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IN THE MONTANA ASBESTOS CLAIMS COURT

IN RE ASBESTOS LITIGATION,

)

Cause No. AC-17-0694

)

Consolidated Cases.

)

Applicable to

)

Hutt v. Maryland Casualty Co. et al.,

)

Eighth Judicial District Court,

)

Cause No. DDV-18-0175

)

)

MOTION TO STAY PROCEEDINGS AND

)

BRIEF IN SUPPORT

Defendant Maryland Casualty Company (“MCC”), n/k/a Zurich American Insurance Company, successor by merger to MCC as of December 31, 2015,¹ by and through its undersigned counsel, hereby submits this Brief in Support of its Motion to Stay.

INTRODUCTION

Following the completion of the Grace bankruptcy and plan confirmation, the Libby Plaintiffs were permitted to file claims against MCC on a limited and restricted basis. The nature and scope of the claims permitted to proceed against MCC remains the subject of ongoing litigation in the U.S. Bankruptcy Court. Based on recent filings and orders in the U.S. Bankruptcy Court, including the recent Third Circuit remand, and briefing in this Court, this matter should be stayed until the U.S. Bankruptcy Court has fully determined what, if any, claims are not channeled to the Asbestos PI Trust.²

PROCEDURAL BACKGROUND

As the Court is aware, Grace and 63 related entities (collectively, “Debtors”) commenced Chapter 11 bankruptcy proceedings on April 2, 2001, in the U.S. Bankruptcy Court for the District of Delaware. The Debtors’ bankruptcy cases were jointly administered at Case No. 01-01139.

On January 31, 2011, the U.S. Bankruptcy Court entered the Plan Confirmation Order and issued a memorandum opinion regarding objections to confirmation of the Plan. *In re W.R. Grace & Co.*, 446 B.R. 96 (Bankr. D. Del. 2011). The U.S. District Court affirmed the Plan on January 30, 2012 and issued an amended opinion on June 11, 2012. *See In re W.R. Grace & Co.*, 468 B.R.

¹ For clarity and conformity with this case’s extensive history, Defendant is referred to as “MCC.”

² At the October 2018 Asbestos Claims Court hearing, this Court inquired as to whether the bankruptcy court proceedings were anticipated to affect the trial date in the instant case. It is now apparent that the bankruptcy court proceedings implicate the proceedings against MCC in this case.

81, *amended and superseded by* 475 B.R. 34 (D. Del. 2012). The Third Circuit affirmed the District Court’s rulings regarding the confirmation of the Plan.³

Under the Plan, Grace established an Asbestos PI Trust funded by settlements with MCC, other insurers, and Grace’s own contributions. Plan §§ 1.1 ¶ 43, 7.2; *Notice of Submission of Blacklines of Exhibits 5 and 6 to Joint Plan of Reorganization* [D.I. No. 26369-1]. The Plan further included an Asbestos PI Channeling Injunction that enjoins an entity from taking any action against an Asbestos Protected Party with respect to any Asbestos PI Claim to the extent authorized by 11 U.S.C. § 524(g).⁴ Plan §§ 1.1 ¶ 33; 8.2. Simply put, “The Plan’s channeling injunction limits all holders of Asbestos PI Claims to recovery from the Asbestos PI Trust after the Plan’s Effective Date, and enjoins those claim holders from pursuing recovery from the Debtors and any other Asbestos Protected Party.” *See* Hutt Opinion at *6. Under the terms of the Plan, the Asbestos PI Trust is an Asbestos PI claim holder’s sole source of recovery. Plan § 8.2.1.

The Plan defines an “Asbestos PI Claim” as a bodily injury claim against a Debtor or Asbestos Protected Party arising out of exposure to asbestos dust generated by the Grace Mine. *See id.* at § 1.1 ¶ 34. Under the Plan, “Asbestos Protected Parties,” includes those insurers with whom Grace settled and contributed to the asbestos trust, referred to as “Settled Asbestos Insurance

³ *In re W.R. Grace & Co.*, 729 F.3d 311 (3d Cir. 2013); *W.R. Grace & Co. v. Garlock Sealing Techs., LLC*, 532 Fed. App’x 264 (3d Cir. 2013); *W.R. Grace & Co. v. Chakarian*, 591 F.3d 164 (3d Cir. 2009).

⁴ 11 U.S.C. § 524(g) provides in part that “a court that enters an order confirming a plan of reorganization under chapter 11 may issue . . . an injunction . . . to supplement the injunctive effect of a discharge under this section.” If certain requirements are met, “the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization . . . is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products” 11 U.S.C. § 524(g)(2)(B).

Companies.” *In re W.R. Grace & Co.*, 475 B.R. at 96; Plan § 1.1 ¶¶ 51, 209. MCC is expressly designated as a Settled Asbestos Insurance Company (and hence, is an Asbestos Protected Party), “meaning that [it] was entitled to injunctive relief under § 524(g).” *In re W.R. Grace & Co.*, 475 B.R. at 101. The Plan went into effect on February 3, 2014. *See Hutt v. Maryland Cas. Co. (In re W.R. Grace & Co.)*, 2016 Bankr. LEXIS 3754, *5 (Bankr. D. Del. 2016) (“Hutt Order”).

On October 21, 2014, Hutt and Carl Osborn (“Osborn”), former Grace employees, filed the Hutt Adversary Complaint seeking a declaratory judgment that certain proposed state court claims against MCC were not barred by the Asbestos PI Channeling Injunction. Hutt and Osborn alleged that their asbestos disease resulted from their work at the Libby Plant, and set forth claims premised on MCC’s position as a workers’ compensation and occupational disease insurer for Grace employees. *Id.* at *4-5.

Hutt and Osborn moved for summary judgment on all Counts of the Hutt Adversary Complaint, which MCC opposed. The U.S. Bankruptcy Court’s Opinion and Order (“Hutt Order”) denied in part and granted in part the Motion for Summary Judgment. *Id.* at *46. The Hutt Order denied judgment on Counts I, III, V, and VI of the Hutt Adversary Complaint, and granted judgment on Counts II and IV. *Id.*

In rejecting Hutt’s and Osborn’s arguments concerning the Negligence and Bad Faith Claims asserted in Counts I and VI, the Bankruptcy Court found that the Asbestos PI Channeling Injunction enjoined those claims:

Accordingly, I reject the Plaintiffs’ argument (asserted in Count I and Count VI of the Adversary Complaint) that Bankruptcy Code § 524(g)(4)(A)(ii) limits the reach of the Asbestos PI Channeling Injunction and prevents the injunction from enjoining the Plaintiffs’ Claims. The Plaintiffs’ Claims seek to hold MCC indirectly liable for the conduct of, claims against or demands on the Debtors. Also, MCC’s provision of insurance to the Debtors is legally relevant to (or, at the very least, a close nexus to) the Plaintiffs’ Claims. Because MCC’s liability could affect the *res* of the Debtors’ estate, determining that § 524(g)(4)(A)(ii) protects an insurer

from claims, such as the Negligence Claim and the Bad Faith Claim, is not beyond the jurisdiction of this Court.

Id. at *38-39. The Bankruptcy Court's reasoning was premised on two conclusions regarding Hutt's and Osborn's state court claims: (1) the claims sought to hold MCC indirectly liable for the debtors' conduct; and (2) the claims' theories of liability relied on MCC's provision of insurance to Grace. *Id.* at *22-23, 25, 39.

Next, the Bankruptcy Court denied Hutt's and Osborn's Motion with respect to Counts III and V of the Hutt Adversary Complaint:

The Plaintiffs are not asserting workers' compensation claims for statutory benefits. The channeling injunction's exception for workers' compensation claims is not applicable to the Plaintiffs' Claims. I reject the Plaintiffs' argument (asserted in Count III and Count V of the Adversary Complaint) that the workers' compensation claim exception to the channeling injunction allows the Plaintiffs' Claims to be filed in state court.

Id. at *40-41.

In granting Hutt's and Osborn's Motion for Summary Judgment on Counts II and IV of the Hutt Adversary Complaint, the Bankruptcy Court responded to their arguments regarding MCC's relationship to them in their roles *as former Grace employees*, in that it permitted the filing of a very narrow set of claims against MCC by *former employees* at the Grace Mine:

Therefore, the channeling injunction does not protect a Settled Asbestos Insurance Company from claims arising out of insurance policies that are not listed on Exhibit 5 to the Plan. The Plaintiffs contend that, *as employees, the Negligence Claim and the Bad Faith Claim must arise under MCC's worker's compensation policies. To the extent that the Plaintiffs can demonstrate that the Plaintiffs' Claims arise out of or are based upon MCC's workers' compensation policies*, the claims are not barred by the Asbestos PI Channeling Injunction and may be filed in state court. I will grant the relief requested in Count II and Count IV of the Adversary Complaint.

Id. at *44 (emphasis added).

In sum, the Bankruptcy Court concluded that Hutt's and Osborn's claims were appropriately channeled into the Asbestos PI Trust except to the limited extent that Hutt and Osborn, *as former Grace Mine employees*, could demonstrate that the claims arose out of MCC's worker's compensation policies. Based on the foregoing, Libby Plaintiffs, including Hutt, are prevented from pursuing any other type of claim not allowed by workers' compensation, and any community exposure claims against MCC. *See, e.g.,* Ex. 60 to MCC's Brief in Support of Summary Judgment, June 27, 2018 Order in *Hunt v. Maryland Casualty Company*, Adv. No. 18-50402 (ECF No. 8)(staying case against MCC involving claims of community exposure). Neither party appealed from the Hutt Order; thus, it is a final order.

Meanwhile, in *Continental Casualty Company, et al. v. Jeremy B. Carr, et al.*, Adv. Proc. No. 15-50766, Continental Casualty Company ("CNA") filed a parallel adversary complaint seeking to enforce the Asbestos PI Channeling Injunction to prevent the defendants in that adversary proceeding from pursuing certain asbestos-related personal injury claims. On October 17, 2016, the Bankruptcy Court entered a separate order granting CNA's motion for summary judgment and denying the defendants' motion to dismiss. *Cont'l Cas. Co. v. Carr (In re W.R. Grace & Co.)*, 2016 Bankr. LEXIS 3753 (Bankr. D. Del. Oct. 17, 2016). The defendants appealed that order to the Third Circuit ("CNA Appeal").

In the Grace bankruptcy case, MCC filed a Motion to Enforce the Permanent Channeling Injunction and for Sanctions [D.I. 32999] ("Roberts Motion") requesting that the Court, *inter alia*, enforce the Asbestos PI Channeling Injunction to enjoin Rose Roberts ("Roberts"), Personal Representative of the Estate of James W. Roberts, deceased, from pursuing an action in Montana State Court. Roberts responded in opposition to the Roberts Motion and cross-moved (jointly with the Roberts Motion, the "Cross-Motions") for the Court to stay and/or dismiss the Roberts Motion

without prejudice. The Bankruptcy Court heard argument on the Cross-Motions on April 30, 2018. However, on June 8, 2018, the Bankruptcy Court issued an Order stating that it would withhold ruling on the Roberts Cross-Motions pending the Third Circuit Court of Appeals' decision in the CNA Appeal.

The Third Circuit rendered its Opinion on August 14, 2018. *See Cont'l Cas. Co. v. Carr (In re W.R. Grace & Co.)*, 900 F.3d 126 (3d. Cir. 2018) ("Third Circuit Opinion"). The Third Circuit Opinion addressed three questions on appeal: (1) whether the Injunction, by its terms, excluded CNA's workers' compensation policies (a) because the policies were not specifically identified in the CNA Settlement Agreement, or (b) by virtue of the Injunction's categorical exclusion of rights or obligations pertaining solely to workers' compensation benefits; (2) whether the Injunction permissibly barred the Montana claims against CNA under 11 U.S.C. § 524(g), including whether (a) the claims alleged derivative liability against CNA for the conduct of, claims against, or demands on W.R. Grace ("derivative liability requirement"), and (b) the alleged liability arose by reason of CNA's provision of insurance to Grace ("statutory relationship requirement"); and (3) whether the Bankruptcy Court had jurisdiction to enjoin the Montana Claims. The Third Circuit affirmed the Bankruptcy Court's holdings with respect to the first and third issues, and it vacated and remanded the second issue to the Bankruptcy Court with instruction. *Id.*

The Third Circuit vacated and remanded the Bankruptcy Court's ruling regarding the second issue on appeal, or the application of § 524(g). *Id.* at 139. With regard to the derivative liability analysis, the Third Circuit stated that "[t]he proper inquiry is to review the law applicable to the claims being raised against the third party (and when necessary to interpret state law) to determine whether the third-party's liability is wholly separate from the debtor's liability or instead depends on it." *Id.* at 137. Regarding the statutory relationship requirement, the Third Circuit

agreed with the Bankruptcy Court “that CNA’s provision of insurance must be a ‘legally relevant factor’ to its alleged liability.” *Id.* at 138. It nevertheless noted that on remand, the Bankruptcy Court “should review the applicable law to determine the relationship’s legal relevance to the third-party’s alleged liability.” *Id.* The Third Circuit’s § 524(g) analysis does not implicate the worker/non-worker distinction at the heart of MCC’s Enforcement Motion.

On October 15, 2018, the bankruptcy court entered a scheduling order providing for briefing of the remand issues. *In re: W.R. Grace & Co, et al.*, Bankruptcy Case No. 01-01139, Adv. Pro. No. 15-50766, Adv. Pro No. 18-50402 (Bankr. D. Del. Oct. 15, 2018) [D.I. 60]. Opening briefs by CNA and MCC are due on or before December 7, 2018, and Libby Claimants’ opposition and/or certification motions are due on January 21, 2019.

ARGUMENT

Issues raised by Hutt in the case before this Court are presently being litigated before the U.S. Bankruptcy Court. The Complaint alleges that Hutt was injured due to, *inter alia*, asbestos exposure relating to Grace’s mining operations in Libby, Montana. *Id.* at ¶ 9. The Complaint alleges that “Plaintiff was a homeowner, recreator, Grace worker, community member of Libby, Montana, or otherwise distinctly exposed to asbestos in unique exposure events and in a wide variety of temporally separated, geographically distinct, and highly differentiated routes and circumstances.” *Id.* The Complaint further alleges “Dates of residence in the Libby area and exposure, including events of injurious exposure, are 1966 through 1990 and 2012 through 2015.” Ex. 54, Compl. ¶ 12. Given that Hutt worked at the Libby Plant from only March 1968 to October 1969, Hutt’s Complaint seeks damages seemingly arising from claims related to his community exposure. Whether Hutt may bring any such claim is being litigated through the *Roberts* Motion which is currently pending before the Bankruptcy Court.

In addition, as discussed in MCC's Brief in Opposition to Plaintiff's Motion for Summary Judgment on Liability at pp. 2-3, in response to the Third Circuit's instructions on remand, Counsel for the Libby Claimants and Hutt have represented to the Bankruptcy Court that they will seek certification of issues related to the analysis of the legal elements of their causes of action to the Montana Supreme Court. Letter Brief of Montana Plaintiffs 9/10/2018 at 5, *In re: W.R. Grace & Co. et al.*, No. 01-01130, D.E. No. 33052. Through that filing, Hutt's counsel has indicated that he will seek a determination by the Montana Supreme Court of whether any duty was owed by CNA (and by extension, MCC) under § 324A or any other theory, thereby attempting to obtain relief in different courts and potentially different opinions, all leading to the same issue and ostensibly the Montana Supreme Court.

Based on the foregoing, and with this recent set of filings, it is now apparent that it would be premature to allow Hutt to proceed with his claims against MCC in the present action. Determinations by the Bankruptcy Court of the issues before it could greatly impact the scope of the claims, if any, Hutt may proceed with against MCC. Allowing Hutt to proceed against MCC prior to resolution of these issues would be waste of judicial resources and could potentially result in considerable undue expense to the parties, and could result in different rulings by different courts. Accordingly, this matter should be stayed.

CONCLUSION

For the foregoing reasons, MCC respectfully requests that the Court issue an Order vacating the trial date and staying this matter until the U.S. Bankruptcy Court has resolved outstanding issues regarding the scope of claims, if any, which are permitted to proceed against MCC.

Dated: November 9, 2018

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The undersigned does hereby certify that a true copy of the foregoing document was filed via the Montana Courts Electronic Filing system and served upon the following individuals:

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Erik H Nelson (Attorney)
519 Southwest Boulevard
Kansas City MO 64108
Representing: BNSF Railway Company
Service Method: Conventional

Electronically Signed By: Kennedy C. Ramos
Dated: 11-09-2018