

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JULIE NONEMACHER and
THOMAS H. NONEMACHER,

Plaintiffs,

v.

RAIN & HAIL, LLC,

Defendant.

OPINION AND ORDER

11-cv-632-slc

In this civil diversity action on removal from state court, plaintiffs Julie and Thomas Nonemacher allege that defendant Rain & Hail, LLC exercised bad faith in denying their insurance claim for losses sustained as a result of their inability to plant crops due to adverse weather.

In an order entered March 30, 2012, I ordered defendant as the party seeking removal to submit proof of diversity citizenship to establish grounds that would allow the court to exercise subject matter jurisdiction over this case. Dkt. 12. Defendant has responded, submitting evidence that the Nonemachers and the members of Rain & Hail, LLC are parties with diverse states of citizenship and that the amount in controversy is more than \$75,000. Dkts. 13-16. Therefore, I conclude that jurisdiction is present under 28 U.S.C. § 1332.

Now before the court is Rain & Hail's motion to confirm the parties' arbitration award pursuant to 9 U.S.C. § 9. Dkt. 7.

A few preliminary matters deserve attention: Rain & Hail first requested confirmation of the arbitration award in its answer filed in state court. As such, I will construe the request for confirmation as a counterclaim. Although Rain & Hail has not styled its motion to confirm as a motion for summary judgment, the motion addresses dispositive issues in the case and is

accompanied by supporting evidence. When a defendant asks the court to consider matters outside of the pleadings on a motion to dismiss or motion for judgment on the pleadings, Federal Rule of Civil Procedure 12(d) requires the court to convert the motion into a motion for summary judgment, provide notice to the plaintiff and give the plaintiff an opportunity to respond. *Massey v. Helman*, 259 F.3d 641, 646 n.8 (7th Cir. 2001); *Fleischfresser v. Directors of School District 200*, 15 F.3d 680, 684 (7th Cir. 1994). In a telephonic status conference held before the court on January 19, 2012, both sides reported that they were comfortable with the court deciding this motion based on the existing record. In addition, the Nonemachers have had an opportunity to present evidence and materials in response of the motion. *See* Rule 12(d) (“All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.”). The documents submitted by Rain & Hail likely comprise most or all of what is available at this early stage of litigation without the benefit of discovery. As a result, I will convert the motion to confirm the arbitration award to a motion for summary judgment and apply the standard of review set forth in Rule 56.

After reviewing the record and applicable case law, I agree with Rain & Hail that the Federal Arbitration Act (FAA) applies in this case. Because I find that the Nonemachers did not bring a timely challenge to the arbitration award, I must confirm it pursuant to § 9 of the FAA.

This leaves the Nonemachers’ bad faith claim. Neither the FAA nor the Federal Crop Insurance Act, which applies to the crop insurance policy in this case, preempts a state law tort claim against the insurance company. The next question is whether, and to what extent, the findings of the arbitrator have preclusive effect in this case. Because the parties have not had an opportunity to address this issue, I need further input from them before making a final ruling on Rain & Hail’s motion for summary judgment.

FACTS

From the pleadings, the insurance contract between the parties and the arbitration decision, I find the following facts to be undisputed and material:

Plaintiffs Julie and Thomas Nonemacher reside in Clayton, Wisconsin. Defendant Rain & Hail is an insurance company headquartered in Johnston, Iowa. In 2008, the Nonemachers entered into a Prevent Plant Insurance Contract with Rain & Hail to insure their crops in case they were unable to plant them as a result of adverse weather.

Pursuant to the Federal Crop Insurance Act, 7 U.S.C. § 1501 *et seq.*, the United States Department of Agriculture (USDA) sponsors a program of multi-peril crop insurance through the Risk Management Agency (RMA), formerly known as the Federal Crop Insurance Corporation (FCIC). *See Nobles v. Rural Community Ins. Services (Nobles I)*, 122 F. Supp. 2d 1290, 1292 (M.D. Ala. 2000).¹ This program is made available to farmers nationwide through private insurance companies, such as Rain & Hail. The RMA licenses private insurance companies to sell uniform policies that comport with the applicable federal regulations. *Id.*

The parties' crop insurance policy—which is codified at 7 C.F.R. § 457.8 (Jun. 29, 2006 to Nov. 23, 2008 version) (USDA FCIC Common Crop Insurance Policy for Reinsured Policies)—states in relevant part:

1. Definitions

Prevented planting - . . . You must have been prevented from planting the insured crop due to an insured cause of loss that is

¹ As Rain & Hail notes in its supporting brief, very few federal courts have had the opportunity to address crop insurance policies because most of these policy disputes are resolved through arbitration and judicial review is limited and rare. *Nobles I* contains one of the most informative discussions of the process and has been cited by most federal courts facing the same issue.

general in the surrounding area and that prevents other producers from planting acreage with similar characteristics.

* * *

18. Prevented Planting

- (a) Unless limited by the policy provisions, a prevented planting payment may be made to you for eligible acreage if:
 - (1) You were prevented from planting the insured crop (Failure to plant when other producers in the area were planting will result in the denial of the prevented planting claim) by an insured cause that occurs. . .

* * *

20. Mediation, Arbitration, Appeal, Reconsideration, and Administrative and Judicial Review

- (a) If you and we fail to agree on any determination made by us except those specified in section 20(d), the disagreement may be resolved through mediation in accordance with section 20(g). If resolution cannot be reached through mediation, or you and we do not agree to mediation, the disagreement must be resolved through arbitration in accordance with the rules of the American Arbitration Association (AAA), except as provided in sections 20(c) and (f), and unless rules are established by FCIC for this purpose. . . .

* * *

- (b) Regardless of whether mediation is elected:

* * *

- (3) If arbitration has been initiated in accordance with section 20(b)(1) and completed, and judicial review is sought, suit must be filed not later than one year after the date the arbitration decision was rendered; and
- (4) In any suit, if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision

or procedure, an interpretation must be obtained from FCIC in accordance with 7 CFR part 400, subpart X or such other procedures as established by FCIC. Such interpretation will be binding.

- (c) Any decision rendered in arbitration is binding on you and us unless judicial review is sought in accordance with section 20(b)(3). Notwithstanding any provision in the rules of the AAA, you and we have the right to judicial review of any decision rendered in arbitration.

* * *

- (f) In any mediation, arbitration, appeal, administrative review, reconsideration or judicial process, the terms of this policy, the Act, and the regulations published at 7 CFR chapter IV, including the provisions of 7 CFR part 400, subpart P, are binding. Conflicts between this policy and any state or local laws will be resolved in accordance with section 36. If there are conflicts between any rules of the AAA and the provisions of your policy, the provisions of your policy will control.

* * *

36. Applicability of State and Local Statutes

If the provisions of this policy conflict with statutes of the State or locality in which this policy is issued, the policy provisions will prevail. State and local laws and regulations in conflict with federal statutes, this policy, and the applicable regulations do not apply to this policy.

The Nonemachers did not plant their crops in the spring of 2008, allegedly because of cool temperatures and above-normal precipitation. They claim the fields were too wet and muddy to be planted. As a result, the Nonemachers filed a claim with Rain & Hail, stating that they were unable to plant 176.9 acres during the 2008 planting season. Rain & Hail denied the claim, stating that the cause of the Nonemachers' loss was not general to the surrounding area and did not prevent other producers from planting acreage with similar characteristics. On May 27, 2009, the Nonemachers demanded arbitration pursuant to the insurance policy.

At the arbitration hearing, the central issue was whether the Nonemachers' inability to plant was "general" or "common" to the area. According to the Nonemachers, Rain & Hail paid three other policy holders for planting losses in the general area of the Nonemacher's land: Mike Jacklyn (about 37 acres), Dale Schemke (about 5 acres) and an unknown farmer (17 acres). Rain & Hail argued that the Nonemachers' loss was much more extensive than the other claims paid and that the Nonemachers had "adequate dry time" to plant their 176 acres.

Following a hearing, arbitrator William Eich entered a written decision on August 17, 2010, finding that the Nonemachers had not established that their claim was "common to the area" within the meaning of the policy and that the claim was properly denied by Rain & Hail. In his decision, Eich relied on the testimony of William Endersen, a meteorologist retained by Rain & Hail to determine the rainfall amounts during the spring of 2008, and on the testimony of Kip Sanders, an agronomist retained by Rain & Hail to determine whether or not there were sufficient dry days for the Nonemachers to plant the 176 acres at issue during the planting season in 2008. Eich also considered the testimony of Holly Dolliver, a soil scientist retained by the Nonemachers who testified that the soils were saturated and planting could not have been completed.

Eich relied upon the testimony of Sanders and evidence of the Nonemachers's planting history that spring to conclude that there was sufficient time to plant the 176 acres at issue. In addition, he noted that the Nonemachers' claim was not representative of the other paid claims in the area and that the Barron and Polk County Farm Service Agencies had denied two other claims on the same grounds.

On August 4, 2011, the Nonemachers filed a claim against Rain & Hail in the Circuit Court for Dunn County, Wisconsin, alleging that the company denied their insurance claim in bad faith. They did not refer to the arbitration award in their complaint, they have not challenged the validity of the arbitration agreement and they have never moved to vacate the award. Rain & Hail filed an answer to the complaint in state court on September 2, 2011, stating that the parties had resolved the issue in binding arbitration and asking the court to confirm the arbitration award. On September 14, 2011, Rain & Hail removed the case to this court.

OPINION

I. Summary Judgment Standard

Summary judgment is proper where there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions and affidavits, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). “A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party.” *Sides v. City of Champaign*, 496 F.3d 820, 826 (7th Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005)). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780 (7th Cir. 2007). Even so, the nonmoving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Electric Indus. Co. v. Zenith RadioCorp.*, 475 U.S. 574, 586 (1986).

II. Analysis

Even though the Nonemachers did not mention the arbitration agreement in their complaint, Rain & Hail has construed this lawsuit as an attempt to vacate the arbitration decision. It asks the court to apply the Federal Arbitration Act (FAA), confirm the arbitration award and deny the Nonemachers' request to modify or vacate the award as untimely under the FAA. In response, the Nonemachers challenge the arbitration decision for the first time, arguing that the arbitrator misinterpreted the policy and made incorrect factual findings.

Although Rain & Hail may be correct that the Nonemachers actually are challenging the arbitration decision, their state law tort claim is an independent and viable cause of action. The federal statute and regulations governing crop insurance contracts preempt any contrary state laws that otherwise would apply to insurance contracts issued by private insurers. *Nobles I*, 122 F. Supp. 2d at 1294; 7 U.S.C. § 1506; 7 C.F.R. § 400.352. However, federal courts addressing the issue agree that nothing in the regulations prevents insureds from suing private companies selling crop insurance for allegedly tortious conduct. *Meyer v. Conlon*, 162 F.3d 1264, 1269 (10th Cir. 1998); *Williams Farms of Homestead, Inc. v. Rain & Hail Ins. Serv., Inc.*, 121 F.3d 630, 634-35 (11th Cir. 1997); *Farmers Crop Ins. Alliance v. Laux*, 442 F. Supp. 2d 488, 491 (S.D. Ohio 2006); *Nobles v. Rural Community Ins. Services (Nobles II)*, 303 F. Supp. 2d 1292 (M.D. Ala. 2004); *Nobles I*, 122 F. Supp. 2d at 1294. Thus, while coverage and other insurance disputes must be arbitrated, a state law claim of breach of contract or bad faith can be brought against a private crop insurance company. This does not mean, however, "that Congress did not intend for the parties to have some factual determinations and disagreements resolved through arbitration." *Nobles I*, 122 F. Supp. 2d at 1295. These issues will be discussed further below.

A. Applicability of the FAA

Rain & Hail assert that the arbitration agreement in this case is subject to the FAA, which sets forth strict statute of limitations periods for challenging or confirming arbitration awards and limits judicial review of arbitration decisions. The Nonemachers ignored this assertion in their response brief, choosing instead to argue the merits of the arbitration decision.

The FAA generally applies to contracts involving “commerce,” which is defined in the act as “commerce among the several States.” 9 U.S.C. § 1. As Rain & Hail correctly points out, other courts considering the issue have applied the FAA to federal crop insurance claims, reasoning that such insurance contracts involve interstate commerce. *See, e.g., Great Am. Ins. Co. Moye*, 733 F. Supp. 2d 1298, 1302 (M.D. Fla. 2010); *In re 2000 Sugar Beet Crop Ins. Litig.*, 228 F. Supp. 2d 992, 997 (D. Minn. 2002); *Nobles I*, 122 F. Supp. 2d at 1295-96; *Svancara v. Rain and Hail, LLC*, 2009 WL 2982906, *3 (D. Neb. Sept. 11, 2009); *Stedman v. Great American Ins. Co.*, 2007 WL 1040367, *3-4 (D.N.D. Apr. 3, 2007); *Heaberlin Farms, Inc. v. IGF Insurance, Co.*, 641 N.W.2d 816 (Iowa 2002). I find these cases persuasive.

Further, the policy in this case specifically requires the arbitration to be “in accordance with the rules of the American Arbitration Association (AAA)” and provides that “the terms of this policy, the Act, and the regulations published at 7 CFR chapter IV, including the provisions of 7 CFR part 400, subpart P, are binding.” *See Svancara*, 2009 WL 2982906 at *3 (noting same language supported applicability of FAA and not state arbitration act). Accordingly, I agree that the FAA applies in this case.

The FAA embodies a “liberal federal policy favoring arbitration.” *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S. Ct. 1740, 1745 (2011); *see also Gore v. Alltel Communications*,

LLC, 666 F.3d 1027, 1032 (7th Cir. 2012) (citing same). Section 2 of the FAA specifically provides that a “written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” It is well-settled that mandatory arbitration provisions in crop insurance policies similar to the one in this case are valid and enforceable. *See, e.g., Bissette v. Rain & Hail, L.L.C.*, 2011 WL 3905059, *2 (E.D.N.C. Sept. 2, 2011); *Great Am. Ins. Co. v. Moye*, 733 F. Supp. 2d at 1302-03; *In re 2000 Sugar Beet Crop Ins. Litig.*, 228 F. Supp. 2d at 999; *Ledford Farms, Inc. v. Fireman's Fund Ins. Co.*, 184 F. Supp. 2d 1242, 1244–45 (S.D. Fla. 2001); *Nobles I*, 122 F. Supp. 2d at 1293–1301. As in the above cases, the policy in this case clearly states that any dispute regarding coverage under the policy must be resolved through mediation or arbitration, and if arbitration is used, the arbitration decision is binding unless judicial review can be sought. The policy further provides that a suit seeking judicial review must be filed not later than one year after the date the arbitration decision was rendered.

Under § 9 of the FAA, application to enter judgment on an award may be made to the United States court in and for the district within which such award was made. The “court *must* grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.” *Id.* (emphasis added). Notice of a motion to vacate, modify or correct an award must “be served upon the adverse party or his attorney within three months after the award is filed or delivered.” 9 U.S.C. § 12. The Federal Arbitration Act could not be clearer on this point: if the adverse party does not bring a timely challenge to the award, then upon a motion of the party seeking to confirm the award, the district court must enter judgment on the award.

B. Confirmation of Award

The arbitration award in this case was issued on August 17, 2010. Rain & Hail is correct that because the Nonemachers did not move to vacate or modify the award within three months, they cannot do so now under the FAA. *International Union of Operating Engineers, Local No. 841 v. Murphy*, 82 F.3d 185 (7th Cir. 1996) (failure to successfully challenge arbitration award within 90-day limitations period makes award final). Unlike the FAA, however, the parties' crop insurance policy provides for the right to seek judicial review of the arbitration decision within one year. Although neither party has raised the issue, an interesting question arises concerning the seemingly conflicting statute of limitations periods in the FAA and the parties' crop insurance policy. It is unclear what effect the policy provision has, if any, given the applicability and clear dictate of the FAA. However, the answer to this question does not affect the outcome in this case. Here's why not:

First, even though the Nonemachers filed their state lawsuit within one year of the arbitrator's decision, nothing within the complaint indicates that they were attempting to vacate the arbitration award. The complaint only discusses Rain & Hail's "bad faith" decision to deny them benefits under the policy. The Nonemachers did not even mention the arbitration decision until Rain & Hail removed the case to this court and filed a motion to confirm.

Second, even if the Nonemachers were to have challenged the arbitration decision in a timely manner, they have not shown that the decision should be set aside. An arbitration award may be vacated only if: (1) it was procured by corruption, fraud or undue means; (2) the arbitrator showed evident impartiality or corruption; (3) the arbitrator was guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to consider

pertinent and material evidence; or (4) the arbitrator exceeded his power or so imperfectly executed his power that a mutual, final, and definite award was not made. 9 U.S.C. § 10(a). The Court of Appeals for the Seventh Circuit has explained that it is not the court's role to perform appellate review of the arbitrator's decision. *Gingiss International v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995) (citations omitted). "Factual or legal errors by arbitrators—even clear or gross errors do not authorize courts to annul awards." *Id.*; see also *Trustmark Ins. Co. v. John Hancock Life Ins. Co. (U.S.A.)*, 631 F.3d 869, 874 (7th Cir. 2011) ("[A]n award need not be correct to be enforceable. . . . It is enough if the arbitrators honestly try to carry out the governing agreements.") (citing *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001)). "With few exceptions, as long as the arbitrator does not exceed this delegated authority, her award will be enforced." *Butler Mfg. Co. v. United Steelworkers of Am.*, 336 F.3d 629, 632 (7th Cir. 2003).

The Nonemachers have not alleged any misconduct or corruption on the part of the arbitrator. Instead, in response to Rain & Hail's motion, they assert that the arbitrator misunderstood the size of their claim because their 176 acres actually are comprised of four separate parcels ranging between 26.5 and 66.8 acres each, making them only somewhat larger than the other paid claims. They also argue that the arbitrator incorrectly interpreted the contract to require that their claimed losses have "similar characteristics" to the other paid losses in order to be considered "common to the area" within the meaning of the policy.² As explained above, even an arbitrator's erroneous findings or policy interpretations are not grounds for setting aside the arbitration award. *Hill v. Norfolk and Western Ry. Co.*, 814 F.2d 1192, 1194-95

² Although it does not matter to this decision, the Nonemachers are mistaken. The definition of "prevented planting" in the policy specifically states that other producers in the surrounding area must have been prevented from planting acreage with "similar characteristics."

(7th Cir. 1987) (“As we have said too many times to want to repeat again, the question for decision by a federal court asked to set aside an arbitration award . . . is not whether the arbitrator . . . erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract.”).

In sum, because the Nonemachers did not challenge the award in a timely manner, they are stuck with the arbitrator's decision. Pursuant to 9 U.S.C. § 9, I must confirm the arbitration award because it has been not been vacated, modified or corrected.

For completeness sake, I note that Rain & Hail did not seek confirmation of the arbitration award until it answered the Nonemachers’ complaint more than a year after the award was issued. Therefore, Rain & Hail’s motion technically falls outside the limitation period set for such motions in § 9 of the FAA. However, because the Nonemachers have not raised this issue in response to the motion to confirm, they have waived the argument. *Dexia Credit Local v. Rogan*, 629 F.3d 612, 626 (7th Cir. 2010) (“Failure to argue a specific statute of limitations, even if others are argued, constitutes waiver.”) (citing *Anderson v. Flexel, Inc.*, 47 F.3d 243, 247 (7th Cir. 1995)). Further, even if the Nonemachers had raised the argument, it would have been unlikely to succeed.

Because § 9 of the FAA provides that a party to the arbitration “may” apply to the court for an order confirming the award any time within one year after the award, there is some question whether the one-year provision is mandatory or permissive. The Court of Appeals for the Seventh Circuit has not addressed the issue. However, in *Kolowski v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 2008 WL 4372711, *3 (N.D. Ill. Mar. 20, 2008), the Northern District

of Illinois followed the Fourth, Sixth and Eighth Circuits in holding that the one-year period is permissive. See *Wachovia Sec., Inc. v. Gangale*, 125 F. App'x 671, 676 (6th Cir. 2005); *Val-U Const. Co. of S.D. v. Rosebud Sioux Tribe*, 146 F.3d 573, 581 (8th Cir. 1998); *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148 (4th Cir. 1993). Only the Second Circuit has held that the statute of limitations is mandatory. *Photopaint Tech., LLC v. Smartlens Corp.*, 335 F.3d 152, 155-60 (2d Cir. 2003). I am persuaded that the majority position, which includes a district court in this circuit, is correct. If it were to matter, this court would find that Rain & Hail timely sought confirmation.

C. Preclusion

This leaves the Nonemachers' state law tort claim of bad faith. Rain & Hail generally states, without supporting argument, that "the arbitrator made specific findings which should be granted preclusive effect by this court." Dkt. 8 at 12. Although the Nonemachers are silent on this specific issue, they disagree with the arbitrator's findings, implying that the award does not deserve any weight. Because the parties have raised but have not adequately argued the issue of preclusion, I will order further briefing on this subject and allow the parties to submit additional proposed findings of fact that may be relevant to the court's decision on this point.

Generally, the preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are referred to collectively as "res judicata." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). "Under the doctrine of claim preclusion, a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'" *Id.* (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)). "Issue

preclusion, in contrast, bars ‘successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,’ even if the issue recurs in the context of a different claim.” *Id.* The preclusive effect of a federal court judgment is determined by federal common law, whereas the preclusive effect of a diversity case judgment is determined by the laws of the state in which the rendering court sits. *Id.* at 891; *see also Manion v. Nagin*, 392 F.3d 294, 300-01 (8th Cir. 2004) (applying state law rules of preclusion with respect to judgment confirming arbitration award under FAA where jurisdiction based on diversity); *Boguslavsky v. Kaplan*, 159 F.3d 715, 720 n. 4 (2d Cir. 1998) (applying federal rules of preclusion with respect to judgment confirming arbitration award under FAA where jurisdiction was based on federal question).

It is not obvious which preclusion rules should apply in this case because it is unclear whether the prior proceeding for which preclusion is sought (i.e., the arbitration) should be considered a state or federal proceeding. The underlying crop insurance policy is a creature of federal law and subject to the FAA. The arbitration itself was mandated by federal law and was subject to the rules of the American Arbitration Association. However, although the award was confirmed by this court under the FAA, the FAA does not independently confer subject matter jurisdiction on the federal courts. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n. 32 (1983) (The FAA “creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 . . . or otherwise.”); *Zurich Amer. Ins. Co. v. Superior Court for St. of Cal.*, 326 F.3d 816, 826 (7th Cir. 2003). Here, the court’s jurisdiction is based on diversity of citizenship over the Nonemachers’ state claim.

Further, although res judicata and collateral estoppel usually attach to arbitration awards, whether they do so is a matter of contract rather than as a matter of law. *IDS Life Ins. Co. v. Royal Alliance Associates, Inc.*, 266 F.3d 645, 651 (7th Cir. 2001) (citing *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 361 (7th Cir. 1997); *Rudell v. Comprehensive Accounting Corp.*, 802 F.2d 926, 929–30 (7th Cir. 1986); *Benjamin v. Traffic Executive Ass'n Eastern Railroads*, 869 F.2d 107, 110–11 (2d Cir. 1989)). “The preclusive effect of the award is as much a creature of the arbitration contract as any other aspect of the legal-dispute machinery established by such a contract.” *Id.* (citing *W.R. Grace & Co. v. United Rubber Workers*, 461 U.S. 757, 765 (1983); *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R.*, 24 F.3d 937, 940 (7th Cir. 1994)). The Supreme Court has refused to grant arbitration awards preclusive effect in certain federal question cases given the federal interests at stake. For example, in *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 287-88 (1984), the Supreme Court held that arbitration awards are not entitled to preclusive effect under the full faith and credit statute in a later civil rights suit brought under 28 U.S.C. § 1983. The Court also found that there was no need to judicially create a rule that preclusive effect be given to the award in that context. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59–60 (1974), the Supreme Court held that arbitration decisions do not have preclusive effect in later litigation under Title VII. However, the Court in *McDonald* left open the question of the general preclusive effect of arbitration awards, allowing courts to establish their own preclusion rules. In framing preclusion rules in this context, courts are to take into account any federal interests warranting protection. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223 (1985).

Given this framework, the court invites input from the parties on these questions:

- (1) Do federal or state preclusion rules apply in this case?
- (2) Should res judicata apply to the arbitration award in this case? If so, is it a matter of claim preclusion or issue preclusion (collateral estoppel)?
- (3) Which, if any, of the arbitrators findings should be given preclusive effect with respect to the Nonemachers' bad faith claim, and why or why not?

As the moving party, Rain & Hail may have until May 14, 2012 to file a supplemental brief and, if necessary, supplemental proposed findings of fact on the above questions. The Nonemachers may have until June 4, 2012 to respond, with any reply due by June 14, 2012. The parties' submissions must comply with the court's procedures with respect to summary judgment, a copy of which was attached to the preliminary pretrial conference order in this case, dkt. 6.

ORDER

IT IS ORDERED that defendant Rain & Hail, LLC's motion to confirm the arbitration award (dkt. 7) is construed as a motion for summary judgment. Ruling on the summary judgment motion is STAYED pending further briefing by the parties as outlined in this opinion.

Entered this 23rd day of April, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge