

**NEW HAMPSHIRE SUPREME COURT  
RULE 7 NOTICE OF MANDATORY APPEAL**

This form should be used for an appeal from a final decision on the merits issued by a superior court, district court, probate court or family division court except for a decision from: (1) a post-conviction review proceeding; (2) a proceeding involving the collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; or (6) a probation revocation proceeding.

**1. COMPLETE CASE TITLE AND DOCKET NUMBERS IN TRIAL COURT**

Roger A. Sevigny, Insurance Commissioner as Liquidator of the Home Insurance Company –  
Docket No. 04-E-0152

**2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)**

Merrimack County Superior Court – Honorable Kathleen McGuire

**3A. NAME AND ADDRESS OF APPEALING PARTY. IF REPRESENTING SELF, PROVIDE TELEPHONE NUMBER**

Utica Mutual Insurance Company  
PO Box 6559  
Utica, NY 13504-6559  
(315) 235-6600

**3B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF APPEALING PARTY'S COUNSEL**

Doreen F. Connor, Esq.  
Wiggin & Nourie, PA  
20 Market St.  
PO Box 808  
Manchester, NH 03105-0808  
(603) 669-2211

4A. NAME AND ADDRESS OF OPPOSING PARTY

Roger A. Sevigny, Insurance  
Commissioner as Liquidator of the Home  
Insurance Company  
56 Old Suncook Street  
Concord, NH 03301-5151

4B. NAME, FIRM NAME, ADDRESS AND TELEPHONE NUMBER OF OPPOSING PARTY'S COUNSEL

Peter C.L. Roth, Esquire  
Senior Assistant Attorney General  
33 Capitol Street  
Concord, NH 03301  
(603) 271-3658

Russell Bogin, Esquire  
The Home Insurance Company in  
Liquidation  
59 Maiden Lane  
New York, NY 10038

Jonathan Rosen, Esquire  
The Home Insurance Company in  
Liquidation  
59 Maiden Lane  
New York, NY 10038

5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

In the proceedings below, Attorney Richard F. Wholley of 17 Kimball Hill Drive, Haverhill MA 01830 represented the interests of Utica Mutual Insurance Company.

6. DATE OF CLERK'S NOTICE OF DECISION OR SENTENCING. ATTACH COPY OF NOTICE AND DECISION.

July 25, 2005

OF CLERK'S NOTICE OF DECISION ON POST-TRIAL MOTION, IF ANY. ATTACH COPY OF NOTICE AND DECISION.

7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS

N/A

8. APPELLATE DEFENDER REQUESTED? No  
IF SO, CITE STATUTE OR OTHER LEGAL AUTHORITY UPON WHICH CRIMINAL LIABILITY WAS BASED AND ATTACH FINANCIAL AFFIDAVIT (OCC FORM 4)

9. IS ANY PART OF CASE CONFIDENTIAL? IF SO, IDENTIFY WHICH PART AND CITE AUTHORITY FOR CONFIDENTIALITY. SEE SUPREME COURT RULE 12.  
Not applicable

10. IF ANY PARTY IS A CORPORATION, LIST THE NAMES OF PARENTS, SUBSIDIARIES AND AFFILIATES.  
Utica Mutual Insurance Company operates under a pooling arrangement with the following companies: Graphic Arts Mutual Ins. Co., Republic-Franklin Ins. Co., Utica National Assurance Co., Utica National Ins. Co. of Texas, Utica Lloyd's of Texas and Utica Specialty Risks Ins. Co.

11. DO YOU KNOW OF ANY REASON WHY ONE OR MORE OF THE SUPREME COURT JUSTICES WOULD BE DISQUALIFIED FROM THIS CASE?  YES  NO  
IF YOUR ANSWER IS YES, YOU MUST FILE A MOTION FOR RECUSAL IN ACCORDANCE WITH SUPREME COURT RULE 21A.

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY FOR THIS APPEAL?  
 YES  NO  
IF YOUR ANSWER IS YES, YOU MUST COMPLETE THE TRANSCRIPT ORDER FORM ON PAGE 4 OF THIS FORM.

13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE SUPREME COURT RULE 16(3)(b).

1. The trial court's decision, which obligates Utica Mutual Insurance Company to provide coverage in the amount of \$910,361.93 with interest for an arbitration award entered against Utica's insured, after Utica's insured assumed or admitted liability in contravention of policy terms and conditions is erroneous.

2. After acknowledging that the parties agreed Connecticut law was controlling, the trial court should have required that Petitioner prove the insured's breach of the policy condition did not prejudice Utica.

14. CERTIFICATIONS

I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.



-----  
Appealing Party or Counsel

I hereby certify that on or before the date below, copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

01/19/05

-----  
Date



-----  
Appealing Party or Counsel

00650753.DOC

**THE STATE OF NEW HAMPSHIRE**  
**Merrimack County Superior Court**

163 N. Main Street  
P. O. Box 2880  
Concord, NH 03301 2880  
603 225-5501

JUL 27 2005

**NOTICE OF DECISION**

RICHARD F WHOLLEY ESQ  
17 KIMBALL HILL DRIVE  
HAVERHILL MA 01830

04-E-0152 Roger A. Sevigny Insurance Commr vs Utica Mutual Ins. Co

Enclosed please find a copy of the Court's Order dated 7/22/2005  
relative to:

Order-Motion for Summary Judgment

(ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT)

07/25/2005

William McGraw  
Clerk of Court

cc: Peter C.L. Roth, Esq.  
Russell G. Bogin, Esquire  
Jonathan Rosen, Esquire

STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Roger A. Sevigny, Insurance Commissioner as  
Liquidator of The Home Insurance Company

vs.

Utica Mutual Insurance Company

Docket No.: 04-E-0152

**ORDER ON CROSS-MOTIONS  
FOR SUMMARY JUDGMENT**

The Liquidator of The Home Insurance Company ("The Home") has filed a declaratory judgment action against Utica Mutual Insurance Company ("Utica") seeking to recover a portion of an outstanding judgment under a claims made errors and omissions policy issued by Utica to Lichtman Associates, Inc. ("Lichtman"). Utica has disclaimed coverage, asserting that Lichtman's failure to abide by the cooperation clause of the Utica policy relieves Utica of any obligation to provide payment. The \$910,367.13 amount at issue was awarded at arbitration in conjunction with a business liability program covering certain risks of Premier Roofing, Inc. ("Premier") placed with The Home by Lichtman in 1990 and 1991. The award was later confirmed by order of the U.S. District Court for the District of Connecticut.

Before the Court are cross-motions for summary judgment requiring the Court to determine whether, under the terms of the coverage at issue and the facts as reflected in the record, either party is entitled to summary judgment. In its review, the Court has considered the pleadings, affidavits and other evidence submitted by the parties, and the reasonable inferences that may be drawn from them.

**Facts:**

Lichtman entered an agency agreement with The Home on January 1, 1989. Utica covered Lichtman under a professional liability claims made errors and omissions policy for the period February 6, 1992 through February 5, 1993. The Home's claim, which arose during the Utica policy period, relates to Premier's general liability, workers' compensation and commercial auto coverages placed with The Home for the 1990 and 1991 policy years by Robert Blackwood, an independent producer for Lichtman, and a

named insured under the Utica policy. Though Lichtman also handled the Premier insurance program for the 1992 policy year, those coverages are not at issue in the matter before the Court.

In April 1992, Robert Blackwood and Michael Feinberg, an officer of Premier, advised John Lichtman, the principal of Lichtman Associates, Inc., that the 1991 Premier program inaccurately reflected loss limits of \$250,000.00, rather than loss limits of \$100,000.00 that Feinberg claimed to have requested through Blackwood. Premier sought Lichtman's accommodation on any exposure to claims, losses, and expenses related to the gap created between the loss limits that Premier claimed to have selected and the loss limits reflected in the original 1991 rate selection forms. In response, John Lichtman signed an April 30, 1992 letter binding himself and Lichtman Associates, Inc., to "protecting, defending, holding harmless, and indemnifying" Premier against "any and all claims, actions, liabilities, losses, costs, and expenses arising out of claims exceeding \$100,000 up to \$250,000 on the 1991 policy period exposures."

By mid-August 1992, Lichtman's agency relationship with The Home was at risk because of Lichtman's failure to remit premium collected on behalf of The Home. Lichtman's ability to satisfy the premium obligation to The Home was foreclosed when Lichtman bank accounts were swept on August 15, 1992 by a creditor in an unrelated matter. On August 26, 1992, The Home terminated the agency agreement with Lichtman and later entered into a direct business relationship with Premier.

In early September 1992, based upon the April 30, 1992 letter, Premier requested that The Home rewrite both the 1990 and 1991 programs to reflect \$100,000.00 loss limits. The Home initially resisted, relying on company records which reflected that Premier had actually selected substantially higher limits for each of the years in question. Premier then advised The Home that Feinberg's signatures on the rate selection forms were forgeries. The Home advised Lichtman of these developments on September 15, 1992.

Utica was first advised of the potential for a claim associated with the Premier matter by letter of November 3, 1992, from Lichtman's attorney. In addition to addressing the challenge to the authenticity of the Feinberg signatures, the letter advised Utica of the circumstances surrounding the 1991 Premier coverage issue as

reflected in the April, 1992 letter. In response to Lichtman's written notice of a potential Premier claim, Utica issued a November 18, 1992 reservation of rights letter, relying upon a number of policy exclusions and conditions.

Two months later, on January 21, 1993, The Home re-issued coverage to Premier to reflect \$100,000.00 loss limits for both 1990 and 1991 coverages. In January 1994, The Home commenced arbitration proceedings against Lichtman, seeking to recover the full range of premium deficiencies that had arisen during their business association, including premium collected but never transmitted, and any premium deficiencies relating to the rewritten Premier programs for 1990 and 1991.

At arbitration on March 21, 2001, Utica provided a defense for Lichtman subject to its reservation of rights letter as to both costs and coverage. The Home and Lichtman first stipulated to an amount which represented premium collected by Lichtman but not remitted, and then contested the deficiency relating to the Premier coverage matters. An award issued in favor of The Home in the amount of \$2,303,656.35, of which \$910,367.13 relates to the loss limits issue with Premier on the 1990 and 1991 programs.

The arbitration award against Lichtman was confirmed by order of the U.S. District Court for the District of Connecticut on April 2, 2002. Under a provision of the Utica policy allowing a judgment creditor to seek satisfaction of a judgment directly from the insurer, The Home next requested that Utica satisfy that portion of the judgment relating to the Premier coverage discrepancy. By letter of January 17, 2003, Utica disclaimed coverage, again referencing various exclusions and the Insured's failure to abide by certain terms and conditions of the policy as the basis.

This long-standing dispute was unresolved at the time The Home went into liquidation in June 2003, and the Liquidator has now filed suit seeking recovery from Utica.

**Legal Standard /Choice of Law:**

Summary judgment will be granted when there are no genuine issues of material fact and the moving party establishes entitlement to summary judgment as a matter of law. "If there is no genuine issue of material fact, and if the moving party is entitled to



judgment as a matter of law, the grant of summary judgment is proper." *Town of Londonderry v. N.H. Municipal Assoc. Prop. Liab. Ins Trust*, 140 N.H. 440,441 (1995).

Utica has raised a choice of law issue in its pleadings. In raising the issue, Utica asserts that the law of the State of Connecticut governs this coverage dispute. Lichtman Associates was at all times located in Connecticut. The contract was signed in Connecticut and does not indicate an alternative choice of law. Without objection, the Court looks to Connecticut's substantive law relating to the coverage issue. *Ellis v. Royal Ins. Co.*, 129 NH 326 (1987).

**Discussion:**

Both Utica's November 18, 1992 reservation of rights letter to Lichtman and January 17, 2003 denial of coverage letter to The Home raise defenses to coverage. Each references various coverage exclusions and the Insured's failure to abide by certain conditions in **SECTION V** of the Utica policy. Both reserved the right to raise additional defenses as appropriate. However, to the exclusion of other provisions, Utica's pleadings now focus selectively upon **SECTION V, 1. e.**, a policy provision prohibiting voluntary assumptions or admissions of liability without the consent of the carrier.<sup>1</sup>

**SECTION V** of the Utica policy contains the following "consent to settlement" provision within the policy's cooperation clause:

**SECTION V-CONDITIONS**

**1. Insured's Duties In The Event Of A Claim Or Suit-Cooperation Clause**

It is a condition precedent to the application of the insurance afforded herein that you shall:

- e. Not voluntarily assume or admit liability nor, without our prior written consent settle any claim or incur any expense, except at the insured's own cost.

A "consent to settlement clause" is crafted to prevent collusion between the insured and the claimant, and to give the insurer control over settlement of any claim.

---

<sup>1</sup> Utica's pleadings touch upon the fact that the arbitration award is silent on whether the award is based upon Lichtman's negligence. In the absence of a clear development of that issue, the Court declines to address it.

"An assumption of obligation by the insured may be construed as an admission of liability, which may detrimentally affect the insurer's ability to conduct an effective defense to the claim." 22 Holmes' *Appleman on Insurance Second*, §138.2 (2002).

Utica asserts that Lichtman's duty to report a potential claim arose before Lichtman signed the April 30, 1992 letter. Utica argues that by signing the letter without notice to the carrier, Lichtman "assumed or admitted liability" in contravention of **SECTION V, 1. e.** of the policy, jeopardizing coverage for claims arising from any circumstances relating to the Premier letter. Focusing heavily upon the April 30, 1992 letter, Utica draws a direct connection between Lichtman's indemnification of Premier and The Home's later decision to rewrite the Premier coverages to accommodate the lower loss limits.

Utica's argument is misplaced. The claimant in this case is the The Home and not Premier. Even if Lichtman had intended to assume or admit liability in the April 30, 1992 letter and then seek coverage from Utica, he would have been seeking coverage for a claim by Premier. Lichtman did not assume or admit liability as to The Home. He did not seek to settle any claim as to The Home. Therefore, the mischief the cooperation clause is intended to prevent, collusion between an insured (Lichtman) and a claimant (The Home), could not arise from the April 30, 2002 letter.

Moreover, the record demonstrates that Lichtman did not intend to seek insurance coverage on the potential exposure created by his assumption of liability in the April 30, 1992 letter. Rather, he signed the letter as a business decision, however misguided, intended to accommodate Premier, an accommodation he saw as neither remarkable, nor of much consequence. At arbitration, Lichtman testified that he believed that any exposure created by the letter wouldn't "amount to anything". See Affidavit of Russell G. Bogin, Exhibit B, Transcript of the Arbitration at p.159. At deposition, Lichtman references a history of "making adjustments" for Premier on other account matters whereby Lichtman Associates absorbed costs on disputed matters. See Affidavit of Russell G. Bogin, Exhibit P, Deposition of John Lichtman at p. 61

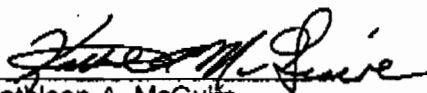
Accordingly, Petitioner's Motion for Summary Judgment is **GRANTED**, and Respondent's Cross-Motion for Summary Judgment is **DENIED**. Utica Mutual Insurance Company must provide coverage pursuant to the U.S. District Court, District of

Connecticut order of April 2, 2002 in the amount of \$910,361.93, together with interest thereon from April 2, 2002.

The Court finds no basis for Petitioner's bad faith claim and therefore declines to provide attorney's fees or exemplary damages in this matter.

SO ORDERED.

7/22/05  
Date

  
Kathleen A. McGuire  
Presiding Justice