

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

BEFORE THE COURT-APPOINTED REFEREE
IN RE THE HOME INSURANCE COMPANY IN LIQUIDATION
DISPUTED CLAIMS DOCKET

In Re Liquidator Number: 2019-HICIL-62
Proof of Claim Number: INSU703957-01 and INSU703968
Claimant Name: PolyOne Corporation

Order on Liquidator's Request to Bifurcate Proceedings

The Liquidator has filed a request to bifurcate the proceedings. The Liquidator requests that the Referee order the parties to address two "threshold" coverage questions before addressing the remaining issues in the case. The Claimant objects.

Brief Background

PolyOne Corporation (PolyOne) seeks coverage under four Home excess policies issued to Goodrich Corporation (Goodrich). PolyOne's claims are related to environmental contamination at the former Goodrich plant in Calvert City, Kentucky ("the Calvert City site"). PolyOne seeks the \$20 million total limits of two Home excess policies issued to Goodrich, policy HEC4356627 (excess of \$40 million), and HEC 4356857 (excess of \$60 million). PolyOne also seeks coverage under HEC 4495806 and HEC9006524, both of which are excess of one American Mutual Insurance Company policy with a limit of \$20 million.

Goodrich is participating in this Disputed Claim, seeking coverage for the Calvert City site under the same excess policies.

The Liquidator denied PolyOne's claims on three grounds: (1) the Law of Kentucky, where the Calvert City site is located, applies and provides for "pro rata" allocation meaning 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 neither has happened; and (3) PolyOne is not entitled to rights under the policies.

PolyOne asserts: (1) Ohio law governs coverage under the policies and provides for an "all sums" allocation allowing it to reach the Home policies; (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.

The Current Motion

The Liquidator asks the Referee to bifurcate the Disputed Claim to first address the issues of: (1) choice of law; and (2) interpretation of the Home excess policies' condition that underlying insurers pay or be held liable to pay their full limits before the Home policies attach. The Liquidator argues that by addressing only these issues in the first instance, the parties will know what allocation rule applies and whether Home is required to pay the full amount of its applicable limits given Home's understanding that there were below-limits settlements with underlying insurers. The Liquidator asserts that bifurcation will greatly reduce the amount of PolyOne's claim by removing policies from consideration and "may dispose of it." The Liquidator further argues that even if the Referee's rulings don't dispose of PolyOne's claims, any ruling on these two issues will simplify later briefing.

PolyOne argues that the Referee does not have the authority to bifurcate in the manner requested by the Liquidator. PolyOne asserts that even if the Referee addresses these two "threshold" questions in favor of the Liquidator, there must still be further proceedings. Moreover, PolyOne claims that to address these two issues, the parties must engage in discovery. Thus, bifurcation will delay the process rather than result in judicial economy.

Analysis

The party seeking bifurcation bears the burden of demonstrating that a bifurcated process will be more efficient or fair. See Bartlett v. Mut. Pharm. Co., Inc., 2010 WL 3210724 (D.N.H. Aug. 10, 2010). The Court has broad discretion in determining whether bifurcation is appropriate. Fed. Rules Civ. Proc. Rule 42(b); see also Lisa v. Fournier Marine Corp., 866 F.2d 530, 531 (1st Cir. 1989). In this case, the Liquidator has not met his burden to demonstrate that the bifurcation he requests is case dispositive.

While the issue of choice of law is critical, it does not appear to be dispositive. The Liquidator acknowledges that even if Kentucky law applies, it does not eliminate all of PolyOne's claims. Moreover, while the Liquidator asserts there is no discovery necessary to brief the issue of choice of law, the Claimant believes that some discovery is required.

The attachment condition is the same in the four Home excess policies at issue. The Liquidator interprets the condition to mean that until all underlying insurers have paid or been ordered to pay their full limits of liability, Home is not required to make payment. PolyOne argues that where it has reached settlement agreements with underlying insurers for less than their policy

limits, PolyOne may apply any unpaid limits against alleged unreimbursed costs to assert the Home policies attach and must respond. While the parties disagree about whether the interpretation of this policy provision requires review of other policy provisions, they all acknowledge that discovery will be required relative to payments and settlements with underlying insurers.

Because the Liquidator has not demonstrated that bifurcating this Disputed Claim as he requests will be case dispositive or eliminate all coverage issues, the Liquidator's Request to Bifurcate Proceedings is DENIED.

Date: January 29, 2020

Melinda S. Gehris
Referee, Melinda S. Gehris