

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

LIQUIDATOR'S REQUEST TO BIFURCATE PROCEEDING

Pursuant to Section 13 of the Restated and Revised Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company in Liquidation dated January 19, 2005 ("Claims Procedures Order"), John R. Elias, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), requests that the Referee issue an order bifurcating the issues of coverage and valuation of the claim submitted by claimant PolyOne Corporation ("PolyOne") to address the two threshold coverage set forth in paragraph 7 below issues before any discovery or other matters. As reasons therefore, the Liquidator states:

Background

1. This proceeding concerns the claim of PolyOne Corporation ("PolyOne") under excess policies issued by Home to B.F. Goodrich Company, now named Goodrich Corporation ("Goodrich"), regarding pollution at the former Goodrich facility in Calvert City, Kentucky (the "Calvert City site"). Goodrich operated a manufacturing plant or plants at the Calvert City site beginning in 1953. See Case File 46-47, 100 n.1 and 105.
2. PolyOne filed a proof of claim. In subsequent submissions respecting the Calvert City site, PolyOne asserted a claim to the \$20 million total limits of two 1974 Home excess

policies issued to Goodrich, HEC4356627 (excess of \$40 million in underlying insurance) and HEC4356857 (excess of \$60 million). Case File 46, 48 (PolyOne May 3, 2018 letter). After exchanges of correspondence, the Liquidator denied PolyOne's claim under the two policies on three grounds: (1) the law of Kentucky, where the Calvert City site is located, applies and provides for "pro rata" allocation, and under that method of allocation the Home policies excess of \$40 million would not be reached; (2) the Home policies require that before they attach the underlying insurers must have either paid or been held liable to pay the full amount of the underlying limits, and the underlying insurers have not so paid or been held liable to pay; and (3) PolyOne is not entitled to rights under the policies. Case File 242-243 (June 13, 2019 Notice of Determination). The Liquidator did not reach other issues concerning coverage under the policies or the value of the claim. Case File 243.

3. On August 8, 2019, PolyOne filed PolyOne Corporation's Objection to the Liquidator's June 13, 2019 Denial of Claim ("Objection") seeking allowance of "the full limits of the Home Policies, i.e. \$20 million." Objection at 5-6; see *id.* at 1. The Objection describes the three grounds for denial of PolyOne's claim for Calvert City under the two Home policies. Objection at 4. It contends that (1) Ohio law governs coverage under the policies, and under that law "all sums" allocation applies; (2) the limits of the underlying policies have been exhausted by payment of claims, "or are deemed exhausted by settlement;" and (3) PolyOne has rights under the policies. See Objection at 4-5.

4. After the Liquidator provided PolyOne with the Case File on October 4, 2019,¹ PolyOne filed the Claimant's Mandatory Disclosures ("PolyOne Disclosures") on November 4,

¹ The Liquidator did not file the Case File with the Liquidation Clerk because the Liquidator anticipated that PolyOne would want to designate certain materials as confidential. That was correct, and the parties are preparing a proposed protective order. The Liquidator submitted the Case File (With Confidential Material Removed) on November 25, 2019, and will submit the entire Case File after the proposed stipulated protective order is addressed.

2019. The PolyOne Disclosures enlarged PolyOne's claim from \$20 million to \$40 million by adding claims under two additional Home excess policies, HEC4495806 for 1975 and HEC9006524 for 1976, both of which are excess of \$20 million in underlying policies. Compare Objection at 1 and PolyOne Disclosures at 1. PolyOne also submitted approximately 36,000 pages of documents in support of its claim. See PolyOne Disclosures at 7-8. Only a small part of those documents (about 3,000 pages) had previously been provided to the Liquidator.

5. Goodrich has also filed a claim in the liquidation seeking coverage for the Calvert City site, and on October 2, 2019, Goodrich filed the Motion of Goodrich Corporation to Participate in Disputed Claim Proceeding ("Goodrich Motion") requesting to participate in this disputed claim proceeding pursuant to Section 9(b) of the Claims Procedures Order. The Goodrich Motion notes that Goodrich seeks coverage for the Calvert City site under the same Home excess policies as PolyOne.² Goodrich Motion at 1. The Liquidator did not object, and on November 4, 2019, the Referee granted Goodrich's motion.

**THIS PROCEEDING SHOULD BE BIFURCATED
TO ADDRESS TWO CRITICAL COVERAGE ISSUES FIRST.**

6. The efficient and cost-effective resolution of PolyOne's claims will be advanced by bifurcating this disputed claim proceeding to start with two critical coverage issues requiring minimal factual presentation. The first question concerns the choice of applicable law, which will determine the allocation rule that applies to the policies, and the second concerns the application of the Home excess policies' condition that underlying insurers pay or be held liable to pay their full limits before the Home policies attach.

² The Liquidator is unclear as to how Goodrich's and PolyOne's claims relate to each other. However, determination of the issues described in this motion will advance resolution of both claims.

7. The two issues are as follows:

Issue No. 1: Are coverage issues under the Home excess policies issued to Goodrich under which PolyOne asserts rights concerning the Calvert City site governed by Ohio law or by Kentucky law?

Issue No. 2: Do the Home excess policies issued to Goodrich, under which PolyOne asserts rights concerning the Calvert City site, apply where insurers issuing policies underlying the Home excess policies neither paid nor were held liable to pay the full amount of their applicable limits with respect to the Calvert City site as a result of below-limits settlements they entered into with Goodrich or PolyOne?

8. This proceeding should be bifurcated and these issues decided first because a ruling in the Liquidator's favor on either of them will greatly reduce the amount of PolyOne's claim by removing policies from consideration, and together they may dispose of it. (Rulings on these issues will also advance determination of Goodrich's claim.) In any event, a ruling on choice of law will simplify any later briefing, and a ruling on attachment of the policies will determine the scope of discovery concerning PolyOne's and Goodrich's settlements with underlying insurers.³

Issue No. 1 – Choice of Law and Allocation

9. The choice of law issue is critical because it will determine the allocation rule ("all sums" or "pro rata") that applies to both PolyOne's and Goodrich's claims respecting the Calvert City site. There is now an actual conflict between the potentially applicable laws.

³ The Liquidator does not request that the third issue presented by the Notice of Determination (the question of PolyOne's asserted rights under the Goodrich policies) be addressed at this time because it will require factual development. It appears that PolyOne asserts rights as alleged successor to Goodrich as a matter of law and under an agreement entered in 1993. See Case File 232-233. PolyOne provided approximately 2,600 pages of transactional documents purportedly bearing on this subject with its disclosures. See PolyOne Disclosures at 8.

PolyOne and Goodrich contend that coverage issues under the Home policies are governed by Ohio law, and that “all sums” allocation accordingly applies under Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co., 769 N.E.2d 835 (Ohio 2002). See PolyOne Disclosures at 2-7; Goodrich Motion at 2. The Liquidator contends that coverage issues are governed by Kentucky law, and that “pro rata” allocation accordingly applies under Aetna Cas. & Sur. Co. v. Com., 179 S.W.3d 830 (Ky. 2005). See Case File 242-243.

10. Choice of law is critical, which is why PolyOne devoted much of its disclosures to the issue and Goodrich relied on it as a basis to participate. See PolyOne Disclosures at 2-4; Goodrich Motion at 2. The Home policies are high level excess policies, and choice of law is potentially dispositive as to the two policies that were the subject of PolyOne’s claim before the Liquidator. If Kentucky law (the “law of the site”) applies, claimed amounts are allocated pro rata and spread across numerous years. As PolyOne acknowledges, this means that the two Home policies will not be reached, as one policy is excess of \$40 million and the other is excess of \$60 million. See PolyOne Disclosures at 1-2 (asserting claims under four policies under Ohio law but only under two under Kentucky law). This was one of the principal grounds relied on by the Liquidator in denying PolyOne’s claim. Case File 242-243.

