

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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

In Re Liquidator Number: 2005-HICIL-14  
Proof of Claim Number: AMBC465096  
AMBC464386  
INTL277878  
AMBC465074  
Claimant Name: Century Indemnity Company

**REFEREE'S ORDER ON METEX' MOTION TO INTERVENE AND PARTICIPATE  
IN DISPUTE REGARDING KENTILE**

Metex Manufacturing Corporation ("Metex") has filed a motion seeking to intervene and participate in this disputed claim. Related to the request to intervene and participate are the extent of discovery which Metex and its representatives may review if a participant in the disputed claims proceeding, and the extent of their role in the on-going claims proceeding.

**Background and Relationship of the Parties**

Kentile Floors, Inc. ("Kentile") was a manufacturer of floor tiles. During some period of time, Kentile used asbestos in certain of its products. Beginning in the 1970's Kentile was named as a defendant in lawsuits alleging liability for personal injury arising out of exposure to Kentile asbestos-containing products.

Home issue first layer excess policies to Kentile for five years from January 1, 1977 through January 1, 1982. The Home policies provided potential coverage subject to aggregate limits totaling \$25 million.

Century Indemnity Company ("CIC") was also an insurer of Kentile. The claims against Kentile were initially paid and defended by Kentile's primary insurers. Eventually, the primary insurers asserted that they had exhausted the limits of their policies. At that point, certain first layer excess carriers, including CIC, began to pay for the underlying claims. Beginning in 2003, CIC increased its shares of defense and indemnity on Kentile claims because of Home's insolvency.

Kentile filed a petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York on November 20, 1992. The Bankruptcy Court confirmed a plan of reorganization on December 15, 1998. The reorganized Kentile became Metex.

On September 24, 2003, the Supreme Court of New York appointed the Ancillary Receiver of Home in the State of New York. Home's insolvency triggered the potential obligations of the Security Fund (the New York form of a guaranty association) to respond to certain claims under

policies issued by Home. The New York Liquidation Bureau administers the Security Fund and the ancillary receivership, so the Security Fund and Ancillary Receiver are referred to collectively as the "NYLB."

Metex, asbestos claimants, and certain insurers have submitted claims to the NYLB and/or in the Home liquidation with respect to the Home policies issued to Kentile.

During 2012, Metex negotiated a prepackaged plan of reorganization which included formation of a §524(g) trust to administer and pay the asbestos related claims. Metex also negotiated settlements with eight solvent insurers of Kentile, including CIC. The prepackaged plan was not approved by a sufficient percentage of asbestos claimants to be put in place. On November 7, 2012, Metex filed a petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Because the plan was not approved, the settlements between Kentile and CIC has not been approved.

### **The Disputed Claims Proceeding**

In 2006, CIC asserted a contribution claim against Home for the increased amounts it had paid on behalf of Kentile due to Home's insolvency. In September 2010, the Liquidator partially disallowed CIC's contribution claim. On February 10, 2011, the Referee granted a joint request made by the Liquidator and CIC to deem their dispute a Disputed Claim Proceeding. A hearing on the merits in the proceeding was scheduled for November 2012.

Metex' bankruptcy filing occurred days before the scheduled hearing on the merits. CIC requested, and the Liquidator and Referee agreed, that the parties consider the effect of Metex' filing on the disputed claims proceeding. The Referee set a deadline of November 19, 2012 for the parties to file pleadings in the disputed claims proceeding indicating their position regarding whether a hearing on the merits could proceed. The Liquidator and CIC jointly requested that the deadline be postponed until December 19, 2012. At Metex' request, the deadline was again postponed until March 10, 2013.

During early 2013, Metex, the Liquidator, and the NYLB negotiated a settlement agreement with regard to claims against the Home policies by Metex and the NYLB. In July 2013, the Liquidator filed a Motion for Approval of Settlement Agreement with Metex and the NYLB. The settlement would become effective after approval of the New Hampshire Superior Court, the Bankruptcy Court overseeing the Metex bankruptcy proceeding, and the New York Court overseeing the ancillary receivership for Home in New York. In addition, the Settlement Agreement is contingent upon the confirmation of a plan of reorganization for Metex establishing an asbestos personal injury trust and on issuance of several injunctions by the Bankruptcy Court. When effective, the Settlement Agreement provides that the remaining amounts available under the Home policy will be paid by the NYLB to the §524(g) trust in two payments. The first payment of \$4 million will be made within thirty days of the effective date of the Settlement Agreement. The remaining policy limits will be paid on the later of one year after the effective date or when the CIC contribution claim has been finally resolved. Should the resolution of this disputed claim be in favor of CIC, the payment to the trust would be reduced by \$5 million.

### **Metex' Motion to Intervene**

In February 2013, the Liquidator sought to provide complete copies of the briefs in this disputed claim to Metex. CIC objected. The Referee denied the Liquidator's motion seeking permission to provide complete copies of the briefs to Metex.

On July 10, 2013, Metex filed the motion at issue seeking to intervene and participate in this disputed claims proceeding. Metex has requested permission to intervene to protect its rights under the Home policy. Metex has indicated it seeks only to intervene on a "going forward" basis and does not intend to delay the proceeding. In addition, the motion sought an opportunity for Metex to review the submissions of the parties in an unredacted form, subject to the confidentiality order already entered and for Metex to be heard with respect to its rights to the \$5 million to be paid by Home and claimed as a credit by CIC. Metex obtained authority from the Bankruptcy Court to seek leave to intervene and participate in this disputed claims proceeding. The Bankruptcy Court agreed that this is the appropriate venue to adjudicate CIC's contribution claim, provided Metex has a full opportunity to be heard.

The Liquidator assents to Metex' motion and requests that the disputed claims proceeding move forward quickly to a hearing on the merits. The Liquidator has no objection to providing Metex with all of the pleadings filed in the disputed claims proceeding, subject to the confidentiality order in place.

CIC objects to Metex' motion. CIC argues that the motion is untimely and that allowing Metex to intervene would harm CIC. CIC asserts that the Liquidation Procedures require that motions to intervene must be made within thirty days after a Disputed Claim Proceeding is initiated, and Metex' motion was filed long past that deadline. CIC asserts that Metex learned about the proceeding by at least late summer of 2012 and waited months before seeking permission to intervene.

CIC further argues that the proposed intervention would harm CIC. First, CIC would be required to disclose confidential, protected claim evaluation materials. CIC was also a first layer excess insurer of Kentile. In that role, it paid defense and indemnity for claims against Kentile. CIC has its own coverage dispute with Metex regarding the duties owed to Metex under the CIC policies. CIC and Metex have negotiated a settlement related to those claims, but that settlement will not be binding unless and until the bankruptcy court approves the reorganization plan. Without that approval, and court order related thereto, CIC and Metex have their own differences regarding duties under the policies. CIC argues that to provide the pleadings it has filed in this matter to Metex' counsel, is to give its opponent a window into its position and arguments in the direct dispute between CIC and Metex. Moreover, CIC asserts counsel for Metex would be required to disclose the briefs from this proceeding to counsel for the plaintiffs in the underlying claims against Kentile – counsel for the "Unsecured Committee of Unsecured Creditors" and a "future Claimants' Representative."

CIC also complains that Metex seeks to re-litigate CIC's contribution claim, a disputed issue that the Liquidator and CIC have been litigating for years. Metex' intervention potentially means

additional discovery requests, and additional discovery disputes to be brought to the Referee. For these reasons, CIC asserts the harm to it outweighs Metex' interest in the proceeding.

After hearing argument on Metex' motion, the Referee ordered the parties to meet and confer regarding an agreement about access to and review and distribution of pleadings and discovery materials in this disputed claim should Metex be allowed to intervene and participate. The parties have filed a report on their efforts in this regard. Metex has indicated that it has received sufficient, unredacted information from CIC to present its opposition to CIC's claim. Metex now asks the Referee to grant its motion, allow Metex to submit its opposition to CIC Contribution and Set-off claim, and proceed to a hearing on the merits. The Liquidator agrees.

CIC seeks an additional opportunity to argue against Metex' motion. CIC remains concerned about Metex gaining access to claim evaluation material and from that material being circulated and used against CIC in other matters.

### **Metex May Intervene and Be Heard**

Section 9(b) of the Liquidation Procedures provides that entities directly affected by a disputed claim proceeding may seek leave to intervene by filing a motion to participate with the Liquidation Clerk no later than thirty (30) days after the date of mailing of the Notice of Disputed Claim proceeding. In section 10, the Liquidation Procedures state that all disputed claims proceedings shall be conducted by the Referee according to the rules of equity or law, pursuant to RSA 519:10, and shall be governed by the New Hampshire Superior Court Rules and the New Hampshire Rules of Evidence.

New Hampshire Superior Court Rule 15 states that any person shown to be interested may become a party to any civil action upon filing and service of an Appearance and pleading briefly setting forth his or her relation to the cause. Rule 1(b) of the New Hampshire Superior Court Rules states that the rules shall be construed and administered to secure the just, speedy, and cost-effective determination of every action. Rule 1(d) states that as good cause appears and as justice may require, the Court may waive the application of any rule.

At issue in this disputed claim is \$5 million of coverage under the Home policies issued to Kentile. Assuming their settlement agreement is approved, Metex and the Liquidator have agreed that all remaining policy limits under the Home policies issued to Kentile would be paid to the Metex asbestos trust. However, in this disputed claims proceeding, CIC seeks to apply that same \$5 million in contribution against the amounts it owes Home. CIC's argues it is entitled to the offset because the additional amounts CIC paid to defend and indemnify Metex with regard to asbestos claims against Kentile were paid solely due to Home's insolvency.

Metex has demonstrated that its interests are directly affected by the outcome of this proceeding. The money at issue is owed either to CIC as a set off, or to Metex' bankruptcy estate. The Bankruptcy Court agrees that this forum is the appropriate one in which to resolve which entity is entitled to the \$5 million. Metex' motion to intervene in the disputed claims proceeding is granted, subject to the parameters set forth in this Order.

## **The Parameters of Metex' Participation**

Metex has requested that it be allowed to participate on a "going-forward basis." In its motion to intervene, Metex seeks: (1) to receive unredacted copies of the pleadings in the disputed matter, and perhaps some of the discovery materials; and (2) to be heard on the issue of CIC's contribution claim.

In its Reply to CIC's Opposition to Metex' motion, Metex indicates that it will be bound by the terms of the Confidentiality Order, and will agree that any sensitive Claims Evaluation Material would be limited to Metex' attorneys eyes only. The information will not be disclosed to plaintiff-attorneys for the claimants with asbestos-related injuries. Metex further indicates that if it wishes to disclose certain confidential information to counsel to the Unsecured Creditors' Committee and the Future Claimants' Representative, Metex will provide written notice to CIC, who may request the Referee resolve any dispute. Metex agrees not to disclose any materials to which CIC objects until such objection is resolved.

Metex further indicates that it does not seek further information, and that it does not intend to seek leave to file briefs for matters that have been fully briefed.

The Referee recognizes CIC's legitimate concern that this disputed claim not become an avenue for Metex to gather additional information to be used in the related dispute between Metex and CIC. However, given Metex' representation that it does not need additional information in order to proceed, the disputed claim will move forward, without additional discovery and subject to the Confidentiality Order now in place. No additional discovery is to be exchanged. Should any party determine it needs additional discovery or documentation, that party will file a motion with the Referee. Metex may file a brief regarding the matters still in dispute in this proceeding and be heard in the hearing on the merits.

Below are the specific parameters for Metex' participation in this Disputed Claims Proceeding:

1. Metex will be bound by the terms of the Confidentiality Order;
2. No further discovery will take place in this Dispute Claims Proceeding except by order of the Referee;
3. Any materials identified as Claims Evaluation Material is limited to Metex' attorneys eyes only. Should counsel for Metex wish to disclose any such material or to discuss any such material with counsel to the Unsecured Creditors' Committee and the Future Claimants' Representative, or any other person or party, Metex will provide written notice to CIC, who may request the Referee resolve any dispute. No such disclosure or discussion to which CIC objects will take place until such objection is resolved.
4. Metex may file a brief addressing matters that have not been resolved in this Disputed Claims Proceeding and may be heard in the hearing on the merits.
5. The parties will inform the Referee of any progress in Metex' Chapter 11 proceeding in a timely manner.

**Briefing Schedule**

The briefing schedule due dates follow:

January 27, 2014 - Metex' pleading on the Merits

March 3, 2014 – Responses to Metex' pleading on the Merits

March 17, 2014 – Any supplemental pleadings for consideration in the hearing on the merits

The Clerk will schedule a hearing on the merits on a date as soon as possible after April 1, 2014.

**So ordered.**

Date: December 17, 2013

  
Referee, Melinda S. Gehris