IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CHEMTURA CORPORATION,	)
	)
Plaintiff,	)
	)
v.	)
	)C.A. No. N14C-12-210 MMJ
CERTAIN UNDERWRITERS AT LLOYD'S, *et al.*,	)CCLD)
	)
Defendants.	)

Submitted: June 19, 2015
Decided: August 26, 2015

Upon Defendants' Motion to Dismiss
DENIED

Upon Defendants' Alternative Motion to Stay this Action
for *Forum Non Conveniens*
DENIED

OPINION

Helen K. Michael, Esq. (Argued), Gregory M. Jacobs, Esq., Tyechia L. White, Esq. Kilpatrick Townsend & Stockton LLP, David J. Baldwin, Esq., Janine L. Hochberg, Esq., Potter Anderson & Corroon LLP, Attorneys for Plaintiff Chemtura Corporation

Stephen T. Roberts, Esq. (Argued), Thomas J. Quinn, Esq., Alexander Mueller, Esq., Mendes & Mount, LLP, John S. Spadaro, Esq., John Sheehan Spadaro, LLC, Attorneys for Defendants Certain Underwriters at Lloyd's London and Various London Market Insurance Companies

JOHNSTON, J.

PROCEDURAL AND FACTUAL CONTEXT

The genesis of this dispute is environmental contamination allegedly caused by plaintiff Chemtura Corporation's predecessor, Uniroyal Chemical Company. Chemtura seeks coverage for losses caused by Uniroyal's operations at two specific sites–Arkansas and Ohio.[1] Chemtura is seeking declarations that defendants have breached their contracts and should be obligated to pay damages for refusing to cover losses.

Defendants fall into two groups: Certain Underwriters at Lloyd's London ("Underwriters") and Certain London Market Insurance Companies ("Companies").[2] Each Underwriter and Company subscribed a percentage of the limits of policies that provided insurance for specified risks to Uniroyal.

The obligations of Insurers have been the subject of approximately twenty years of litigation. Insurers and Chemtura have been in settlement discussions for several years in an attempt to resolve coverage for liability. Settlement was reached for claims arising in states other than Arkansas and Ohio. The parties entered into a Tolling Agreement in 2010 regarding the Arkansas and Ohio site coverage disputes.

On December 22, 2014, Chemtura provided the thirty-day termination notice required by the Tolling Agreement with Companies. The same day, this action was

[1]Other sites not part of this case include New Jersey, South Carolina, Mississippi, Connecticut, Italy and Mexico.
[2]Defendants shall be referred to as "Insurers."

filed in Delaware against Underwriters. The Tolling Agreement with Underwriters did not contain a thirty-day notice provision.

On January 8, 2015, the Prothonotary issued a summons enabling Chemtura to commence service of process under Superior Court Civil Rule 4. Chemtura employed three methods of service: through Delaware's long-arm statute; sheriff's service on the Delaware Insurance Commissioner; and in accordance with the insurance policies' service-of-suit clause.

On January 12, 2015, counsel for Insurers received correspondence from counsel for Chemtura enclosing a Summons and Complaint.

On January 15, 2015, Underwriters filed an action in New York State Supreme Court relating to policies from 1952 to 1986. The New York action seeks a declaratory judgment that Underwriters have no duty to indemnify Chemtura for the environmental claims. The New York action also requests relief with respect to claims made by factory workers against Chemtura for bodily injuries arising from exposure to diacetyl (a food flavoring), as well as losses arising from the investigation and remediation of sites other than Arkansas and Ohio.

On January 22, 2015, thirty days after notice of termination of the Tolling Agreement, Chemtura filed an Amended Complaint in Delaware. Companies were added as defendants. Chemtura again used three means to obtain service of

process.

Also in January 22, 2015, Companies filed an action against Chemtura in New York. The Companies and Underwriters actions are essentially identical. On January 23, 2015, Chemtura's registered agent in Connecticut was served with both the Underwriters and Companies complaints.

Insurers have moved to dismiss, or alternatively to stay, this case on the grounds of *forum non conveniens.* Chemtura filed separate *forum non conveniens* motions to dismiss the New York actions. The New York State Supreme Court graciously has agreed to hold in abeyance any forum ruling in the cases pending in that Court, until October 8, 2015.

STANDARD OF REVIEW

Improper Venue

Superior Court Civil Rule 12(b)(3) governs a motion to dismiss or stay due to improper venue. The Court should "give effect to the terms of private agreements to resolve disputes in a designated judicial forum out of respect for the parties' contractual designation."[3] "The Court can 'grant a dismissal motion before the commencement of discovery on the basis of affidavits and documentary evidence if the plaintiff cannot make out a *prima facie* case in support of its position.'"[4]

[3] *Loveman v. Nusmile, Inc.*, 2009 WL 847655, at *2 (Del. Super.).
[4] *HealthTrio, Inc. v. Margules*, 2007 WL 544156, at *2 (Del. Super.) (citing *Simon v. Navellier*

However, the Court usually must allow the plaintiff to take discovery where the plaintiff "advances a non-frivolous legal argument that would defeat the motion if the facts turn out to be as it alleges."[5] "In reviewing a motion to dismiss, the court must assume as true all the facts pled in the complaint and view those facts and all reasonable inferences drawn from them in the light most favorable to the plaintiff."[6]

Forum non Conveniens

At issue in this case is the standard of review applicable to dismiss this action or to grant a stay based on *forum non conveniens*. The Court must first address the timing of the Delaware actions and the New York actions to determine which standard is applicable. "A motion to stay or dismiss on grounds of *forum non conveniens* is addressed to the sound discretion of the Court."[7] The doctrine of *forum non conveniens* is not a vehicle for the Court to determine which forum would be most convenient for the parties.[8] The Court "cannot perfunctorily apply *McWane* or *forum non conveniens* if either doctrine is to accomplish the purposes for which they were crafted by the Delaware Supreme Court."[9] When applying

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Series Fund, 2000 WL 1597890, at *3-*7 (Del. Ch.)).
[5] *Id*.
[6] *Loveman*, 2009 WL 847655, at *2 (citing *Anglo Am. Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 148-49 (Del. Ch. 2003)).
[7] *Tex. Instruments Inc. v. Cyrix Corp.*, 1994 WL 96983, at *2 (Del. Ch.) (citing *Williams Gas Supply Co. v. Apache Corp.*, 594 A.2d 34, 37 (Del. 1991)).
[8] *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 117 (Del. Ch. 2009).
[9] *Rosen v. Wind River Sys., Inc.*, 2009 WL 1856460, at *3 (Del. Ch.).

either doctrine, the Court "always must consider judicial economy and principles of comity."[10]

"Where one of two 'competing' actions is filed before the other, the so-called *McWane* standard controls and the first-filed action generally is entitled to preference."[11] "Where two or more actions are contemporaneously filed, the Court 'examines a motion to stay under the traditional *forum non conveniens* framework without regard to a *McWane*-type preference of one action over the other.'"[12]

If the Court finds that the actions were filed contemporaneously, the movant seeking dismissal has the burden to prove that litigating in Delaware would cause overwhelming hardship.[13] Where a stay of litigation likely would have substantially the same effect as a dismissal, the overwhelming hardship standard applies.[14]

"To justify a stay, the movant need only demonstrate that the preponderance of applicable forum factors 'tips in favor' of litigating in the non-Delaware forum."[15] "In balancing all of the relevant factors, the focus of the analysis should

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[10] *Id.*; *See Carvel v. Andreas Holdings Corp.*, 698 A.2d 375, 378 (Del. Ch. 1995); *Adirondack GP, Inc., v. Am. Power Corp.*, 1996 WL 684376, at *6 (Del. Ch.).
[11] *BP Oil Supply Co. v. ConocoPhillips Co.*, 2010 WL 702382, at *2 (Del. Super.); *see McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).
[12] *Id.*
[13] *BP Oil Supply Co.*, 2010 WL 702382, at *2.
[14] *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d at 117.
[15] *Id.*

be which forum would be the more 'easy, expeditious, and inexpensive' in which to litigate."[16]

"Delaware courts examine six factors, known as the *Cryo-Maid* factors, when determining whether to dismiss or stay an action on *forum non conveniens grounds*."17 The Court will consider: (1) whether Delaware law governs the case; (2) the relative ease of access to proof; (3) the availability of compulsory process for witnesses; (4) the pendency or nonpendency of a similar action or actions in another jurisdiction; (5) the possibility of a view of the premises; and (6) all other practical considerations that would make the trial easy, expeditious, and inexpensive.[18]

ANALYSIS

Contentions of the Parties

Insurers

Insurers argue that Chemtura has engaged in a "race to the courthouse" for the purpose of forum shopping, in an attempt to preempt any action by Underwriters and Companies in their forum of choice. Insurers assert that Chemtura intentionally filed shortly before the Christmas holidays, and waited until January 8, 2015 to

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[16] *Royal Indem. Co. v. Gen. Motors Corp.*, 2005 WL 1952933, at *7 (Del. Super.) (citing *HFTP Invs., L.L.C. v. ARIAD Pharms., Inc.,* 752 A.2d 115, 122 (Del. Ch. 1999)).
[17] *Certain Underwriters at Lloyds Severally Subscribing Policy No. DP359504 v. Tyson Foods, Inc.*, 2008 WL 660485, at *3 (Del. Super.).
[18] *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964); *Parvin v. Kaufmann,* 236 A.2d 425, 427 (Del. 1967).

attempt service, to delay giving Underwriters actual notice of the action. Thus, the first-filed Delaware action is not entitled to deference. Further, the New York actions are broader that the Delaware action.

Insurers contend that there is a complete lack of nexus to Delaware. Relevant witnesses are located in New York, Connecticut, New Jersey and Pennsylvania, and compulsory process is not likely available in Delaware. New York is the place of negotiation, brokering and placement of the relevant insurance policies. During the relevant time period, Uniroyal had its principal place of business in New York. Uniroyal was a New Jersey corporation. Chemtura maintained offices in Connecticut and Pennsylvania. Insurers claim that Chemtura is not the natural plaintiff in the context of this lawsuit. Finally, because of prior litigation, there is the risk of inconsistent rulings.

Chemtura

Chemtura counters that the relevant insurance policies include a service-of-suit clause. The clause provides that Chemtura has the right to choose the forum for litigating any coverage dispute. The Delaware action is first-filed, and Insurers cannot meet the overwhelming hardship standard justifying dismissal of this action. Chemtura states that any delay in service was not for the purpose of tactical advantage. Chemtura filed a detailed Affidavit outlining its efforts to serve

process as quickly as possible.

Chemtura disputes the lack of Delaware nexus. Chemtura is a Delaware corporation. Additionally, the location of witnesses should not pose a hardship. Live witness testimony may not be necessary as the disputes are largely legal. The states in which Defendants assert potential witnesses reside are all in close proximity to Delaware. However, transatlantic travel may be required for witnesses for Underwriters and Companies.

Chemtura asserts that in the absence of a conflict with the law of states having the most significant relationship to the coverage dispute, Delaware law will apply. Finally, New York has no present connection to the dispute. Neither Chemtura nor any Insurer has ever resided in New York. Even if live testimony is necessary, compulsory process is equally available for litigation sited in New York or Delaware.

First-Filed Delaware Action Entitled to Deference

It is undisputed that this Delaware Action was filed on December 22, 2014. The first New York case was filed on January 15, 2015. The Court is wholly unpersuaded by Insurers' contention–that Chemtura intentionally manipulated the time of filing, or effecting service of process, to delay actual notice to Insurers, for the purpose of tactical advantage.

Chemtura is the natural plaintiff in this action. When coverage is denied, or the insurer has failed to pay for losses after a substantial amount of time, the insured is the natural plaintiff.[19] An action by the insurer, filed in anticipation of a claim for damages by the insured, generally would not be entitled to first-filed deference.[20]

The disputes among the parties have been unresolved for some time. The Court finds that the New York action filed on January 15, 2015 was reactive. The Tolling Agreement with Underwriters did not contain a thirty-day termination notice provision. Underwriters could have filed suit long before Chemtura brought this Delaware case. In the absence of special circumstances, a second-filed reactive action will not divest a plaintiff from its choice of forum, even when the second action is filed within a time frame that could be viewed as contemporaneous.[21]

Under the circumstances presented by the competing Delaware and New York actions, the Court finds that the actions were not filed contemporaneously. Even if the Court were to conclude that the suits were contemporaneously filed, Insurers have failed to demonstrate that litigating in Delaware would cause the overwhelming hardship that would justify dismissal of this action.[22]

The next step is to consider whether a stay is warranted. The Court must

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[19] *Playtex, Inc. v. Colom. Cas. Co.*, 1989 WL 40913, at *4 (Del. Super.).
[20] *Nat'l Union Fire Ins. Co. of Pitts., Pa. v. Turner Constr. Co.*, 2014 WL 703808, at *3 (Del. Super.).
[21] *Dura Pharm., Inc. v. Scandipharm, Inc.*, 713 A.2d 925, 929 (Del. Ch. 1998).
[22] *See BP Oil Supply Co.*, 2010 WL 702382, at *2.

consider the following six factors.[23]

Applicable Law

The choice of law issue has not yet been determined. Arguments have been made that the law of Arkansas or Ohio might apply. It is premature to consider whether the law of any other jurisdiction would conflict with Delaware law. Even if New York law would apply, that reason alone should not mandate stay or dismissal of the Delaware action. Delaware courts regularly apply the law of other jurisdictions.[24]

Therefore, this factor is neutral at this stage of the proceedings.

Relative Ease of Access of Proof
and
Availability of Compulsory Process for Witnesses

Several jurisdictions appear to have an interest in this case filed in Delaware. The sites at issue are located in Arkansas and Ohio. Although it is likely that live testimony will not be necessary at trial, potential deponents are located in New York, Connecticut, New Jersey and Pennsylvania. The Court notes, however, that three of these locations are no more geographically convenient to New York than to Delaware. Compulsory process is as readily available in Delaware as it is in New

[23]*Gen. Foods Corp.*, 198 A.2d at 694.
[24]*In re Asbestos Litig.*, 929 A.2d 373, 386 (Del. Super. 2006) ("Delaware courts regularly interpret and apply the laws of other states and have consistently held that the 'need to apply another state's law will not be a substantial deterrent to conducting litigation in this state.'").

York. Where litigants are entities with substantial resources, the burden created by witnesses and evidence located outside Delaware is "substantially attenuated."[25]

Therefore, the Court finds that these factors also are neutral.

Pendency of a Similar Action in Another Jurisdiction

The Court finds that the pending actions in New York would provide an adequate forum for resolution of this dispute.

Possibility of a View of the Premises

No party has suggested that a view of the premises actually will be necessary.

Other Practical Considerations

When plaintiffs choose to sue in a jurisdiction that has no connection to the litigation, "our trial courts should be extremely cautious not to intrude on the legitimate interests of other sovereign states."[26] Each state is "entitled to conduct its own cost-benefit analysis" to balance legitimate state interests in fostering commercial activity and compensating those claiming losses.[27]

Insurers argue that New York is the most appropriate forum. Insurers reason that New York was: (1) the principal place of business of Uniroyal; (2) the location where certain policies were brokered; (3) the place where decisions were made by Uniroyal regarding its overall insurance program; and (4) the place from which at

[25] *Id.* at 384.
[26] *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1051-52 (Del. 2014).
[27] *Id.*

least one insurer issued policies.

The Court finds this argument unpersuasive. None of these circumstances has a more than tenuous relationship to the disputes at issue in this case. There has been no argument that New York is the central repository for documents or the primary location for live witnesses. Instead, the witnesses and relevant evidence appear to be situated in numerous states, and outside of the United States.[28]

Further, the Court finds no reason to stay this action in order to permit discovery on forum issues. The six factors considered are fairly obvious and not subject to credibility determinations.

Service-of-Suit Clause

The following has been presented to the Court as a representative service-of-suit clause contained in Insurers' policies:

> It is agreed that in the event of the failure of [the Insurers] hereon to pay any amount claimed to be due hereunder, [the Insurers] hereon, at the request of the Insured (or reinsured), will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.
>
> It is further agreed that service of process in such suit may

[28]*See E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 577 A.2d 305, 308 (Del. Super. 1989) (Where defendants are located outside of the United States, "regardless of where this litigation is conducted significant expenses will be incurred by all parties.").

> be made upon [Mendes & Mount], and that in any suit instituted against any one of them upon this contract, [the Insurers] will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

This service-of-suit clause specifically states that the Insurers agree to submit to the jurisdiction chosen by the insured. The provision entitles the insured to select the forum for coverage litigation.[29] Forum selection clauses are presumptively valid and should be specifically enforced, absent extraordinary circumstances.[30] The insured may not be able to prevent the insurer from bringing an action in a jurisdiction of the insurer's choice. Nevertheless, the insured's first-filed action triggers the forum selection component of the service-of-suit clause.[31]

CONCLUSION

This Delaware action is entitled to plaintiff's choice of forum as the first-filed case. Defendants' subsequently-filed New York actions are reactive. Even if the New York actions were deemed to have been contemporaneously-filed under the circumstances of this case, Insurers have failed to meet the "overwhelming hardship" standard necessary to justify dismissal of the Delaware case.

Having considered the six *Cryo-Maid*, factors, the Court finds that neither

[29] *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1990 WL 9496, at *4 (Del. Super.).
[30] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010).
[31] *Nat'l Union Fire Ins. Co. of Pitts., Pa. v. Crosstex Energy Servs., L.P.*, 2013 WL 6598736, at * 5-8 (Del. Super.).

dismissal nor stay is warranted on *forum non conveniens* grounds.

THEREFORE, Defendants' Motion to Dismiss and Alternative Motion to Stay this Action for *Forum Non Conveniens* are hereby **DENIED.**

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston