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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

THE HOME INDEMNITY COMPANY, a
New Hampshire corporation;
WAUSAU BUSINESS INSURANCE
COMPANY; WAUSAU UNDERWRITERS
INSURANCE COMPANY; and
EMPLOYERS INSURANCE OF WAUSAU,
A MUTUAL COMPANY, Wisconsin
corporations; and CALIFORNIA
INSURANCE COMPANY, a
California corporation,

Plaintiffs,

v.

STIMSON LUMBER COMPANY, an
Oregon corporation; AMERICAN
NATIONAL FIRE INSURANCE
COMPANY, a New York corpora-
tion; THE INSURANCE COMPANY
OF THE STATE OF PENNSYLVANIA,
a Pennsylvania corporation;
and NATIONAL UNION FIRE IN-
SURANCE COMPANY OF PITTSBURGH,
a Pennsylvania corporation,

Defendants.

No. CV-01-514-HU

ORDER

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1 - ORDER

1 Dianne K. Dailey
BULLIVANT HOUSER BAILEY, P.C.
2 300 Pioneer Tower
888 SW Fifth Avenue
3 Portland, Oregon 97204

4 Attorney for Plaintiff The Home Indemnity Company

5 Beth Skillern
BULLIVANT HOUSER BAILEY, P.C.
6 300 Pioneer Tower
888 SW Fifth Avenue
7 Portland, Oregon 97204

8 Attorney for Plaintiff California Insurance Company

9 Jan K. Kitchel
SCHWABER, WILLIAMSON & WYATT, P.C.
10 Pacwest Center, Suites 1600-1900
1211 S.W. Fifth Avenue
11 Portland, Oregon 97204

12 Attorneys for Plaintiffs Wausau Business Insurance
Company, Wausau Underwriters Insurance Company, and
13 Employers Insurance of Wausau

14 Edwin C. Perry
TONKON TORP LLP
15 1600 Pioneer Tower
888 S.W. Fifth Avenue
16 Portland Oregon 97204

17 James A. Riddle
THELEN REID & PRIEST LLP
18 101 Second Street
San Francisco, California 94105

19 Attorneys for Defendant Stimson Lumber Company

20 Michael A. Lehner
21 LEHNER, MITCHELL, RODRIGUEZ & SEARS
1500 SW First Avenue
22 Suite 1015
Portland, Oregon 97201

23 Attorney for Defendant American National Fire Insurance
24 Company

25 Eric J. Neiman
Vivian Raits Solomon
26 DUDEN NEIMAN LLP
333 SW Taylor Street
27 Portland, Oregon 97204

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2 - ORDER

1 Pamela M. Andrews
Stephen G. Skinner
2 JOHNSON CHRISTIE ANDREWS & SKINNER, P.S.
7400 Bank of America Tower
3 701 Fifth Avenue
Seattle, Washington 98104

4 Attorneys for Defendants The Insurance Company of the
5 State of Pennsylvania, and National Union Fire Insurance
Company of Pittsburgh

6 HUBEL, Magistrate Judge:

7 Plaintiffs The Home Indemnity Company ("the Home"), Wausau
8 Business Insurance Company, Wausau Underwriters Insurance
9 Company, Employers Insurance of Wausau (collectively "Wausau"),
10 and California Insurance Company, bring this action against
11 Stimson Lumber Company ("Stimson") and several other insurance
12 companies. Plaintiffs issued contracts of primary liability
13 insurance to Stimson. Defendants, other than Stimson ("the
14 excess insurers"), issued contracts of excess liability
15 insurance to Stimson.

16 Plaintiffs seek a declaration, pursuant to the Declaratory
17 Judgment Act, 28 U.S.C. §§ 2201-2202, of plaintiffs' obligations
18 to Stimson in connection with Stimson's claims for insurance
19 coverage under the insurance contracts. Plaintiffs additionally
20 seek a declaration of the excess insurers' obligations to
21 Stimson and to plaintiffs with regard to payment of any damages
22 under contracts of insurance issued by plaintiffs or the excess
23 insurers.

24 As pleaded in the First Amended Complaint, plaintiffs, the
25 excess insurers, and other insurers, provided certain liability
26 insurance to Stimson from 1980 to the present. Stimson
27 manufactures a reformulated exterior hardboard siding and other
28

3 - ORDER

1 wood products, including the Forestex Series 400 and 500
2 hardboard siding products. Upon information and belief,
3 plaintiffs contend that Stimson manufactured the Forestex siding
4 ("the siding"), from 1986 until on or about June 1997, at its
5 plant in Oregon. Stimson sold these products throughout the
6 western United States.

7 Stimson notified plaintiffs and some or all of the excess
8 insurers of various suits and claims against Stimson arising out
9 of the use of the siding ("the siding claims"). Stimson
10 maintains that the insurers are obligated to defend or indemnify
11 Stimson in connection with the siding claims. The parties have
12 represented that there are approximately twenty siding claims
13 presently pending, most of them in California. Plaintiffs have
14 investigated the siding claims and have agreed to defend Stimson
15 as to certain of those claims, subject to a reservation of
16 rights. Stimson contends that plaintiffs are obligated to
17 defend or indemnify it more broadly than plaintiffs have agreed
18 to do with respect to the siding claims. The excess insurers
19 provided certain excess liability insurance to Stimson, and that
20 excess liability insurance may be reached as a result of the
21 payment of sums by or on behalf of Stimson in connection with
22 the siding claims.

23 Based on these facts, plaintiffs bring two claims: (1) a
24 declaratory judgment claim against Stimson in which plaintiffs
25 seek to clarify the limits of their coverage of the siding
26 claims; and (2) a declaratory judgment claim against the excess
27 insurers seeking a declaration of the excess insurers'
28 obligations to Stimson regarding the payment of any sums by or

4 - ORDER

1 on behalf of Stimson in connection with the siding claims, and
2 seeking a declaration of the proper allocation among Stimson's
3 primary and excess insurers and between those insurers and
4 Stimson, of liability for any sums for which Stimson may be
5 obligated in connection with the siding claims.

6 Stimson counterclaims against plaintiffs for breach of
7 contract and for breach of the implied covenant of good faith
8 and fair dealing. Stimson seeks damages of not less than
9 \$312,522 for those two claims. Stimson also brings a
10 counterclaim for declaratory relief against plaintiffs seeking
11 a declaration of its rights under plaintiffs' insurance
12 policies, including, but not limited to, a declaration that
13 plaintiffs are obligated to fully defend and indemnify Stimson
14 in connection with all of the pending siding claims and to
15 reimburse Stimson for costs and expenses incurred in connection
16 with the defense and resolution of two particular claims.

17 Presently, The Home moves for a stay of ninety days based
18 on a stay order issued by the Superior Court of New Hampshire on
19 March 5, 2003. In that Order, the court granted a petition by
20 the Commissioner of Insurance for the State of New Hampshire and
21 ordered The Home into rehabilitation under New Hampshire law.
22 The court appointed the Insurance Commissioner Rehabilitator of
23 The Home. The court's order also includes a provision staying
24 all actions against The Home and its insureds. Exh. A to March
25 12, 2003 Dianne K. Dailey Affid, at p. 2.

26 I grant The Home's motion subject to the following
27 conditions. Furthermore, I order all other parties to the
28 action to respond to the inquiries listed below.

5 - ORDER

1 First, as to The Home, the motion to stay is granted subject
2 to The Home submitting a request to the Rehabilitator as soon as
3 possible, but no later than March 31, 2003, seeking a response
4 from the Rehabilitator to the following inquiries:

5 1) will the Rehabilitator object to summary judgment
6 motions proceeding in the case with the representation from the
7 three plaintiffs that any motion filed by plaintiffs will be
8 filed as a single joint motion on behalf of all three
9 plaintiffs, including The Home, under the current briefing
10 schedule which requires motions to be filed April 4, 2003,
11 responses to motions to be filed April 25, 2003, and replies to
12 be filed May 9, 2003 -

13 a) with The Home's participation in the summary
14 judgment motion litigation?

15 b) without The Home's participation in the summary
16 judgment motion litigation, but with any rulings on the motions
17 binding The Home given that the plaintiffs will be proceeding
18 jointly? and

19 c) without The Home's participation in the summary
20 judgment motion litigation and without any rulings binding The
21 Home?

22 2) will the Rehabilitator allow The Home's participation
23 in the scheduled mediation of this case with Ninth Circuit Court
24 of Appeals Judge Edward Leavy on April 15 and 16, 2003, with the
25 knowledge that the parties have represented that what they
26 expect to accomplish at the mediation is the negotiation of a
27 formula for contribution to settlements of or judgments against
28 Stimson for siding claims by Stimson, the three primary insurers

6 - ORDER

1 (The Home, Wausau, and California Insurance Company), and the
2 excess insurers (American National Fire Insurance Company, The
3 Insurance Company of the State of Pennsylvania, and National
4 Union Fire Insurance Company of Pittsburgh)? Additionally, The
5 Home shall represent to the Rehabilitator that it requests the
6 Rehabilitator to allow it to participate in this mediation with
7 the authority to agree to a formula as outlined above, subject
8 to any specific contribution by The Home in any given case
9 requiring the prior approval of the Rehabilitator.

10 3) what is the Rehabilitator's position on whether current
11 or former employees of The Home may be deposed in this coverage
12 case with the understanding that Stimson believes that The
13 Home's current and former employees have information pertinent
14 to the coverage dispute not only between Stimson and The Home,
15 but also to the dispute between Stimson and the other carriers.

16 In posing these requests to the Rehabilitator, The Home
17 shall underscore the importance of a timely response by the
18 Rehabilitator to the efficient resolution of the claims pending
19 in this case. The Home shall serve a copy of its submission to
20 the Rehabilitator on the other plaintiffs, Stimson, the excess
21 carriers, and this Court.

22 Second, as to the other parties. Stimson's position is that
23 if I grant a stay to The Home, I should stay the case as to the
24 other parties as well. On the other hand, the other plaintiffs
25 and the excess carriers desire to proceed, notwithstanding any
26 stay granted to The Home. Any stay with respect to The Home
27 creates a number of issues. To fully assess the impact of
28 extending the stay to the other plaintiffs, I request that all

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1 other parties (Stimson, the other two plaintiffs, and the excess
2 carriers), respond to the following inquiries:

3 1) jointly provide a list of all of the presently pending
4 underlying siding claims including whether a motion to stay has
5 been filed, the date of any such filing, and the adjudication of
6 any such motion. If a stay has been granted, include
7 information as to whom is bound by the stay order, including
8 what defendants, what claims, and the dates the stay is in
9 effect. Additionally, for each pending siding claim, list which
10 primary carrier may be liable on the claim and which excess
11 carrier lines up with which primary carrier;

12 2) the position of each party regarding what effect, if
13 any, a stay granted to The Home has on the defense costs and
14 indemnity liabilities of the remaining primary and excess
15 carriers?

16 3) the position of each party regarding if, when, and how
17 the Oregon Insurance Guaranty Association will become involved
18 in the underlying siding claims and this coverage case, and the
19 position of each party as to who will bear the ultimate risk if
20 The Home is unable to make any contribution toward the
21 settlement or judgment of the underlying siding claims - the
22 claimants, the insured, the other primary carriers, the excess
23 carriers, the Oregon Insurance Guaranty Association, or a
24 combination of them? If the parties believe that resources from
25 a combination of parties may be required, what order of
26 contribution is followed?

27 4) the position of each party as to the present respective
28 role of each primary carrier in handling the pending siding

B - ORDER

1 claims. That is, in any given underlying siding claim, Stimson
2 has tendered that claim to one or more of the primary and excess
3 carriers. What is the working relationship among the primary
4 carriers in responding to that tender? Additionally, why is it
5 important or unimportant for Stimson to obtain additional
6 discovery from The Home in order to litigate the summary
7 judgment motions brought by Stimson against the other plaintiffs
8 or excess carriers, or brought against Stimson by the other
9 plaintiffs or excess carriers.

10 5) a statement addressing the case schedule. From Stimson,
11 I request a proposed case schedule if a stay is granted as to
12 all carriers. From the other carriers (both primary and
13 excess), I request a proposed case schedule that takes into
14 account a stay only as to The Home. The carriers' proposed
15 schedule(s) should address

16 a) how to accommodate Stimson's request to depose
17 additional former or current employees of The Home before the
18 final summary judgment briefs are due;

19 b) when to schedule a mediation without The Home;

20 c) what issues should be adjudicated without The Home,
21 and when (e.g. at summary judgment or at trial) - just the
22 declaratory relief claims (both those brought by plaintiffs and
23 Stimson's counterclaim), or Stimson's counterclaims for money
24 damages as well; and

25 d) reincorporation of The Home in this litigation if
26 the stay against The Home is lifted.

27 Responses to these inquiries by Stimson, the remaining two
28 plaintiffs, and the excess carriers, is due no later than April

9 - ORDER

1 4, 2003. To the extent the primary and excess carriers can
 2 agree on a proposed schedule, or a response to any of the
 3 inquiries, they may submit a joint response. To the extent
 4 their positions vary, separate responses are to be filed. Each
 5 party may then file a response to the April 4, 2003 filing by
 6 any other party, no later than April 11, 2003.

7 CONCLUSION

8 The Home's motion for stay (#94) is granted subject to the
 9 conditions outlined above.

10 .IT IS SO ORDERED.

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12 Dated this 25th day of March

13 2003.

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16 /s/ Dennis James Hubel

17 Dennis James Hubel
18 United States Magistrate Judge
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10 - ORDER