

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-106

**In the Matter of the Liquidation of
The Home Insurance Company**

**AFFIDAVIT OF PETER A. BENGELSDORF, SPECIAL DEPUTY LIQUIDATOR,
IN SUPPORT OF MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT
WITH METEX AND NEW YORK LIQUIDATION BUREAU**

I, Peter A. Bengelsdorf, hereby depose and say:

1. I was appointed Special Deputy Liquidator of The Home Insurance Company (“Home”), by the Insurance Commissioner for the State of New Hampshire, as Liquidator (“Liquidator”) of Home. I submit this affidavit in support of the Liquidator’s Motion for Approval of Settlement Agreement with Metex and New York Liquidation Bureau. The facts and information set forth are either within my own knowledge gained through my involvement with this matter, in which case I confirm that they are true, or are based on information provided to me by others, in which case they are true to the best of my knowledge, information, and belief.

2. The motion seeks approval of a Settlement Agreement and Mutual Release (“Settlement Agreement”) between Metex Mfg. Corporation (“Metex”), the Superintendent of Financial Services of the State of New York as Administrator of the New York Property/Casualty Insurance Security Fund (“Security Fund”) and as Ancillary Receiver of Home (“Ancillary Receiver”) (the Security Fund and Ancillary Receiver collectively are referred to as the New York Liquidation Bureau or “NYLB”), and the Liquidator. A copy of the Settlement Agreement is attached as Exhibit 1 to the motion.

3. The Settlement Agreement provides for a comprehensive resolution of a complex situation involving two entities acting for the insolvent Home (the Liquidator and the NYLB), a

policyholder that is in bankruptcy (Metex), many asbestos claimants, and several other insurer claimants. In essence, it provides for the remaining limits of the Home policies to be paid by the NYLB to an asbestos personal injury trust to be established as part of a Metex bankruptcy plan; mutual releases between Metex and Home, the NYLB and the Liquidator; and bankruptcy court injunctions to channel asbestos claims to the trust and protect Home, the NYLB and the Liquidator from claims. As a result, the Liquidator will deny claims concerning the Home policies issued to Kentile except for a contribution claim by Century Indemnity Company (“CIC”) (which has already been denied and is the subject of a disputed claim proceeding before the Referee) and claims of the NYLB for its payments under the Home policies.

4. The Settlement Agreement was negotiated under the Supervision of the Special Deputy Liquidator, and it is subject to the Court’s approval. See Settlement Agreement at 3 (defining “Liquidation Court”) and ¶¶ II.T (“Effective Date”); II.II (“Other Court Approval”). It is also subject to approval by the bankruptcy court overseeing the Metex bankruptcy proceeding and the New York court overseeing the ancillary receivership for Home in that state (which, under New York law, must approve payments by the Security Fund). *Id.* at 3 (“Ancillary Receivership Court”) and ¶¶ II.B (“Approval Order”); II.H (“Bankruptcy Court”); II.O (“Court Approval”); II.T (“Effective Date”); II.II (“Other Court Approval”). The Settlement Agreement will only become effective on confirmation of a plan of reorganization for Metex establishing an asbestos personal injury trust under § 524(g) of the Bankruptcy Code and on issuance of several injunctions by the bankruptcy court. *Id.* ¶¶ II.T (“Effective Date”); II.O (“Court Approval”).

5. Kentile Floors, Inc. (“Kentile”) was a manufacturer of floor tiles that, for a time, used asbestos in certain of its products. Settlement Agreement at 1. Beginning in the 1970s, Kentile was named as a defendant in lawsuits alleging liability for personal injury arising out of exposure to Kentile asbestos containing products. *Id.* On November 20, 1992, Kentile filed a

petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York as Case No. 92-B-46466 (BRL). Id. at 2. The bankruptcy court confirmed a plan of reorganization on December 15, 1998. The reorganized Kentile – after a merger and name change – became Metex. Id.

6. Kentile continued and continues to be named as a defendant in thousands of asbestos-related claims. Settlement Agreement at 6. As of May 2013, there were approximately 28,000 asbestos-related claims outstanding against Kentile. Id. at 2.

7. During 2012, Metex negotiated a prepackaged plan of reorganization including formation of a § 524(g) trust and settlements with eight solvent insurers of Kentile, but the plan was not approved by a sufficient percentage of asbestos claimants.¹ Settlement Agreement at 5-6 & n.1. 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 as Case No. 12-14554. Id. at 6 and ¶ II.J (“Chapter 11 Case”).

8. Home issued first layer excess insurance policies to Kentile for five years from January 1, 1977, through January 1, 1982. Settlement Agreement Ex. B. Together, the Home policies provided potential coverage subject to aggregate limits totaling \$25 million. Id. ¶ II.RR.

9. On June 13, 2003, the Court issued an Order of Liquidation for Home that declared Home to be insolvent, ordered Home to be liquidated, and appointed the Commissioner as Liquidator. Settlement Agreement at 2-3.

10. On September 24, 2003, the Supreme Court of New York appointed the Superintendent as Ancillary Receiver of Home in the State of New York. Settlement Agreement at 3. Home’s insolvency triggered the potential obligations of the Security Fund (the New York

¹ After the voting deadline, Metex received additional votes which, if counted, met the applicable two-thirds in amount standard, thus making the prepackaged plan confirmable.

form of 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 collectively referred to as the “NYLB”.

11. 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. Settlement Agreement at 3.

12. As of May, 2013, the Security Fund had paid out \$14,016,147.38 under the Home policies in connection with asbestos claims and pursuant to orders of the Ancillary Receivership Court, and it has paid or will pay an additional \$408,849.50 pursuant to an order of the Ancillary Receivership Court dated December 4, 2012. Settlement Agreement at 4, ¶ RR, Ex. A.

13. The number and value of asbestos claims against Metex made or anticipated to be made against the Security Fund with respect to the Home policies are expected by Metex, the NYLB and the Liquidator to exhaust the aggregate limit of insurance coverage provided in those policies. See Settlement Agreement at 3.

14. Four hundred thirty-eight proofs of claim asserting claims concerning the Home/Kentile policies have been filed by representatives of asbestos personal injury claimants, Metex/Kentile, and several insurers including CIC. The Liquidator is mailing, first class postage prepaid, a copy of this motion to all those who filed proofs of claim concerning the Home/Kentile policies in the Home liquidation.

15. Metex seeks to implement a bankruptcy plan that will provide for establishment of a trust to handle and pay asbestos claims, settlements with Metex’s insurers to fund the trust, and injunctions to channel asbestos claims to the trust and protect Metex and settling insurers from claims. The NYLB and Liquidator sought to participate in the plan and address the claims against them by negotiating the Settlement Agreement. Once effective, the Settlement

Agreement will (a) resolve all claims between Metex and Home, the NYLB, and the Liquidator; (b) provide for payment of the remaining Home policy limits (subject to resolution of the CIC claims discussed below) to an asbestos personal injury trust to be established pursuant to §524(g) of the Bankruptcy Code (the “§ 524(g) Trust”); (c) provide that all remaining asbestos claims will be channeled to the § 524(g) Trust; and (d) provide Home, NYLB and the Liquidator with releases from claims under the Home policies and the protections of Metex’s plan of reorganization and related injunctions against claims. See Settlement Agreement ¶ I. The Settlement Agreement also accounts for a pending disputed claim proceeding in the Home liquidation concerning a contribution claim by CIC. The principle aspects of the settlement are summarized below.

16. Under the Settlement Agreement, the NYLB will pay the remaining aggregate limit of the Home policies to the § 524(g) Trust in two payments. The Security Fund will pay \$4 million of the remaining policy limits to the § 524(g) Trust within thirty days after the Settlement Agreement becomes effective. Settlement Agreement ¶¶ III.A.1.a; II.SS (“Settlement Amount”). The Security Fund will pay the remaining policy limits to the § 524(g) Trust on the later of one year after the effective date or when the CIC contribution claim in the Home liquidation has been finally resolved. *Id.* ¶ III.A.1.b. In the event that any of CIC’s claim is allowed, that allowance will reduce the amount of the second payment to the § 524(g) Trust. *Id.* ¶¶ III.A.1.b; II.RR (“Remaining Policy Limit”).

17. Under the settlement, Home, the NYLB, and the Liquidator receive releases from Metex and they release Metex. Settlement Agreement ¶¶ IV.A; IV.B. Home, the NYLB, and the Liquidator will also be afforded the protections of Metex’s bankruptcy plan and supporting injunctions to be entered by the bankruptcy court. *Id.* ¶¶ II.MM (“Plan”). The injunctions will provide overlapping protections and include:

- a channeling injunction under 11 U.S.C. § 524 that will direct all asbestos claims against Metex (Kentile) to the § 524(g) Trust and bar actions against Home, the NYLB and the Liquidator for such claims, Settlement Agreement ¶¶ II.F (“Asbestos Protected Parties”); II.Y (“524 Injunction”); Ex. C (form of injunction);
- a policy injunction under 11 U.S.C. § 105 that will bar claims against Home, the NYLB and the Liquidator under the policies, Settlement Agreement ¶¶ II.TT (“105 Injunction”); Ex. D (form of injunction); and
- an injunction under 11 U.S.C. § 363 that will bar claims attributable to the Home policies. Settlement Agreement ¶¶ II.VV (“363 Injunction”); Ex. E (¶ 12) (form of injunction in Approval Order).

18. Payment by the Security Fund to the § 524(g) Trust under the settlement will exhaust the Home policies. Settlement Agreement ¶ IV.A. Accordingly, after the Settlement Agreement becomes effective, the Liquidator and NYLB will deny claims under the Home policies consistent with the channeling and other injunctions as described below. *Id.* ¶ V.C.

19. After the Settlement Agreement becomes effective, the Liquidator will deny the third party asbestos claimants’ claims in the Home liquidation without prejudice to their claims against the § 524(g) Trust. This will not prejudice the third party claimants because the §524(g) Trust will have been established to address their claims and funded by the various Metex/insurer settlements, including the Settlement Agreement. Under the Metex reorganization plan, the asbestos claimants will have their claims against the § 524(g) Trust, and the channeling injunction entered by the bankruptcy court will direct them to pursue their claims against the Trust by enjoining them from pursuing the Asbestos Protected Parties, including Metex, Home,

the NYLB, the Liquidator, or any of the other settling insurers. The § 524(g) Trust will receive the full remaining limits of the Home policies (subject to resolution of the CIC claim).²

20. The Liquidator will also deny other insurers' claims in the Home liquidation concerning the Home/Kentile policies. This will not prejudice the other insurers because, among other things, they do not have any claims in light of their own settlements with Metex. In the Settlement Agreement, Metex represents that the other insurers (except CIC) have already assigned any rights they have against Home to the § 524(g) Trust, and the § 524(g) Trust covenants that it will not assert any such right against Home. Settlement Agreement ¶ IV.D. Moreover, claims against Home by other insurers (except CIC) will be enjoined by the policy injunction. *Id.* Ex. D. The effect of the Settlement Agreement and the settlement agreements between Metex and the other insurers is to resolve the obligations between Metex and each insurer and bar claims between or among the insurers.

21. CIC is in a different position because CIC's own settlement with Metex permits CIC to pursue its rights, if any, to allowance of its contribution claim in the Home liquidation. See Settlement Agreement at 3-4; ¶ IV.C. CIC contends that part of its payments under policies that a predecessor issued to Kentile was "on Home's behalf" and that it is entitled to contribution from Home. CIC is using this claim as a setoff to reduce its reinsurance payments to the Liquidator under reinsurance contracts with Home by more than \$5 million.

22. The Liquidator has denied CIC's claim, and CIC and the Liquidator are litigating over the validity of CIC's claim before the Referee as part of the 2005-HICIL-14 disputed claim proceeding. See Settlement Agreement at 3-4. CIC takes the position that its contribution claim

² The third party claimants' proofs of claim against the insolvent Home, if not enjoined by the channeling injunction and denied with this agreement, would release Kentile from those claims up to the limits of the policies but only entitle the third party claimants (assuming their claims were allowed) to a presently undetermined percentage distribution at the future date when a distribution is made. See RSA 402-C:40, I. It is not expected that the allowed claims of any third party claimants (or other Class II creditors) will be paid in full.

impairs the limits of the Home policies so that NYLB makes payment on claims under the Home policies at its peril. *Id.* at 4. Unless and until CIC's claim is finally disallowed, therefore, CIC's claim and setoff reduces the available limits of the Home policies. Otherwise, the entities addressing claims under the Home policies – the NYLB and the Liquidator – might make combined payments in excess of the aggregate limits of the Home policies.

23. The Settlement Agreement addresses this situation by providing that (1) the NYLB will not make the second payment to the § 524(g) Trust until the CIC claim is finally determined, and (2) the amount of the second payment will be reduced by any allowed amount on the CIC claim. Settlement Agreement ¶¶ III.A.1.a and A.1.b; II.RR. The Settlement preserves CIC's ability to assert its contribution claim. See *id.* ¶¶ IV.C (noting CIC/Metex settlement); V.C (CIC's prosecution of claim not enjoined after effective date); VI.B (CIC's claim not stayed during Metex's bankruptcy); VII.A.3 (allowing for determination of automatic stay as to CIC claim).³ The bankruptcy court injunctions will not enjoin that claim. *Id.* ¶ V.C, Ex. D (¶ 13). The Settlement Agreement also preserves the Liquidator's ability to contend that CIC's claim is not valid and should not be allowed. See *id.* ¶¶ V.B (preserving rights and defenses); VII.B.2 (reserving rights as to CIC claim); Ex. D (¶ 13).

24. The Settlement Agreement makes the full remaining limits of the Home policies available to benefit Metex and the asbestos claimants without prejudicing the rights, if any, of CIC or exposing Home (through the NYLB and the Liquidator) to the risk of paying more than the aggregate policy limits.

25. Once the Settlement Agreement is effective, the Liquidator will also deny the claims filed on behalf of Metex and Kentile without prejudice to their rights under the Settlement

³ Metex has moved to intervene in the disputed claim proceeding over the CIC claim before the Referee. In the event that intervention is not allowed, Metex may seek a determination from the bankruptcy court concerning the application of the automatic stay to the disputed claim proceeding.

Agreement. That will not prejudice them because, under the Settlement Agreement, the full limits of the Home policies will be paid by the NYLB (subject to resolution of the CIC claim), and they release Home. Settlement Agreement ¶¶ III.A; IV.A.

26. The NYLB will continue to have its claim in the Home estate for the amounts it pays under the Home policies as contemplated by RSA 402-C:44 and RSA 404-B:11. The Settlement Agreement preserves that claim. Settlement Agreement ¶¶ IV.B; VII.B.2. The bankruptcy injunctions will not enjoin that claim. *Id.* Ex. E (¶ 13).

27. The Settlement Agreement is the result of negotiations involving the Claims Department, under the supervision of the Special Deputy Liquidator, which has extensive experience in assessing the exposure presented by claims for asbestos claims under Home's insurance policies. The settlement reflects careful evaluation and negotiation of coverage obligations under Home's policies respecting the underlying liabilities of Metex/Kentile by both the NYLB and the Liquidator. The Settlement Agreement provides for a comprehensive and appropriate resolution of a complex situation involving two entities acting for Home (the NYLB and the Liquidator), the policyholder in bankruptcy (Metex), many third party asbestos claimants, and several insurer claimants, including CIC. The Liquidator accordingly recommends approval of the Settlement Agreement in accordance with RSA 402-C:45.

28. I believe that the Settlement Agreement is fair and reasonable and in the best interests of the policyholders and creditors of Home.

Signed under the penalties of perjury this 10th day of July, 2013.

Peter A. Bengelsdorf
Peter A. Bengelsdorf
Special Deputy Liquidator of The Home Insurance
Company

STATE OF NEW YORK
COUNTY OF NEW YORK

Subscribed and sworn to, before me, this 10th day of July, 2013.

Nelly M. Gomez-Ramirez
Notary Public/Justice of the Peace

Nelly M. Gomez-Ramirez
Notary Public State of New York
No. 01GO5005271
Qualified in Bronx County
Commission Expires 2/1/2015