

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:** 2013-HICIL-56  
**Proof of Claim Number:** INSU389339  
**Claimant Name:** Flexible Products Company  
**Claimant Number:** INSU389339-01

LIQUIDATOR'S SCHEDULING PROPOSAL

Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), submits this scheduling proposal in accordance with the Referee's direction at the telephonic conference on June 5, 2013.

1. The Liquidator requests that the Referee set a six month period for written and document discovery, after which the parties will confer as to the need for depositions and either propose a time for depositions or request that the Referee set a briefing schedule. The Liquidator requests this schedule because there are four subjects on which discovery is necessary before this matter can usefully be briefed.

- a. *When did Flexible Products Company ("FPC") first sell isocyanate-containing products for use in mines?* The Liquidator understands that FPC first sold such products in October 1984 – after Home's last policy expired on May 31, 1984. See Case File ("CF") 12. It is accordingly the Liquidator's position that there is no potential for coverage under the Home policies and thus no duty to defend. Home did not agree, and FPC cannot reasonably expect, that Home policies provide coverage for alleged injuries from exposure to products that FPC first sold after the policies expired. Any alleged bodily injury from such products could not have occurred during Home's policy periods as required for coverage. FPC now suggests that such products "became available" in early 1984. Mandatory Disclosures ("MD") 13. This should be an ascertainable fact, and it appears there was inquiry on this topic in FPC's action against other insurers, Flexible Products Co. v. Employers Ins. of Wausau, et al., No 10-10812 (E.D. Mich.), or the underlying actions. See MD 5 (carriers in coverage action raised "a variety of defenses, including the allocation and late notice issues asserted by Home here"), 13-14 (citing "extensive discovery" in the underlying actions).

- b. *When did FPC notify its various other insurers of the underlying actions, and why did FPC delay even indirectly notifying Home until late June 2005 of actions filed in 2001 (Bice and Abernathy) and 2002 (Acklin)?* See MD 3, 8 n. 8. Under applicable Georgia law, delay in notice can be unreasonable as a matter of law so as to warrant denial of coverage without any showing of prejudice. See State Farm Fire & Cas. Co. v. LeBlanc, 494 Fed.Appx. 17, 2012 WL 5199253 \*21, \*23 (11th Cir. Oct. 22, 2012) (Georgia law); Diggs v. Southern Ins. Co., 321 S.E.2d 792, 793-94 (Ga. App. 1984). FPC contends it only became aware of the Home policies in “early 2004.” MD 8. The Liquidator contends that the more than one year delay from “early 2004” until June 2005 warrants denial of coverage, but needs to inquire into the circumstances surrounding the alleged unawareness of the Home policies to determine whether the appropriate period for considering delay is actually almost three or four years. See MD 15 (asserting delay was “reasonable”). FPC acknowledges that late notice issues were raised in the coverage action. MD 5.
- c. *What were the costs of defending the underlying actions, who paid them and how much did FPC or others pay?* This bears on the existence and amount of FPC’s claim and should be discoverable through a few straightforward interrogatories.
- d. *How did FPC allocate defense expenses to Home to arrive at the \$2.6 million amount of its claim, and did that calculation exclude pre-tender expenses?* The calculation of FPC’s claim is only generally described in FPC’s mandatory disclosures. MD 7. It should be discoverable through interrogatories.

2. Once written discovery and documents (including deposition transcripts) on these subjects has been provided, the Liquidator will be able to assess whether there is a need for depositions. The Liquidator anticipates that the most likely course of action at the conclusion of written and document discovery would be to set a briefing schedule.

3. The Liquidator understands that FPC proposes to have briefing on the duty to defend point first. In the Liquidator’s view, this would be inefficient and prolong this proceeding. First, it would not be appropriate to brief the issue without the underlying facts regarding when FPC first sold isocyanate containing products for use in mines. Briefing “in the air,” not grounded in some factual record, is necessarily problematic. Second, even if FPC were to somehow prevail on that issue, the parties would then need to then proceed with discovery on issues (b)-(d), followed by further briefing. The Liquidator submits that it would be more

efficient to have one round of discovery followed by one round of briefing than to brief a single issue, then have discovery, and then proceed to a second round of briefing.<sup>1</sup>

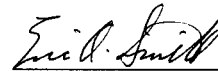
Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE  
COMMISSIONER OF THE STATE OF  
NEW HAMPSHIRE, AS LIQUIDATOR  
OF THE HOME INSURANCE  
COMPANY,

By his attorneys,

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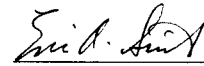


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July 3, 2013

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Scheduling Proposal was emailed to counsel for FPC on July 3, 2013.



Eric A. Smith

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<sup>1</sup> If the Referee were inclined to direct briefing first, the Liquidator proposes that the briefing should also include choice of law and the impact of the late notice under that law. FPC's assertion that New Hampshire law applies because Home "prefers" to apply New Hampshire law (MD 2 n. 3), is incorrect. See, e.g., 2008-HICIL-37 (Hubbard – Montana law) and 2008-HICIL-39 (Holsons – Connecticut law). Georgia law properly applies here.