UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

SEATON INSURANCE COMPANY (f/k/a UNIGARD MUTUAL INSURANCE COMPANY) and STONEWALL INSURANCE COMPANY, Plaintiffs, v. CLEARWATER INSURANCE COMPANY (f/k/a SKANDIA AMERICA REINSURANCE CORPORATION), Defendant.	Civil Action NO.: 1:09-cv-516-S MARCH 22, 2010

DEFENDANT'S REPLY BRIEF IN FURTHER SUPPORT OF ITS OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pursuant to Local Civil Rule 7(b)(2), Defendant Clearwater Insurance Company ("Clearwater") respectfully submits this reply brief in further support of its objection to Magistrate Judge's Almond's Report and Recommendation regarding Clearwater's motion to dismiss or stay this later-filed, duplicative action.

I. The Court Should Not Be Persuaded By Plaintiffs' Repeated Assertions That Abstention Is Unwarranted Because The Connecticut State Court Action Has Been Stayed.

The central theme of Plaintiffs' opposition to Clearwater's objection to Magistrate Judge Almond's report and recommendation is that Clearwater's Connecticut state court action has already been stayed, and therefore this Court lacks the authority to abstain from hearing this case, and abstaining would leave Plaintiffs without a forum to litigate their claims. Magistrate Judge Almond's decision was similarly, and wrongly, informed by the fact that the Connecticut

action has been stayed. The fact that the Connecticut action has been stayed cannot, contrary to Plaintiffs' assertions and Magistrate Judge Almond's decision, operate to deprive this Court of its authority to consider, and grant, Clearwater's motion on its merits.

In an effort to dissuade this Court from even considering the merits of Clearwater's motion, Plaintiffs repeatedly urge this Court to treat the stay entered by the Connecticut court as if it were a conclusive and immutable termination to the Connecticut case. Plaintiffs thus repeatedly assert that if Clearwater's motion is granted, they will be left without a forum in which to litigate their claims. Nothing could be further from the truth. The Connecticut case has been stayed, not dismissed. Moreover, Clearwater has filed a motion for articulation seeking an explanation for the Connecticut court's decision as well as a motion for reargument, both of which remain pending.[1] Even if the Connecticut court ultimately rules against Clearwater, the stay can easily be lifted through a motion by the Plaintiffs or by Clearwater. Thus, the Plaintiffs are wrong to suggest that they will be "deprive[d] . . . of any forum in which to litigate their claims" if this Court abstains. (See Plaintiffs' Response to Defendant's Objection to Report And Recommendation, R. Doc. 24, at 10.) If Clearwater's motion is granted by this Court, the apparent predicate for the Connecticut state court's decision will no longer exist, and the stay of that case can be lifted.

More importantly, the decision of whether this Court should exercise its jurisdiction should be made in the first instance by this Court. This Court should not allow its decision to hinge on the completely fortuitous fact that Seaton and Stonewall's motion to stay or dismiss the Connecticut action was heard before this Court heard Clearwater's motion to stay or dismiss this

[1] Copies of Clearwater's motion for articulation and motion for reargument are attached hereto as Exhibits A and B, respectively.

later-filed action. The order in which the two courts heard the parties' competing motions should not control this Court's exercise of its discretion in weighing important federal policies regarding the limits of removal jurisdiction and the prevention of forum shopping.

The Plaintiffs' emphasis on the Connecticut court's decision is understandable, however, because they have not offered any other legitimate reason for keeping this case in Rhode Island. Although Plaintiffs have filed four briefs regarding the parties' forum dispute in this Court and the Connecticut court and have argued the issue in both courts, they have not offered any explanation for their decision to file this case in federal court in Rhode Island rather than asserting counterclaims in Connecticut state court *or* timely removing the Connecticut action to federal court. They have not justified their tactical decision to file multiple motions for extension of time in Connecticut and then, after litigating the Connecticut case for more than five months, commence a parallel lawsuit in this Court followed closely by a motion to stay or dismiss the Connecticut case. And they have offered no reason that Connecticut is an inadequate or inconvenient forum to litigate the parties' dispute.

As the Plaintiffs acknowledge, "the overwhelming majority of relevant documents are located in Rhode Island"—a short drive from the Stamford courthouse. The Plaintiffs are subject to personal jurisdiction in Connecticut, they are represented by competent Connecticut counsel, and the Connecticut court is fully capable of adjudicating this dispute. Simply put, this is a case of forum shopping and the Court should not condone Plaintiffs' conduct by allowing them to proceed in this Court.

Magistrate Judge Almond clearly acknowledged that Plaintiffs were forum shopping, but he felt constrained to recommend denying Clearwater's motion using the overly stringent

abstention standard from Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), because the Connecticut action had been stayed. This Court should rectify this mistake and, applying the appropriate abstention standard, hold that the Plaintiffs cannot defeat Clearwater's good faith forum choice in Connecticut with a later-filed, duplicative lawsuit in the District of Rhode Island.

II. The Plaintiffs Offer No Authority To Support Their Interpretation of *Wilton*.

The crux of Clearwater's objection is that Magistrate Judge Almond mistakenly applied the stringent abstention standard set forth in Colorado River rather than the more lenient and discretionary standard articulated in Wilton v. Seven Falls Co., 515 U.S. 277 (1995). Plaintiffs address this argument on only three pages in their twenty-two-page brief. They do not analyze (or even cite) any of the numerous district court cases that Clearwater relied upon in arguing that the discretionary Wilton abstention standard applies in this case. Although they ridicule Clearwater's position as "absurd," the Plaintiffs do not offer a single case citation to support their interpretation of Wilton.

Plaintiffs' inability to muster any contrary authority is revealing. This Court should not limit its own discretion when Plaintiffs can offer no precedent for doing so. Rather, this Court should hold that the discretionary Wilton standard governs abstention in this insurance coverage dispute. See, e.g., Leonard v. State Farm Mut. Auto. Ins. Co., Civ. No. 08-1451, 2009 U.S. Dist. LEXIS 87241 (W.D. Pa. Sept. 2, 2009), aff'd as modified, 2009 U.S. Dist. LEXIS 87282 (W.D. Pa. Sept. 23, 2009); General Nutrition Corp. v. Charter Oak Fire Ins. Co., Civ. No. 07-0262, 2007 U.S. Dist. LEXIS 75775, at *5 (W.D. Pa. Oct. 10, 2007); Lexington Ins. Co. v. Rolison, 434 F. Supp. 2d 1228 (S.D. Ala. 2006); ITT Indus. v. Pacific Employers Ins. Co., 427 F. Supp.

2d 552 (E.D. Pa. 2006); Coletc Indus. v. Continental Ins. Co., Civ. No. 04-5718, 2005 U.S. Dist. LEXIS 8837, at *10 (E.D. Pa. May 11, 2005); Scully Co. v. OneBeacon Ins. Co., Civ. No. 03-6032, 2004 U.S. Dist. LEXIS 9953 (E.D. Pa. May 24, 2004). Under that standard, as demonstrated in Clearwater's prior briefs in this case and in its objection to Magistrate Judge Almond's recommendation, Clearwater's motion should be granted.

III. The Plaintiffs' Reliance On *Quackenbush* Is Misplaced.

Plaintiffs are likewise incorrect in suggesting that Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996), is an absolute bar to dismissing any of the claims in this case. In Quackenbush, the Supreme Court considered whether a district court could dismiss a claim seeking *only* money damages based upon the Burford abstention doctrine. See Quackenbush, 517 U.S. at 709.[2] Pursuant to Burford, the district court had remanded a case that the California Insurance Commissioner filed in his role as trustee of the assets of a defunct insurer. Id. at 709. After concluding that the remand order was reviewable, the Supreme Court held that "Burford might support a federal court's decision to postpone adjudication of a damages action pending the resolution by state courts of a disputed question of state law," but that "[b]ecause this was a damages action . . . the District Court's remand order was an unwarranted application of the Burford doctrine." Id. at 730-31.

The Plaintiffs here seek to expand Quackenbush beyond the specific context of Burford abstention in which it arose. Seizing upon the Court's statement that "federal courts have the

[2] The Burford doctrine, named for Burford v. Sun Oil Co., 319 U.S. 315 (1943), permits a federal court to abstain from deciding "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." Quackenbush, 517 U.S. at 726-27 (quoting New Orleans Public Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989)).

power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary," id., they argue that dismissal is unavailable in this case because two counts in their complaint seek damages. This is not a proper interpretation of Quackenbush for three reasons.

First, Quackenbush did not address the situation where a plaintiff seeks *both* discretionary relief *and* damages. Indeed, the Court noted that it had previously sanctioned the dismissal of cases seeking only equitable relief. Id. at 718-19. The Court likewise endorsed the holding of Fair Assessment in Real Estate Assn., Inc. v. McNary, 454 U.S. 100, 115 (1981), in which it affirmed the dismissal of a damages claim that was contingent upon a declaration that a state tax scheme was unconstitutional. Quackenbush, 517 U.S. at 719. The Court described such cases as proper exercises of the discretion traditionally enjoyed by courts of equity, highlighting the Insurance Commissioner's admission that he was *only* seeking legal relief as the justification for a different result in Quackenbush. Id. at 728 ("[T]he Commissioner appears to have conceded that the relief being sought in this case is neither equitable nor otherwise committed to the discretion of the court."). Three years later, the Court again emphasized this point, explaining Quackenbush's holding as follows: "in a case seeking damages *rather than* equitable relief, a federal court may not abstain, but can stay the action pending resolution of the state-law issue" Jefferson County v. Acker, 527 U.S. 423, 435 n.5 (1999) (emphasis added).[3]

[3] See also Guillemard-Ginorio v. Contreras-Gomez, 585 F.3d 508, 517 n.14 (1st Cir. 2009) ("There is mixed authority on the question of whether abstention doctrines are only available to challenge the exercise of a federal court's equitable power, or alternatively, whether they may apply to actions for damages as well."); Royal Indem. Co. v. Apex Oil Co., 511 F.3d 788, 798 n.4 (8th Cir. 2008).

Quackenbush simply does not apply where, as is the case here, the plaintiff seeks both damages and equitable relief.

Second, the rationale underlying Quackenbush does not apply to abstention under Wilton (or Colorado River). Quackenbush explained that Burford "balances the strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court, against the State's interests in maintaining uniformity in the treatment of an essentially local problem." 517 U.S. at 728 (internal quotation marks omitted). As such, "the concern is with principles of comity and federalism." Id. at 723. The Court contrasted these concerns with "far broader range of considerations" that justify the dismissal of damages actions under the doctrine of *forum non conveniens*. Id. These concerns include "convenience to the parties," "the practical difficulties that can attend the adjudication of a dispute in a certain locality," and the "difficulty of coordinating multiple suits," id.—precisely the type of considerations pertinent to abstention under Wilton.[4] Dismissal should therefore be an available remedy under Wilton regardless of whether a damages claim is present in the case.

Third, even if Quackenbush were applicable here, this Court should not read the decision as mandating a rigid and inflexible rule for all cases. To the contrary, Quackenbush expressly rejected the lower court's conclusion that "Burford abstention does not apply to suits seeking solely legal relief," explaining that this "*per se* rule . . . is . . . more rigid than our precedents

[4] See Wilton, 515 U.S. at 283 (noting that the "inquiry . . . entails consideration of whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, [and] whether such parties are amenable to process in that proceeding, etc.") (internal quotation marks omitted); see also United States v. Fairway Capital Corp., 483 F.3d 34, 40 (1st Cir. 2007) (noting that the factors pertinent to Colorado River abstention include "the inconvenience of the federal forum, "the desirability of avoiding piecemeal litigation," "whether state or federal law controls," and "the adequacy of the state forum to protect the parties' interests").

require." Id. at 729-30. In a thoughtful concurrence, Justice Kennedy underscored this point and recognized that dismissal of a suit for damages might be appropriate under certain circumstances. Quackenbush, 517 U.S. at 733 (Kennedy, J., concurring). He explained that "[t]he traditional role of discretion in the exercise of equity jurisdiction makes abstention easiest to justify in cases where equitable relief is sought, *but abstention, including dismissal, is a possibility that may yet be addressed in a suit for damages, if fundamental concerns of federalism require us to face the issue.*" Id. at 734 (Kennedy, J., concurring) (emphasis added); see also Gilbertson v. Albright, 381 F.3d 965, 982 n.18 (9th Cir. 2004) (citing Justice Kennedy's concurrence and refusing to "foreclose the possibility of a unique case where damages are sought and Younger principles apply but dismissal is indicated for some other reason").

This case presents equally significant concerns. Plaintiffs' attempt to make an end-run around the federal removal statute is an affront to the delicate balance of federal and state interests that Congress struck in 28 U.S.C. § 1446. Likewise, Plaintiffs' invocation of the jurisdiction of this Court to hide from a case properly filed in state court seeks to undermine the protections of state sovereignty enshrined in the Constitution. See U.S. Const. art. III § 2 & Amend. XI. If this Court believes, as Magistrate Judge Almond did, that staying this case would not be practical given the posture of Clearwater's first-filed Connecticut lawsuit, then this is a case where dismissal is warranted because "a serious affront to the interests of federalism could be averted in no other way." Quackenbush, 517 U.S. at 733 (Kennedy, J., concurring).

IV. Conclusion.

For the foregoing reasons, as well as those set forth in its objection to the Report and Recommendation and motion to dismiss or stay this action, Clearwater's objection should be sustained and its motion should be granted.

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CERTIFICATION

I hereby certify that on March 22, 2010, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties noted below by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing for viewing and/or downloading through the Court's CM/ECF System.

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