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

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

Plaintiff,

and

CHARLES LARSON,

Involuntary Plaintiff,

v.

ELECTROLUX HOME PRODUCTS, INC.,

Defendant.

OPINION AND ORDER

11-cv-678-slc

This is one of three cases pending in this court involving a claim by a subrogated insurer to recover money paid on an insurance policy for fire losses caused by an allegedly defective clothes dryer manufactured by defendant Electrolux Home Products, Inc.. In this case, plaintiff American Family Mutual Insurance Company ("American Family") seeks to recover damages it paid for losses sustained by its insured, Charles Larson; in *American Family Mutual Insurance Company v. Electrolux Homes Products, Inc.*, 12-cv-15-slc, American Family seeks to recover damages it paid out to its insureds, John and Jeanne Brossard; and in *Country Mutual Ins. Co. et al v. Electrolux Home Products, Inc.*, 11-cv-782-slc, Country Mutual Insurance Company seeks to recover damages paid out in connection with a fire in the home of its insured, William Holt. In all three cases, plaintiffs are proceeding against Electrolux on theories of strict product liability and negligence, alleging that these fires were caused by a design defect that allowed lint to accumulate behind the dryer drum where it is hidden from view and close to the dryer's heat source. The *Larson* case is scheduled for trial on January 14, 2013; the *Holt* case for trial on February 11, 2013; and the *Brossard* case for trial on March 11, 2013.

Before the court is a tripartite motion filed by the two insurance company plaintiffs in these cases, American Family and Country Mutual, joined by a third insurer, General Casualty Company of Wisconsin, in which they ask that the court:

> (1) Consolidate pretrial proceedings in the *Larson*, *Brossard*, and *Holt* cases under Fed. R. Civ. P. 42;
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> (2) Permit General Casualty to intervene pursuant to Fed. R. Civ. P. 24(b) so that it may assert a similar claim that it has against Electrolux (the "Donahue" claim) for a claim paid in excess of $75,000;[1]
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> (3) Permit the parties to file, as co-plaintiffs, an amended complaint that combines these four claims *plus* an additional 17 Electrolux dryer fire claims paid by American Family, some of which involve pay-outs of less than $75,000 and some of which occurred in other states.[2]
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> *See* Exhibit A to Proposed Consolidated Complaint, dkt. 17, exh. 2.

Having considered the parties' competing arguments, I am granting the motion in part and denying it in part.[3] For reasons set forth below, I agree that in light of the significant common issues among all the dryer fire claims asserted against Electrolux by the insurance companies, both judicial economy and the ends of justice will be served by permitting General Casualty to intervene in this action and for this court to order this case consolidated for pretrial proceedings with the *Brossard* and *Holt* actions.

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[1] I will presume from General Casualty's participation in this motion that it is consenting to a magistrate judge exercising jurisdiction over its claim. If this is incorrect, then General Casualty has until August 10, 2013 to decline consent, in which case a district judge would take over this entire matter.

[2] Two of the sub-$75,000 claims are the subject of suits filed by American Family in Wisconsin state court; American Family says it will dismiss these state court cases if the pending motion is granted. The remaining 15 claims are currently not in suit. I provide a more detailed breakout below.

[3] Because the briefs thoroughly address the issues raised by the insurance companies' motion, I find that a hearing would not aid the court significantly in its determination of the motion. Accordingly, defendant's request for a hearing, dkt. 41, is denied.

However, I am denying the motion to file the amended complaint as proposed because it includes fires that occurred in out-of-state jurisdictions. The court would be more amenable to permitting an amended complaint limited to dryer fires that occurred within the State of Wisconsin.

BACKGROUND

The moving parties are insurance companies that have paid property loss claims arising from fires allegedly caused by clothes dryers manufactured by Electrolux. American Family is an insurance company licensed in Wisconsin with its principal place of business in Madison, Wisconsin; General Casualty Company of Wisconsin is an insurance company licensed in Wisconsin with its principal place of business in Sun Prairie, Wisconsin; and Country Mutual Insurance Company is an insurance company licensed in Wisconsin with its principal place of business in Bloomington, Illinois. Defendant Electrolux is a Delaware corporation with its principal place of business located in Charlotte, North Carolina.

As detailed in the proposed amended complaint, each moving party alleges that it had insureds who either purchased clothes dryers or rented or purchased homes or buildings equipped with clothes dryers designed, manufactured, distributed and sold by Electrolux. *See* Proposed Amended Complaint, dkt. 17, exh. 2., ¶13. These dryers included gas clothes dryers, electric clothes dryers, gas laundry centers or electric laundry centers. *Id*. The moving parties allege that all of these dryers were defective because they were designed so that lint accumulated inside the clothes dryers in areas not observable to th`e insureds and in close proximity to the heat sources of the dryers, which in turn caused the fires and related property damage. *Id*., ¶¶ 16-17.

The moving parties have paid 21 claims arising from Electrolux dryer fires. Exhibit A to the Proposed Amended Complaint, dkt. 17, exh. 2. Those claims and their present disposition are as follow:

> American Family: 2 cases pending in this court (Larson and Brossard)
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> Country Mutual: 1 case pending in this court (Holt)
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> American Family: 2 cases pending in Wisconsin state court (Kucharski and Blake)
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> General Casualty: 1 Wisconsin claim not yet filed (Donahue)
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> American Family: 15 claims not yet filed, as follows:
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> - 1 Wisconsin claim over $75,000 (Freeman)
> - 2 Wisconsin claims under $75,000 (Lara, Slivka)
> - 1 Minnesota claim under $75,000 (Bartell)
> - 3 Illinois claims over $75,000 (Carranza, Maley, Spinelli)
> - 6 Illinois claims under $75,000 (Cox, Flores, Louchios, Nitti, Crews, Webb)
> - 1 Ohio claim over $75,000 (Novak)
> - 1 Ohio claim under $75,000 (Gucciardo)

The *Larson* case was commenced by American Family on August 25, 2011 in the Circuit Court for Dane County, Wisconsin, and timely removed to this court by defendant Electrolux on October 3, 2011. This court entered a preliminary pretrial conference order on November 17, 2011, which set January 6, 2012 as the last day to amend the pleadings without leave of court. Plaintiff's deadline for disclosing experts was June 4, 2012 and the deadline for filing dispositive motions is August 17, 2012. The discovery cut-off date is November 30, 2012 and the case is set for trial on January 14, 2013. The instant motion was filed on May 3, 2012.

A second claim by American Family, the *Brossard* case, 12-cv-15-slc, was filed by American Family in the Circuit Court for Dane County on November 14, 2011 and removed by Electrolux on January 5, 2012. The preliminary pretrial conference order was entered on February 8, 2012, and the last day to amend the pleadings was March 16, 2012. Plaintiff's deadline for disclosing liability experts is August 6, 2012. The discovery cut-off date is October 5, 2012 and the case is set for trial March 11, 2013.

Country Mutual commenced litigation on its subrogated claim arising from the *Holt* fire on October 7, 2011 in the Circuit Court for Barron County. The case was removed to this court on November 18, 2011, the preliminary pretrial conference order was entered January 4, 2012, the last day to amend the pleadings was February 17, 2012 and the discovery cut-off is December 21, 2012. Plaintiff was to have disclosed its liability experts by June 30, 2012. The case is scheduled for trial on February 11, 2013.

These cases got off to a slow start, largely due to Electrolux's reluctance to provide the insurers with requested discovery. *See* dkt. 43, 11-cv-678-slc, Tr. of Telephonic Hearing on Motion to Compel, June 13, 2012. It appears that Electrolux only recently has made its first set of production, which consists of over 12,000 pages of documents. *See* dkt. 13, 11-cv-782-slc. In all three cases, the plaintiffs have asked for extensions of their deadlines to disclose expert witnesses on liability on the ground that Electrolux's late and voluminous document production has hampered their ability to prepare their expert reports. Although this court has granted the motions explicitly or by implication, it has yet to hold a conference for the purpose of re-calendering the cases. It is plain that we will have to recalendar all of these cases, including setting new trial dates.

OPINION

I begin with the insurance companies' most ambitious and all-inclusive request: they want to start over with a new complaint that aggregates the three cases already filed in this court, a new claim by General Casualty, the two Wisconsin state court cases filed by American Family and 15 as-yet unfiled claims paid by American Family which include claims arising from fires in three other states. Motions to amend the complaint are governed by Fed. R. Civ. P. 15(a)(2), which provides that courts should "freely give leave [to amend] when justice so requires." Courts have broad discretion to deny amendment where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile. *Johnson v. Cypress Hill*, 641 F.3d 867, 871-72 (7th Cir. 2011).

The insurance companies assert that joining all their claims—including those not yet filed—into a single action makes sense because each party alleges that the Electrolux dryers that caused the fires have the same design defects, each party alleges that Electrolux was negligent in the way it designed and tested its dryers and warned its customers regarding the hazard the dryers posed and each party will rely on the same expert witnesses to establish their cases. Although the insurance companies acknowledge that it may not be appropriate to consolidate all 21 cases for trial, they argue that, at least for pretrial purposes, consolidation promotes judicial efficiency and decreases the likelihood of inconsistent rulings by different courts on matters such as the proper scope of discovery, the admissibility of expert testimony and the propriety of summary judgment. In their view, a decision whether and which cases need to be tried separately can be made after discovery is complete. Br. in Supp., dkt. 18, at 7-8. The moving parties point out that a similar, multi-plaintiff, multi-claim complaint against Electrolux alleging the same type of dryer defects has been allowed to proceed in the United States District

Court for the Northern District of Illinois. *State Farm Fire and Casualty Co. v. Electrolux Home Products, Inc.*, 2012 WL 1287698 (N.D. Ill. April 16, 2012) (a copy of Judge Conlon's slip opinion is available at dkt. 17, exh. 3, at 2).

In response, Electrolux argues that merely because the insurance companies all blame their subrogated fire losses on the same alleged defects in the design of Electrolux's dryers is not enough to warrant consolidation, intervention by General Casualty or amendment of the complaint. In Electrolux's view, notwithstanding these supposed commonalities, each case is *sui generis* because each involves different circumstances concerning each dryer's installation, operation and maintenance and not every case involves the same dryer model. These differences, says Electrolux, require not only separate trials for each dryer fire but will drive much of the discovery between the parties. Further, argues Electrolux, allowing General Casualty to intervene or the parties to file the proposed amended complaint would be unduly prejudicial to Electrolux because: 1) granting this request would ineluctably require postponing the trial date in this case in order to permit full discovery by Electrolux on the new claims; and 2) allowing the addition of claims involving insureds who live out of state or outside this court's 100-mile subpoena power would impair Electrolux's ability to defend itself because the insureds are likely to be central witnesses to its affirmative defenses and causation generally. As Electrolux sees it, it is fairer and more efficient to litigate these cases one at a time in the forums in which the fires occurred rather than in a consolidated proceeding in this court.[4] Br. in Opp., dkt. 37, at 8-13.

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[4] Electrolux also argues that insofar as the amended complaint includes the two cases filed by American Family that are pending in state court (the "Kucharski" and "Blake" claims), it should be rejected as an improper "removal" of a state court action to federal court. *See* Br. in Opp., at 6-7. This argument is without merit. As American Family points out, if this court allows the moving parties to file the proposed amended complaint in this case, it will seek dismissal of the state court cases. Contrary to Electrolux's position, there is nothing improper about this approach.

Before addressing whether it is fair or pragmatic to accept submission of the amended complaint, I will address the technical sufficiency of the amended complaint. Electrolux does not dispute that under Fed. R. Civ. P. 18(a), an insurer may aggregate in a single action all the subrogated claims it has against a single defendant. *See Wheeler v. Wexford Health Sources, Inc.*, ___ F.3d ___ , 2012 WL 2999967, *2 (7th Cir. July 23, 2012) (a "plaintiff may put in one complaint every claim of any kind against a single defendant, per Rule 18(a)"); *State Farm*, 2012 WL 1287698, *4 (under Rule 18(a), State Farm plaintiffs could join 210 partial subrogation claims alleged to have been caused by defendant's defective dryers in single lawsuit); *National Asbestos Workers Medical Fund v. Philip Morris, Inc.*, 74 F. Supp. 2d 221, 238 (E.D.N.Y. 1999) (subrogee may aggregate its claims to meet amount-in-controversy requirement).

Electrolux does not argue that the insureds are indispensable parties whose absence would require dismissal of the amended complaint, an argument it presented unsuccessfully in the *State Farm* case. *State Farm*, 2012 WL 1287698, at *2-*4.

Electrolux *does* object to the proposed joinder of the three insurance companies, but I find that joinder is proper under Fed. R. Civ. P. 20(a). Parties are properly joined as plaintiffs where: (A) they assert any right "arising out of the same transaction, occurrence, or series of transactions or occurrences" and (B) "any question of law or fact common to all plaintiffs will arise in the action." Electrolux argues that even if the insurance companies' claims arguably raise some common questions of law or fact, they do not arise from the "same transaction, occurrence, or series of transactions or occurrences" because each subrogation claim arose out of a separate fire that occurred under different circumstances and involved different dryer products.

Relying on the Second Circuit's decision in *Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238, 251 (2d Cir.1986), and Seventh Circuit case law interpreting the phrase "transaction

or occurrence" in the context of Fed. R. Civ. P. 13, Judge Conlon rejected the same argument by Electrolux in the *State Farm* case, *supra*. Judge Conlon found that the parties' allegation that the same defect caused all the fires for which they had subrogation claims was enough to satisfy the same transaction or occurrence requirement. *Id*. at *5. Although not her opinion is not binding on this court, Judge Conlon's conclusion–which Electrolux has not attempted to distinguish–-is well-reasoned, amply supported by the authority she cited and consistent with Rule 20's goal of preventing unnecessary multiple lawsuits. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966) ("Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."). Based on this same reasoning, I find that the three insurance companies may properly join as plaintiffs in this court.

Having concluded that the moving parties *could* file the amended complaint as proposed, the next question is whether they *should* be allowed to file it in this case. I agree with the insurance companies that efficiency and judicial economy can be best served with respect to discovery disputes, motions to exclude expert testimony under *Daubert* and motions for summary judgment by having one referee, one set of rulings and one pre-trial calendar governing all of these defective dryer claims against Electrolux. Electrolux's arguments notwithstanding, significant common issues of law or fact exist insofar as the insurance companies are contending in each of the 21 cases that their insured's losses were caused by Electrolux's defective design of the dryers and its failure to test for or warn consumers of the risk posed by lint accumulating in areas behind the dryer drum and within the plastic air duct or blower housing. As the scope of discovery and expert witness testimony related to the alleged design defects and failure to test

and warn will be common to all claims, allowing the moving parties to file the proposed joint complaint would serve the goals of fostering judicial economy and consistent results.

Although I agree with Electrolux that each claim will likely need to be *tried* separately because of the individual issues with respect to each fire concerning how the dryer was installed, maintained and used by the insured, this can be accomplished with an order for separate trials under Rule 42(b) or by severing the claims under Rule 21. It is not a basis to disallow the amended complaint.

Electrolux also complains that allowing the amended complaint will unreasonably delay the trials in this case and the other two dryer fire claims that are already pending in this court and that American Family has not shown good cause for amending the scheduling order. I agree that allowing the proposed amended complaint will cause some additional delay. As the moving parties point out, however, these cases already have been thrown off schedule due to Electrolux's resistance to plaintiffs' discovery demands. The parties in all the pending cases have asked for more time for disclosure of experts, and they will get it. With the parties not yet having exchanged expert reports, it is a foregone conclusion that the trial currently set for January 2013 will have to be moved back, regardless whether the court allows an amended complaint. Although the addition of the new claims may require a new trial date to be set out further than it would have been had this case proceeded only on the Larson fire, any additional delay will be relatively incremental and it will be outweighed by the benefits of having the common issues among the insurance companies' claims briefed and adjudicated in a single proceeding before a single court.

Electrolux's most persuasive argument against allowing the amended complaint is that it includes claims involving insureds who live out of state or outside the reach of this court's 100-mile subpoena power. As Electrolux points out, the witnesses it will have to call to establish its "user error" defense are the insureds and possibly service technicians or maintenance employees who likely live near the site of each fire. I share Electrolux's view that, without the ability to subpoena these central witnesses to appear for trial, Electrolux's ability to defend against the allegations in the complaint will be prejudiced. The insurance companies are dismissive of Electrolux's position, hewing to their view that all of these dryer fires resulted from defective products, not negligent users.

Duly noted. This court is not going to pick sides at this juncture; that's why we have trials, and given Electrolux's position, it appears that the dryer users will be important witnesses at these trials. From the court's perspective, playing a videotape–let alone reading a transcript–of a witness's deposition will not offer jurors the opportunity to assess credibility as well as live testimony does.[5] If these cases are going to be decided by juries, then Electrolux is entitled to keep open the option of having each jury determine each dryer user's credibility based on live testimony.

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[5] Admittedly, this is putting the cart slightly ahead of the horse: Electrolux has not identified any witnesses by name, much less shown that they will be necessary to its defense and unwilling to testify voluntarily. But the conversation is hypothetical at this point because of the procedural posture in which the issue has arisen, namely, in the context of deciding whether to allow a proposed amended complaint that joins in a single action subrogated claims arising in different states. In answering this question, this court must predict how things likely would unfold if the complaint was actually filed. Having already presided over one jury trial involving a home fire and an Electrolux dryer (but at which the homeowner did not testify because she could not be found), I am aware that these cases are as likely as not to go to trial, and that testimony from the homeowner/dryer user likely will be important to the jury's understanding of what did and did not happen.

In theory, this court could address this trial witness concern by allowing the entire complaint as proposed, severing it into four separate lawsuits (one for each state involved) under Fed. R. Civ. P. 21, then transferring the out-of-state cases to the appropriate federal court under 28 U.S.C. § 1404(a).[6] Implementing such a plan would require this court to expend significant judicial resources, thereby diminishing any efficiencies gained from permitting all these claims to go forward together. Having weighed the costs and benefits, I conclude that the amended complaint—as proposed—likely will require this court to expend more judicial resources than it saves. Pursuant to F.R. Civ. Pro. 1, it makes little sense to accept the proposed amended complaint only to bust it back apart and ship shards to other jurisdictions.[7]

Accordingly, I am denying the motion for leave to file the proposed amended complaint. That said, I am willing to permit an amended complaint that is pared down to only dryer fires that occurred in Wisconsin. This approach addresses the location-of-the-witnesses issue while for the most part advancing the goals of avoiding duplicative lawsuits and inconsistent results. If the moving parties wish to take this path, then they may have until August 17, 2012, in which to file an amended complaint that meets the court's requirements.

Because the moving parties may opt *not* to file a Wisconsin-fires-only amended complaint, I briefly address General Casualty's motion to intervene in this case and the motion to consolidate this case for pretrial purposes with the Brossard and Holt cases already pending. As

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[6] This means that federal court jurisdiction would be lost with respect to the Minnesota claim, which involves a single fire with losses under the $75,000 amount-in-controversy requirement. *Gaffney v. Riverboat Services of Indiana, Inc.*, 451 F.3d 424, 442 (7th Cir. 2006) ("Where a single claim is severed out of a suit, it proceeds as a discrete, independent action") (internal quotation marks and citation omitted).

[7] This approach would lead to additional concerns over whether it was fair or efficient for this court to prep these cases for trial then foist them onto other courts that might have preferred prepping the cases themselves. If this were an MDL proceeding, then the dynamics would be different, but it's not.

should be plain from the foregoing discussion, these cases amply meet Rule 42(a)'s criteria for consolidation in that they involve common issues of law or fact; in fact, *de facto* consolidation of the three cases already has occurred. *See* dkt. 40 (granting plaintiffs' motions to compel in 11-cv-678 and 11-cv-782) (text only order, June 13, 2012). General Casualty's allegation that the Donahue fire was caused by the very same defect in Electrolux's dryer that caused the Larson, Brossard and Holt fires suffices to allow General Casualty to intervene under Fed. R. Civ. P. 24(b)(1)(B) ("the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.") Although Electrolux argues that General Casualty's claims investigation and payment processes differ from those of the other plaintiffs, it has not provided enough detail to convince me that these differences warrant denying the motion. Accordingly, the motions to consolidate and to intervene will be granted. However, I shall defer entering an order to that effect until the August 17, 2012 deadline for filing a new draft amended complaint has passed. If the moving parties opt to file an amended complaint, then these motions will be moot.

ORDER

IT IS ORDERED THAT:

1. The motion of plaintiff American Family Mutual Insurance Company, proposed intervenor General Casualty of Wisconsin and proposed joint plaintiff Country Mutual Insurance Company, dkt. 17, is DENIED IN PART and STAYED IN PART:

> A. The motion is DENIED with respect to the parties' request for leave to file the proposed amended complaint attached as Exhibit 2 to dkt. 17. However, the parties have until noon on August 17, 2012 in which to file an amended complaint that is limited to dryer fires that occurred in Wisconsin, should they choose to do so.
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> B. The motion is STAYED until August 17, 2012 with respect to General Casualty's motion to intervene in this action and the parties' motion to consolidate this case with case nos. 11-cv-782-slc and 12-cv-15-slc. Then court will grant these parts of the motion if the moving parties have not filed an amended complaint as specified above. The court will deny these parts of the motion as moot if the parties file an amended complaint as specified above.
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> C. On August 24, 2012 at 10:00 a.m., the court shall hold a joint telephonic status conference in cases 11-cv-687-slc, 11-cv-782-slc and 12-cv-15-slc for the purpose of discussing and setting new dates and deadlines. Counsel for plaintiff American Family is responsible for setting up the conference call to chambers.
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> D. Not later than August 22, 2012 the parties shall file their proposals for how to schedule this case. They may file joint or separate letters as they see fit.

Entered this 3rd day of August, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge