IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

AR CAPITAL, LLC, EDWARD M. WEIL, WILLIAM M. KAHANE, NICHOLAS S. SCHORSCH and PETER M. BUDKO,	)	
Plaintiffs,	)	C.A. No. N19C-01-024 MMJ [CCLD]
v.	)	
XL SPECIALTY INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, ARGONAUT INSURANCE COMPANY, FREEDOM SPECIALTY INSURANCE COMPANY, QBE INSURANCE CORPORATION, WESTCHESTER FIRE INSURANCE COMPANY, STARR INDEMNITY & LIABILITY COMPANY, RSUI INDEMNITY COMPANY, and AXIS INSURANCE COMPANY,	)	
Defendants.	)	

Submitted: June 23, 2020
Decided: August 3, 2020

On Defendants' Motion to Dismiss Plaintiffs' Third Amended Complaint, or in the Alternative, Stay the Action,
GRANTED IN PART, DENIED IN PART

OPINION

Kenneth H. Frenchman, Esq., (Argued), McKool Smith, New York, New York, John P. DiTomo, Esq., Elizabeth A. Mullin, Esq., Kenneth J. Nachbar, Esq., Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware, *Attorneys for Plaintiff*

Amber W. Locklear, Esq., (Argued), Ropers, Majeski, Kohn and Bentley, P.C., New York, New York, John C. Phillips, Jr., Esq., David A. Bilson, Esq., Phillips, Goldman, McLaughlin, & Hall, P.A., Wilmington, Delaware, *Attorneys for Defendant Argonaut Insurance Company*

David F. Cutter, Esq., (Argued), BatesCarey LLP, Washington, D.C., Robert J. Katzenstein, Esq., Eve. H. Ormerod, Esq., Smith, Katzenstein, & Jenkins LLP, Wilmington, Delaware, *Attorneys for Defendant Continental Casualty Company & QBE Insurance Corporation*

Bruce E. Jameson, Esq., John D. Gay, Esq., Prickett, Jones & Elliott, P.A., Wilmington, Delaware *Attorneys for Defendant Freedom Specialty Insurance Company*

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

This coverage action arises from Directors and Officers ("D&O") insurance policies issued by Defendants to Plaintiffs. Plaintiffs Edward M. Weil, William M. Kahane, Nicholas S. Schorsch, and Peter M. Budko (the "Individual Plaintiffs") served as directors and officers of Plaintiff AR Capital, LLC (collectively "AR Capital"). Defendant XL Specialty Insurance Company ("XL") issued a primary Management Liability and Company Reimbursement Insurance Policy (the "XL Policy") to AR Capital for the 2014–2015 policy period.[1] The XL Policy provides a $10 million limit of liability per Claim and in the Aggregate.[2] Defendants Continental Casualty Company ("Continental"), Argonaut Insurance Company

[1] Third Amend. Compl., Ex. C.
[2] *Id.*

("Argonaut"), Freedom Specialty Insurance Company ("Freedom"), and QBE Insurance Company ("QBE") (collectively the "Excess Insurers") each issued to AR Capital an excess policy providing a $10 million limit of liability.[3]

AR Capital seeks insurance coverage from Defendants for settlements of an investigation by the Securities and Exchange Commission ("SEC") and certain civil litigations (the "Civil Litigations"), under the D&O policies issued by Defendants (the "Policies").[4] XL, although originally the first named Defendant in this action, has since tendered its remaining policy limits and has been voluntarily dismissed.[5]

This case is proceeding on a parallel track with another lawsuit (the "New York Action") filed by Defendants in the Supreme Court of the State of New York, County of New York (the "New York Court"). XL filed the New York Action less than 24 hours before AR Capital filed this action in Delaware.

On April 25, 2019, this Court issued an order denying Defendants' motion to dismiss the Amended Complaint.[6] This Court ruled that the New York Action and this action were filed contemporaneously, thus the "*McWane*-type preference of

---

[3] *Id.* ¶¶ 35.b–e.
[4] Compl., ¶¶ 16-17.1
[5] Trans. ID.64716919.
[6] *AR Capital, LLC v. XL Specialty Ins. Co.*, 2019 WL 1932061, at *8 (Del. Super. Apr. 25).

one action over the other" did not apply.[7] As a result, this Court analyzed whether this action should be dismissed based upon the six *Cryo-Maid*[8] factors.[9] This Court found that five of the six *Cryo-Maid* factors—applicable law, ease of access to proof, availability of compulsory process of witnesses, the possibility of a view of the premises, and all other practical considerations—were neutral or inapplicable and did not weigh in favor of dismissal.[10]

With respect to the factor of whether the controversy is dependent upon the application of Delaware law, the Court concluded that at that early stage of the proceedings, it could not weigh that factor in favor of either Plaintiffs or Defendants.[11] The Court further held that although "New York would provide an adequate forum for resolution of this dispute," this did not warrant dismissal of this case in Delaware because Defendants could not establish hardship.[12] The Court further observed that the choice of law issue had not yet been determined but that even if the law of another jurisdiction applied, "Delaware courts regularly apply the laws of other jurisdictions" and, therefore, "this factor was neutral in its

---

[7] *Id.* at *3.
[8] *Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964).
[9] *Id.* at *6–8.
[10] *Id.*
[11] *Id.* at *6–7.
[12] *Id.* at *7.

analysis."[13] On May 29, 2019, this Court denied Defendants' motion for reargument.[14]

On August 8, 2019, the New York Court denied AR Capital's motion to dismiss or stay the New York Action in light of the existence of this action.[15] The New York Court relied heavily on the fact that the New York Action had been "first-filed" by XL.[16] In so holding, the New York Court observed that "unfortunately sometimes you do have two parallel cases going on at the same time. I think the parties have to do their best to coordinate them."[17] The parties have since coordinated discovery in both actions, with the understanding that discovery in one action could be used in the other. Thus, for example, the parties have filed notices of deposition, discovery requests and discovery responses interchangeably under the captions of both cases.

In September 2019, the Civil Litigations settled.[18] On October 1, 2019, Plaintiffs amended their counterclaims in the New York Action to include claims

---

[13] *Id.*
[14] Trans. ID 63304397.
[15] Locklear Decl., Ex. C.
[16] *Id.*
[17] Locklear Decl., Ex. C, p. 52.
[18] Third Amended Compl. ¶ 117.

seeking coverage for the Civil Litigations settlement and for breach of the implied covenant of good faith and fair dealing.[19]

On October 14, 2019, Plaintiffs sought leave from this Court to file a Third Amended Complaint that included claims seeking coverage for the Civil Litigations settlement and for breach of the implied covenant of good faith and fair dealing.[20] AR Capital also sought leave to amend its Complaint to assert claims for the first time in this action against the four Excess Insurers for coverage for the Civil Litigations, which had been raised in the New York Action on January 30, 2019.

On October 21, 2019, the insurers filed in the New York Action motions to dismiss the newly-asserted bad faith claims. On January 31, 2020, the New York Court granted the Excess Insurers' motion to dismiss Plaintiffs' bad faith claim.[21]

Notably, the New York Court applied New York law to its analysis of Plaintiffs' bad faith claim because, under New York choice of law principles, the insured entity's principal place of business dictates the applicable law, irrespective of the entity's place of incorporation or whether the policy is a D&O policy:

---

[19] Locklear Decl., Ex. D
[20] Trans. ID 64312285.
[21] Locklear Decl., Ex. E.

> The Courts in Foster Wheeler considered whether the corporation should be an important consideration and decided that the state of domicile really should be the driving force here.
>
> The fact that this is a securities case as opposed to an asbestos case, in my view, is a distinction without a difference.
>
> This case is not about whether the defendants breached their fiduciary duties to the shareholders of their VEREIT. It's about -- that claim is already settled. The question here is about insurance coverage and interpretation of the insurance contract and to me that is the central point of Foster Wheeler; and I think one of the elements in Foster Wheeler was they were looking for a rule that was, in their words, that provides certainty, predictability and uniformity of result. They ended up with principal place of business as doing that.[22]

The New York Court also dismissed the bad faith claim because it was duplicative of the breach of contract claim under New York law.[23]

On February 5, 2020 in the New York Action and on February 7, 2020 in this action, AR Capital filed a stipulation of discontinuance in light of its settlement with the *only* Delaware-incorporated Defendant, primary insurer, XL.

On February 12, 2020, AR Capital filed its Third Amended Complaint in this action asserting its claim for coverage for the Civil Litigations and a bad faith claim against the Excess Insurers in connection with the settlement of the Civil Litigations.

---

[22] *Id.*, at Ex. C., Hearing Transcript at 46.
[23] *Id.*, at Ex. C., Hearing Transcript at 48.

On March 4, 2020, Defendants filed in this action a Motion to Dismiss Plaintiffs' Third Amended Complaint. On May 8, 2020, Plaintiffs filed an Answer in opposition to Defendants' motion to dismiss, and Defendants' filed a reply on May 29, 2020. The Court heard oral argument on June 23, 2020.

STANDARD OF REVIEW

Failure to State a Claim

In a Rule 12(b)(6) Motion to Dismiss, the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof."[24] The Court must accept as true all well-pleaded allegations.[25] Every reasonable factual inference will be drawn in the non-moving party's favor.[26] If the claimant may recover under that standard of review, the Court must deny the Motion to Dismiss.[27]

McWane and Cryo-Maid Factors

"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."[28] "Where two or more actions are contemporaneously filed, the Court

---

[24] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[25] *Id.*
[26] *Wilmington Sav. Fund Soc'y, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).
[27] *Spence*, 396 A.2d at 968.
[28] *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).

'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.'"[29]

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.[30] Where a stay of litigation likely would have substantially the same effect as a dismissal, the overwhelming hardship standard applies.[31]

"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."[32] "In balancing all of the relevant factors, the focus of the analysis should be which forum would be the more 'easy, expeditious, and inexpensive' in which to litigate."[33]

"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."[34] The Court will consider: (1) whether Delaware law governs the case;

---

[29] *Id.*
[30] *BP Oil Supply Co.*, 2010 WL 702382, at *2.
[31] *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d at 117.
[32] *Id.*
[33] *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)).
[34] *Certain Underwriters at Lloyds Severally Subscribing Policy No. DP359504 v. Tyson Foods, Inc.*, 2008 WL 660485, at *3 (Del. Super.).

(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.[35]

ANALYSIS

Status of the Delaware and New York Actions

The parties agreed that discovery would proceed simultaneously in Delaware and New York. Discovery has since been completed. Summary judgment motions have been filed in New York and are currently in the process of briefing.

Delaware

By Opinion dated April 25, 2019, the Court denied XL's Motion to Dismiss. The Court held:

> This Delaware action is contemporaneously-filed with the New York actions. []Defendants have failed to demonstrate overwhelming hardship justifying dismissal. The *Cryo-Maid* factors are mainly neutral, and do not tip in favor of litigating in the non-Delaware forum.... Therefore, [] Defendants' Motion to Dismiss or Stay is hereby **DENIED**.[36]

---

[35] *Cryo-Maid, Inc.*, 198 A.2d at 684; *Parvin v. Kaufmann*, 236 A.2d 425, 427 (Del. 1967).
[36] *AR Capital, LLC v. XL Specialty Ins. Co.*, 2019 WL 1932061, at *8.

This Court then denied Defendants' Motion for Reargument on May 29, 2019, finding that "[t]he Court did not overlook a controlling precedent or legal principle, or misapprehend the law or the facts in a manner affecting the outcome of the decision."[37]

The Court heard fully-briefed partial summary judgment and cross-summary judgment motions on June 23, 2020.

New York

On August 12, 2019 the New York Court denied AR Capital's motion to dismiss or stay.[38] First, Justice Cohen found that the New York action was more comprehensive:

> In terms of comprehensiveness[,] to the extent that factor applies, it tilts towards New York. I think the fact that the excess carrier issues are here and not in Delaware is relevant. I think the fact that the excess or Securities litigation claims came in by amendment doesn't make them latter filed cases. So I don't see that making any difference, really. And there is no case in Delaware, as I understand it, with respect to the Securities law claims against the excess insurers. So that's the First-Filed version of that, anyway.[39]

The New York Court also addressed the fact that this Court had—at the time of the New York hearing—already decided the motion to dismiss at issue. Justice Cohen stated that to the extent that the Delaware Action was more advanced, "I

---

[37] *AR Capital, LLC v. XL Specialty Ins. Co.*, 2019 WL 2443057, at *2 (Del. Super. May 29).
[38] Locklear Decl., Ex. C., Decision and Order on Motion.
[39] *Id.*, at Ex. C., Hearing Transcript at 50; *see also XL Specialty Ins. Co. v. AR Capital, LLC,* 2019 WL 4640497 (N.Y. Sup.), *aff'd,* 181 A.D.3d 546 (N.Y.A.D. 2020).

don't think it's in a material way....I don't see how Delaware is meaningfully more advanced in a way that it overcomes the other factors."[40]

The New York Court further held that:

> [A] *forum non-conveniens* would not have merit here...all the parties are at home in New York in the sense of the principal place of business...[s]o it's certainly not an inconvenient forum in New York. And I do think, to add one more factor to it, frankly, New York is the logical forum. Delaware is, you know, a stretch. That's not to say that Judge Johnston isn't correct that it's properly brought there, too, but if you're weighing the two jurisdictions together, I certainly can['t] conclude that New York has less of an interest in the matter.[41]

Finally, the New York Court encouraged, and the parties agreed to "coordinate with Delaware"[42] such that schedule in the New York Action would mirror the Delaware schedule.[43] Justice Cohen also noted that:

> The undue burden of having two cases at once is undeniable....I'm willing to work with the parties and Judge Johnston in any way that can be helpful, but I don't think the end result of the jockeying back and forth on both sides is enough to cause me to just dismiss a case that would otherwise be properly brought in front of me.[44]

The New York Court has since held that New York law applies, and dismissed the counterclaim for bad faith on the grounds that AR Capital failed to plead a viable cause of action.[45]

---

[40] *Id.*, at Ex. C., at 51.
[41] *Id.*, at Ex. C., at 52–53.
[42] *Id.*, at Ex. C., at 55.
[43] *Id.*, at Ex. C., at 55–56.
[44] *Id.*, at Ex. C., at 52–53.
[45] *Id.*, at Ex. E.

McWane Factors

These pending motions mark the third time Defendants have sought to dismiss or stay this action in Delaware.

Civil Rule 54(b) provides that "any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties…is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Pursuant to Rule 54(b), reconsideration or renewal of a prior order may be appropriate when there is "a controlling or significant change in the law or facts since the submission of the issue to the Court."[46] However, circumstances warranting reconsideration "rarely arise and the motion to reconsider should be equally rare."[47]

Further, "in deciding *forum non conveniens* motions to dismiss, Delaware trial judges must decide whether the defendants have shown that the *forum non conveniens* factors weigh so overwhelmingly in their favor that dismissal of the Delaware litigation is required to avoid undue hardship and inconvenience to

---

[46] *Washington House Condo. Ass'n of Owners v. Daystar Sills, Inc.*, 2018 WL 6046714, at *2 (Del. Super.) (internal quotations omitted).
[47] *Id.*

them."[48] This "overwhelming hardship" standard is "stringent, but not preclusive."[49]

During oral argument, Plaintiffs asserted that hardship would result from New York being somewhat less procedurally advanced. Nevertheless, because the New York Court already decided to unequivocally deny a *forum non conveniens*-based dismissal, the actions have followed a parallel path. Thus, Defendants argue that without reconsideration of dismissing or staying the action in this Court, the parallel actions will ultimately result in inconsistent rulings which will cause *all* parties to suffer overwhelming hardship: "The Insurers can think of no better evidence of 'overwhelming hardship' than to succeed on their motion to dismiss Plaintiffs' bad faith claim in New York only to be forced to re-litigate that identical legal issue before a different court and potentially under a different legal standard."[50]

In order to prevail, Defendants must show that this is a rare case where a significant change in circumstances would cause the *forum non-conveniens* factors to now weigh so overwhelmingly in their favor that this Court should reconsider its two prior orders. The Court is reluctant to revisit its rulings on the *McWane* and

---

[48] *Martinez v. E.I. DuPont de Nemours & Co.*, 86 A.3d 1102, 1106 (Del. 2014).
[49] *Id.*
[50] Defs. Reply Br. at 19; Defendants note that, for example, the bad faith claims in the New York Action have already been dismissed, and therefore, allowing AR Capital to pursue these claims in Delaware would enable them "to take two bites at the proverbial apple." *Bradfield v. Unemployment Ins. App. Bd.*, 53 A.3d 301 (Table) (Del. 2012).

Cryo-Maid factors, as its prior rulings were the result of full briefing by the parties, opportunity for comprehensive oral argument, and written opinions.

Comity

Defendants argue that because the New York Court determined that it would hear the case and apply New York law, this Court should defer to the New York Court pursuant to the principles of comity.

Where Delaware law is not at stake, comity requires Delaware courts to "be extremely cautious not to intrude on the legitimate interests of other sovereign states."[51] "Comity permits one state to give effect to the laws of a sister state, not out of obligation, but out of respect and deference."[52] "[T]he primary concern is not which court has jurisdiction or even which court should hear the dispute but whether…[i]n the interest of judicial economy,…which court should defer, as a matter of comity, to the other in order to avoid vexatious litigation and duplication of effort, with the attendant risk of divergent rulings on similar issues."[53]

The New York Court has found that New York law applies, that New York is the logical forum, and that New York has a legitimate interest in the litigation. The New York Court's decision was also affirmed by the New York Appellate

---

[51] *Bell Helicopter Textron, Inc. v. Artega*, 113 A.3d 1045, 1051–52 (Del. 2015).
[52] *First Health Settlement Class v. Chartis Specialty Ins. Co.*, 111 A.3d 993, 998 (Del. 2015).
[53] *White Light Prods., Inc. v. On the Scene Prods., Inc.*, 231 A.D.2d 90, 96 (N.Y.A.D. 1997).

Division. Therefore, this Court finds that the principles of comity weigh in favor of deferring to the concurrent jurisdiction of the New York Court.[54]

Plaintiffs' contentions of prejudice on the basis of delay are not persuasive. These cases presently are, and have been, essentially moving on a parallel track. Under these circumstances (particularly considering the unanticipated and unavoidable delays due to COVID-19), a difference of a few months does not constitute hardship or inconvenience sufficient to warrant reconsideration of two prior *forum non conveniens* rulings.

CONCLUSION

The Court finds that the principles of comity weigh in favor of deferring to the concurrent jurisdiction of the New York Court. The Superior Court has discretion in the exercise of its "inherent authority to stay proceedings in control of its docket after balancing the competing interests."[55] Therefore, Defendants' Motion to Dismiss is hereby **DENIED**, and Defendants' Motion to Stay the Action is hereby **GRANTED**.

---

[54] *See, e.g.*, *In re Topps Co. S'holders Litig.*, 924 A.2d 951, 962 (Del. Ch. 2007) ("One can imagine a myriad of [claims]...that would be much more properly heard in a New York court than in this court...[i]n such cases, this court would not hesitate to defer in a 'New York minute,' as it were."); *Strickler v. Sussex Life Care Assocs.*, 541 A.2d 587, 591 (Del. Super. 1987) (Superior Court deferring to the Chancery Court); *Flaherty v. Indus. Tr. Co.*, 178 A. 586, 587 (Del. Ch. 1935) (Delaware Chancery court deferring to the jurisdiction of the Superior Court).
[55] *M & T Bank v. Ellery*, 2016 WL 6092727, at *2 (Del. Super.) (quoting *Fleming & Hall, Ltd. v. Clarendon Nat'l Ins. Co.*, 1998 WL 734794, at *1 (Del. Super.)).

Therefore, the Court will hold its rulings on the pending partial summary judgment motions in abeyance until such a time as it may be appropriate to lift the stay.

IT IS SO ORDERED.

The Hon. Mary M. Johnston