IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KATHLEEN McHUGH and
DEANNA SCHNEIDER, individually
and on behalf of all persons similarly situated,

Plaintiffs,

v.

MADISON-KIPP CORPORATION,
CONTINENTAL CASUALTY COMPANY,
COLUMBIA CASUALTY COMPANY,
UNITED STATES FIRE INSURANCE COMPANY
and ABC INSURANCE COMPANIES 1–50,

Defendants,

v.

LUMBERMENS MUTUAL CASUALTY COMPANY,
AMERICAN MOTORISTS INSURANCE CO.
and JOHN DOE INSURANCE COMPANIES 1-20,

Third-party defendants.

OPINION and ORDER

11-cv-724-bbc

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In this case, which is brought under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, and state common law, plaintiffs Kathleen McHugh and Deanna Schneider allege that their houses have been contaminated by toxic vapors released from a manufacturing facility operated by defendant Madison-Kipp Corporation. Plaintiffs filed suit against Madison-Kipp as well as three of Madison-Kipp's insurers, defendants

Continental Casualty Company, Columbia Casualty Company and United States Fire Insurance Company. In turn, Madison-Kipp filed cross-claims against the insurance companies, seeking a declaration that they owe a duty to defend and indemnify itfor the damages sought by plaintiffs as well as the remediation and investigation demands made by the Wisconsin Department of Natural Resources concerning environmental contamination in the area. Continental is defending Madison-Kipp under a full reservation of rights, and both Continental and Columbia filed cross-claims against Madison-Kipp, contending that Madison-Kipp's insurance policies do not cover plaintiffs' or the Department of Natural Resources' claims against Madison-Kipp. Also, the insurance companies filed a third-party complaint against Lumbermens Mutual Casualty Company, American Motorists Insurance Company and John Doe Insurance Companies 1-20, contending that these third-party defendants have a duty to defend or indemnify Madison-Kipp. Dkt. #50.

Now before the court is defendants Continental Casualty Company's and Columbia Casualty Company's motion to dismiss the insurance coverage claims for lack of subject matter jurisdiction. Dkt. #94. The insurance companies contend that this court cannot exercise supplemental jurisdiction over the insurance coverage claims because they are not part of the same case or controversy as plaintiffs' federal claim under the Resource Conservation and Recovery Act and because the claims are not ripe. In the alternative, the insurance companies request that the court modify its scheduling order and extend the deadline for the insurance companies to file their expert reports and dispositive motions. Dkt. #97.

I am denying both motions. I conclude that this court may exercise subject matter jurisdiction over the insurance coverage claims, including plaintiffs' direct action claim against the insurance companies, Madison-Kipp's cross-claims and the insurance companies' own cross-claims and third-party complaint. The insurance coverage disputes present a real case and controversy and have a factual relationship to the underlying environmental contamination claims sufficient to satisfy supplemental jurisdiction under 28 U.S.C. § 1367.

I am denying the insurance companies' motion to amend the scheduling order because I am not persuaded that a modification is necessary. As I explained in a previous order on this topic, it will be more efficient for the court and parties if this case proceeds under the current schedule. Further, I am not persuaded that the current schedule deprives the insurance companies of any procedural rights. (Defendant United States Fire Insurance Company filed a motion to join Continental's and Columbia's motion to modify the scheduling order. Dkt. #107. I am granting the motion to join.)

OPINION

A. Motion to Dismiss

1. Ripeness

Defendants Continental Casualty Company and Columbia Casualty Company contend that the court lacks subject matter jurisdiction over the insurance coverage claims because the insurance disputes are not "ripe." They contend that because Continental is defending Madison-Kipp, there is no dispute about the duty to defend. Further, because

plaintiffs have not yet been and may never be awarded any relief against Madison-Kipp, there is no ripe issue regarding indemnification.

In cases in which there is a question about the existence of an actual case or controversy between the parties, the Court of Appeals for the Seventh Circuit has described the doctrine of ripeness as a question of subject matter jurisdiction. Wisconsin Central, Ltd. v. Shannon, 539 F.3d 751, 759 (7th Cir. 2008) ("ripeness, when it implicates the possibility of this Court issuing an advisory opinion, is a question of subject matter jurisdiction under the case-or-controversy requirement"); Lehn v. Holmes, 364 F.3d 862, 867 (7th Cir. 2004) (ripeness is predicated on "central perception . . . that courts should not render decisions absent a genuine need to resolve a real dispute") (citation omitted). However, in cases in which there is a live controversy between the parties, the court of appeals has described ripeness as a prudential concern about the appropriate timing for resolution of a question. Brandt v. Village of Winnetka, 612 F.3d 647, 649–51 (7th Cir. 2010) (ripeness concerns "appropriate exercise of discretion rather than the limits of judicial power"); Meridian Security Insurance Co. v. Sadowski, 441 F.3d 536, 538 (7th Cir. 2006) ("[R]ipeness is peculiarly a question of timing rather than a limit on subject-matter jurisdiction.") (citation and quotations omitted).

In this case, the ripeness question is not whether there is an actual case or controversy related to the insurance coverage disputes. Plaintiffs' direct action claim raises a real dispute about whether Continental and Columbia may be held liable for Madison-Kipp's alleged negligence. The direct action statutes, Wis. Stat. §§ 803.04(2)(a) and 632.24, permit

plaintiffs to bring claims against the insurers regardless whether liability against Madison-Kipp "is presently established or is contingent and to become fixed or certain by final judgment against the insured." Wis. Stat. § 632.24. Continental and Columbia cite no cases suggesting that direct action claims are not ripe disputes because the defendant-insured has not yet been found liable. Indeed, such a conclusion would make Wisconsin's direct action procedure useless.

Similarly, Madison-Kipp's declaratory judgment claims, coupled with Continental's reservation of rights, raise real disputes about the companies' duties to defend and indemnify Madison-Kipp under the terms of the insurance policies and the scope of those policies. Madison-Kipp has been sued for environmental harms committed in connection with the operation of its manufacturing plant. In light of the various theories of liability asserted by plaintiffs, there is a sufficient possibility that Madison-Kipp could be found liable. Although Continental is defending Madison-Kipp, it is doing so under a reservation of rights and has filed counterclaims contending that it has no duty to defend or indemnify Madison-Kipp. Thus, the pending harm to Madison-Kipp is sufficiently immediate and real to justify determining whether the insurance companies are obligated to defend and indemnify Madison-Kipp.

Although the insurance companies are correct that their ultimate liability is contingent on a finding that Madison-Kipp is liable to plaintiffs for environmental contamination, it is not uncommon to have claims within a single lawsuit that are contingent on the outcome of other claims. This does not mean that plaintiffs' and Madison-Kipp's

claims are only "hypothetical, speculative, or illusory," rather than "actual, concrete conflicts." Hinrichs v. Whitburn, 975 F.2d 1329, 1333 (7th Cir. 1992) ("Cases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts."). In a similar scenario, the court of appeals has explained that an insurance indemnification claim creates a live controversy:

> A sues B in state court; C, B's insurer, brings a suit in federal court seeking a declaratory judgment that the policy does not cover the events, so that it need not indemnify B, should B be held liable in the state case. No one supposes that such litigation, a staple under the diversity jurisdiction, exceeds the judicial power under Article III just because the state court may decide in B's favor on the merits and make the federal decision irrelevant. As long as there is a risk that B will be held liable and C called on to indemnify, there is a live controversy that a federal court may resolve.

In re Kmart Corp., 434 F.3d 536, 539-40 (7th Cir. 2006) (dictum). See also Meridian Security Insurance, 441 F.3d at 538 ("Although a plaintiff's asserted injury may depend on so many future events that a judicial opinion would be advice about remote contingencies . . . these parties' disagreement about potential indemnity is part of a larger controversy that is neither conjectural nor speculative.").

Thus, the ripeness question is a matter of prudential concerns regarding the appropriate timing of resolution of the insurance disputes. Such ripeness determinations depend on "'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" Wisconsin Right to Life State Political Action Committee v. Barland, 664 F.3d 139, 148 (2011) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)). The court of appeals has explained that decisions about indemnity

should generally be "postponed until the underlying liability has been established," Lear Corp. v. Johnson Elec. Holdings Ltd., 353 F.3d 580, 583 (7th Cir. 2003), and has held that it is appropriate to dismiss indemnification claims that are pending simultaneously and separately from the underlying dispute until after that dispute is resolved. Medical Assurance Co. v. Hellman, 610 F.3d 371 (7th Cir. 2010). See also Nationwide Insurance v. Zavalis, 52 F.3d 689, 693 (7th Cir. 1995) ("the duty to indemnify is not ripe for adjudication until the insured is in fact held liable in the underlying suit") (applying Pennsylvania law). But see Bankers Trust Co. v. Old Republic Insurance Co., 959 F.2d 677, 681–82 (7th Cir. 1992) (holding that it is appropriate to determine liability if it is highly likely that the indemnitee will be held liable in underlying action and will not be able to afford award of damages).

However, in Lear, Medical Assurance and Zavalis, the court of appeals was considering whether a district court should stay or dismiss indemnification disputes between an insurer and insured that were proceeding separately from the state court proceedings on the underlying claims against the insured, and none of the cases involved plaintiffs who had filed direct action claims against insurance companies. In this case, both the primary action involving the environmental contamination claims and the insurance coverage claims are before this court and there are no parallel or related cases in state court that could affect the insurance issues in this case. Thus, there is no danger of offending the principles of comity or federalism and fewer concerns about judicial efficiency.

Further, the insurance issues in this case are fit for judicial decision. As the court of

appeals has explained, "purely legal issues are normally fit for judicial decision." Wisconsin Right to Life, 664 F.3d at 148. Under the current schedule, the parties may file dispositive motions related to the scope of the insurance contracts and the companies' duty to defend or indemnify that present questions of law to be resolved by the court. Those issues are fit for judicial decision. Any insurance coverage issues that depend on resolution of the underlying environmental contamination claims will be resolved after resolution of the underlying claims.

Additionally, hardship would result to plaintiffs and Madison-Kipp if their claims against Continental and Columbia were dismissed. Wisconsin's direct action statute permits plaintiffs to bring direct action claims in conjunction with negligence claims; the purpose of the statute is to resolve both issues in the same case. Rick Products Corp. v. Zurich American Insurance Co., 293 F.3d 981, 983 (7th Cir. 2002). Declining to consider plaintiffs' direct action claims in this lawsuit would require plaintiffs to bring a separate action against Continental and Columbia, contrary to the purpose of the direct action statutes. Similarly, Madison-Kipp would suffer hardship if the insurance claims are dismissed because it would be required to bring a separate lawsuit to resolve its disputes concerning the insurers' duty to defend and indemnify. Thus, under the factors set forth in Wisconsin Right to Life, 664 F.3d at 148 and Abbott Labs., 387 U.S. at 149, I conclude that the insurance issues are ripe. Accordingly, I will deny the motion to dismiss on the basis of ripeness.

2. Supplemental jurisdiction

Defendants Continental and Columbia also contend that the insurance claims should be dismissed for lack of subject matter jurisdiction because the insurance claims are not part of the same case or controversy as the environmental contamination claims. In other words, there is no basis under 28 U.S.C. § 1367 for the court to exercise supplemental jurisdiction over the insurance claims.

Under 28 U.S.C. § 1367(a), a federal court has supplemental jurisdiction over a state law claim if it shares "a common nucleus of operative fact" with a federal claim in the same lawsuit, Wisconsin v. Ho-Chunk Nation, 512 F.3d 921, 936 (7th Cir. 2008), which means that the two claims arise out of "the same set of circumstances." Houskins v. Sheahan, 549 F.3d 480, 495 (7th Cir. 2008). This is a liberal standard, requiring only a "loose factual connection" between the claims. Id.; Ammerman v. Sween, 54 F.3d 423, 424 (7th Cir. 1995). Plaintiffs meets this standard because both their federal claim (the claim under the Resource Conservation and Recovery Act) and state law direct action claim relate to liability for environmental contamination of the same area. Also, Madison-Kipp meets this standard because its claims for defense and indemnification share a factual connection with the underlying environmental contamination claims. As Columbia and Continental have conceded, the insurance claims are "related" to the environmental contamination claims and some factual issues are relevant to all claims, such as the circumstances under which the pollutants were allegedly released by Madison-Kipp, the timing of the discharges and whether plaintiffs sustained any property damage. Dkt. #62 at 4-5. This is sufficient to

establish a "loose factual connection."

Moreover, it is appropriate to exercise supplemental jurisdiction over the insurance claims. Although Columbia and Continental contend that these claims raise complex issues of state law, they do not identify any specific issues that are particularly complex. Additionally, the cases cited by Columbia or Continental are distinguishable because they involve situations in which there were parallel proceedings in state court, all federal claims had been dismissed or the plaintiff was not proceeding under a direct action statute. Wisconsin law permits and anticipates that plaintiffs can pursue a direct action claim against the insurers under the circumstances present in this case. If I dismissed plaintiffs' direct action claim, plaintiffs could pursue the claim only by dismissing its state law negligence claim and refiling that claim and its direct action claim in state court. Such a result would not promote fairness or judicial economy, two primary purposes of § 1367. Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 (1988) ("[A] federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims.").

For these reasons, I am denying the motion to dismiss for lack of subject matter jurisdiction.

B. Motion to Amend Scheduling Order

Defendants Continental and Columbia have filed a motion to modify the scheduling

order that Magistrate Judge Crocker entered on July 30, 2012. Dkt. #95. The motion is essentially a motion for reconsideration of the order I issued on July 5, 2012, in which I concluded that the insurance coverage issues should not be bifurcated and stayed and that the insurance coverage issues would proceed on the same scheduling track as the rest of the case. Dkt. #92. I explained that it would be more efficient and convenient to conduct discovery on all issues now, particularly because the insurance companies stated that they intended to seek discovery from Madison-Kipp as well as class members. Additionally, I concluded that all parties would be subject to the same deadlines for filing dispositive motions. For the purpose of trial, the case would be presented to one jury in phases: liability (which may include class and individual issues); damages; and insurance coverage (if necessary).

In their motion to amend the scheduling order, Columbia and Continental request that the court set a second dispositive motion deadline between the phase of the trial devoted to damages and the phase devoted to insurance issues. They contend that any other schedule would result in the jury's having to decide issues of law about the insurance contracts. They also request that the court move the deadline for the disclosure of their expert reports on insurance coverage until six weeks after all damages experts' reports have been disclosed.

I am denying the motion. The current schedule allows for the earliest determination of all claims and issues in this case. Because the parties should be conducting discovery on insurance coverage issues now, legal issues regarding the scope of the insurance policies can

be decided through dispositive motions before trial. Interpretation of insurance policies is generally a question of law for the court, and Continental and Columbia do not explain why such interpretation must wait until after a trial on the environmental contamination claims. Waiting until after the trial would merely prolong this case. That being said, if there are any legal issues related to insurance coverage that arise after the jury trial on liability for the environmental contamination claims, I will set a schedule for the parties to brief those issues for the court. Issues of law to be decided by the court will not be submitted to the jury.

With respect to the expert reports, I am not persuaded that the insurer's experts will need to consider both plaintiffs' and Madison-Kipp's damages expert reports before they can provide opinions on insurance coverage. The insurers' experts will have access to the discovery conducted in the case and the other parties' experts' opinions regarding liability, and will be able to incorporate that information when discussing insurance coverage. The insurers may file a motion for leave to file supplemental reports if, after the damages reports have been filed, the insurers can provide sufficient explanation as to why their experts need a chance to respond. For now, the deadlines remain firm.

ORDER

IT IS ORDERED that

1. The motions to dismiss, dkt. #94, and modify the scheduling order, dkt. #97, filed by defendants Continental Casualty Company and Columbia Casualty Company are DENIED.

2. Defendant United States Fire Insurance Company's motion to join the reply brief filed Continental Casualty Company and Columbia Casualty Company, dkt. #107, is GRANTED.

Entered this 19th day of September, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge