

THE 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: 2008-HICIL-41
Proof of Claim Number: CLMN712396-01
Claimant Name: Harry L. Bowles

LIQUIDATOR'S RESPONSE TO MAY 14, 2009 ORDER AND
CLAIMANT'S BRIEF REGARDING REFEREE'S JURISDICTION

Roger A. Sevigny, Commissioner of Insurance of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), hereby responds both to the Referee's Order dated May 14, 2009 ("Order") and to the Claimant's Brief Regarding the Referee's Jurisdiction to Hear Claimant's Objection to Liquidator's Determination of Proof of Claim ("Claimant's Brief").

A. DISCOVERY SHOULD BE STAYED PENDING DETERMINATION OF JURISDICTION AND UNTIL AFTER PRELIMINARY BRIEFING IF THE CLAIM PROCEEDS.

1. During the telephonic structuring conference held May 13, 2009 and in the Order, the Referee directed the Claimant to file his discovery requests and "a written motion with the reasons supporting his request for discovery before any briefing is done." The Claimant has not complied with the Order. While the discovery request was apparently included with the Claimant's Brief filed with the Liquidation Clerk, the Claimant's Brief does not provide any statement of reasons for discovery prior to briefing. Such discovery should not be allowed. It would be a waste of resources to engage in discovery prior to the Referee's determination regarding jurisdiction because the matter may not be heard in this forum if the Referee were to determine that jurisdiction is lacking. Moreover, discovery is not appropriate even after the

jurisdictional determination given the nature of Claimant's claims as discussed below and the likelihood that they can be resolved without burdening either party with unnecessary discovery.

2. The Liquidator had understood from the initial colloquy at the telephonic structuring conference that Claimant was not pursuing his contention that the Liquidator's determination of Claimant's third-party claim under the Home insurance policy issued to Bishop, Peterson & Sharp ("BPS") was in error. The Liquidator had determined the claim against BPS was precluded under principles of res judicata. Claimant had objected to that determination but then acknowledged that he had no claim under the policy (see his Request for Evidentiary Hearing (March 5, 2009)) and instead contended that he had a claim based upon the alleged improper provision of a defense to BPS in Claimant's lawsuit against the firm. It now appears from the Claimant's Brief, however, that Claimant seeks to pursue both his challenge to the Liquidator's determination and his subsequently articulated "improper provision of defense" argument.¹

3. Assuming that the Referee has jurisdiction (an issue addressed below), discovery should not be permitted on either of Claimant's contentions until after briefing of the potentially dispositive initial issues.

¹ Claimant's contentions are inconsistent. He could have a claim under the Home policy only if (a) his claim against BPS has merit (the Liquidator determined it was barred by res judicata principles), and (b) there is coverage for that claim under the Home policy. Assuming that there could be a claim for "improper provision of defense" (which the Liquidator denies), Claimant could only have such a claim if there were no coverage for the claim under the Home policy. The Claimant apparently attempts to harmonize these positions by requesting that the grounds for the Liquidator's determination of the third party claim be changed to lack of coverage. Claimant Brief ¶ 18. If Claimant believes he has no claim, however, he should withdraw the claim, not litigate over the grounds for disallowance. Litigation over a claim that is concededly without merit is patently unreasonable and wasteful of the resources of the parties and the Referee. Pursuit of such a claim can warrant an award of attorney's fees or other sanction. See Super. Ct. R. 59 ("The Court may assess reasonable costs, including reasonable counsel fees, against any party whose frivolous or unreasonable conduct makes necessary the filing of or hearing on any motion."); Glick v. Naess, 143 N.H. 172, 175 (1998) ("A claim is patently unreasonable when it is 'commenced, prolonged, required or defended without any reasonable basis in the facts provable by evidence, or any reasonable claim in the law as it is, or as it might arguably be held to be.'"), quoting Keenan v. Fearon, 130 N.H. 494, 502 (1988). In the circumstances, any such withdrawal should be with prejudice to avoid later litigation.

4. With respect to the Claimant's third-party claim under the Home policy, the Liquidator determined that the claim was barred under principles of res judicata. If Claimant is pursuing his objection to the determination, then the parties should address the preclusion issue through briefing under § 15 of the Restated and Revised Order Establishing Procedures regarding Claims Filed with The Home Insurance Company in Liquidation entered January 19, 2005 ("Claims Procedures Order"). Preclusion is a matter of law based on pleadings and judgments, and discovery is not necessary.²

5. With respect to the "improper provision of defense" theory, discovery should not be permitted until after the facial validity of such a claim has been considered. Contrary to Claimant's suggestion, claims may be resolved by determination of legal sufficiency without evidentiary hearing, as by motion to dismiss. E.g., Brzica v. Trustees of Dartmouth College, 147 N.H. 443 (2002); Williams v. O'Brien, 140 N.H. 595 (1995); Jay Edwards, Inc. v. Baker, 130 N.H. 41 (1987). This is particularly appropriate regarding claims of fraud, as such claims must "specify the essential details of the fraud, and specifically allege the facts of the defendant's fraudulent actions." Brzica, 147 N.H. at 449 ("It is not sufficient for the plaintiff merely to allege fraud in general terms,"), quoting Jay Edwards, 130 N.H. at 46-47. "[L]egal conclusions" and "amorphous accusatory statements" are insufficient, and the question is whether a "cognizable legal cause of action" has been presented. Jay Edwards, 130 N.H. at 48. A motion to dismiss is appropriate to test the existence of a duty. Brzica, 147 N.H. at 447-48. The potential strength of such a motion is demonstrated by the Order entered April 2, 2009 in Claimant's Texas federal court action. Bowles v. Home Insurance Co. in Liquidation et al., No.

² The Liquidator leaves the merits of the preclusion issues to briefing. However, the Liquidator notes that the 2006 and 2007 judgments in favor of BPS and Mr. Bishop found that Mr. Bowles' claims were precluded by a 1996 judgment in another case. That same logic applies to the claim against Mr. Sharp even if, as Claimant contends, the later case is still open as to Mr. Sharp because he had not been served.

A-08-CA-808-SS, Order at 6-7 (April 2, 2009) (attached as Exhibit A to the Liquidator's Supplement to Objection to Request for Evidentiary Hearing (May 12, 2009)). As in the Texas federal court action, Claimant has not pled a coherent cause of action based on allegations of duty, breach, causation and damage.

6. Discovery should not be permitted until such an initial determination of legal sufficiency has been resolved. It is well established that discovery is subject to "the sound discretion of the trial judge." New Hampshire Ball Bearings, Inc. v. Jackson, 2009 N.H. LEXIS 29, *15 (March 18, 2009). A request for information "must appear relevant and 'reasonably calculated to lead to the discovery of admissible evidence.'" Id. at *16, quoting Super. Ct. R. 35(b)(1). The trial court should "avoid 'open-ended fishing expeditions' or harassment to ensure that discovery contributes to the orderly dispatch of judicial business." Id., quoting Robbins v. Kalwall Corp., 120 N.H. 451, 453 (1980). The discovery request seeks to inquire into Home's dealings with its insured BPS based on the erroneous premise that a claimant has some interest in an insurer's (or, in this case, the Texas Property & Casualty Guaranty Association's) provision of a defense to an insured. In the circumstances of this case, where the Texas federal court ruled that Claimant had not alleged a claim against Home, and the Claimant's allegations are confusing and aggressively assert fraud based on a novel assertion of a duty not to provide an insured with a defense, discovery should be postponed until the legal sufficiency of Claimant's "improper provision of defense" claim has been tested. See Brzica, 147 N.H. at 450 ("There is no support for allowing the plaintiffs to make meritless fraud claims and search for support for those claims later.").³

³ As noted in the Liquidator's Objection to Request for Evidentiary Hearing, the "improper provision of defense" claim does not present factual issues but legal issues regarding the respective duties of the Texas Property & Casualty Insurance Guaranty Association under its statute, Tex. Ins. Code ch. 462, and the obligations of the

B. THE REFEREE HAS JURISDICTION OVER THE THIRD PARTY CLAIM AND CLEARLY COULD HAVE JURISDICTION OVER THE “IMPROPER PROVISION OF DEFENSE” CLAIM IF IT WERE FILED, DETERMINED AND PRESENTED BY OBJECTION.

7. During the telephonic structuring conference, the Referee raised the question whether Claimant’s claim was within the Referee’s jurisdiction and thus could properly be heard by the Referee. The Liquidator construes this issue as being directed at Claimant’s “improper provision of defense” contention because early in the conference Claimant had indicated he was not pursuing the objection to the Liquidator’s determination of his third-party claim. As stated in the letter attached as Exhibit A to the Claimant’s Brief, the objection to the Liquidator’s determination of the third-party claim falls within the Referee’s jurisdiction.⁴ This disputed claim proceeding was commenced because Claimant filed an objection and a notice of disputed claim proceeding accordingly issued pursuant to Claims Procedures Order § 10(b).

8. The status of Claimant’s “improper provision of a defense” contention is not clear. In light of the Order of Liquidation, the claim can be asserted – if it can be asserted at all – in the Home liquidation proceeding. The Liquidator was initially of the view that it would be most efficient to address the issue in the context of this disputed claim proceeding and accordingly proposed that it be heard here, subject to the right to raise all defenses to the claim, including but not limited to whether Claimant has standing to assert his claim, whether such a claim states a cause of action, and the applicable claim priority. See Liquidator’s Objection to Request for Evidentiary Hearing ¶ 2 (March 16, 2009).

Liquidator under the New Hampshire Insurers Rehabilitation and Liquidation Act, RSA 402-C, including RSA 402-C:28.

⁴ The February 12, 2009 letter attached as Exhibit A to the Claimant’s Brief did not address the “improper provision of defense” issue.

9. However, the Referee's inquiry regarding jurisdiction has caused the Liquidator to revisit the issue. Claimant's "improper provision of defense" claim has not been presented to the Liquidator and been the subject of determination and objection as is contemplated by the Claims Procedures Order. See Claims Procedures Order § 9. It emerged as a new claim during the disputed claim proceeding. The Claims Procedures Order is intended to provide for the orderly presentation of claims against Home, and it incorporates the Superior Court Rules. *Id.* §§ 3, 10(b). The Claims Procedures Order, however, does not contemplate free standing litigation but review of determinations by the Liquidator. See *id.* §§ 4-9. The Referee is to adjudicate a "Disputed Claim," defined as a claim "which has been disallowed in whole or in part or classified as to priority by the Liquidator's Notice of Determination and for which the Claimant has timely filed an Objection." *Id.* §§ 2(d), 10(a). See also RSA 402-C:41.⁵

10. In light of the continually evolving nature of Claimant's claims, the Liquidator submits that they should proceed in strict compliance with the structure contemplated by the Claims Procedures Order. That will permit orderly proceedings and avoid questions over the authority of the Referee to proceed. Accordingly, the Claimant should be directed to file a proof of claim concerning the "improper provision of defense" issue. The Liquidator would then formally determine the claim promptly. The Claimant could then file an objection and the matter could proceed under the Claims Procedures Order in conjunction with the existing disputed claim proceeding. This would provide a logical framework for the dispute. The Referee would have the Liquidator's statement of reasons and the Claimant's objection to them to identify the issues. As it stands, the matter is currently a series of accusatory filings to which the Liquidator

⁵ The Liquidator infers that this is the basis for the Referee's jurisdictional concern. If there are other issues, the Liquidator will address them promptly upon notice of them.

has not had an opportunity to respond on the merits. The matter could then proceed on written submissions under § 15 of the Claims Procedures Order or as the Referee determines.

11. Accordingly, the Liquidator proposes that:

- the disputed claim proceeding regarding the third-party claim be temporarily stayed pending the following steps;
- the Claimant be directed to file a proof of claim regarding the “improper provision of defense” claim if he wishes to pursue it;
- the Liquidator then promptly determine Claimant’s “improper provision of defense” claim;
- the Claimant then have the usual sixty day period to object;
- assuming an objection is filed, a notice of disputed claim proceeding issue; and
- the two disputed claim proceedings then be consolidated and proceed by briefing under Section 15.⁶

12. The Liquidator is prepared to address these issues at the further telephonic structuring conference scheduled for June 15, 2009.

⁶ The Liquidator opposes any discovery until after that briefing for the reasons set forth in the first part of this response. A case file would of course be filed.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER
OF INSURANCE OF THE STATE OF
NEW HAMPSHIRE, SOLELY AS
LIQUIDATOR OF THE HOME
INSURANCE COMPANY,
By his attorneys,
KELLY A. AYOTTE
ATTORNEY GENERAL

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



J. David Leslie
NH Bar ID No. 16859
Eric A. Smith
NH Bar ID No. 16952
Rackemann, Sawyer & Brewster
160 Federal Street
Boston, MA 02110
(617) 542-2300

May 27, 2009

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Response to May 14, 2009 Order and Claimant's Brief sent by email to Claimant on May 27, 2009.



Eric A. Smith
NH Bar ID No. 16952