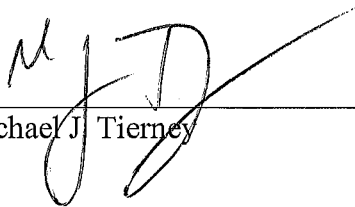
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CERTIFICATE OF SERVICE

I certify that today I am serving a true and correct copy of the foregoing upon Eric A. Smith, Esq. (counsel to the Liquidator) and J. Chase Johnson, Esq. (counsel for Goodrich Corporation).

Date: November 4, 2019



Michael J. Tierney