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

CERTAIN UNDERWRITERS AT LLOYDS SEVERALLY SUBSCRIBING POLICY NUMBER DP359504; CERTAIN UNDERWRITERS AT LLOYDS SEVERALLY SUBSCRIBING POLICY NUMBER DP359604; AXIS SPECIALTY EUROPE LTD.; ACE AMERICAN INSURANCE COMPANY; COMMONWEALTH INSURANCE COMPANY; ESSEX INSURANCE COMPANY; and ZURICH INSURANCE COMPANY,	)	
Plaintiff,	)	
v.	)	I.D. No. 07C-06-255-JEB
TYSON FOODS, INC.,	)	
Defendant.	)	

Submitted: September 17, 2007
Decided: March 7, 2008

OPINION

Defendants' Motion to Dismiss or Stay the Delaware Actions.
Motion Denied.

Appearances:

Francis J. Murphy, Esquire, Wilmington, Delaware. Attorney for Plaintiffs Underwriters at Lloyds. *Of Counsel*: Kenneth P. Erickson, Esquire, Boston, Massachusetts, Attorneys for Certain Underwriters at Lloyds, Axis Specialty Europe, Ltd. Ace American Insurance Company and Commonwealth Insurance Company, and Philip C. Silverberg. Esquire. Attorneys for Essex Insurance Company and Zurich American Insurance Company.

Patricia P. Mcgonicle, Esquire, Wilmington, Delaware, and, Sava Alexander Vojcanin, Esquire, Chicago, Il., Attorney for Lexington Insurance Company in C.A. No. 07C-06-273-JEB.

John E. James, Esquire, W. Harding Drane, Jr., Esquire and Jennifer C Wasson, Esquire, Wilmington, Delaware. *Of Counsel:* Randy Paar, Esquire, and Danielle I. Feldman, Esquire, New York, New York., and Andrew M. Weiner, Esquire, Washington, DC. Attorneys for Defendant Tyson Foods Inc..

JOHN E. BABIARZ, JR., JUDGE.

This case is an insurance coverage dispute between Tyson Foods, Inc. ("Tyson"), a Delaware corporation, and certain of its commercial property underwriters, including excess underwriters ("the Underwriters"). The alleged damages stem from Hurricane Katrina, which hit the Gulf Coast in August 2005. After the parties engaged in lengthy but unsuccessful negotiations about coverage, the Underwriters filed three actions for declaratory judgment in Delaware, seeking a ruling that they were not liable for any part of Tyson's insurance claim.[1] Tyson then filed a mirror action in Mississippi, and has now filed a Motion to Dismiss or Stay the Delaware Actions Based on *Forum Non Conveniens.* For the reasons explained below, Tyson's motion is Denied.

After Katrina devastated the Gulf coast, Tyson submitted to Underwriters a claim for damages totaling $113,529,815.[2] Almost $109.6 million was allegedly lost in the global chicken leg quarter markets; only $261,068 was claimed as property loss or damage to hatcheries, equipment, and disposal of dead chickens in the State of

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[1]On June 22, 2007, two actions were filed in Superior Court: *Certain Underwriters at Lloyd's and Houston Casualty Company v. Tyson Foods, Inc.* and *Certain Underwriters at Lloyd's, Axis Specialty Europe, Ltd.,Ace American Ins, Co., Commonwealth Ins. Co., Essex Ins. Co. and Zurich American Co. v. Tyson Foods, Inc.* On June 25, 2007, the third action was filed: *Lexington Ins. Co. v. Tyson Foods, Inc.*

These actions have been consolidated.

[2]Underwriters include primary insurers and excess insurers, who are part of Tyson's property insurance on a layer above the deductibles and above $50 million in primary insurance.

Mississippi. Pursuant to the contracts, the Underwriters conducted a lengthy analysis and investigation of the claim, and negotiations between the parties continued for more than a year without resolution.

On June 8, 2007, the Underwriters wrote (by certified mail and by E-mail) to Tyson stating that they had determined that the claims for business losses were not covered, and that the claims for property damage were arguably coverable but did not exceed the applicable deductibles. Excess Underwriters raised additional coverage defenses. On June 14, Tyson and the Underwriters met in Atlanta, Georgia, to discuss the claim and the concerns that Underwriters had outlined in their correspondence. At this point, at least to appearances, the parties were still negotiating the coverage issues.

On June 21, Tyson sent Underwriters a letter providing certain information and asking that Underwriters answer their questions about coverage by July 2. The letter closed with the statement that "Tyson has exhausted its efforts to resolve this matter in the current forum."[3]

On June 22 and 25, the Underwriters filed three declaratory judgment actions in this Court against Tyson, which were subsequently consolidated. Underwriters sought judgments that Underwriters are not liable to indemnify Tyson on any of its

[3]Renella Aff. at ¶ 7; Martin Aff. ¶ 17; Ex. B. To Martin Aff.

claims. The complaints were accompanied by praecipes directing the Sheriff's Office to serve Tyson's registered agent with the Complaints.

On June 27, one of the Underwriters sent by overnight mail courtesy copies of their Complaint to Thomas Harris, Tyson's risk manager, and J. Timothy Georges, Tyson's insurance broker. The next day, June 28, Mr. Georges contacted Paul A. Smith, a claims handler who was acting on behalf of one of the Underwriters. Mr. Georges asked Mr. Smith if the Underwriters had initiated legal proceedings on the coverage issues, and was told that Underwriters had filed declaratory judgment proceedings against Tyson in Delaware. On July 10, the Sheriff served Tyson's registered agent with copies of the Complaints in the Delaware actions.

On July 9, 2007, Tyson filed an action in the Southern District Court of Mississippi. On July 11, service was made on Underwriters via the Mississippi Department of Insurance. The Mississippi and Delaware actions arise out of the same set of facts and involve the same parties.

In its Motion to Dismiss or Stay, Tyson argues that the Delaware and Mississippi actions were contemporaneously filed, and that the Delaware actions should be stayed in favor of the Mississippi action. In the alternative, Tyson argues that if the Court finds that the Delaware action was first filed, Tyson has met the undue hardship test warranting dismissal. Underwriters argue that the Delaware

actions were filed two weeks before the Mississippi action, that service was properly made, and that the Delaware actions should be afforded first filed status.

The first question before the Court is whether the Delaware and Mississippi actions were simultaneously filed or if the Delaware action was first filed.[4] In general, litigation should proceed in the forum in which it started, and a defendant should not be permitted to defeat the plaintiff's choice of forum in a pending suit by commencing litigation involving the same cause of action in another jurisdiction.[5] Tyson cites to several cases to support its argument for contemporaneous filing. In *Royal Indem. Co. v. Gen'l Motors Corp.*,[6] *Azurix Corp. v. Synagro Technologies, Inc.,*[7] *Friedman v. Alcatel Alsthom*,[8] and *Texas Instruments, Inc. v. Cyrix Corp.,* the Superior Court and Chancery Court held that complaints filed within hours, and at most one business day, of each other were contemporaneously filed because each party had intended to file regardless of the opposing party's actions and was prepared to do so. In this case, Underwriters filed two Complaints on June 22 and one on June

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[4]*See Texas Instruments Inc. v. Cyrix Corp.*, 1994 WL 96983 (Del. Ch.) (stating that when a motion to dismiss or stay is before the court, the threshold issue is who is first filed).

[5]*Id.* at 283.

[6]2005 WL 1952933 (Del. Super.).

[7]2000 WL 193117 (Del. Ch.).

[8]752 A.2d 544 (Del. Ch. 1999).

25 and gave Tyson informal notice of the filings on June 27. Since Tyson's complaint was not filed until July 9, there is no basis for a finding that it was de facto contemporaneously filed.

In *Stepak v. Tracinda Corp.*[9] and in *Joyce v. Cuccia*,[10] the Court of Chancery denied first filed status to the first filed complaint because the complaint was filed with instructions to withhold service in order to conceal the filing from the defendant. Nothing in the record suggests that Underwriters had any intent to delay service or conceal filing. Tyson filed its Mississippi action on July 9, which was 17 days and 14 days after the Delaware actions were filed. Service was made via the Mississippi Department of Insurance on July 11. Tyson asserts that Underwriters did not inform Tyson of any intent to litigate, and that Tyson filed its action as soon as it learned about Underwriters' action. However, Underwriters had no duty to inform Tyson of the pending lawsuit other than to have process timely served, which it did through the Sheriff's Office. There is no evidence of intentional delay on Underwriters' part, and there is no reason to treat the Delaware actions as anything other than first filed. Underwriters filed in Delaware two weeks before Tyson filed in Mississippi, and the Court concludes that the Delaware Underwriters' Complaints are first filed.

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[9] 1989 WL 100884 (Del. Ch.).

[10] 1996 WL 42239 (Del. Ch.).

Tyson argues that even if the Court finds that the Underwriters are first-filed, Tyson has shown that being forced to litigate in Delaware would cause Tyson undue hardship. Plaintiffs argue that Tyson cannot meet the undue hardship test. A defendant's motion to stay or dismiss a suit based on the doctrine of *forum non conveniens* is addressed to the discretion of the Court.[11] There is a presumption in favor of a plaintiff's choice of forum that is overcome only if the defendant shows with particularity that being forced to litigate in Delaware would subject it to overwhelming hardship.[12] The *forum non conveniens* analysis is not altered where the only connection to Delaware is the defendant's status as a Delaware entity.[13] The defendant must show that this is one of those "rare cases where the drastic relief of dismissal is warranted based on a strong showing that the burden of litigating in this forum is so severe as to result in manifest hardship to the defendant."[14] This burden is substantial but not preclusive.[15] The burden on the moving party is a lesser one

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[11] *Williams Gas Supply Co. v. Apache Corp.*, 1991 WL 18091 (Del. Super.).

[12] *Mar-Land Industrial Contractors, Inc. v. Caribbean Petroleum Refining, L.P.,*, 777 A.2d 774, 777-78; *In re Asbestos Litigation*, 929 A.2d 373, *Candlewood Timber Group, LLC v. Pan American Energy, LLC*, 859 A.2d 989, 999 (Del. 2004).

[13] *Mar-Land,* 777 A.2d at 778.

[14] *Id.* (quoting *Ison v. E.I. DuPont de Nemours and Co., Inc.*, 729 A.2d 832, 842).

[15] *Ison*, at 842.

when a stay rather than a dismissal is sought.[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: (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 possibility of a view of the premises; (5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and (6) all other practical considerations that would affect the trial.[17]

The first factor is which state's law will govern the case, the choices being Delaware, Mississippi, where the lawsuits are filed, or elsewhere. Several of the policies, including both primary policies and excess policies, have a choice of law provision, which will govern the case, barring some ambiguity in the language of the policies. As to the policies without a choice of law provision, Tyson argues that Mississippi law should apply because Mississippi has the most significant relationship to the locations where the damage was incurred. Tyson also argues that Mississippi has an interest in applying its own law that overrides any interest Delaware might have because the case does not involve any substantive issue of

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[16] *Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811266 (Del. Super.).

[17] *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964).

Delaware law.

Underwriters point out that the policies were negotiated in various states and locations and that the insured properties are located in both the United States and Canada. Underwriters also assert that approximately 85 percent of Tyson's claim is for business interruption in overseas markets while only 2 percent of the claim is for physical damage or business interruption in Mississippi.

While Tyson's assertions may be relevant to a choice of law analysis, the inquiry is whether Tyson has shown it would experience overwhelming hardship because of a substantive issue that could be addressed only by Mississippi law. Tyson has not made that showing. Even assuming, for purposes of this motion, that Mississippi law will be found to apply, Delaware courts are competent to interpret and apply the laws of other states and have consistently held that the need to apply the law of another state will not be a "substantial deterrent" to litigating in this State.[18] Tyson has not shown that the application of Delaware law would cause undue hardship.

The second factor is whether accessing proof would cause undue hardship to Tyson if the case were tried in Delaware. Tyson asserts that all the relevant

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[18] *In re Asbesto Litigation,* 929 A.2d 373, 386 (Del. Super. Ct. 2006); *Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811266, at *6 (Del. Super.) (quoting *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1200 (Del. 1997)).

documents are in Mississippi and that transporting them to Delaware would be inconvenient or impossible. Underwriters assert that Tyson has litigated in various jurisdictions and that it has the resources to do so in this case.

The Court finds no undue hardship in the transport of documents, electronic or otherwise. As the Court of Chancery has observed, "modern methods of information transfer render concerns about transmission of documents virtually irrelevant."[19]

Tyson also argues that testimonial evidence would be difficult to obtain. Tyson asserts that witnesses not subject to its control would be needed to testify about the damage to three Mississippi plants and the business interruption at those plants in the aftermath of Katrina. Tyson notes that plant operations will be disrupted by having many employees, particularly management, travel to Delaware for trial. In its Opening Brief, Tyson identifies witnesses, both employees and individuals qualified to testify on topics as the effect of port closures.

Underwriters argue that Tyson overstates the significance of the claim for damage to Mississippi locations, which at $261,068, is the smallest element of the claim. Underwriters also assert that minus the deductible there is arguably no coverage for the damage. As to the Mississippi witnesses, Underwriters assert that the testimony of many of them overlaps and that some of the facts they would testify

[19] *Rapoport v. Litigation Trust of MDIP, Inc.*, 2005 WL 3277911, *5 (Del. Ch.).

to are not in dispute. Finally, Underwriters assert that witnesses who would testify as to other claim-related issues are located around the world and many of them would be equally difficult to retain in either Delaware or Mississippi.

The Court accepts the fact that potential witnesses hail from more than one jurisdiction. Statements and opinions of these witnesses could be obtained by deposition. Tyson may well experience some inconvenience in having witnesses physically present to testify or in obtaining statements from them.[20] The witness list in Tyson's brief includes more than one witness for every topic but one, increasing the odds of obtaining live testimony. However, "[m]odern methods of transportation lessen the Court's concern about the travel of witnesses who live neither in Delaware

[20]In support of its position on the access to proof issue, Tyson cites to two cases applying the balancing test, that is, whether each factor favors one party or the other. This is the lower standard for addressing a motion to stay. In *American Home Products Corp. v. Adriatic Ins. Co*, 1991 WL 236915 (Del. Super.), this Court considered the relative ease of proof question in regard to 77 underwriters, 32 sites and 11 states. The Court stated that such complex litigation would congest Delaware courts, impose an unfair burden on a Delaware jury, and present the difficulty of applying the law of 11 states, citing to a federal case, *Banco Nomineees LTD. v. Iroquois Brands, Ltd*, 748 F.Supp. 1070 (D. Del. (1990), and a United States Supreme Court case, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Based on the federal standard, the Court concluded that the relevant factors weighed in favor of dismissal. In *Texas Instruments Inc. v. Cyrix Corp*, 1994 WL 96983 (Del. Ch.), the Chancery Court considered similar factors relating to access of proof. The Court found that the factors favored a stay of the Delaware action. Under the overwhelming hardship test, the Court does not weigh the merits of each factor or decide what outcome is favored by those factors. Instead, the moving party bears the burden of showing undue hardship as set forth in *Cryo-Maid* , and the Court decides if the moving party has made that showing on any of those factors.

nor [the alternate forum]."[21] The convenience of a forum is irrelevant, and the court is not permitted to compare Delaware, the plaintiff's chosen forum with another forum and decide which is more appropriate.[22] The standard Tyson must meet is overwhelming hardship not inconvenience. Tyson has not met this burden on grounds of access to evidence.

The third factor to be considered is the availability of compulsory process for witnesses. Tyson argues that a number of potential witnesses would be subject to compulsory process in Mississippi but not in Delaware. Tyson further asserts that some but not all are current Tyson employees, and even those who are now may not be by the time of trial. The Court does not find that Tyson has shown overwhelming hardship on this issue. Delaware law requires that Tyson identify the witnesses not subject to compulsory process and the specific substance of their testimony.[23] Tyson's brief names multiple individuals for most topics. Only on the topic of Tyson's "logistical costs" is one witness listed: Mike Pate of Pate Stevedoring, who is also named as being a potential witness regarding the effect of Katrina on Gulf Coast ports. In addition, witnesses both domestic and abroad may be deposed in lieu

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[21] *Rapoport* at *27.

[22] *Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref., L.P.,* 777 A.2d 774, 781 (Del. 2001).

[23] *Lee v. Choice Int'l Inc.*, 2006 WL 1148755 (Del. Super.).

of appearing for trial.[24] Without a particularized showing regarding specific potential witnesses, it cannot be said that Tyson has demonstrated overwhelming hardship because of compulsory process.

The fourth factor the Court is to consider is whether there is a similar suit pending in another jurisdiction. Delaware has no hard and fast rule for granting or denying a stay of prosecution of a Delaware action by reason of a similar action pending in another jurisdiction.[25] It is uncontested that the Delaware and Mississippi actions stem from the same facts and involve the same parties. Thus at this point both parties face duplication of effort and inconsistent adjudications because Tyson is pursuing its later-filed Mississippi action; if Tyson were to dismiss the Mississippi action this hardship would disappear.[26] The Delaware Supreme Court has rejected the argument that a Delaware action should be stayed simply to avoid the undesirable result of having two mirror-image actions proceeding in two different jurisdictions.[27] The pending Delaware Actions do not pose an undue hardship on Tyson because Tyson could dismiss or withdraw its action, permitting a single adjudication of all the

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[24] *See* Super. Ct. Civ. R. 28.

[25] *Gen'l Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 683 (Del. 1964).

[26] *Chrysler First Business Credit Corp. v. 1500 Locust Limited Partnership*, 669 A.2d 104, 107-08 (Del. 1995).

[27] *Williams Natural Gas Co. v. BHP Petroleum Co, Inc.*, 1990 WL 38329 (Del.).

issues in the first-filed Delaware case.

The fifth factor pertains to the ability to view the premises during trial. Tyson asserts that a Mississippi court may consider it desirable for the jury to view the Tyson facilities, hatcheries, or the ports damaged by Katrina in order to assess the property damage. This is speculative argument that does not demonstrate undue hardship. Underwriters argue that the Mississippi locations are a minimal percentage of the claim. As to the business interruption claim, Underwriters argue that the relevant sites could not be viewed under any circumstances because they are located in many different places. These sites include ports, warehouses, and freezer facilities. As the Delaware Supreme Court noted in *Candlewood,* there is nothing in Delaware case law to suggest that reliance on video or other visual aids is less informative or causes hardship.[28] A trial in either Delaware or Mississippi would no doubt entail use of such visual aids, and consequently the Court finds that Tyson has not met its burden on this factor.

The sixth consideration is whether any practical matters would create overwhelming hardship for Tyson. Tyson asserts that Delaware has no interest in this case, and that the fact of Tyson's incorporation in Delaware has no weight. Tyson

[28] *Candlewood Timber Group, LLC v. Pan American Energy*, 859 A.2d 989, 1002 (Del. 2004).

contends instead that judicial economy and public interest considerations both favor Mississippi. Tyson further argues that the consequences of this case will be felt in Mississippi but not in Delaware.

Contrary to Tyson's assertions, Delaware has a significant interest in making a neutral forum available to parties in commercial disputes who file against Delaware entities, even where the dispute involves the law of another jurisdiction and the parties and conduct are centered in another jurisdiction.[29] The *forum non conveniens* analysis is not altered where the only connection to Delaware is the defendant's status as a Delaware entity.[30] In this case, three of the insurers (Tyson, Lexington and Essex) are Delaware corporations, no party is based in Mississippi, and the Mississippi case is apparently filed in a county different from those in which the damage occurred. It may be true that the residents of Mississippi will feel the impact of this case more directly than Delaware residents, but that fact is not relevant to determining whether Tyson will experience undue hardship by having to litigate in Delaware. The Court finds that Tyson has not identified any practical matters that would cause it to experience overwhelming hardship if compelled to litigate in Delaware.

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[29] *Id.* at 1000.

[30] *Warburg, Pincus Ventures, L.P. v. Schrapper*, 774 A.2d 264, 267; *Mar-Land Industrial Contractors, Inc. v. Caribbean Petroleum Refining, L.L.P*, 774A.2d 778 (Del. 2000).

The Court concludes that the Delaware action is first-filed case and that Tyson has not shown that it will be subject to overwhelming hardship from litigating in Delaware. The motion to dismiss is ***Denied.***

It Is So ORDERED.

Judge John E. Babiarz, Jr.

JEB,jr/ram/bjw
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