11. In its mandatory disclosures, PolyOne added claims under two additional Home excess policies, each of which is excess of \$20 million. PolyOne Disclosures at 1. Even considering these two policies, however, PolyOne acknowledges that application of Kentucky law will greatly reduce its claim. PolyOne calculates that application of Kentucky law reduces its claim from \$40 million (for four policies under Ohio law) to \$2.6 million (for two policies under Kentucky law). PolyOne Disclosures at 2.⁴

⁴ The Liquidator cites to PolyOne’s calculation for illustration only. The Liquidator reserves all rights.

12. The Referee (Paula Rogers, R.) previously addressed the choice of law issue presented here under New Hampshire choice of law principles in the VIAD disputed claim proceeding. In that case, the Referee ruled on choice of law as a preliminary matter and held that the law of the state of the environmental site (there, California) applied to coverage issues under the Home policies. Claim of VIAD, Disputed Claim Proceeding 2008-HICIL-35, Order Regarding Choice of Law Issue (Dec. 4, 2008).⁵

13. The choice of law issue does not require factual development. It may be presented based upon the policies and the documents concerning the Calvert City facility in the Case File. If PolyOne and Goodrich wish to contend that prior litigation involving Goodrich requires application of Ohio law here (see Goodrich Motion at 2, PolyOne Disclosures at 3-4), they may present that argument based on documents concerning that prior litigation.

Issue No. 2 – Attachment of the Home Excess Policies

14. The second issue concerns application of the condition in the Home policies requiring that underlying insurers “have paid or have been held liable to pay the full amount of” the underlying limits before Home’s policies attach. This matters because it will determine whether the Home excess policies can have obligations respecting the Calvert City site. The Home excess policies provide that:

As respects accidents or occurrences, whichever is applicable, taking place during the period of the Policy, the Company agrees to afford the Insured such additional insurance as the issuers of the Underlying Coverage specified in the schedule would afford the Insured by increasing the underlying limit from the limit(s) set forth under Item 2 of the Declarations to the limit(s) set forth under Items 2 and 3 of the Declarations combined provided that it is expressly agreed that liability shall attach to the Company:

⁵ After a subsequent decision on the merits, VIAD filed a motion to recommit. The motion was pending in the Superior Court when the parties settled non-asbestos and non-workers’ compensation matters. The Court approved the VIAD/Liquidator settlement agreement on May 2, 2012.

- (a) Only after the issuers of the Underlying Coverage have paid or have been held liable to pay the full amount of the said underlying limits . . .

E.g., Case File 22, 35. This condition is found in all four of the Home excess policies issued to Goodrich under which PolyOne asserts coverage.

15. PolyOne contends that Home's policies attach because the underlying policies have been exhausted as to the Calvert City site by settlements with insurers or payments by insurers that in the aggregate total less than the policy limits underlying the Home policies, and that it suffices for PolyOne to give Home a "credit" for underlying limits. See Case File 239 (PolyOne April 25, 2019 letter) ("Because other insurers have settled their Calvert City liabilities and the Calvert City claim costs reach the attachment point of the Home Insurance Company policies, Home Insurance Company is obligated to pay the amount of these costs sought by PolyOne."). This is made clear in the PolyOne Disclosures, where PolyOne noted there are \$25 million in "unpaid" limits underlying the Home 1974 policies and simply applied the amount of underlying limits against alleged unreimbursed costs to assert that the Home policies attach and are obligated to respond. PolyOne Disclosures at 5 & n.7.

16. By contrast, the Liquidator contends that under the terms of the Home policies, coverage does not attach unless and until the underlying insurers have paid their full policy limits with respect to the Calvert City site or have been held liable to pay those full limits. This issue was another of the principal grounds relied on by the Liquidator in denying PolyOne's claim. See Case File 243.

17. The Liquidator is not aware of any state court decisions on this issue in Ohio and Kentucky. However, the United States Court of Appeals for the Sixth Circuit, applying Ohio law, has held that a provision in an excess policy similar to that in the Home policies was clear, and that it precluded coverage where the underlying insurer settled for less than policy limits.

Goodyear Tire and Rubber Co. v. National Union Fire Ins. Co., 694 F.3d 781, 782-783 (6th Cir. 2012). “Per the general rule in Ohio . . . we will enforce that agreement according to its terms.” Id. at 783 (applying an excess policy that provided: “Coverage hereunder shall attach only after [underlying insurer] shall have paid in legal currency the full amount of the Underlying Limit for such Policy Period.”).⁶

18. This issue is potentially dispositive of PolyOne’s claims under the two policies it pursued before the Liquidator. In its submissions to the Liquidator, PolyOne acknowledged that insurers underlying the 1974 Home excess policies settled for less than policy limits, Case File 239, and the Liquidator denied the claim accordingly. Case File 243. The other two Home excess policies were only added in PolyOne’s mandatory disclosures. However, in asserting that the Home policies attach, PolyOne just gave Home a credit for the amount of the “[l]imits underlying” the 1975 and 1976 policies, see PolyOne Disclosures at 5-6, so the Liquidator expects the issue may apply to them as well. In any event, resolution of the attachment issue can greatly reduce the amount of PolyOne’s claim (and Goodrich’s claim) by removing the first two policies from consideration.

19. The attachment issue does not require factual development for decision, and its determination will eliminate or focus any factual inquiry regarding the underlying limits. If the issue is resolved in the Liquidator’s favor, discovery would be necessary only if PolyOne and Goodrich actually contend that the underlying insurers have in fact paid their full policy limits

⁶ Principles of policy interpretation are similar in Ohio and Kentucky. See, e.g., Westfield Ins. Co. v. Custom Agri Sys., Inc., 979 N.E.2d 269, 271 (Ohio 2012) (“We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties.”); Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd., 597 N.E.2d 1096, 1102 (Ohio 1992); Thiele v. Kentucky Growers Ins. Co., 522 S.W.3d 198, 200 (Ky. 2017) (“We have consistently held that ‘the words employed in insurance policies, if clear and unambiguous, should be given their plain and ordinary meaning.’”) (quoting Nationwide Mut. Ins. Co. v. Nolan, 10 S.W.3d 129, 131 (Ky. 1999)).

respecting the Calvert City site (or have been held liable to pay those full policy limits). If the issue were resolved in favor of PolyOne, then the Liquidator would not need to inquire into the settlements with underlying insurers. Discovery regarding actual payment would require inquiry into the settlements with underlying insurers, the amounts paid in settlement by the insurers, the policies involved in the settlements, and the proper allocations (among policies, years and settled claims) of the settlement sums. PolyOne and Goodrich would need to provide their settlement agreements with the underlying insurers, the analysis reflected in the settlements, and demonstrate that under those settlements the insurers paid their full policy limits respecting the Calvert City site. The Liquidator anticipates, however, that PolyOne and Goodrich do not assert actual payment of limits by underlying insurers for the Calvert City site but instead contend that below-limits settlements suffice to “exhaust” the underlying policies and reach the Home excess policies. That is the issue the Liquidator seeks to present by this motion.

20. Counsel for the Liquidator, PolyOne, and Goodrich have discussed bifurcation of the two issues, and PolyOne and Goodrich have declined assent to the bifurcation proposed in this request.

WHEREFORE, the Liquidator requests that the Referee bifurcate this proceeding and direct that the Issues No. 1 and 2 set forth in paragraph 7 above be briefed for decision in accordance with Section 15 of the Claims Procedures Order before any other matters go forward. A proposed order is submitted herewith.

Respectfully submitted,

JOHN R. ELIAS, INSURANCE
COMMISSIONER OF THE STATE OF
NEW HAMPSHIRE, SOLELY AS
LIQUIDATOR OF THE HOME
INSURANCE COMPANY,

By his attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

J. Christopher Marshall
christopher.marshall@doj.nh.gov
NH Bar ID No. 1619
Civil Bureau
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3650



Eric A. Smith
esmith@rackemann.com
NH Bar ID No. 16952
Rackemann, Sawyer & Brewster P.C.
160 Federal Street
Boston, MA 02110
(617) 542-2300

December 2, 2019

Certificate of Service

I hereby certify that copies of the foregoing Liquidator's Request to Bifurcate Proceeding and the proposed form of order were sent this 2d day of December, 2019, by email to counsel for PolyOne and counsel for Goodrich.



Eric A. Smith
NH Bar ID No. 16952