United States Courts
Southern District of Texas
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Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, Plaintiff, v. ENRON CORP., et al., Defendants.	§ § § § § § §	Consolidated Lead No. H-01-3624
AMERICAN NATIONAL INSURANCE COMPANY, et al., Plaintiffs, vs. J. P. MORGAN CHASE & COMPANY, Defendant.	§ § § § § § §	Civil Action No. G-02-0299

PLAINTIFFS AMERICAN NATIONAL, ET AL.'S MOTION FOR RECONSIDERATION OF REMAND ORDER OR, IN THE ALTERNATIVE, REQUEST FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

Plaintiffs, American National Insurance Company, et al., move for reconsideration of the Court's August 12, 2002, Order denying American National's Motion to Remand and ask the Court to remand this action to state court. In the alternative, Plaintiffs seek permission, pursuant to 28 U.S.C. § 1292(b), to appeal the question of whether "related to" bankruptcy jurisdiction may be exercised under the facts presented and pursuant to applicable law.

BACKGROUND

American National Insurance Company, et al. ("American National") brought Texas state law claims in state court against Defendant J.P. Morgan Chase & Company ("JPM"). Shortly thereafter, JPM removed the action to federal court. *Removal Notice* (Exhibit A). JPM asserted

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federal subject matter jurisdiction based upon (1) supplemental jurisdiction under 28 U.S.C. §§ 1367 and 1441; (2) the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §§ 77(p)(c) and 78bb; and (3) "related to" bankruptcy jurisdiction pursuant to 29 U.S.C. §§ 1334(b) and 1452(a).

JPM raised its "related to" bankruptcy jurisdiction argument in the final two paragraphs of the Removal Notice's last listed ground for removal. *Removal Notice* at 9-10, ¶¶ 21, 22. These two paragraphs contain the bald, unsupported assertions that JPM may have contribution claims against Enron's bankruptcy estate and that "related to" bankruptcy jurisdiction exists because Enron had purchased directors and officers liability insurance. *See Id.*

American National moved for remand explaining that JPM failed to meet its burden of demonstrating any legitimate basis in the law for removal. *Remand Motion* (Exhibit B). Concerning the purported "related to" bankruptcy jurisdiction, American National complained that JPM failed to analyze the claims presented to demonstrate that there were any contribution or indemnity claims with the required nexus to, that is "related to," Enron's bankruptcy estate. *Id.* at 11-14. JPM, in responding to the Remand Motion, merely reiterated its conclusory allegation of contribution and indemnity claims and re-stated that it may have indemnity claims under an Enron directors and officers insurance policy. *Response to Remand Motion* (Exhibit C).

The Court rejected JPM's first two grounds for removal, but determined that it could and should exercise "related to" bankruptcy jurisdiction. Memorandum and Order ("*Order*") (August 12, 2002) (Exhibit D). American National brings this Motion for Reconsideration because, as a matter of law, JPM failed to meets its burden of demonstrating subject matter jurisdiction, JPM does not have any contribution or indemnity claims against Enron's bankruptcy estate, and the exercise of jurisdiction over American National's action is therefore improper.

MOTION FOR RECONSIDERATION

The Court enter an Order on August 12, 2002, denying American National's Motion to Remand based upon exercise of 28 U.S.C. §§ 1334(b) and 1452 "related to" bankruptcy jurisdiction. A review of the applicable law establishes that JPM does not have any cognizable contribution or indemnity claims which could affect Enron's bankruptcy estate.

The test for "related to" bankruptcy jurisdiction is whether "the outcome of that proceeding could conceivably have any effect of the estate being administered in bankruptcy." *In re Woods,* 825 F.2d 90, 93 (5th Cir. 1987) (adopting *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3d Cir. 1984)). The Fifth Circuit has noted that a claim for contribution may be an adequate basis for "related to" bankruptcy jurisdiction. *Arnold v. Garlock, Inc.,* 178 F.3d 426, 434-35 (5th Cir. 2001) (the court held, however, that under Texas law contribution claims against the bankruptcy estate were invalid). In the Order denying remand, the Court said:

> Clearly JPM's claims for contribution and indemnity alter the rights, obligations, and choice of action of the debtor and have an effect on the administration of the estate and the debtor's reorganization. Moreover JPM is named as a defendant in the consolidated class action complaints in *Newby v. Enron Corp.,* H-01-3624, and *Tittle v. Enron Corp.,* H-01-3913, MDL 1446, raising the specter of a significant impact on Enron's bankrupt estate should JPM's potential claims for indemnity and contribution succeed.

Order (App. A) at 15-16.

The JPM "claims for indemnity and contribution" referenced in the Order comprise: (1) conclusory allegations that JPM has contribution or indemnity claims against Enron's bankruptcy estate and (2) the unanalyzed and unsupported contention that Enron's officers and directors liability insurance somehow brings American National's claims with the purview of "related to" bankruptcy jurisdiction. *See Removal Notice* at 8-9; *Response to Remand Motion* at 17-18.

JPM failed to explain what body of law it seeks to employ in pursuing these purported contribution and/or indemnity claims. Rather, JPM merely alleged that these claims arise "under the applicable common law." *Removal Notice* at 9, ¶ 21. Whether JPM means Texas common law, federal common law, or some other state's common law, is not explained. In sum, JPM does not does not meet its burden of establishing that contribution/indemnity claims give rise to federal jurisdiction.

The basis for relying on directors and officers insurance is equally vague and even more convoluted:

> If this case were properly consolidated and those other parties [the names of all these "other parties" are never specified] properly joined, such consolidation and joinder may also impact the Enron bankruptcy. Enron purchased approximately $450 million in "Directors and Officers" liability insurance policies which may correctly be considered party of the Enron estate. [citation to motion of Enron directors in the bankruptcy court]. If those defendants are joined to this case, as they should have been (but for Plaintiffs' tactical pleadings), their rights under those policies may impact the Enron estate. JPMC may have rights to contribution from those defendants as well, which may also in turn trigger their rights to the insurance policies of the Enron estate. [cite to Texas code section dealing with amount of recovery, not liability, on a contribution claim].

Removal Notice at 10, ¶ 22. In its Response to the Remand Motion, JPM again merely alleges: "JPMorgan Chase also could have rights to contribution from Enron's directors and officers, whose liability insurance policies of approximately $450 million are correctly considered part of the Enron estate." *Response to Remand Motion* at 17. How these are "correctly" part of the bankruptcy estate, of course, is not explained. Rather than cite authority to support its contention, JPM merely stands on its own conclusory allegations.

JPM's generalized allegations – without any reference to the applicable law governing contribution or indemnity claims – are insufficient in the face of a Motion to Remand. JPM as the removing party bears the burden of demonstrating that the federal jurisdictional requirements

have been satisfied. *Order* at 3 (citing *Manquno v. Prudential Property and Casualty Co.,* 276 F.3d 720, 723 (5th Cir. 2002)). "Moreover, a party opposing a motion to remand bears the burden of demonstrating federal subject matter jurisdiction." *Order* at 3-4 (citing *Green v. Ameritrade,* 279 F.3d 590, 596 (8th Cir. 2002). *See also Hummel v. Townsend,* 883 F.2d 367, 369 (5th Cir. 1989).

JPM, in other words, failed to meet its burden of demonstrating that the federal court may exercise subject matter jurisdiction. The applicable law, in any event, makes clear that JPM does not have contribution or indemnity claims which could impact Enron's bankruptcy estate.

American National's action, alleging only Texas state law claims, brought in a Texas state court, complaining of conduct occurring in Texas, is governed by Texas substantive law. "It is well established under Texas law that neither contribution nor indemnification can be recovered from a party against whom the injured party has no cause of action." *Arnold v. Garlock, Inc.,* 278 F.3d 426, 439 (5th Cir. 2001) (citing *Safway Scaffold Co. of Houston, Inc. v. Safway Steel Products, Inc.,* 570 S.W.2d 225, 228-29 (Tex. App. – Houston [1st Dist.] 1978, writ ref'd n.r.e.)).

The Texas code "eliminates a debtor in bankruptcy as a 'responsible third party' from whom contribution may be sought, except to the extent that liability insurance or another source of third party funding may be available to pay the claims asserted against the debtor." *Id.* (citing Tex. Civ. Prac. & Rem. Code § 33.011(6)(B)(ii)). In this case there is no source of liability insurance or third party funding related to Enron's bankruptcy estate. Under Texas law, therefore, JPM can have no contribution/indemnity claims against Enron. Suspiciously, JPM failed to cite section 33.011 of the Texas Civil Practice & Remedies Code, which specifies that a person or entity that is a debtor in bankruptcy cannot be subject to a contribution claim. Instead

JPM cited only section 33.012, which deals with the amount of recovery for contribution claims and is wholly irrelevant to the issue of Enron's possible liability, which is the issue before this Court.

JPM's proposition that Enron's directors and officers liability insurance provides "related to" bankruptcy jurisdiction is a red herring. The insurance JPM points to as a basis for its contribution/indemnity claims cannot support federal subject matter jurisdiction because the policy proceeds are not payable to, and thus do not "relate to," the bankruptcy estate. The Fifth Circuit addressed this issue and made clear that directors and officers liability coverage does not "relate to" the corporation's bankruptcy for the purposes of sections 1334 and 1452. *In re Louisiana World Exposition, Inc.*, 852 F.2d 1391 (5th Cir. 1987). *See also In re Equinox Oil Co.*, 2002 U.S. App. Lexis 16170 (5th Cir. August 12, 2002); *In re Edgeworth,* 993 F.2d 41 (5th Cir. 1993).

An insurance policy owned by the debtor is generally considered property of the estate. *Edgeworth,* 993 F.2d at 55 & n.13. But whether the proceeds of a particular insurance policy is property of the estate depends upon the nature of the policy. *See Equinox Oil,* 2002 U.S. App. Lexis 16170 at *6. In determining "related to" bankruptcy jurisdiction, the issue is not who purchased the policy, but who may receive the proceeds. *See Id.* at *5-11. The central question when determining whether insurance proceeds associated with a policy are property of the bankruptcy estate is whether, in the absence of the bankruptcy proceeding, the proceeds of the policy would belong to debtor when the insurer pays a claim. *Id.* The proceeds of the policy JPM relies upon as a basis for "related to" bankruptcy jurisdiction plainly will not be paid to Enron's bankruptcy estate.

In *In re Louisiana World Exposition,* the Fifth Circuit held that the proceeds of a directors and officers liability policy were not part of the bankruptcy estate of Louisiana World Exposition, Inc. ("LWE"). 832 F.2d at 1398-1401. The exposition had purchased insurance policies providing liability coverage to its officers and directors for liabilities and related legal expenses they might incur in relation to their service to the corporation. The insurance policies also provided indemnification to LWE to the extent it might be required to indemnify the directors or officers for such legal expense or liability. The directors and officers, not LWE, the debtor, were the insured under the policy. The appellate court concluded that, while the policies themselves were part of the bankrupt's estate (such that the bankruptcy court could prevent their cancellation), the debtor had no ownership interest whatever in the proceeds of the liability coverage as the obligation of the insurance companies was only to the directors and officers who were the only insureds. *Id.*

The holding in *Louisiana World Exposition* was affirmed in *Edgeworth* and *Equinox Oil.* In *Edgeworth* the Court explained:

> The overriding question when determining whether proceeds are property of the estate is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on a claim. When a payment by the insurer cannot inure to the debtor's pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate. In other words, when the debtor has no legally cognizable claim to the insurance proceeds, those proceeds are not property of the estate.

In re Edgeworth, 993 F.2d at 55-56.

When reviewing JPM's Response to the Motion to Remand, American National could not ascertain, from JPM's conclusory allegations, any legal basis for contribution or indemnity claims related to American National's causes of action which could possibly "relate to" Enron's bankruptcy estate. In its Motion to Remand, therefore, American National pointed out that JPM

did not meet its burden of demonstrating removal was proper because JPM failed to analyze the claims at issue or explain which of American National's claims against JPM could somehow give rise to indemnity or contribution claims against Enron's bankruptcy estate. *See Remand Motion* at 13-14.

JPM simply ignored this challenge. In its Response to the Motion to Remand, JPM merely reiterated its conclusory allegations. An analysis of the claims presented, however, must be performed to determine if there indeed exists a federal question, that is, to determine whether the claims presented are related, or instead wholly unrelated, to the bankruptcy. *See Goodman v. Lee,* 78 F.3d 1007, 1011 (5th Cir. 1996) (court must unravel the claims and examine the applicability of federal and state law); *Bauhaus USA, Inc. v. Copeland,* 292 F.3d 439, 445 (5th Cir. 2002) (discussing ERISA preemption, "unless the federal courts cautiously, deliberately, and charily examine every asserted challenge to, or claim of limitation on, subject matter jurisdiction . . . Congress's command cannot be effectuated to the extent clearly intended) (J. Weiner, dissenting); *Manguno,* 276 F.3d at 723 ("To determine whether jurisdiction is present for removal, we consider the claims in the state court petition . . ."); *Halper v. Halper,* 164 F.3d 830, 838 (3d Cir. 1999) ("claims presented must be analyzed to determine if . . . they are wholly unrelated to the bankruptcy"). *See also, e.g., In re AK Services, Inc.,* 159 B.R. 76, 84 (D. Mass. 1993) (court determined it had no jurisdiction over certain claims after it analyzed the claims to see if they were core, non-core or wholly unrelated to the bankruptcy).

To the extent that JPM may contend that its contribution or indemnity claims are asserted under federal statutory or common law, the argument fails for two reasons. First, JPM as the removing defendant had the burden to specify, but failed to specify, the legal basis for any such contribution or indemnity claims. Second, any argument by JPM that the federal nature of the contribution/indemnity claims establishes federal jurisdiction cannot be sustained in light of the well-established rule that a federal defense to a state law claim does not confer federal question jurisdiction. *See Gaar v. Quirk,* 86 F.3d 451, 453 (5th Cir. 1996); *Aaron v. National Union Fire Ins. Co.,* 876 F.2d 1157, 1161 (5th cir. 1989), *cert. denied,* 493 U.S. 1074 (1990). If JPM's theory is based upon the law of some other state, JPM had the burden of specifying how such laws are applicable and how they can support federal jurisdiction. *See Hummel, supra*

Similarly, to the extent JPM alleges that "related to" bankruptcy jurisdiction in the instant action should be based upon pending contribution or indemnity claims against Enron in other actions, JPM fails to meet its burden of (1) specifying the claims upon which this theory is based and (2) demonstrating how these alleged contribution/indemnity claims could possible related to the dispute between JPM and American National. JPM's failure to provide an explanation is not surprising, however, because such contribution claims, alleged in response to other causes of action brought by other parties in other lawsuits, are plainly not material to the issues now before this Court.

Analysis of the claims under Texas law establishes that the Court may not exercise "related to" bankruptcy jurisdiction over American National's action. Because JPM has not demonstrated that federal common law or some other state's law should govern the claims and such to provide "related to" bankruptcy jurisdiction, JPM failed to demonstrate federal subject matter jurisdiction.

If the super-expansive interpretation of jurisdiction granted by Congress under section 1334(b) and 1452, proposed by JPM and adopted in this Court's denial of remand, is embraced by federal courts around the country, the securities laws enacted and implemented by the states would be gutted. Almost as a matter of course, when large-scale fraud or other serious misdeeds are revealed at a publicly held corporation and shareholders begin filing lawsuits, the corporation files for bankruptcy protection. Under the approach articulated by Defendants, the right of a plaintiff to bring state law securities claims would in effect be abrogated. This approach is not in keeping with repeated statements from Congress which support state regulation of securities. *See Green v. Fund Asset Management, L.P.*, 245 F.3d 214, 223 n.7 (3d Cir. 2001); *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1107 (4th Cir. 1989) (*en* banc); Riley *v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 168 F.Supp.2d 1352, 1356 (M.D. Fla. 2001) (citing H.R.CONF. REP. 105-803).

A lack of subject matter jurisdiction may be raised at any time. *See In re McCloy,* 296 F.3d 370 (5th Cir. 2002). "While all federal courts are courts of limited jurisdiction, defined by the Constitution and statute, a bankruptcy court's jurisdiction is even more restricted and wholly defined by statute." *Order* at 14-15 (citations omitted). As American National has demonstrated, this Court does not have a basis for exercising "related to" bankruptcy jurisdiction and the action should be remanded to state court.

MOTION TO APPEAL DENIAL OF REMAND

In the alternative, if the Motion for Reconsideration is not granted, American National seeks permission to appeal the denial of its Motion pursuant to 28 U.S.C. § 1292(b). In light of Texas law governing contribution/indemnity claims and the Fifth Circuit's holding that the proceeds of directors and officers liability insurance do not "relate to" bankruptcy jurisdiction,

exercising jurisdiction over American National's action puts at issue the limits of a federal court's power to exercise "related to" bankruptcy jurisdiction.

That there exist facts and circumstances common to the bankruptcy proceeding and the plaintiffs' action is undeniable, but such similarities have been held insufficient in themselves for conferring "related to" bankruptcy jurisdiction. *In re Zale Corp.,* 62 F.3d at 751-55 (5th Cir. 1995). Judicial economy, although considered for permissive abstention, likewise cannot be the basis of such jurisdiction. *Id. See also Carpenter v. Wichita Falls Indep. Sch. Dist.,* 44 F.3d 362, 371 (5th Cir. 1995) ("to complain of the costs arising out of concurrent litigation in separate jurisdictions is to complain generally of federalism, which suffers inefficiencies and multiplicity for its own sake") (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr.,* 460 U.S. 1, 13 (1983).

The limits of "related to" bankruptcy jurisdiction, therefore, is a controlling question of law in this action and will be a recurring question as to which there is substantial ground for difference of opinion. In an Enron related action, the district court in the Western District of Texas recently rejected "related to" bankruptcy jurisdiction asserted by one of Enron's officers. *Bullock v. Arthur Andersen,* No. A-02-CA-278-H, Order of Remand (June 17, 2002) (Exhibit E). American National, therefore, asks the Court to allow immediate appeal in the event the Court denies the pending Motion for Reconsideration.

PRAYER

American National prays that the Court reconsider its August 12, 2002, denial of American National's Motion to Remand, vacate its August 12, 2002 Order, and enter a new order remanding the action to the 56th District Court of Galveston County, Texas. In the alternative, if the Motion is not granted, American National requests the Court to allow an

immediate appeal, within ten days of the denial of the Motion to Reconsider, pursuant to 28 U.S.C. § 1292(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this motion was served on all counsel via electronic means pursuant to Court order and also on counsel for J.P Morgan Chase & Company via U.S. mail on 5 Sept, 2002.

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The Exhibit(s) May

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