IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LIBERTY MUTUAL FIRE
INSURANCE COMPANY,

OPINION AND ORDER

Plaintiff,

01-C-0207-C

v.

THE NORDIC GROUP OF
COMPANIES, LTD. and
SNOW VALLEY, LLC,

Defendants.

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This is a civil action for declaratory relief in which plaintiff Liberty Mutual Fire Insurance Company contends that defendants The Nordic Group of Companies, Ltd. and Snow Valley, LLC, the named insureds on a workers' compensation policy issued by plaintiff, are obligated to pay (1) a retrospective insurance premium of $153,705 calculated on the basis of a $750,000 workers' compensation settlement made on behalf of defendant Snow Valley plus (2) a future retrospective premium to be calculated on the basis of that same settlement. (Although the bankruptcy court has imposed a stay of proceedings against defendant Snow Valley, I will nevertheless refer to both Nordic Group and Snow Valley as

defendants in this order.) Plaintiff seeks a declaratory judgment that it may legally draw against a standby, irrevocable letter of credit issued by Flambeau Corporation, another named insured on the same policy (and a subsidiary of defendant Nordic Group), because (1) plaintiff is uncertain whether the letter of credit applies to an "incurred basis" claim such as this and (2) defendants have alleged that plaintiff settled the workers' compensation claim in bad faith. Subject matter jurisdiction is present pursuant to 28 U.S.C. § 1332.

In August 2001, after this lawsuit had been filed, defendant Snow Valley filed a Chapter 11 petition for rehabilitation in the U.S. Bankruptcy Court for the Central District of California. The filing triggered an automatic stay of all proceedings against defendant Snow Valley, including this action. See 11 U.S.C. § 362. Because the insurance policy stipulates that all named insureds, including defendant Nordic Group, are jointly and severally liable for any premiums due under the policy, plaintiff is proceeding against Nordic Group for the retrospective premium and any financial obligations incurred allegedly by defendant Snow Valley.

Several motions are presently before this court. Defendants have filed motions to (1) transfer this case for convenience to the Central District of California; (2) stay the proceedings pending the bankruptcy court's approval of defendant Snow Valley's amended plan of rehabilitation and determination whether this lawsuit will violate the automatic bankruptcy stay; and (3) dismiss for failure to join indispensable parties or, in the

alternative, join the parties.

Because I find that the convenience of the parties and witnesses and the interests of justice weigh in favor of transferring this cause of action to the Central District of California, I will grant defendants' motion to transfer under 28 U.S.C. 1404(a). Because I am transferring this case, I will not decide defendants' remaining motions to stay the proceedings and to dismiss for failure to join indispensable parties or, in the alternative, join the parties.

In its complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

Plaintiff Liberty Mutual Fire Insurance Company has its principal place of business in Boston, Massachusetts. Defendants The Nordic Group of Companies, Ltd. and Snow Valley, LLC have their principal places of business in Baraboo, Wisconsin and Running Springs, California, respectively.

Plaintiff and defendant Nordic Group entered into a workers' compensation and employers liability insurance policy, Policy No. WC2-141-013875-185, for the period from June 30, 1995 to June 30, 1996. The policy identified numerous named insureds, including defendant Nordic Group. Defendant Nordic Group has represented to plaintiff and has published material to the public indicating that defendant Snow Valley is a subsidiary of

Nordic Group. Employees of defendant Snow Valley were provided with workers' compensation coverage under the policy.

The policy identified Flambeau Corporation as the "organization named in Item 1 of the Information Page [which] by acceptance of this policy is authorized to act and agress [sic] to act on behalf of all persons or organizations insured under this policy with respect to all matters pertaining to the insurance afforded by the policy, including the receiving of return premiums, if any, and of such dividends as may be declared by the company."

The policy also provided that "[i]t is hereby agreed that the Insured and the Insurer have mutually agreed to a Large Risk Alternative Rating Option Retrospective Rating Plan."

