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**

CLAIMANT'S OBJECTION TO LIQUIDATOR'S REQUEST TO BIFURCATE PROCEEDINGS

Although more than fifteen years have already elapsed since Claimant PolyOne Corporation ("PolyOne") filed its Proof of Claim in June 2004, the Liquidator seeks to delay these proceedings still further, by bifurcating it into two separate and overlapping proceedings. Because the two questions the Liquidator seeks to "front-load" will not be dispositive of this $40 million claim (even if the Referee wholly adopted the Liquidator's positions), and a "phase two" will be required regardless of their answers, the Liquidator's proposal will delay the outcome of this proceeding – perhaps by years – and will only magnify the costs and burdens on all involved. Simply put, as PolyOne argues more completely below, bifurcation will not be more efficient or convenient, will not expedite the case, and in fact will prejudice PolyOne; the most efficient and fair course of action is the customary resolution of all matters in a single phase of the proceedings. As a result, as more completely shown below, bifurcation is inappropriate and the Liquidator's Request to Bifurcate Proceedings (the "Request") should be denied.

I. The Liquidation Claims Procedures Do Not Contemplate the Resolution of Coverage Questions in Multiple Phases.

As an initial matter, it is not clear that the Referee is even empowered to grant the relief that the Liquidator requests, within the scope of the Referee's authority pursuant to the January 19, 2005 Restated and Revised Order Establishing Procedures Regarding Claims Filed with the Home Insurance Company in Liquidation (the "Claims Procedures"). Section 13 of the Claims Procedures contemplates ***only*** bifurcation of "the issues of coverage and valuation of the claim."

That is not what the Liquidator requests here, however; indeed, the Liquidator wishes to postpone the determination of a disputed coverage question – whether PolyOne has rights to coverage under the policies at issue – because the Liquidator posits that "it will require factual development." Request at 4 n.3. The Liquidator also appears to be reserving the right to raise other coverage questions in phase two of the proceedings. *See id.* at 5 n.4. In any event, the relief that the Liquidator seeks is clearly not the type of proceeding contemplated by the Claims Procedures under which this matter is governed, and should be denied on that ground alone.

II. Bifurcation Is Not the Usual Course, and Is Not Appropriate Unless the Liquidator Can Prove That Bifurcation Is Needed to Prevent Prejudice and Will Promote Efficiency.

Moreover, bifurcation in the fashion the Liquidator contemplates in any event is not supportable under the governing legal principles that would guide the Referee's decision. Tellingly, the Liquidator does not discuss (or identify) any of these principles, and does not cite any authority in support of his position. That is not surprising, given that the law places a substantial burden on the Liquidator, one the Liquidator cannot surmount here.

The Superior Court Civil Rules do not specifically mention or permit bifurcation; rather, it is a creature of New Hampshire Supreme Court case law, designed to be used in appropriate situations to ensure "justice and convenience," *Jamestown Mut. Ins. Co. v. Meehan,* 113 N.H. 639, 641 (1973). The New Hampshire Supreme Court, in discussing bifurcation, has analogized to Federal Civil Rule 42(b)'s allowance of separate trials "[f]or convenience, to avoid prejudice, or to expedite and economize." *See generally Jamestown,* 113 N.H. at 641 (citing Rule 42(b) as authority).[1]

The Liquidator, as the party seeking bifurcation, bears the burden of proving that a bifurcated proceeding will be more efficient or fair. *See Bartlett v. Mut. Pharm. Co., Inc.,* No.

[1] If anything, the Superior Court Civil Rules implicitly ***disfavor*** bifurcation and favor a unitary proceeding as to all issues, providing that by default the parties at trial shall "put in [their] whole case... except by permission of the Court for good cause shown." N.H. SUPER CT. CIV. R. 36(g).

08-cv-00358-JL, 2010 WL 3210724, at *1 (D.N.H. Aug. 10, 2010); *see also Keene v. Maine Dept. of Corrections,* No, 1:17-cv-00403-JDL, at *1 (D. Me. Apr. 11, 2018); *Hardesty Builders, Inc., v. Mid-Continent Cas. Co.,* No. C-10-142, 2010 WL 2787810, at *3 (S.D. Tex. July 14, 2010).[2]

That burden is not a light one: the precedents make clear that bifurcation is "not to be routinely ordered." FED. R. CIV. P. 42 adv. comm. notes (1966). Put otherwise, "[t]he piecemeal trial of separate issues in a single lawsuit... is not to be the usual course." 9A Charles A. Wright *et al.,* FED. PRAC. & PROC. § 2388 (3d ed.). As Judge Laplante observed, bifurcation is "not the normal course of events, and a single trial will usually be more expeditious and efficient.'" *Bartlett*, 2010 WL 3210724, at *2 (D.N.H. Aug. 10, 2010) (quoting 8 MOORE'S FED. PRAC. § 42.20[4][a])).

In order to satisfy his burden, the Liquidator "'must show that he will be prejudiced if separate trial is not granted,'" and bifurcation will be denied if the movant "does not pin-point actual prejudice, present or potential, specific to this case." *Marshall v. Overhead Door Corp.,* 121 F.R.D. 94, 97 (E.D. Pa. 1990) (quoting 5 MOORE'S FED. PRAC. § 42.03); *accord Carpenter v. Liberty Ins. Corp.,* No. 3:17-cv-00228, 2017 WL 6055118, at *2 (S.D. Ohio Dec. 7, 2017).

Bifurcation is also properly denied where any claimed efficiency is speculative, or contingent upon the assumption that the party seeking bifurcation would prevail on the issue. *See, e.g., Wolkosky v. 21st Century Centennial Ins. Co.,* No. 2:10-cv-439, 2010 WL 2788676, at *5 (S.D. Ohio July 14, 2010) ("[A] defendant may not ground its bifurcation argument on the mere possibility that resolution of the [first phase] issue may preclude the plaintiff's [second phase] claim."); *Hardesty Builders,* 2010 WL 2787810 at *4 (denying bifurcation because "[s]eparate trials will save time and resources only if, in fact, [the moving party] prevails" (internal quotation omitted)).

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[2] Because the New Hampshire Supreme Court looked to Federal Rule 42(b) in discussing bifurcation, *see Jamestown,* 113 N.H. at 641, it is appropriate to consider as persuasive authority federal precedents applying that rule to requests for bifurcated proceedings.

And – of particular significance here – bifurcation is particularly inappropriate if further proceedings would be required in any event. *See, e.g., Keene,* 2018 WL 1737940, at *3 (denying bifurcation where "a [first phase] trial could not be decisive, because even in the event of a verdict in the Department's favor, [other] claims... would still proceed"); *Datel Holdings, Ltd. v. Microsoft Corp.,* No. C-09-05535 EDL, 2010 WL 3910344, at *4 (N.D. Cal. Oct. 4, 2010) (denying bifurcation where "resolution of the [first phase] claim will not moot the entire... claim"); *Young v. Mercury Cas. Co.,* No. 2:09-CV-2399 JCM (LRL), 2010 WL 2757291, at *1 (D. Nev. July 8, 2010) (denying bifurcation where the proposed first phase "would not dispose of the entire case").

These principles, properly applied, are fatal to the Liquidator's Request.

III. Because a Second Phase Is Required in Any Event, Bifurcation Will Only Prolong the Proceedings.

Most significantly, in this case, any claim of efficiency is wholly illusory. While the two questions the Liquidator seeks to prioritize – choice of law, and whether underlying coverage must actually pay its full limits in order to trigger the excess Home policies – are indeed important questions, they are not case-dispositive. Even if the Liquidator "runs the table," and obtains rulings in its favor on both questions of policy interpretation, it will not dispose of the matters at issue here. In other words, bifurcation will not achieve any efficiency, and instead will only delay the ultimate resolution of the matter.

A. PolyOne's Claim Survives Even If Kentucky Law Applies.

This is especially clear with regard to the question of choice of law. While the applicability of Ohio law (as PolyOne advocates) or Kentucky law (as the Liquidator proposes) will unquestionably have an effect on the value of the claim, it will not preclude further proceedings. As PolyOne's mandatory disclosures show, and as the Liquidator admits, PolyOne

still has a substantial claim (more than $2.5 million[3]) even if Kentucky law applies and PolyOne's costs are prorated across applicable policies. *See, e.g.,* Request ¶ 11; PolyOne's Mandatory Disclosures at 2.

B. PolyOne's Claim Survives Even If the Policies Are Construed to Require Actual Payment by Underlying Insurers (Contrary to Prevailing Law).

Nor would the Liquidator's attempt to invoke an "actual payment" condition be case-dispositive, if the Liquidator succeeds on that matter. Even if the Referee were to agree with the Liquidator that the Home policies respond only if underlying carriers ***in fact*** paid their whole limit (a position that PolyOne believes is insupportable under the policies and prevailing law), at least some of the Home policies at issue remain impacted. For example, policy numbers HEC 4495806 (July 1, 1974-July 1,1975) and HEC 9006524 (July 1, 1975-July 1, 1977) are excess only to American Mutual Insurance Company ("AMICO") policy 9YM113800, and the evidence will show that AMICO in fact paid that policy's $20 million limit of liability in connection with Calvert City-related liabilities. As a result, the Liquidator is incorrect in assuming that a preliminary ruling on that question would advance the conclusion of the proceedings.

In any event, even if the Liquidator weren't mistaken about the ultimate effect of its position, the matter would only be expedited if the Liquidator would actually prevail on the question, something that is questionable at best.[4] As one federal judge observed, in denying

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[3] That number will increase significantly; once the Referee enters the parties' Stipulated Protective Order, PolyOne will supplement its Mandatory Disclosures to take account of certain additional projected future costs, as contained in confidential documents.

[4] While a detailed discussion of the question is premature, the Liquidator's position is not well-grounded in either Ohio or Kentucky law. Contrary to the Liquidator's argument, *see* Request at 7, there is in fact controlling Ohio Supreme Court case law on the question. *See, e.g., Fulmer v. Insura Prop. & Cas. Ins. Co.,* 94 Ohio St. 3d 85, 93-97, 760 N.E.2d 392, 399-402 (2002) (holding that a policyholder properly exhausts coverage by settling for less than the underlying policy limits, and can pursue coverage in excess of those limits, and rejecting the contrary argument as against the Ohio public policy favoring settlements). The contrary case cited by the Liquidator, *Goodyear Tire & Rubber Co. v. Nat. Union Fire Ins. Co.,* 694 F.3d 781 (6th Cir. 2012), is thinly-reasoned, wrongly rejects *Fulmer* as reflecting a "niche rule," and has only been cited by one other court (in a 2013 decision from Washington state). Importantly, no Ohio court has adopted (or even cited) this *Goodyear* decision.

another insurer's request for bifurcation of the policyholder's breach of contract and bad faith claims:

> Separate trials will save time and resources only if, in fact, Mid–Continent prevails on the contractual claim. If it does not, then a great deal of time will be wasted.... The judicial economy argument is therefore a wash: If Mid–Continent prevails on the contract claim, then time and resources will be saved by conducting separate trials. On the other hand, if Plaintiff prevails, then time and resources will be wasted. At this stage in the litigation, the Court is not in any position to guess which outcome might be more likely, so it cannot order separate trials on the supposition that doing so would promote judicial efficiency.

Hardesty Builders, 2010 WL 2787810 at *4 (citations and internal quotations and alterations omitted).

In short, the Liquidator's arguments in favor of bifurcation ignore the fact that the proposed first phase could not terminate, and would not accelerate, the termination of the matter. As a result, the Liquidator has failed to carry the burden of showing that bifurcation would promote efficiency, and the Request should therefore be denied.

IV. Substantial Discovery Will Still Be Required on Choice of Law and Exhaustion.

The Liquidator's position is further undermined by an unwillingness to recognize that substantial discovery would be required in ***both*** phases of the proposed bifurcated proceeding. For example, while the Liquidator may believe that the location of the Calvert City site is the only datum needed to reach a decision on applicable law, a more holistic evaluation of the question – an evaluation that PolyOne believes is mandated by the Second Restatement and New Hampshire law – requires an evaluation of the other contacts associated with the Home policies, contacts which are not necessarily apparent from the face of the policies themselves. Nor is the Liquidator correct in positing that PolyOne can "contend that prior litigation involving Goodrich

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More broadly, the prevailing rule across the nation for nearly a century — one that the parties would undoubtedly have had in mind when (respectively) procuring and underwriting the Home policies at issue — is contrary to the Liquidator's position. *See generally, e.g., Zeig v. Mass. Bonding & Ins. Co.,* 23 F.2d 665 (2d Cir. 1928).

requires application of Ohio law here... based on documents concerning that prior litigation," without discovery. Most of Home's filings in the Ohio litigation were filed under seal, and are not in PolyOne's possession, and so can only be obtained through formal discovery mechanisms in this proceeding.

The Liquidator in fact admits that significant discovery will be needed on exhaustion of underlying limits, even if it succeeds, including "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," and PolyOne's and Goodrich's production of "settlement agreements with the underlying insurers," and "the analysis reflected in the settlements," so that they may "demonstrate that under those settlements the insurers paid their full policy limits respecting the Calvert City site." *See* Request ¶ 19.

Further, the variety of internally-inconsistent provisions in the Home policies, as relevant to the question of exhaustion, also show that discovery will be needed to determine how those policies were actually intended to operate. While the Liquidator focuses solely on the "have paid or have been held liable to pay the full amount" language, there are other provisions that call into question the Liquidator's misplaced certainty, requiring further inquiry. For example, two of the Home policies (HEC 4495806 and HEC 9006524) also provide that covered "Ultimate Net Loss" includes "the total sum which ***the Insured, or any Company as his Insurer, or both,*** become obligated to pay... ***either through Adjudication or Compromise."*** The Home policies also contain a condition requiring the maintenance of underlying insurance – a provision that would be wholly surplus under the Liquidator's interpretation of the exhaustion language. These provisions, and others, create internal inconsistencies that merit investigation and an attempt at explanation.

Simply put, the Liquidator is incorrect in suggesting that the proposed "first phase" questions "do[] not require factual development," Request ¶¶ 13, 19. In consequence, the

Liquidator's Request would simply replace one unitary discovery and hearing process with two separate, equally prolonged processes, and should for that further reason be denied.

V. The Liquidator Never Suggests, Let Alone Demonstrates, That It Would Be Prejudiced by a Unitary Proceeding, While Bifurcation Would Prejudice PolyOne and Burden Non-Parties.

Finally, the Liquidator's Request is "dead on arrival" for another independent, dispositive reason: it makes no effort to suggest that a unitary litigation schedule would cause it prejudice. Indeed, the word "prejudice" does not appear once in the Request.

By contrast, a bifurcation here would manifestly prejudice PolyOne. First, it would deny PolyOne any chance (after more than 15 years of Liquidator delay) of a speedy resolution to its objections to the Liquidator's denial of claim. *See Jamestown,* 113 N.H. at 641 (upholding denial of bifurcation because, *inter alia,* the opposing party's "right to have his actions speedily tried should not be held up"). It would also prejudice PolyOne and non-parties by requiring PolyOne to engage in duplicative discovery. For example, under the Liquidator's proposal, PolyOne would have to depose the former Goodrich and Home employees responsible for policy procurement twice: once to inquire about exhaustion or the policies' various contacts with different jurisdictions, and once to inquire about the definition of "insured" and whether PolyOne was intended to qualify.

VI. Conclusion.

In sum, the bifurcation that the Liquidator seeks will only prolong and delay these proceedings, will prejudice PolyOne's interests, and therefore the Liquidator's Request should be denied.

Dated: December 13, 2019

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CERTIFICATE OF SERVICE

I certify that today I am serving a true and correct copy of the foregoing upon Eric A. Smith, Esq. (counsel to the Liquidator) and J. Chase Johnson, Esq. (counsel for Goodrich Corporation).

Date: December 13, 2019

Michael J. Tierney