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**STATE OF VERMONT
ORANGE COUNTY**

PROGRESSIVE PLASTICS, INC.,)	
Plaintiff,)	Orange Superior Court
)	Docket No. 186-9-03 Oecv
v.)	
)	
PEERLESS INSURANCE COMPANY and)	
THE NETHERLANDS INSURANCE)	
COMPANY,)	
Defendants.)	

Decision

Plaintiff’s Motion to Reopen and Renew, filed December 14, 2006

The court appreciates the comprehensive memoranda filed by the parties on the issue of primary jurisdiction raised *sua sponte* by the court in its decision of September 28, 2006. Having reviewed them carefully, the court declines to change the outcome of the prior decision, with the exception of the clarification and modification set forth below.

Declaratory Judgment

Neither Plaintiff’s nor Defendant’s arguments demonstrate that the court erred in concluding that the issue before the court, on which both parties seek declaratory relief, should be addressed in the first instance by the Commissioner of Labor: whether the home assemblers were employees or sole proprietors. The issue goes to the heart of coverage of the Worker’s Compensation Act, and 21 V.S.A. §606 calls for such questions to be placed before the Commissioner.

If this court were to make a ruling in the context of a contract claim, and the ruling appealed, neither this court nor the Supreme Court would ever have the benefit of the perspective of the Commissioner charged with the responsibility of administration of the Act. The agency would simply be left out of the loop. Such a result would be inconsistent with the letter and spirit of 21 V.S.A. §606.

By contrast, if the question is put to the Commissioner in the first instance as

called for under 21 V.S.A. §606, the decision will have the benefit of agency expertise in interpreting the Act in a comprehensive and coherent manner. If the determination is appealed, presumably the appeal would be directly to the Supreme Court pursuant to 3 V.S.A. §808 and §815. The Court would have the benefit of the agency's expertise and perspective when making its ruling.

This court has considered whether economy for all could be achieved by a ruling requiring the Commissioner to be named as a necessary party in the suit in order to have the benefit of agency input. That would still leave this court as the decisionmaker. This would be inconsistent with 21 V.S.A. §606, which demonstrates the governing principle of primary jurisdiction in the agency on issues such as the one at the heart of this case, and with *Travelers Indemnity Co. v. Wallis*, 176 Vt. 167 (2003).

Therefore, as to the request for declaratory relief on coverage, the court's prior ruling stands: the court defers to the Commissioner under the doctrine of primary jurisdiction, and the claim is dismissed for lack of subject matter jurisdiction.

Contract Claims: Plaintiff's Claims 1, 2, and 3 and Defendant's Counterclaim

Plaintiff correctly points out that the Commissioner has no jurisdiction to adjudicate the contract claims in this case, and that jurisdiction for such claims lies in this court. Indeed, only this court, and not the Commissioner, could address the contract claims of the parties.

As both parties have recognized, the merits of the contract claims are entirely dependent on the outcome of the declaratory issue: whether the home assemblers are covered by the Act.

The court oversimplified in stating previously that it does not have jurisdiction on the contract claims. It is more accurate to say that the court will have jurisdiction to adjudicate them once they are ripe, but because primary jurisdiction for the declaratory action lies with the Commissioner, and because that jurisdiction has not yet been invoked nor a ruling obtained, the contract disputes are not yet ripe for adjudication in this court.

Previously, the court dismissed them without prejudice, based on lack of subject matter jurisdiction, subject to renewal. An alternative, since there are other pending claims in this suit, is simply to stay action on them pending exhaustion of administrative remedies. The court is willing to do so, at least as long as the other claims in the case are unresolved.

Order

For the reasons set forth above, Paragraph 2 of the Order of September 28, 2006 is modified as follows:

- 2) Counts 1, 2, and 3 of Plaintiff's Complaint and Defendant's Counterclaim

remain pending but are stayed until exhaustion of administrative remedies or further order of the court;

Dated this 2nd day of May 2007.

Mary Miles Teachout
Superior Court Judge