On July 26, 1995, Flambeau Corporation accepted the Large Risk Alternative Rating Option. Under this option, the premium for all workers' compensation and employers' liability coverage provided for under the policy is to be calculated and paid in accordance with the Retrospective Rating Plan contained in the Large Risk Alternative Rating Option. (Although it is not alleged in the complaint, it appears that the policy required each named insured to reimburse plaintiff for losses incurred on its behalf for workers' compensation claims and that Flambeau Corporation posted an irrevocable letter of credit to insure the loss reimbursement obligations of each named insured.)

On January 11, 1996, an employee of defendant Snow Valley, Daniel Bunnell, sustained an injury while snowboarding on the Snow Valley premises that rendered him

quadriplegic. Bunnell filed suit in California against defendant Snow Valley under the theory that he was working *outside* the scope of his employment when the accident occurred. Bunnell also filed a workers' compensation claim against defendant Snow Valley under the theory that he was working *within* the scope of his employment at the time of the accident. The workers' compensation claim was defended by plaintiff. Plaintiff was not the liability insurance carrier for defendant Snow Valley.

In the spring of 2000, all parties reached a settlement of all of Bunnell's claims against defendant Snow Valley. Plaintiff paid $750,000 in settlement for Bunnell's workers' compensation claim and defendant Snow Valley's liability insurance carrier paid money in settlement of the liability claim.

Defendant Nordic Group is jointly and severally liable with defendant Snow Valley for all premiums because the policy provided that "each person or organization insured under this policy as provided by this endorsement is jointly and severally liable for all premiums due under this policy and for any other financial obligation of any insured to [plaintiff] arising out of any agreements contained in this policy."

On May 10, 2000, in accordance with the Retrospective Rating Plan, plaintiff calculated a retrospective premium adjustment of $153,705 for defendant Snow Valley. On May 19, 2000, the premium was delivered to defendant Nordic Group on behalf of defendant Snow Valley. Defendants have refused to pay this premium.

At the next annual retrospective rating plan adjustment date, plaintiff will calculate an additional retrospective premium adjustment as it relates to plaintiff's payment of Bunnell's $750,000 settlement.

Defendants have indicated that they refuse to pay plaintiff money under the Retrospective Rating Plan as it relates to plaintiff's payment of the Bunnell settlement.

As part of the policy, Flambeau Corporation issued a standby, irrevocable letter of credit naming plaintiff as beneficiary. Plaintiff is uncertain whether it can draw on this letter of credit because (1) it is unclear whether the letter of credit is applicable to a settlement such as this that has been converted to an "incurred basis" pursuant to the terms of the Large Risk Alternative Rating Option and (2) defendants have alleged that plaintiff settled the workers' compensation claim in bad faith.

OPINION

A. Overview of Dispute

There are four contracts involved in this dispute: (1) the insurance policy, which was issued and delivered in Wisconsin; (2) the settlement agreement, which was entered into in California and contains a California choice-of-law provision; (3) the so-called "claims management service agreement," which defendants allege required plaintiff to obtain defendants' consent prior to any settlement in excess of $10,000; and (4) the standby,

irrevocable letter of credit issued by Flambeau Corporation.

Plaintiff argues that the only contract at issue is the insurance policy because plaintiff is seeking a declaratory judgment that hinges on whether defendants owe a retrospective premium under the terms of that policy. In contrast, defendants argue that the settlement agreement is the key contract at issue because they do not object to the insurance policy's retrospective premium, but rather the fact that the premium was calculated on the basis of a settlement that was entered into in bad faith and without their authorization as required by the claims management service agreement. Specifically, defendants assert that no money should have been paid in settlement of defendant Snow Valley's workers' compensation claim because it was clear that the snowboarding accident occurred while the claimant, Bunnell, was acting outside the scope of employment so that the claim did not fall within workers' compensation. Plaintiff contends that at the time of the settlement and on the basis of the facts involved, California law was unsettled whether Bunnell was working within or outside the scope of his employment at the time of the snowboarding accident.

B. Motion to Transfer

Defendants have filed a motion to transfer this case to the District Court for the Central District of California. 28 U.S.C. § 1404(a) permits such transfers under certain circumstances: "For the convenience of parties and witnesses, in the interest of justice, a

district court may transfer any civil action to any other district or division where it might have been brought." The purpose of § 1404(a) is to allow federal civil suits to be tried "at the place called for in the particular case by considerations of convenience and justice." Van Dusen v. Barrack, 376 U.S. 612, 616 (1964). The decision to transfer a case is committed to the sound discretion of the trial judge. Coffey v. Van Dorn Iron Works, 796 F.2d 217, 219 (7th Cir. 1986). However, before a court can transfer a case, it must conclude that (1) venue is proper in the transferor district and (2) the transferee district is one in which the action might have been brought. Id. at 219 & n.3. Venue in this court is proper because defendant Nordic Group is a citizen of the Western District of Wisconsin. See 28 U.S.C. § 1391(a)(3). Venue also would have been proper in the Central District of California because defendant Snow Valley is a citizen of California, a substantial part of the events giving rise to the claim occurred in California and defendants represent that they would have been subject to personal jurisdiction in California. See 28 U.S.C. § 1391(a)(2), (3). Neither party argues that venue would have been improper in the Central District of California. Therefore, it is appropriate to consider whether to transfer the case.

In a motion to transfer brought pursuant to 28 U.S.C. § 1404(a), the moving party bears the burden of establishing that the transferee forum is "clearly more convenient." Coffey, 796 F.2d at 219-20. In weighing the motion, a court must decide whether the transfer serves the convenience of the parties and witnesses and will promote the interests

of justice. See 28 U.S.C. 1404(a); Coffey, 796 F.2d at 219-20; see also Roberts & Schaefer Co. v. Merit Contracting, Inc., 99 F.3d 248, 254 (7th Cir. 1996) (question is whether plaintiff's interest in choosing forum is outweighed by either convenience concerns of parties and witnesses or interests of justice). The court should view these factors as placeholders among a broader set of considerations and evaluate them in light of all the circumstances of the case. See Coffey, 796 F.2d at 219 n.3. Such broader considerations include the situs of material events, ease of access to sources of proof and plaintiff's choice of forum. See Harley-Davidson, Inc. v. Columbia Tristar Home Video, Inc., 851 F. Supp 1265, 1269 (E.D. Wis. 1994); Kinney v. Anchorlock Corp., 736 F. Supp. 818, 829 (N.D. Ill.1990)

1. Convenience of the parties

Defendants argue that it is inconvenient for them to litigate in Wisconsin because California is where (1) the accident occurred; (2) the witnesses to the accident are located; (3) the witnesses to the investigation of the accident are located; (4) the settlement negotiations took place; and (5) plaintiff's claims office and investigators are located. In other words, defendants argue that because everything pertaining to this lawsuit except defendant Nordic Group's principal place of business is located in California, it is more convenient to defend this lawsuit in California. (Because of the bankruptcy stay imposed against Snow Valley, I have considered the convenience of defendant Nordic Group and

plaintiff only.)

Shifting the inconvenience from one party to the other does not justify a transfer. See Heller Financial, Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1293 (7th Cir. 1989). However, plaintiff does not argue that it would be inconvenient for it to litigate in California, but rather that this dispute centers on interpreting an insurance policy that was issued and delivered in Wisconsin. Moreover, because plaintiff's principal place of business is in Massachusetts, litigating in California appears to be no less convenient to plaintiff than litigating in Wisconsin. In fact, plaintiff's California office handled the investigation and workers' compensation claim that underlies this lawsuit. This factor favors transfer to California.

2. Convenience of witnesses

a. Whether witnesses are required

Defendants argue that in order to substantiate their defense that plaintiff is not entitled to any retrospective premium because it was calculated on a settlement made in bad faith, they will need to put on witnesses to the settlement negotiations and snowboarding accident, both of which took place in California. Plaintiff argues that this dispute can be resolved solely by interpreting the insurance policy, which was issued and delivered in Wisconsin and, for that reason, defendants overstate the need for witnesses. This thrust and

parry goes to the heart of the question whether witnesses will be required at all. If this case is solely about interpreting the four corners of the insurance policy, then no witnesses are needed. On the other hand, if this case centers on whether the settlement agreement was entered into in bad faith, then witnesses will be required.

Defendants concede that they do not object to the retrospective premium itself, but rather the allegedly bad faith nature of the settlement agreement, which had the direct effect of (1) raising the retrospective premium substantially and (2) causing defendants to be liable to plaintiff for the settlement itself ($750,000) because plaintiff had no duty to indemnify defendants for the settlement under the policy. In other words, defendants assert that plaintiff settled quickly and without any concern about the amount (hence, in bad faith) because litigating defendants' liability would have served only to increase plaintiff's legal expenses (under its duty to defend) and defendants have to reimburse plaintiff for the settlement itself regardless of the amount (no duty to indemnify). In fact, defendants argue, plaintiff stood to gain financially from a large settlement: the larger the settlement, the larger the retrospective premium. Plaintiff recognizes in its complaint that defendants are alleging that the settlement was made in bad faith. At this point in the litigation, I am not persuaded that this case will be determined solely on the basis of the insurance policy without consideration of defendants' bad faith defense.

In addition, plaintiff argues that although defendant Nordic Group is jointly and

severally liable for the premiums, Nordic Group cannot assert the defense of a bad faith settlement because it was not a party to the litigation that gave rise to the settlement. According to plaintiff's reasoning, because this action has been stayed against defendant Snow Valley, defendant Nordic Group is left with no defense. First, plaintiff assumes erroneously that whatever amount it alleges that defendant Snow Valley owes is tantamount to a legal liability that can be passed on carte blanche to defendant Nordic Group through joint and several liability. On the contrary, in order to determine whether defendant Nordic Group is jointly and severally liable, a court must first decide whether defendant Snow Valley is liable (which it might not be if the settlement was the product of bad faith). If defendant Snow Valley is liable, then under the terms of the policy defendant Nordic Group must share in that liability, jointly and severally. If defendant Snow Valley is not liable in the first instance, then there is simply no liability for defendant Nordic Group to share jointly, severally or otherwise.

Second, defendant Snow Valley cannot litigate this issue itself because an automatic stay has been imposed by the bankruptcy court pursuant to federal law. (Ironically, plaintiff opposes defendants' pending motion to stay these proceedings, arguing that defendant Snow Valley is not a necessary party to this litigation.) Defendant Nordic Group may assert the rights of defendant Snow Valley if there is reason to believe that Nordic Group will represent the interests of Snow Valley effectively. See Secretary of Maryland v. Joseph H. Munson

Co., 467 U.S. 947, 956 (1984) ("Where practical obstacles prevent a party from asserting rights on behalf of itself, for example, the Court has recognized the doctrine of *jus tertii* standing. In such a situation, the Court considers whether the third party has sufficient injury-in-fact . . . and whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal."); see also Jackson v. United States, 881 F.2d 707, 709 (9th Cir. 1989) (federal government, the party obligated to pay the settlement, had ancillary standing to contest private fee agreement among plaintiffs and their attorney regarding claim brought under Federal Tort Claims Act because government was clearly involved in case or controversy and had right to contest amount of settlement).

In this case, the bankruptcy stay is an obstacle that prevents defendant Snow Valley from asserting rights on its own behalf. Moreover, because defendant Nordic Group is jointly and severally liable for any premiums or financial obligations defendant Snow Valley may owe plaintiff, Nordic Group would suffer a sufficient injury-in-fact if required to pay plaintiff for a settlement procured in bad faith. Finally, because defendant Snow Valley has filed for bankruptcy, it is quite likely that defendant Nordic Group may never collect any contribution from Snow Valley. In light of such a prospect, Nordic Group can reasonably be expected to present the issues with the necessary adversarial zeal. Therefore, defendant Nordic Group can assert as a defense to its liability the allegation that plaintiff settled

defendant Snow Valley's workers' compensation claim in bad faith. As a result, at this point in the litigation, the convenience of witnesses relating to the defense of bad faith is a factor to be weighed in deciding whether to transfer this case.

b. Possible witnesses

Defendants assert that their witnesses either reside currently or were last known to reside in California, including (1) plaintiff's insurance adjusters who handled the claims; (2) defendant Snow Valley's employees with knowledge of the pertinent facts; and (3) witnesses with first-hand knowledge of the workers' compensation investigation and snowboarding accident. In response, plaintiff argues that because of the previous litigation, the testimony of these witnesses is preserved in an admissible form. Therefore, plaintiff argues, only documents and not people will be needed in Wisconsin. Plaintiff's argument is not persuasive because the original litigation did not involve the allegation of bad faith; it concerned Bunnell's workers' compensation and tort claims. Therefore, there is no reason to assume that the prior litigation would have explored the issue of a settlement allegedly made in bad faith. It is true that one aspect of defendants' bad faith defense is the allegation that at the time the accident occurred Bunnell was so clearly outside the scope of employment that plaintiff's settling for $750,000 was in and of itself in bad faith. Prior testimony will no doubt shed light on this allegation but not on the settlement negotiation

itself. For example, defendants may want to litigate plaintiff's stance during the negotiations, why plaintiff originally denied the claim and then later accepted it, what factors influenced this change in position and how the figure of $750,000 was derived. Plaintiff alleges that under the terms of the policy, it was allowed to settle claims on behalf of defendants. Although this may be true, it does not mean that plaintiff can settle claims in bad faith. The duty of good faith and fair dealing is implied in every contract. See Restatement (2d) Contracts § 205 (1981). This is especially true in a case such as this because the amount of the settlement correlates directly to the amount of the retrospective premium (and future retrospective premiums) and plaintiff did not have a duty to indemnify defendants for the settlement itself. The convenience of witnesses favors a transfer to California.

3. Situs of material events

The accident that gave rise to the workers' compensation claim at issue in this case occurred in California. The investigations surrounding the accident also occurred in California. The disputed settlement, which ultimately gave rise to the retrospective premium, was entered into and negotiated in California. Moreover, the settlement itself contains a California choice-of-law provision. Other than the fact that original policy was issued and delivered in Wisconsin, no events, material or otherwise, took place in Wisconsin.

This factor weighs in favor of transferring venue to California.

4. Ease of access to sources of proof

Neither party argued this factor. Defendants have implied that their documentary evidence is located in California and it is clear that the court documents regarding the prior litigation are located in California. In any event, because transportation of documents is not difficult, this factor is in balance.

5. Plaintiff's choice of forum

Generally, the court should give deference to a plaintiff's choice of forum, especially when it is the district in which plaintiff resides. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981). However, if plaintiff's chosen forum is not the situs of material events, courts have held that plaintiff's choice has weight equal to other factors and will not receive deference. See Carillo v. Darden, 992 F. Supp. 1024, 1026 (N.D. Ill. 1998); see also Sanders v. Franklin, 25 F. Supp. 2d 855, 858 (N.D. Ill. 1998). Because California is the situs of all material events (settlement negotiations and underlying accident) other than the delivery of the policy and Wisconsin is not plaintiff's home forum, this factor is in balance.

6. Interest of justice

The final factor to be considered is whether the transfer will serve the interest of justice. The "interest of justice" includes such concerns as trying related litigation together, having a judge who is familiar with the applicable law try the case and ensuring speedy trials. Coffey, 796 F.2d at 221; see also Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22, 30 (1988) (interest of justice embraces public-interest factors of systemic integrity and fairness, rather than private interests of litigants and their witnesses).

a. Conflicts of law

In a federal lawsuit based upon diversity of citizenship, the court will apply the choice-of-law principles of the jurisdiction in which it sits to determine the substantive law that will apply. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). But after a diversity case has been transferred, "the law of the transferor district is applied as if there had been no more than 'a change of courtrooms.'" Soo Line Railroad Co. v. Overton, 992 F.2d 640, 643 (7th Cir. 1993) (quoting Van Dusen v. Barrack, 376 U.S. 612, 634 (1964) (defendants may not use § 1404(a) "to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue")). Therefore, the conflicts of law arguments made by plaintiff and defendants are of little merit because the transferee court will apply the same state law and choice-of-law rules that the transferor court

would have applied. See Ferens v. John Deere Co., 494 U.S. 516, 524-25 (1990); Van Dusen, 376 U.S. at 633-37. In other words, if venue is transferred, the California court will apply Wisconsin's choice-of-law rules (taking into consideration the fact that the settlement agreement has a California choice-of-law provision), in determining whether California or Wisconsin substantive law will apply. Therefore, this factor is in balance.

b. Receiving a speedy trial

Defendants have failed to suggest how the administration of justice would be improved if this case were transferred to California. According to the latest Federal Court Management Statistics prepared by the Administrative Office of the U.S. Courts, the docket in the Western District of Wisconsin is less congested than the docket in the Central District of California. For the period ending September 30, 2000, civil litigants in the Western District of Wisconsin could expect to go to trial in nine months, whereas in the Central District of California the median time from filing to trial was 18 months. This factor weighs against transferring the case.

c. Judicial familiarity with governing law

In a diversity action, it is advantageous to try a case with a federal judge who is familiar with the applicable state law. See Coffey, 796 F.2d at 221. Defendants argue that

a California court is better equipped to decide California law. Without a meaningful analysis of the choice-of-law issue, it is impossible to determine which state's law would apply. However, I need not resolve this issue. Although it is highly likely that a federal court sitting in California is more familiar with California law and, in the same respect, a federal court sitting in Wisconsin is more familiar with Wisconsin law, federal courts are often called upon to decide substantive legal questions involving the laws of various states. See Brandon Apparel Group, Inc. v. Quitman Manufacturing Co., Inc., 42 F. Supp. 2d 821, 835 (N.D. Ill. 1999). The issues in this case are not beyond the bounds of either court's ability. Accordingly, this factor is in balance.

In sum, defendants have met their burden of establishing that the transferee forum is clearly more convenient. A substantial number of relevant witnesses and documents are located in the Central District of California and the effect of a transfer on the convenience of plaintiff will be negligible. Additionally, the deference generally afforded a plaintiff in a motion to transfer is diminished because Wisconsin lacks any significant relationship to the underlying claims and is not plaintiff's home forum. The only factor weighing against transfer is the speed with which this case can expect to go to trial, but a nine-month difference does not outweigh the factors in favor of transfer. Therefore, the convenience of the parties, witnesses and the interest of justice dictate transfer of this matter to the Central

District of California.

Because this action will be transferred, I will not address defendants' remaining motions to stay the proceedings pending the bankruptcy court's approval of defendant Snow Valley's amended plan of rehabilitation and to dismiss for failure to join indispensable parties or, in the alternative, join the parties.

ORDER

IT IS ORDERED that

1. Defendants The Nordic Group of Companies, Ltd. and Snow Valley, LLC's motion to transfer this case is GRANTED. This case is transferred to the United States District Court for the Central District of California.

2. The clerk of court is directed to transmit the file to the United States District Court for the Central District of California.

Entered this 4th day of December, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge