United States Courts
Southern District of Texas
FILED
OCT 09 2002
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 REPLY TO J.P. MORGAN'S OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION

Plaintiffs, American National Insurance Company, et al., ("American National" or "Plaintiffs") tender this Reply to J.P. Morgan Chase & Company's ("JPM") Opposition (and Revised Opposition) to Plaintiff's Motion for Reconsideration of the Court's decision to deny remand (JPM's "Opposition"). American National submits this Reply brief to show that (1) JPM's Opposition is based upon incorrect application of the law; (2) JPM fails to carry its burden of establishing federal subject matter jurisdiction and improperly attempts to shift onto American National the burden of disproving federal jurisdictional; and (3) JPM's recent filing of an Enron-related action in a Texas state court further demonstrates that American National's action should be remanded to state court.

1067

BACKGROUND

American National brought Texas state law claims in state court against JPM. Shortly thereafter, JPM removed to federal court and the action was consolidated with *Newby*. American National requested remand but the Court agreed with JPM that federal subject matter jurisdiction could be exercised based upon "related to" bankruptcy jurisdiction pursuant to 29 U.S.C. §§ 1334(b) and 1452(a). Memorandum and Order ("*Order*") (August 12, 2002).

The Court based its decision on JPM's allegations of contribution and/or indemnity claims against Enron's bankruptcy estate. *Id.* In its Motion for Reconsideration ("Reconsideration Motion" or "Motion"), American National provides authority demonstrating that JPM does not, in fact, have any cognizable contribution/indemnity claims against the Enron bankruptcy estate such to provide "related to" bankruptcy jurisdiction. Specifically, American National (1) cites provisions of the Texas Civil Practice & Remedies Code, as well as Texas and Fifth Circuit case law explaining these provisions, that bar contribution claims against a debtor in bankruptcy and (2) discusses Fifth Circuit precedent holding that the directors and officers insurance cited by JPM as a basis for its indemnity claim cannot provide the basis for "related to" bankruptcy jurisdiction. *See Reconsideration Motion (Exhibit A)* at 5-10.

The Reconsideration Motion also shows that JPM, in its attempt to establish federal subject matter jurisdiction, bases removal on conclusory allegations that are inadequate for meeting a removing party's burden. *See Id.* at 2-4 (citing *Order* at 3-4; *Manquno v. Prudential Property and Casualty Co.,* 276 F.3d 720, 723 (5th Cir. 2002); *Green v. Ameritrade,* 279 F.3d 590, 596 (8th Cir. 2002); *Hummel v. Townsend,* 883 F.2d 367, 369 (5th Cir. 1989) (cases explaining removing party's burden of establishing federal subject matter jurisdiction). Under JPM's theory of "related to" bankruptcy jurisdiction, a party can remove any pending state court

case to federal court simply by finding any pending bankruptcy proceeding and then alleging that it has a "conceivable contribution and/or indemnity claim" against the debtor in bankruptcy. Under JPM's standard, the fact that there may be no facts to support the contribution/indemnity claim, or that the claim is barred by limitations or other controlling law, is of no consequence.

JPM pedantically declares that its claims against the Enron bankruptcy estate only need be "conceivable" and hence there is no need for the court to analyze the claims or require detail proofs. *See Opposition* at 6 n.5. A claim, however, is not "conceivable" where, as here, it is barred by controlling law.

By its Opposition brief, JPM argues that the Reconsideration Motion should be rejected because (1) reconsideration is barred under Rules 59 and 60 of the Federal Rules of Civil Procedure (*Opposition* at 3-4); (2) Plaintiffs' claims against JPM are "related to" Enron's bankruptcy because Plaintiffs own Enron securities (*Opposition* at 6-7); (3) JPM may assert contribution/indemnity claims under Texas law (*Opposition* at 7-9); (4) JPM may assert contribution/indemnity claims under New York law (*Opposition* at 10); and (5) The rule enunciated by the Fifth Circuit in *Louisiana World Exposition, Inc. v. Fed. Ins. Co.*, 832. F.2d 1391 (5th Cir. 1987) and its prodigy is bad law and therefore inapplicable to bar JPM's claims under Enron's directors and officers insurance which also supposedly has "entity coverage." (*Opposition* at 11-14). All of JPM's contentions are based upon incorrect statements of law and/or upon "factual" allegations that are conclusory and unsupported by admissible evidence.

Interestingly, JPM fails mention it own role as plaintiff in a Texas state court Enron-related action. JPM, along with other banks involved in the Enron debacle, recently filed a lawsuit against Enron officers in a Texas court alleging claims under Texas state law. *See Exhibits B and C.* Thus, while using every conceivable tactic to keep American National out of

state court, JPM implicitly admits that claims such as those raised by American National should properly be tried in state court. Not surprisingly, JPM fails to explain why New York law should not apply to its Enron-related claims and or why JPM's claims should not properly by tried in federal court, as JPM asserts is appropriate (and required) for American National's claims.

RULES 59 AND 60 DO NOT BAR AMERICAN NATIONAL'S MOTION FOR RECONSIDERATION

JPM's contention that Rules 59 and/or 60 of the Federal Rules of Civil Procedure preclude consideration of American National's Motion is frivolous. It is well established that challenges to subject matter jurisdiction can be raised at any time by one of the parties or *sua sponte* by the court. *In re McCloy,* 296 F.3d 370 (5th Cir. 2002); *Giles v. NYL Care Health Plans, Inc.,* 172 F.3d 332, 336 (5th Cir. 1999); *Johnston v. United States,* 85 F.3d 217, 218 n.2 (5th Cir. 1996); *Solsona v. Warden,* 821 F.2d 1129, 1132 n.2 (5th Cir. 1987).

American National's Motion for Reconsideration solely concerns this Court's exercise of subject matter jurisdiction. The Fifth Circuit recently noted that Rule 60 "has nothing to do" with subject matter jurisdiction and that a motion concerned with subject matter jurisdiction is "a question that a registering court (and an appellate court, for that matter) has an obligation to answer..." *Jackson v. Fie Corp.*, 302 F.3d 515, 2002 U.S. App. Lexis 16703 at *24 (5th Cir. August 20, 2002).

PLAINTIFFS' OWNERSHIP OF ENRON SECURITIES DOES NOT RESULT IN "RELATED TO" BANKRUPTCY JURISDICTION

JPM contends, by way of a one-paragraph argument, that American National's mere ownership of Enron securities means that the instant case is "related to" the Enron bankruptcy. JPM cites one inapposite case in support of this theory. *In re Canion,* 196 F.3d 579 (5th Cir. 1999). *Canion* was brought by a judgment creditor of the debtor who sued friends, family and

business associates of the debtor for conspiring to interfere with the plaintiff's collection efforts against the debtor. *Id.* at 581. The plaintiff asserted claims of fraudulent conveyance and other claims that were non-core, but related to the bankruptcy. *Id.* at 582-83. Only after obtaining an adverse ruling from the bankruptcy court did the plaintiff assert that the bankruptcy court lacked jurisdiction over some of the claims. *Id.* at 583. Based upon the applicable Texas subrogation law, the appellate court determined that, at the time plaintiff filed suit, the claims were "related to" the bankruptcy proceeding. *Id.* 585-87. The *Canion* decision, accordingly, does nothing to support or enhance JPM's argument.

American National has not brought claims against Enron. JPM nonetheless contends that American National's suit against JPM is, in essence, also a derivative action. This very proposition was recently raised and rejected by a district court in the Western District of Texas. In an Enron-related lawsuit, a defendant Enron officer asserted "related to" bankruptcy jurisdiction based upon the same allegations and argument made by JPM. *See Bullock v. Arthur Andersen,* No. A-02-CA-278-H, Order of Remand (June 17, 2002) (*Exhibit D*). The *Bullock* court carefully analyzed the Enron officer's claim and determined, as a matter of law, the theory could not be employed to confer "related to" bankruptcy jurisdiction. *Id.* This Court, like its sister district court, should similarly reject JPM's argument.

JPM CANNOT ASSERT CONTRIBUTION/INDEMNITY CLAIMS UNDER TEXAS LAW

The Texas Civil Practices and Remedies Code provides that a "person or entity that is a debtor in bankruptcy proceedings or a person or entity against whom this claimant's claim has been discharged in bankruptcy, except to the extent that liability insurance or other source of third party funding may be available to pay claims asserted against the debtor" cannot be subject to a contribution claim. Tex. Civ. Prac. & Rem. Code § 33.011(6)(B)(ii).

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. The provisions of the Texas Civil Practice & Remedies Code material to this case have been reviewed by the Fifth Circuit which has held, "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, thus, "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." [1] *Id.* (citing Tex. Civ. Prac. & Rem. Code § 33.011(6)(B)(ii)).

In its Opposition, JPM fails to address the implications of *Arnold,* but instead asserts that its claims are based upon section 32.002 of the Civil Practices & Remedies Code. Nothing in section 32.002, however, states or implies that 33.001(b)(B)(ii), the more specific provision, is inapplicable to 32.002. Further, section 32.001 is not applicable to the contribution/indemnity claims alleged by JPM. Section 32.002 provides:

> A person against whom a judgment is rendered has, on payment of the judgment, a right of action to recover payment from each codefendant against whom judment is also rendered.

JPM fails to explain what judgment and payment of judgment it relies upon in attempting to apply section 32.002. In fact, there has been no judgment, and there has been no payment of judgment. Texas statutory law and Fifth Circuit case law make it clear that JPM does not have any conceivable contribution or indemnity claims against Enron's bankruptcy estate. *See*

[1] JPM's purported claim under directors and officers insurance is discussed *infra*.

Arnold, supra. (barring JPM's contribution claims); *In re Louisiana World Exposition, Inc.*, 852 F.2d 1391, 1398-1401 (5th Cir. 1987) (barring JPM's indemnity claims).

JPM'S CONTRIBUTION/INDEMNITY CLAIMS UNDER NEW YORK LAW MUST BE REJECTED

Realizing that under Texas law and Fifth Circuit precedent its has no "conceivable" contribution or indemnity claims, JPM tries a new tack. JPM argues that New York's choice-of-law rules should be employed, with New York substantive law then applied to provide "related to" bankruptcy jurisdiction for the contribution and/or indemnity claims. JPM's novel approach for attempting to inject cognizable contribution/indemnity claims fails because (1) American National asserts only Texas state law claims and, accordingly, there is no choice-of-law issue; (2) American National's action is pending in the Southern District of Texas and Texas choice-of-law principles apply; and (3) in any event, under New York's choice-of-law rules (as under Texas choice-of-law criteria), Texas substantive law applies.

"Choice-of-Law" Is Not An Issue

American National's action against JPM is brought under Texas law and JPM's contribution/indemnity claims associated with those claims necessarily are Texas law claims. JPM, with the burden of demonstrating jurisdiction, does not show that it has a cognizable claim under some other substantive law that may be raised in American National's action against JPM. In sum, there is no basis for asserting New York contribution/indemnity claims in an action pleaded under Texas law. JPM, accordingly, has no basis for raising the issue of choice-of-law.

This Court Must Apply Texas Choice-of-Law Principles

It is well established that a district court applies the choice of law rules of the forum state. *Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 647 (5th Cir. 2002); *Baxter v. Strum, Ruger & Co.*, 13 F.3d 40, 43 (2d Cir 1993). "In a case based upon diversity jurisdiction, a

federal court exercising its "related to" jurisdiction over state law claims applies the choice of the rules of the forum state." *Periera v. Cogan,* 2001 U.S. Dist. Lexis 2461 at*55 (S.D.N.Y. 2001) (citing 28 U.S.C. § 1334(b) and *Whitney Holdings, Ltd. V. Givotovsky,* 988 F.Supp. 732, 741 n.53 (S.D.N.Y. 1997)). Accordingly, even if the claims raised by JPM required a choice-of-law analysis, Texas choice-of-law principles are applied.

This case is pending in the Southern District of Texas. The "forum," accordingly, is located in Texas and the Court must apply Texas choice-of-law rules. Texas courts apply the "most significant relationship" test. *See The Torrington Co. v. Stutzman,* 46 S.W.3d 829 (Tex. 2000). JPM does not dispute that, under Texas law choice of law principles, Texas law substantive law is applicable. Enron is located in Texas, its officers reside or at the relevant times resided in Texas, and the complained-of sham transactions were implemented by Enron in Texas. Texas plainly has the most significant relationship with American National's action and with any contribution/indemnity claims arising from the conduct of Enron or its officers.

Even Under New York Choice-of-Law Principles, Texas Substantive Law Applies

Even under New York choice-of-law rules, Texas law is controlling. As JPM explains, "under New York choice of law rules, courts follow the approach of "giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." *Opposition* at 10 n.8 (citing *Dep't of Econ. Dev. v. Arthur Andersen & Co.,* 747 F.Supp. 922, 935 (S.D.N.Y. 1990)). As usual, JPM does not provide legal analysis to support its theory but instead relies on a few "sound-bites" from New York choice-of-law decisions.

Notwithstanding JPM's arguments, New York choice of law principles, like those of Texas, require a court to apply the law of the state with the most significant relationship. *See*

Indosuez Int'l Finance B.V. v. National Reserve Bank, 774 N.E.2d 696, 244-45 (N.Y. 2002). It is well established that a New York court will apply the "center of gravity" inquiry and consider factors listed in Restatement [Second] of Conflict of Laws § 188 [2]) when determining choice of law. *See Integon Ins. Co. v. Garcia,* 261 A.D.2d 480, 481-82 (N.Y. App. [2d Div.] 2001) (citing *J.. Zeevi and Sons, Ltd. V. Grindlays Bank,* 333 S.E.2d 168 (N.Y.), *cert. denied,* 423 U.S. 866 (1975); *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.,* 84 N.E.2d 1065, 1068 (N.Y. 1994).

JPM cannot with a straight face claim that Houston is not the center of gravity for this case. There simply is no choice-of-law issue. JPM seeks to inject New York substantive law because, in its own words, "New York law clearly affords rights to contribution and/or indemnity in the circumstances of this case." *Opposition* at 10. JPM's jejune attempt to escape the affect of Texas substantive law and the Fifth Circuit's *Louisiana World Exposition* decision should be rejected.

CLAIMS BASED UPON DIRECTORS AND OFFICERS INSURANCE ARE BARRED BY CONTROLLING FIFTH CIRCUIT PRECEDENT

JPM's contribution/indemnity claims, based upon Enron's directors and officers insurance, are barred pursuant *In re Louisiana World Exposition*, 832 F.2d 1391 (5th Cir. 1987). The case has not been overruled, but instead has been followed by subsequent Fifth Circuit decisions. *See 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). JPM, nonetheless, wants this Court to ignore the holdings of the Fifth Circuit based upon **a single district court decision that "called into doubt"** the Fifth Circuit's ruling. *Opposition* at 12. The choice for this Court – to follow the holdings of Fifth Circuit decisions, or instead follow dicta found in one Louisiana district court decision – is easy.

JPM also alleges that the provisions of the subject officers and directors insurance provide an escape from the consequences of *Louisiana World Exposition*. According to JPM, the directors and officers provide the debtors with "entity coverage" – whatever that means. *See Opposition* at 12. The evidence to support this allegation consists solely of **JPM's own motion** in the bankruptcy court – that is, no evidence at all. The policy is not tendered for the Court's consideration and JPM does not even attempt to explain the meaning of "entity coverage" except to imply that it somehow allows JPM's contribution claims in the American National action.

JPM's bald, unsupported allegations (whether in pleadings and motions before this court, or in pleadings and motions in the bankruptcy court) are not sufficient for establishing subject matter jurisdiction. *See Engler, supra.* American National does not ask and the law does not require that JPM prove it can win a claim. JPM, however, does have the burden of showing, and fails to show, that it has a cognizable cause of action that could conceivably affect the bankruptcy estate. As explained in detail in American National's Reconsideration Motion, JPM's proposition that Enron's directors and officers liability insurance provides "related to" bankruptcy jurisdiction is a red herring. *See Reconsideration Motion* at 3-9.

JPM CONTINUES TO IGNORE ITS BURDEN OF ESTABLISHING FEDERAL SUBJECT MATTER JURISDICTION

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).

American National has repeatedly complained, and again complains, that JPM fails to meet its burden of demonstrating that the federal court may exercise subject matter jurisdiction. JPM asserts a hodge-podge of federal, Texas and New York legal principles in its attempt to finesse federal subject matter jurisdiction. Only through misapplication of the law or conclusory allegations can JPM argue that it has a claim "related to" Enron's bankruptcy estate.

Uncognizable claims and manufactured allegations do not provide a basis for "conceivable" claims against the Enron bankruptcy estate. It is well established that a party seeking to invoke the subject matter of the court has the burden of proving such an entitlement. *See, e.g., Ramming v. United States,* 281 F.2d 158 (5th Cir. 2001); *Manchaca v. Chrysler Credit Corp.,* 613 F.2d 507 (5th Cir. 1980). "A party seeking to remove a suit from state court must prove subject matter in the district court." *Engler v. Winfrey,* 201 F.3d 680, 686 (5th Cir. 2000) (citing *Allen v. R&H Oil & Gas Co.,* 63 F.3d 1326, 1335 (5th Cir. 1995)). JPM does not provide any such proof. American National, on the other hand, has explained how Texas statutory law and Fifth Circuit precedent bar the contribution and indemnity claims JPM purportedly seeks to assert.

JPM mischaracterizes the Texas Civil Practice & Remedies Code and disregards the Fifth Circuit's *Louisiana World Exposition* decision and it progeny. JPM also attempts to invoke inapplicable conflict-of-law rules to provide subject matter jurisdiction. The Court is asked to reject JPM's invitation to disregard controlling state and federal law. Under controlling law, JPM's claims allegedly "related to" Enron's bankruptcy are barred and therefore cannot "conceivably" affect Enron's bankruptcy estate.

JPM'S CONDUCT DEMONSTRATES THAT AMERICAN NATIONAL'S ACTION SHOULD BE TRIED IN A TEXAS STATE COURT

Perhaps the most audacious aspect of JPM's strategy (so far successful) of keeping American National out of state court is its own pursuit, in a Texas state court, of a strikingly similar Enron-related state court action. JPM is a lead member of the Committee of Unsecured Creditors in the Enron bankruptcy proceeding. *See Exhibit B.* JPM and other creditors sought and received permission from the bankruptcy court to bring actions against former Enron officers and employees in Texas state court. On October 1, 2002, JPM and the other creditors filed such an action against the former Enron personnel in Montgomery County, Texas. *Official Committee of Unsecured Creditors of Enron Corp. v. Fastow,* No. 02-10-06531-CV (9th Judicial District Court of Montgomery County, Texas) (*Exhibit C*).

JPM's filing of a Texas lawsuit conflicts with virtually everything JPM has argued before this Court. JPM has all along argued that anything Enron-related must be tried either in the New York bankruptcy proceeding or in conjunction with the securities action pending in this Court. Now it is clear that JPM only wanted to keep other potential plaintiffs out of state court. The Texas lawsuit also demonstrates that JPM's claims concerning application of New York law were a ruse. JPM clearly recognized, when requesting and when receiving permission to file its Texas lawsuit – and well before filing its Opposition to American National's Motion for Reconsideration – that Texas law is applicable to claims Enron, its directors, it officers and employees whether for contribution, indemnity, or otherwise.

JPM's Texas lawsuit is a judicial admission that Texas law is controlling law for any contribution/indemnity claims JPM purports it may assert. In accordance with Texas and Fifth Circuit law, American National's action should be remanded to state court.

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,

GREER, HERZ & ADAMS, L.L.P.

By: _____
Andrew J. Mytelka
Attorney in Charge
State Bar No. 14767700
One Moody Plaza, 18th Floor
Galveston, Texas 77550
(409) 797-3200;
(409) 766-6424 (telecopier)
ATTORNEY PLAINTIFFS

OF COUNSEL:
John S. McEldowney
State Bar No. 13580000
Joe A.C. Fulcher
State Bar No. 07509320
M. David Le Blanc
State Bar No. 00791090
Steve Windsor
State Bar No. 21760650
Greer, Herz & Adams, L.L.P.
One Moody Plaza, 18th Floor
Galveston, Texas 77550
(409) 797-3200
(409) 766-6424 (FAX)
ATTORNEYS FOR PLAINTIFFS

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 October 8, 2002.

Richard W. Mithoff
Mithoff & Jacks, LLP
One Allen Center, Penthouse
500 Dallas Street, Suite 3450
Houston, Texas 77002
713-654-1122
713-739-8085 fax

Thomas C. Rice
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, NY 10017
212-455-2000
212-455-2502 fax

Charles A. Gall
Jenkens & Gilchrist
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202
214-855-4500
214-855-4300 fax

Steve Windsor

The Exhibit(s) May

Be Viewed in the

Office of the Clerk