IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LEXINGTON INSURANCE COMPANY, as subrogee of State of Wisconsin,

Plaintiff,

OPINION AND ORDER

11-cv-598-bbc

v.

THE WHESCO GROUP, INC., FIREYE, INC. and INVENSYS OPERATIONS MANAGEMENT,

Defendants.

- -

This is a civil suit brought under the court's diversity jurisdiction in which plaintiff Lexington Insurance Company is suing defendants The Whesco Group, Inc., Fireye, Inc. and Invensys Operations Management for damages caused to plaintiff's insured, the state of Wisconsin, by a boiler explosion at the University of Wisconsin-Whitewater. Plaintiff brings the suit in its role as subrogee of the state.

The case is before the court on defendant Whesco's motion to dismiss for lack of jurisdiction. Although all of the defendants have citizenship different from that of plaintiff and the amount in controversy easily exceeds $75,000, Whesco argues that diversity jurisdiction does not exist because the state of Wisconsin is a real party in interest under Fed. R. Civ. P. 17 that must be joined in this suit. If that happens, it will destroy diversity

jurisdiction because a state is "stateless" for purposes of diversity. I conclude that the state may be a real party in interest, as Whesco alleges, because it may have a claim to some portion of the monetary damages sought in this case, but that does not mean that it must be made a party to this case, if doing so would destroy jurisdiction. The action can proceed in equity and good conscience among the existing parties. Fed. R. Civ.P. 19(b).

This is a motion to dismiss, but the parties have filed proposed findings of facts and submitted evidence to support their positions, which is appropriate when the court is resolving a motion to dismiss for lack of subject matter jurisdiction. In that situation, it may consider these facts and matters outside the complaint. Evers v. Astrue, 536 F.3d 651, 656-57 (7th Cir. 2008); Davis Cos. v. Emerald Casino, Inc., 268 F.3d 477, 480 n.4 (7th Cir. 2001).

I find from the facts proposed by the parties and the evidence in the record that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff Lexington Insurance Company is a Massachusetts corporation with its principal place of business and nerve center in Massachusetts. Defendant Whesco Group, Inc. is a Wisconsin corporation with its principal place of business and nerve center in Wisconsin. Defendant Fireye, Inc. is a New Hampshire Corporation with its principal place of business and nerve center in New Hampshire. Defendant Invensys Operations Management is a Texas corporation with its principal place of business and nerve center in

Texas.

On April 16, 2008, Boiler #5 exploded at the University of Wisconsin-Whitewater power plant in Whitewater, Wisconsin, causing $5,051,354.94 in property damage to the state-owned and operated facility. Defendant Whesco Group is a boiler servicing company, whose technicians were on site at the power plant at the time of the explosion. (I will refer to defendant Whesco Group as "defendant" for the rest of this opinion because it is the only defendant that has moved to dismiss.) Defendants Fireye and Invensys are manufacturers that produced components used or contained in Boiler #5.

At the time of the explosion, the state of Wisconsin had a "Self-Funded Property Program" in effect as well as an insurance policy issued by plaintiff. In 2007-08, the Self-Funded Property Program included an annual aggregate loss retention obligation for the state in the amount of $2,700,000, requiring the state to pay up to that amount in property losses sustained during the 12-month fiscal year covered by Lexington Policy No. 8756012 before it could claim reimbursement from plaintiff.

At the time of the explosion, the state had incurred nearly $1,200,000 in property damage losses under its self-insured loss retention obligation. At some point in 2008, before it submitted any invoices to plaintiff for the boiler explosion, the state satisfied its self-insurance requirement by paying the full amount of its self-insured loss retention obligation.

The state then made a claim relating to the boiler explosion to plaintiff under Lexington Policy No. 8756012, in effect from July 1, 2007 to July 1, 2008. The policy has a $25,000 occurrence deductible, which the state paid. Plaintiff paid the state

$5,026,354.94 for the damage arising from the boiler explosion, reimbursing the state in full for the damages, minus the $25,000 deductible.

OPINION

Fed. R. Civ. P. 17(a), requires that "every action shall be prosecuted in the name of the real party in interest." Defendant contends that because the state of Wisconsin is the insured and still retains an interest in the recovery of its deductible, it is a real party in interest and must be joined in this case, although its joinder will destroy diversity. Indiana Port Commission v. Bethlehem Steel Corp., 702 F.2d 107, 109 (7th Cir. 1983) (citing Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482 (1894)) (state "is considered stateless for diversity purposes . . ." and, as party to the claim, destroys diversity jurisdiction). It views Rule 17 as a basis for joinder independent of Rule 19, which addresses the required joinder of parties.

So far, plaintiff has failed to provide satisfactory evidence showing that the state totally and completely assigned all its claims to plaintiff. The subrogation policy provision in Policy No. 8756012 between the state and plaintiff does not include an express assignment of the deductible to plaintiff. Dkt. #36-8, ¶ 17A. Instead, the provision appears to be nothing more than a description of plaintiff's subrogation rights regarding any payment made to the state.

Plaintiff relies solely on the affidavit of Rollie Boeding, Director of Risk Management for the state, in which Boeding avers that the state transferred the right to recover the

$25,000 deductible to plaintiff and that "[t]his transfer took place in the June/July 2009 timeframe." Dkt. #58, ¶¶ 7-8. Plaintiff has not submitted the actual document of transfer allegedly executed in the summer of 2009, but merely contends that the state previously transferred all of its rights to plaintiff. Boeding's affidavit continues "[t]o the extent the State of Wisconsin still owns any right against the present defendants, the State hereby releases and discharges all of the present defendants relative to any rights the State may still possess." Dkt. #58, ¶ 12. These documents leave certain questions: if Boeding cannot identify the date on which the transfer took place, on what is he relying when he swears that there was such a transfer? What individual transferred the rights to plaintiff? As to waiver, is Boeding authorized to waive the state's right of recovery? What is the source of his authority?

For the purpose of this decision, I will assume that the state has a right of recovery of its own and is therefore a "real party in interest" under Rule 17. I disagree with defendant that Rule 17 controls the question of required joinder. I believe that the Supreme Court made it clear in United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 382 (1949), that a party could be a real party in interest under Rule 17 but that joinder was not required under Rule 19 if it was not feasible unless the party was "indispensable." See also Krueger v. Cartwright, 996 F.2d 928, 934 (7th Cir. 1993) ("where an insurer has become partially subrogated to the rights of an insured under the Federal Tort Claims Act, both are necessary but not indispensable parties under (then) Rule 19. We agree with the majority of courts that have addressed the issue and applied this principle as a general rule in cases of partial

subrogation.") (citing Aetna Casualty, 338 U.S. at 382 & n.2). Therefore, I will take up the question whether the state must be joined to this suit.

Joinder is not "feasible" in this instance because it would destroy diversity and require the dismissal of the case. Note to 1966 Amendment to Fed. R. Civ. P. 19(b) ("Whenever feasible, the persons materially interested in the subject of an action . . . should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished—a situation which may be encountered in Federal courts because of limitations on service of process, subject matter jurisdiction, and venue—the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.")

Thus, it is necessary to decide, "in equity and good conscience," as Rule 19(b) directs, whether the action should proceed. Rule 19(b) sets out a number of criteria for the court to consider in reaching that decision.

The first factor is the extent to which a judgment entered in the person's absence would prejudice the person or the existing parties. Defendant has not shown any prejudice. Not only is it probable that the state will assign its claim to plaintiff if it has not done so already; its claim is a freestanding one. Proceeding on only plaintiff's claims would not leave defendant subject to any risk of incurring double obligations. Aetna Casualty, 338 U.S. at 382 (holding that in case of partial subrogation, both insured and insurer own "portions of the substantive right" and both may sue as "real parties in interest" under Rule 17; although

such parties were considered "necessary," they were clearly not "indispensable" parties in sense that they "have 'an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience'") (quoting Delaware County v. Diebold Safe & Lock Co., 133 U.S. 473, 488 (1890)). The worst that can happen is that defendant might have to defend a separate lawsuit brought by plaintiff, but this is not the kind of prejudice that Rule 19 is intended to prevent. Id. ("[T]here will be cases in which all parties cannot be joined because one or more are outside the jurisdiction, and the court may nevertheless proceed in the action under Rule 19(b). In such cases the United States, like other tortfeasors, may have to defend two or more actions on the same tort and may be unable to assert counterclaims and offsets against the original claimant upon unrelated transactions.")

The second factor is the extent to which any prejudice could be ameliorated by protective provisions in the judgment, shaping the relief or other measures. In the absence of any showing of prejudice by defendant, it is not necessary to spend any time on this factor other than to note that measures will be taken to make sure that plaintiff is not permitted to recover the amount of the deductible in the absence of a showing that it has a legal right to do so.

The third factor is whether a judgment rendered in the state's absence would be adequate, which it would. Plaintiff has the right to claim damages in the amount of the entire loss, less only the $25,000 deductible.

The fourth factor is whether plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. It would have such a remedy in state court, but it chose federal court and should be permitted to remain here unless defendant can make an adequate showing of prejudice, which it has not.

I conclude, therefore, that defendant's motion to dismiss must be denied. The parties can pursue in discovery the question of plaintiff's ownership of the right to claim damages for the amount of plaintiff's deductible. If plaintiff cannot prove to defendant's satisfaction that the state has assigned its claim to plaintiff, it will not be permitted to add that amount to its damages request.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendant The Whesco Group, Inc. is DENIED.

Entered this 11th day of July, 2012.

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