



Ellen M. Farrell
(202) 624-2952
efarrell@crowell.com

May 13, 2013

By Electronic Mail & U.S. Mail

Referee Melinda Gehris
In the Liquidation of the Home Insurance Company
Disputed Claims Docket
Merrimack Superior Court
163 North Main Street
P.O. Box 2880
Concord, NH 03302-2880

Re: 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”)

Referee Gehris:

Pursuant to the Court’s November 9, 2012, January 2, 2013 and April 2, 2013 Orders, CIC submits the following statement in support of its view that the above-referenced Disputed Claim Proceeding may go forward.

As you know, CIC seeks contribution from the Home Insurance Company in Liquidation (“Home”) for defense and indemnity that CIC paid on Home’s behalf beginning in 2003, in connection with claims against their mutual policyholder Kentile. The Liquidator’s partial disallowance of that claim in 2010 led to this Disputed Claim Proceeding. When Kentile’s alleged successor, Metex Mfg. Corporation (“Metex”), filed for bankruptcy on November 9, 2012, shortly before a hearing on the merits in the Disputed Claim Proceeding had been scheduled to take place, you continued that hearing and asked the parties to submit their respective positions as to whether that hearing may proceed.

Based on the information that is currently available to CIC, we believe that a merits hearing can go forward. CIC is aware of only one order from Metex’s bankruptcy that potentially applies here (the “Order”). The Order “stay[s], restrain[s] and enjoin[s]” persons from commencing or continuing proceedings against Metex or Kentile; and also from “taking any action to obtain possession of property of Debtor [Metex].” (Ex. 1.) Because this

proceeding is not against Metex or Kentile, and does not seek property of Metex, the Order does not appear to apply here. CIC's claim against Home's policies – for reimbursement of the \$5 million that CIC paid on Home's behalf in connection with the Kentile claims – does not seek property of Metex because Metex does not have rights to that \$5 million. Metex has never paid anything in connection with the Kentile claims, and thus does not have rights to the \$5 million that CIC did pay. Instead Metex has, at most, a claim for the remaining limits of the Home policies.¹

When Metex sought the Order, Metex confirmed that it would not apply to this Disputed Claim Proceeding or any other claims against Kentile's insurers. On the same day that Metex filed the motion that put the Order in place, counsel for CIC reached out to Metex and asked if Metex would also seek an order extending the stay to Metex's insurance policies and their proceeds. Metex confirmed that it would not, and further that:

[n]o such motion is contemplated. If and when it is an issue we will address it. We contemplate the Judge issuing an order that we can file in various jurisdictions confirming the stay for the debtor.

(Ex. 2.) This confirmation is consistent with Metex's contemporaneous representations to the Bankruptcy Court, that the Order was only necessary because substantially all of the underlying asbestos claims have been asserted against Kentile and not Metex. Metex's counsel indicated that an order clarifying that the stay applies to Kentile as well as Metex was necessary, in order to assure that plaintiffs and the courts in those actions honored the automatic stay with respect to claims against both entities.

This position that the stay does not apply to claims against Kentile's insurers is also consistent with the June 2012 Metex-CIC settlement in which Metex agreed that CIC would "retain any and all rights, Claims, and proceeds relating to Claims against" the Home. (Ex. 3.) This agreement was negotiated with Metex's bankruptcy counsel in connection with Metex's pre-bankruptcy planning, and by signing the agreement, Metex acknowledged that it (and therefore, its bankruptcy estate) has no interest in any portion of the proceeds of the Home policies that is the subject of CIC's claim against the Home. Indeed, even though Metex has known since December 2012 that the Referee would be considering the very issue of whether this Disputed Claim Proceeding may go forward, Metex chose not to seek a stay of this Disputed Claim Proceeding, or even to "weigh in" on the issue.

Last week Metex finally did, however, confirm its view that this proceeding may go forward. Last Thursday (on May 9), Metex filed a motion in its own bankruptcy case for an order authorizing Metex to use estate assets to seek to intervene in this Home-CIC proceeding.²

¹ This is approximately \$6 million: Aside from CIC's \$5 million claim, New York's Liquidation Bureau has already paid \$14 million in connection with other insurer contribution claims against the Home policies.

² The April 2, 2013 Order directed the parties to confer on this issue, and to file a joint position paper on this matter unless the parties were unable to reach agreement. During a May 9, 2013 "meet and

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By taking the position that “should [Metex] be permitted to intervene, The Home Liquidation Proceeding is the appropriate forum to adjudicate the propriety of Century’s asserted contribution claim and offset,” Metex affirmed the view that CIC’s contribution claim should move forward and be resolved in this forum. (Ex. 4.)

It is thus clear at this point that Metex is not insisting that these proceedings be stayed, and the Referee should schedule a hearing date. Metex can, if it then chooses if the bankruptcy court grants it authority to do so, seek to intervene and this Court can, after briefing by the parties, decide the extent, if any, of Metex’s right to do so.³ But assuming that Metex moves to intervene and the Court rules on that motion, this proceeding should move forward according to the Referee’s schedule.

Finally, we note that Metex appears to be taking the position that if it is not allowed to intervene, it may then at that point seek to stay this proceeding. While CIC does not necessarily agree with this approach, if you determine that the automatic stay does (or may) apply to this proceeding, then it would necessarily follow that all proceeds of the policies issued to Kentile are property of Metex’s bankruptcy estate. If so, we would request an order staying any and all approvals and/or distributions by the Liquidator involving the Home policies issued to Kentile. Otherwise, claimants against the Home policies that are situated similarly to CIC would be able to proceed with their claims while CIC would not be able to do so; and that could potentially improperly impair or even exhaust Home policy limits that should be available for CIC to recover once the stay ends.

Sincerely,



Ellen M. Farrell

cc: Lisa Snow Wade
Paul W. Kalish

confer,” the Liquidator asked CIC to agree that this matter not go forward until Metex actually moves to intervene in this proceeding. CIC did not agree with this proposal, given that Metex so far has waited six months before indicating that it might seek to intervene in these proceedings. CIC does not believe that it should have to wait an additional unspecific period of time for Metex to choose to act, before this proceeding goes forward.

³ At this point, it is not clear what rights Metex is seeking as part of a motion to intervene, but it is clear that Metex has long been aware of these proceedings. Thus, CIC would oppose any attempt by Metex to, for example, seek to reopen discovery or to raise new issues.