

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.

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In this case 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 and 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.

Now before the court is third-party defendants Lumbermens Mutual Casualty Company's and American Motorists Insurance Company's motion to dismiss the claims against them. Dkt. #105. They contend that the court should abstain from adjudicating the claims under Burford v. Sun Oil Co., 319 U.S. 315 (1943), because both defendants are involved in state rehabilitation proceedings in Illinois. On July 2, 2012, the Circuit Court for Cook County, Illinois entered an Order of Rehabilitation regarding Lumbermens Mutual Insurance Company, dkt. #105-1, and on August 16, 2012, the same court entered an Order of Rehabilitation regarding American Motorists Insurance Company. Dkt. #105-2. Both orders require the court-appointed rehabilitator to "take immediate possession and control of the property, . . . business and affairs, and all other assets" of the insurance companies and to "liquidate the assets, business and affairs of" the companies. Dkt. #105-1 at ¶ 6(A); dkt. #105-2 at ¶ 7(a). The orders contain anti-suit injunction provisions, prohibiting any entity from "bringing or further prosecuting any claim, action or proceeding at law or in equity or otherwise" against either defendant. Dkt. #105-1 at ¶ 14(D); dkt. #105-2 at ¶ 12(D).

Defendants Continental Casualty Company and Columbia Casualty Company oppose the motion, arguing that it is unclear whether they will be permitted to assert their claims against Lumbermens and American Motorists in the rehabilitation proceedings. Continental

Casualty and Columbia Casualty contend that this court should stay their claims until the Illinois court issues instructions about where they can assert the claims.

I conclude that in light of the anti-suit injunction orders issued by the Illinois court, Continental Casualty and Columbia Casualty may not proceed with their claims against Lumbermens Mutual and American Motorists at this time. However, I will not grant Lumbermens Mutual and American Motorists' motion to dismiss the claims without further information from the parties. Although I think it is likely that the third-party claims should be dismissed in light of the Illinois rehabilitation proceedings, it would be premature to do so until Lumbermens Mutual and American Motorists have shown that the rehabilitation proceedings will provide a forum in which Continental Casualty and Columbia Casualty can assert their claims. Therefore, I will give the parties two weeks to provide the court more information regarding whether procedures have been established through which the third-party claims may be asserted in the rehabilitation proceedings. I expect all interested parties to determine the claim procedures to be followed by the Circuit Court for Cook County and the court-appointed rehabilitators. This means that not only should Lumbermens Mutual and American Motorists ask about creditor claims, but Continental Casualty and Columbia Casualty should seek information about how to file their claims in the context of the state rehabilitation proceedings.

DISCUSSION

There are two situations in which abstention under Burford v. Sun Oil Co., 319 U.S. 315 (1943) is appropriate. "First, federal courts should abstain from deciding difficult

questions of state law bearing on policy problems of substantial import” International College of Surgeons v. City of Chicago, 153 F.3d 356, 362 (7th Cir. 1998) (internal quotations omitted). Second, courts “should also abstain from the exercise of federal review that would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.” Id. The Court of Appeals for the Seventh Circuit has applied the second type of Burford abstention in cases involving state insurance rehabilitation proceedings, noting that states have assumed primary responsibility for regulating the insurance industry. E.g., Hartford Casualty Insurance Co. v. Borg-Warner Corp., 913 F.3d 419, 425-27 (7th Cir. 1990) (finding Burford abstention appropriate where Illinois had implemented state court rehabilitation proceeding that would resolve plaintiff’s claims); see also Mountain Funding, Inc. v. Frontier Insurance Co., 329 F. Supp. 2d 994, 999 (N.D. Ill. 2004) (abstention appropriate where insurance liquidation proceeding was adjudicating all claims against defendant in detailed and uniform manner). Third-party defendants Lumbermens and American Motorists argue that the rehabilitation proceedings in Illinois represent a state effort to establish a coherent policy for a matter of great public concern. Therefore, they argue, abstention is warranted under the second type of Burford abstention.

However, “Burford abstention requires a very careful and fact-specific inquiry.” Property & Casualty Insurance Ltd. v. Central National Insurance Co. of Omaha, 936 F.2d 319, 326 n.13 (7th Cir. 1991). Abstention is proper under Burford only if the state “offer[s] some forum in which claims may be litigated.” Id. at 323. Moreover, “that forum must be

special—it must stand in a special relationship of technical oversight or concentrated review to the evaluation of those claims.” Id. “The ability to point to a specialized proceeding is a prerequisite of, not a factor in, the second type of Burford abstention.” Id.

Lumbermens and American Motorists have not shown the existence of any forum or “specialized proceeding” that would determine Continental Casualty and Columbia Casualty’s claims against them. Although Lumbermens and American Motorists argue that the Circuit Court for Cook County will resolve the claims, they submit no evidence to support this assertion. Rather, they point only to the anti-injunction provisions of the rehabilitation orders, as well as a provision in the orders stating that the Circuit Court for Cook County “retains jurisdiction in this cause for the purpose of granting such other and further relief as the nature of the cause and the interests of Lumbermens . . . , their policyholders, beneficiaries, members and creditors, or of the public, may require and/or as the Court may deem proper in the premises.” Dkt. #105-1 at ¶ 15; dkt. #105-2 at ¶ 13. Although these provisions suggest that the Circuit Court for Cook County may resolve creditor claims, there is no evidence that it has taken any steps to do so.

As defendants Continental Casualty and Columbia Casualty point out, the Illinois Insurance Code provides that the procedures for filing claims against insurers subject to rehabilitation or liquidation proceedings are to be established by court order. 215 Ill. Comp. Stat. 5/208(1). The Code contemplates the entry of “an order . . . for the filing of claims” that specifies, among other things, the time and place for the filing of claims, and the manner in which the Director of Insurance of the State of Illinois must notify potential claimants of

the claim procedures. Id. At this stage, neither side has submitted evidence showing that such an order has been entered in the Illinois rehabilitation proceedings involving Lumbermens or American Motorists. Further, the website of the Office of the Special Deputy Receiver regarding the two rehabilitation proceedings indicates that no claims filing deadlines have been established. <http://www.osdchi.com/open/amico.htm>; <http://www.osdchi.com/open/lumbermens.htm> (last visited Dec. 1, 2012). Thus, it is not clear whether Continental Casualty and Columbia Casualty will be permitted to assert their claims against Lumbermens and American Motorists in the context of the state rehabilitation proceedings or any other forum. I cannot dismiss the third-party claims without such information.

I am not willing to stay the third-party claims indefinitely, as suggested by Continental Casualty and Columbia Casualty. Instead, I will give the parties two weeks to provide further information regarding the status of the rehabilitation proceedings and the procedures for filing creditor claims within those proceedings. All interested parties should seek to determine whether the Circuit Court for Cook County intends to issue an order under 215 Ill. Comp. Stat. 5/208(1) setting deadlines and procedures for filing creditor claims. As the parties seeking dismissal under Burford, Lumbermens and American Motorists have the burden of demonstrating that the requirements of Burford are established. However, as the parties seeking to assert claims against Lumbermens and American Motorists, Continental Casualty and Columbia Casualty should take steps to demonstrate their genuine interest in pursuing these claims. This includes taking steps to

determine whether they may pursue their contribution claims in Illinois state court. If the parties submit information suggesting that the Circuit Court for Cook County will not provide a forum for the third-party claims, I will stay those claims until all other claims in this lawsuit have been resolved. If the third-party claims remain outstanding after all other claims have been resolved, I will close the case administratively and permit Continental Casualty and Columbia Casualty to move to reopen the case after the rehabilitation proceedings have been resolved.

ORDER

IT IS ORDERED that the motion to dismiss filed by third-party defendants Lumbermens Mutual Casualty Co. and American Motorists Insurance Co., dkt. #105, is DENIED. The parties may have until December 27, 2012 to provide the court more information regarding the rehabilitation proceedings and the ability of defendants Continental Casualty Company and Columbia Casualty Company to pursue their third-party claims in the context of the rehabilitation proceedings.

Entered this 12th day of December, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge