

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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: In re : Chapter 11
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: DPH HOLDINGS CORP., et al., : Case No. 05-44481 (RDD)
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: Reorganized Debtors. : (Jointly Administered)
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: ACE AMERICAN INSURANCE COMPANY :
: and PACIFIC EMPLOYERS INSURANCE :
: COMPANY, :
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: Plaintiffs, :
: :
: v. : Adv. Pro. No. 09-01510(RDD)
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: DELPHI CORPORATION; STATE OF :
: MICHIGAN WORKERS' COMPENSATION :
: INSURANCE AGENCY; and STATE OF :
: MICHIGAN FUNDS ADMINISTRATION, :
: :
: Defendants. :
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ORDER (I) DENYING DEFENDANTS MICHIGAN WORKERS' COMPENSATION AGENCY'S AND MICHIGAN FUNDS ADMINISTRATION'S JOINT MOTION TO DISMISS FOR LACK OF JURISDICTION AND IN THE ALTERNATIVE, FOR ABSTENTION AND (II) DENYING IN PART DEFENDANTS MICHIGAN WORKERS' COMPENSATION AGENCY'S AND MICHIGAN FUNDS ADMINISTRATION'S JOINT AMENDED MOTION TO DISMISS PLAINTIFFS' ADVERSARY COMPLAINT AND DPH HOLDINGS CROSSCLAIM FOR FAILURE TO STATE A CLAIM, LACK OF JURISDICTION, AND IN THE ALTERNATIVE, FOR ABSTENTION

Upon the defendants' Michigan Workers' Compensation Agency And State of Michigan Funds Administration Joint Motion To Dismiss For Lack Of Jurisdiction And In The Alternative, For Abstention (Docket No. 15) (the "Motion to Dismiss"); defendants' Michigan Workers' Compensation Agency And Michigan Funds Administration Joint Memorandum Of Law In

Support Of Joint Motion To Dismiss For Lack Of Jurisdiction And In The Alternative, Abstention (Docket No. 17) and Exhibit Thereto (Docket No. 18); plaintiff's Brief In Opposition To Motion To Dismiss Of State of Michigan Workers' Compensation Insurance Agency And State of Michigan Funds Administration (Docket No. 28); Declaration of Lewis R. Olshin (Docket No. 29); Memorandum of DPH Holdings Corp. (Formerly Delphi Corporation) In Opposition to Defendants Michigan Workers' Compensation Agency's And Michigan Funds Administration's Joint Motion to Dismiss For Lack Of Jurisdiction And In The Alternative, For Abstention (Docket No. 30); defendants' Michigan Workers' Compensation Agency's And Michigan Funds Administration's Joint Amended Motion To Dismiss Plaintiffs' Adversary Complaint And DPH Holdings Crossclaim For Failure to State A Claim, Lack Of Jurisdiction, And In The Alternative, For Abstention (the "Amended Motion to Dismiss") (Docket No. 43); defendants' Michigan Workers' Compensation Agency's And Michigan Funds Administration's Brief In Support Of Joint Amended Motion To Dismiss Plaintiffs' Adversary Complaint And DPH Holdings Crossclaim For Failure to State A Claim, Lack Of Jurisdiction, And In The Alternative, For Abstention (Docket No. 44); defendants' Michigan Workers' Compensation Agency's And Michigan Funds Administration's Joint Reply To Memorandum of DPH Holdings Corp. (Formerly Delphi Corporation) In Opposition to Defendants Michigan Workers' Compensation Agency's And Michigan Funds Administration's Joint Motion to Dismiss For Lack Of Jurisdiction And In The Alternative, For Abstention (Docket No. 45); Joint Reply To Plaintiff's Brief In Opposition to Motion to Dismiss Of State Of Michigan Workers' Compensation Agency And Michigan Funds Administration (Docket No. 46); plaintiff's Reply To Memorandum of DPH Holdings Corp. (Formerly Delphi Corporation) In Opposition to Defendants Michigan Workers' Compensation Agency's And Michigan Funds Administration's

Joint Motion to Dismiss For Lack Of Jurisdiction And In The Alternative, For Abstention (Docket No. 51); Corrected Joint Reply To Plaintiffs' Brief In Opposition To Motion To Dismiss Of State Of Michigan Workers' Compensation Agency And Michigan Funds Administration (Docket No. 53); plaintiff's Brief In Response to the (I) Joint Reply and (II) Amended Motion to Dismiss of State of Michigan Workers' Compensation Agency And State of Michigan Funds Administration (Docket No. 54); Declaration of Lewis R. Olshin In Support of Plaintiff's Response (Docket No. 55); and upon the Supplemental Memorandum of DPH Holdings Corp. (Formerly Delphi Corporation) In Opposition To Defendants Michigan Workers' Compensation Agency's and Michigan Fund Administration's Joint Amended Motion to Dismiss Plaintiffs' Adversary Complaint And DPH Holdings Cross Claim for Failure To State A Claim, Lack Of Jurisdiction, And In The Alternative, For Abstention (Docket No. 57); and the Bankruptcy Court having considered the arguments of Counsel at the hearing held on January 8, 2010; and after due deliberation thereon, and for the reasons stated in the Court's Amended Bench Ruling, a copy of which is attached hereto as Exhibit A, which modifies and supersedes the Court's bench ruling set forth in the January 12, 2010 transcript, it is hereby

ORDERED that:

1. The Motion to Dismiss is DENIED.
2. The Amended Motion to Dismiss is DENIED to the extent that the Amended Motion to Dismiss seeks to dismiss the complaint and defendant DPH Holdings Corp.'s (formerly Delphi Corporation) crossclaim for lack of jurisdiction or, in the alternative, seeks abstention, but not as to that portion of the Amended Motion to Dismiss that seeks to dismiss the complaint and defendant DPH Holdings Corp.'s (formerly Delphi Corporation)

crossclaim under Fed.R.Civ.P. 12(b)(6), incorporated by Fed.R.Bankr.P. 7012(b), for failure to state a claim.

3. The Amended Motion to Dismiss is adjourned to the extent that the Amended Motion to Dismiss seeks to dismiss the complaint and defendant DPH Holdings Corp.'s (formerly Delphi Corporation) crossclaim pursuant to Fed.R.Bankr. P. 7012(b) and Fed.R.Civ.P. 12(b)(6).

4. This Court shall retain jurisdiction to hear and determine this Adversary Proceeding.

Dated: White Plains, New York
January 25, 2010

/s/Robert D. Drain
Robert D. Drain (U.S.B.J.)

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EXHIBIT

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Lead Case No. 05-44481-rdd; Adv. Pro. No. 09-01510-rdd

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In re:
DPH HOLDINGS CORP., et al.,
Debtors.

- - - - -x

ACE AMERICAN INSURANCE COMPANY, et al.,
Plaintiffs,

v.

DELPHI CORPORATION, et al.,
Defendants.

- - - - -x

United States Bankruptcy Court
300 Quarropas Street
White Plains, New York

January 12, 2010
2:04 PM

AMENDED BENCH RULING

B E F O R E:
HON. ROBERT D. DRAIN
U.S. BANKRUPTCY JUDGE

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HEARING re Amended Motion to Dismiss Case; Defendants Michigan
Workers' Compensation Agency's and Michigan Funds
Administration's Joint Amended Motion to Dismiss Plaintiff's
Adversary Complaint and DPH Holdings' Crossclaim for Failure to
State a Claim, Lack of Jurisdiction, and in the Alternative,
for Abstention

A P P E A R A N C E S:

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Attorneys for the Debtors

155 North Wacker Drive

Chicago, IL 60606

BY: ALBERT L. HOGAN, III, ESQ. (TELEPHONICALLY)

NICK D. CAMPANARIO, ESQ. (TELEPHONICALLY)

JOHN K. LYONS, ESQ. (TELEPHONICALLY)

JOSEPH N. WHARTON, ESQ. (TELEPHONICALLY)

ALSTON & BIRD LLP

Attorneys for Creditor, ACE American Insurance Company

and Pacific Employers Insurance Company

90 Park Avenue

New York, NY 10016

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BY: MARTIN G. BUNIN, ESQ. (TELEPHONICALLY)

CATHERINE R. FENOGLIO, ESQ. (TELEPHONICALLY)

DUANE MORRIS LLP

Attorneys for Creditor, ACE American Insurance Company

and Pacific Employers Insurance Company

30 South 17th Street

Philadelphia, PA 19103

BY: LEWIS R. OLSHIN, ESQ. (TELEPHONICALLY)

PLUNKETT COONEY, P.C.

Attorneys for Plaintiffs ACE American Insurance Company

and Pacific Employers Insurance Company

38505 Woodward Avenue

Bloomfield Hills, MI 48304

BY: CHARLES W. BROWNING, ESQ. (TELEPHONICALLY)

ROBERT G. KAMENEC, ESQ. (TELEPHONICALLY)

ELAINE M. POHL, ESQ. (TELEPHONICALLY)

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MICHIGAN ASSISTANT ATTORNEY GENERAL'S OFFICE

Attorneys for Michigan Workers' Compensation Agency
5th Floor G. Mennen Williams Building
525 W. Ottawa Street
Lansing, MI 48909

BY: SUSAN PRZEKOP-SHAW, AAG (TELEPHONICALLY)

MICHIGAN ASSISTANT ATTORNEY GENERAL'S OFFICE

Attorneys for Michigan Funds Administration
G. Mennen Williams Building
525 W. Ottawa Street
5th Floor
Lansing, MI 48909

BY: DENNIS J. RATERINK, AAG (TELEPHONICALLY)

1 This is an adversary proceeding commenced by ACE
2 American Insurance Company and Pacific Employers Insurance
3 Company against both Delphi Corporation (which, since the
4 confirmation and consummation of its Chapter 11 plan, is known
5 as DPH Holdings Corp., but which I may still refer to as
6 "Delphi") and the State of Michigan Workers' Compensation
7 Insurance Agency (which I'll refer to as the "Agency") and the
8 State of Michigan Funds Administration (which I'll refer to as
9 the "Funds").

10 The Funds include a fund, the Michigan Self-Insurers'
11 Security Fund, that has filed proofs of claim against Delphi's
12 Chapter 11 estate for unsecured non-priority claims in the
13 amount of 36.3 million, a priority claim of approximately 25.5
14 million, and an administrative expense claim of 5.6 million,
15 all for amounts that it claims would be owed by Delphi to it in
16 its capacity as, on a statutory basis, a surety or a backstop
17 for Delphi's obligation to pay workers' compensation claims.

18 The Agency is also a creation of Michigan law tied
19 into the Michigan workers' compensation system. It has a
20 fairly limited, although important, function; it oversees the
21 operation of the system and the operation of the administrative
22 tribunals that consider workers' compensation claims, and it
23 has the power, in a so-called "Rule 5 proceeding", to bring up
24 a common question pending before the Michigan administrative
25 tribunals that would affect the administration of the workers'

1 compensation statutes. It also is charged with giving notice
2 to potentially responsible parties when it believes that a
3 workers' compensation claim that has been filed before the
4 workers' compensation, or the Board of Magistrates, is one that
5 a particular third party may have responsibility for paying
6 under Michigan law.

7 This dispute originally arose because the Agency made
8 a determination last summer -- based upon, it appears, the fact
9 that the Agency's records contain so-called "Form 400s" from
10 the two insurer plaintiffs herein -- that those insurers would
11 be potentially liable for a spate of workers' compensation
12 claims that had been filed, and have since been filed as a
13 result of Delphi's failure to pay workers' compensation in
14 light of its liquidation.

15 In response, and as the number of Michigan workers'
16 compensation proceedings involving them in front of the Board
17 of Magistrates grew, the insurers commenced this action in this
18 Court, seeking a declaration that the insurers are not liable
19 under either the theory espoused by the Agency or under their
20 respective insurance policies with Delphi, which are referred
21 to in the complaint in two categories -- "Deductible policies"
22 and "Retention policies" -- for the claims being raised against
23 them under the Michigan Workers' Compensation Disability Act.

24 The primary theory of the insurers' complaint is that,
25 by the policies' express terms and under Michigan law, Delphi

1 was self-insured except with respect to excess coverage (which
2 has not been triggered, however, and which would apply only in
3 respect of the Retention policies). Thus, the insurers contend
4 that, by the policies' express terms, as intended by the
5 parties, the insurers are not liable for the claims now being
6 asserted against the insurers in the Michigan proceedings under
7 the Agency's legal theory as previously communicated to the
8 insurers.

9 In addition, the complaint requests that if,
10 notwithstanding the foregoing, the Deductible policies are
11 somehow determined to provide insurance coverage in any other
12 respect to Delphi for the underlying self-insured Michigan
13 workers' compensation claims, the Court find that the
14 Deductible policies do so inadvertently through mutual mistake
15 or scrivener's error and, therefore, that the Court enter an
16 order reforming the policies to reflect the parties' actual
17 intent.

18 The insurers note in their complaint that at times in
19 this Chapter 11 case the Agency has taken a similar position to
20 the insurers' and contrary to the position that the Agency has
21 more recently been taking in the Michigan proceedings vis a vis
22 the insurers, at least insofar as the Agency is on record in
23 the Chapter 11 case as stating that, if, in fact, Delphi was
24 not for some reason required to pay the claims (or a third-
25 party acquirer was not required to pay the claims), the

1 workers' compensation claims would not be covered by insurance.
2 Having recognized that Delphi will, in fact, not be able to pay
3 the workers' compensation claims in full, except perhaps the
4 administrative claims, and that a third-party acquirer will not
5 be picking up these claims, the insurers make the point that
6 they believe that the Agency now has reversed field in
7 concluding that the insurers are liable. (I do not believe,
8 however, that there is a basis for judicial estoppel of the
9 Agency, since it did not prevail in the proceeding in this
10 Court where it arguably took a contrary position to the
11 position it now espouses. See New Hampshire v. Maine, 532 U.S.
12 742, 749-51 (2001); In re Oneida Ltd., 383 B.R. 29, 45-46
13 (Bankr. S.D.N.Y. 2008), rev'd on other grounds, 562 F.3d 154
14 (2d Cir. 2009); In re Allegiance Telecom, Inc., 356 B.R. 93,
15 107 (Bankr. S.D.N.Y. 2006). Moreover, because the Agency was
16 not asserting a claim when it took the prior allegedly contrary
17 position, it is not subject to the judicial admission
18 doctrine.)

19 After the commencement of this adversary proceeding,
20 the two Michigan defendants, the Agency and the Funds, moved to
21 dismiss on several different grounds, and it is that motion
22 that is before me today and upon which I'm ruling, with the
23 exception of the Michigan defendants' motion under Federal Rule
24 of Civil Procedure 12(b)(6), incorporated by Bankruptcy Rule
25 7012), for a determination that the complaint fails to state a

1 claim on the merits. Because the other bases for the motion to
2 dismiss are jurisdictional in one form or another, or request
3 mandatory or permissive abstention, I informed the parties that
4 I would consider those bases first and, only if I first
5 determined that I properly had jurisdiction and would not
6 abstain, would I consider the Rule 12(b)(6) motion.

7 In addition, after the complaint was filed, DPH
8 Holdings answered and agreed with the insurers as to the
9 insurers' interpretation of the applicable policies and the
10 fact that, as asserted by the insurers, those policies do not
11 provide for coverage of the unpaid workers' compensation
12 obligations with the exception of excess coverage in the
13 Retention policies.

14 Finally, in addition to the filing of hundreds of more
15 unpaid workers' compensation claims in Michigan, for which the
16 Agency has noticed the insurers as potentially liable parties,
17 the Agency has, on December 14th, 2009, called for a compliance
18 hearing, a so-called "Section 5 proceeding," by a hearing
19 officer appointed by the Agency, "to address whether the two
20 insurers ... are the responsible carriers for the pending
21 claims through their filing of the Form 400s giving notice of
22 their insurance coverage for Delphi Automotive Systems and
23 Delphi Corporation." That's a quote from the Corrected Joint
24 Reply to Plaintiffs' Brief in Opposition to Motion to Dismiss
25 of the two Michigan defendants. That corrected Joint Reply

1 also attaches the Rule 5 pleading filed by the Agency seeking
2 the foregoing relief. The Rule 5 proceeding was voluntarily
3 stayed, however, given the fact that the parties had agreed,
4 and this Court had previously scheduled, the date of the
5 hearing on the Agency and the Funds' motion to dismiss.

6 In addition, both DPH Holdings and the insurers have
7 asserted that the pursuit of the Rule 5 proceeding violates the
8 injunction that was entered under the order confirming Delphi's
9 Chapter 11 plan and as set forth in that plan. That issue is
10 not before me presently, but I believe that, in light of the
11 parties' attempt to clarify what, in fact, the Agency is
12 seeking to have determined in the Rule 5 proceeding, DPH may
13 well continue to make such an assertion if the Rule 5
14 proceeding resumed.

15 As I stated, the Michigan defendants seek to dismiss
16 this adversary proceeding on several jurisdictional and
17 procedural grounds. I will address those grounds now.

18 The Michigan defendants apparently do not dispute that
19 this Court has "related-to" jurisdiction under 28 U.S.C. §
20 1334(b), but contend that it has no more than related-to
21 jurisdiction; that this is a non-core proceeding under 28
22 U.S.C. § 157(b); that the Court lacks jurisdiction in light of
23 their Eleventh Amendment sovereign immunity; that the Court is
24 required to abstain under 28 U.S.C. § 1334(c)(2); that, even if
25 the Court is not required to abstain, it should use its

1 discretion to abstain under 28 U.S.C. § 1334(c)(1); that the
2 Court should abstain not only under the traditional twelve-part
3 test for permissive abstention in bankruptcy matters but also
4 under the Burford abstention doctrine; that the Court should
5 decline to hear this proceeding by exercising its discretion
6 the Declaratory Judgment Act, 28 U.S.C. § 2201; and, finally,
7 that this is not an enumerated proceeding permissibly brought
8 under Bankruptcy Rule 7001 as an adversary proceeding.

9 The insurers and DPH Holdings strongly disagree with
10 all of the foregoing.

11 Obviously, the Court's jurisdiction is a threshold
12 issue. The Bankruptcy Code itself does not confer
13 jurisdiction, but 28 U.S.C. § 1334(b) provides that the Court
14 "shall have original but not exclusive jurisdiction of all
15 civil proceedings arising under title 11 or arising in or
16 related to cases under title 11".

17 Before focusing on that section in more detail, I
18 should also note that it's well-recognized, although nowhere
19 found in 28 U.S.C., that after the confirmation of a Chapter 11
20 plan the Court's jurisdiction shrinks. It is generally held
21 that for the bankruptcy court to have jurisdiction over an
22 action commenced after the confirmation of a Chapter 11 plan,
23 the dispute must have a close nexus to the plan and/or the
24 Chapter 11 case, and that the plan or confirmation order must
25 have reserved jurisdiction over such a dispute. See Krys v.

1 Sugrue, 2008 U.S. Dist. LEXIS 86149 at pages 19-22 (S.D.N.Y.
2 October 23, 2008); Penthouse Media Group v. Guccione (In re
3 General Media, Inc.), 335 B.R. 66, 73-74 (Bankr. S.D.N.Y.
4 2005).

5 Here, the Chapter 11 plan fully reserved jurisdiction
6 -- to the extent that I had it pre-confirmation. In addition,
7 for all intents and purposes, and certainly for purposes of
8 this dispute, the plan was a liquidating Chapter 11 plan. DPH
9 Holding's purpose in life is to deal with claims against the
10 estate, to liquidate the estate's remaining assets, of which
11 there are few, and to make distributions of cash on hand as
12 well as the proceeds of those remaining assets to the holders
13 of allowed claims. It's well-recognized that the Court's post-
14 confirmation jurisdiction is greater in such a liquidation
15 context, because it relates much more directly to proceedings
16 "under" Title 11 or "arising in" Title 11 proceedings, and
17 there's no risk of untoward prolonged bankruptcy court
18 supervision of an ongoing reorganized business. See In re
19 General Media Inc., 335 B.R. at 73-74, citing Boston Regional
20 Medical Center v. Reynolds (In re Boston Regional Medical
21 Center), 410 F.3d 100, 106-107 (1st Cir. 2005).

22 I conclude, therefore, that, nothing flowing from the
23 confirmation and consummation of Delphi's Chapter 11 plan
24 circumscribes my jurisdiction over this proceeding, which, as
25 I'll discuss in a moment, pertains to the core post-

1 confirmation bankruptcy function of dealing with claims against
2 the estate and the estate's remaining assets for distribution
3 to holders of allowed claims.

4 As I noted, there appears to be no dispute that I have
5 "related-to" jurisdiction under 28 U.S.C. § 1334(b). In any
6 event, as defined by the Second Circuit, "related-to"
7 jurisdiction extends to my determination of litigation whose
8 outcome has any "conceivable effect" on the bankruptcy estate.
9 In re Cuyahoga Equipment Corp., 980 F.2d 110, 114 (2d Cir.
10 1992). Here, it's evident to me that, particularly as
11 clarified by the parties' unsuccessful efforts to narrow the
12 issues raised or that would remain open in this proceeding, the
13 outcome of this proceeding would have not only a conceivable
14 effect but a potentially significant effect on Delphi's estate.

15 Delphi assumed the prepetition Retention and
16 Deductible policies at issue and entered into certain new
17 insurance policies with the plaintiff insurers during the
18 course of its Chapter 11 case, and, in so doing, Delphi agreed
19 that it would be liable for all amounts owing to the insurers
20 under those policies. I believe it's uncontroverted that both
21 the debtor and the insurers -- at least the debtors -- believed
22 that the assumption of the policies and the entry into the new
23 policies postpetition would not render the debtors liable to
24 the insurers for the insurers paying the types of claims at
25 issue in the subsequently filed Rule 5 proceeding or the

1 hundreds of workers' compensation proceedings now pending in
2 Michigan. But the insurers have contended, based on the
3 debtor's assumption of the policies and its entry into the new
4 policies that they will have a claim against the debtor,
5 against DPH Holdings, that is, if, in fact, it is determined,
6 contrary to their claims in this adversary proceeding, that
7 they are liable under the policies. The scope of the debtor's
8 insurance, as well as the existence of the insurers' possible
9 claims against the debtor's estate if the scope of such
10 insurance is determined as the Agency has argued, is thus at
11 issue in this proceeding.

12 In addition, the Michigan Self-Insurers' Surety Fund
13 has conceded that if it is determined that the insurers are
14 liable (and, of course, if they pay, although there's no reason
15 to doubt they would pay after such a determination, by final
16 order), the Fund would not have a claim against the debtor's
17 estate and, therefore, that the multimillion dollar claims
18 filed by it would then be resolved in Delphi's favor.

19 Either of those outcomes clearly would have a very
20 substantial effect on the debtor's estate, or at least they
21 would, in particular, with respect to any allowed priority or
22 administrative claim under Section 507 and 503 of the
23 Bankruptcy Code, since, as is clear from the entire record of
24 this Chapter 11 case, especially the record of the confirmation
25 hearing, the debtors' cash position is very tight and, of

1 course, any administrative claim would need to be paid in full,
2 in cash, under the plan unless the holder agreed to a different
3 treatment.

4 It is argued by the insurers, contrary to the
5 contention of the Agency and the Funds, that this adversary
6 proceeding should properly be viewed as one that "arises under"
7 the Bankruptcy Code for purposes of 28 U.S.C. § 1334(b), in
8 that it is essentially, according to the insurers, a proceeding
9 to determine the existence (and therefore the allowability,
10 since existence is a precondition to allowability) of their
11 claims against DPH Holdings that would stem from the Agency's
12 theory and Delphi's assumption of or postpetition entry into
13 the policies, and, on the flip side, the allowability of the
14 Self-Insurers' Security Fund's claim. It would "arise under"
15 the Bankruptcy Code because it would be an efficient and
16 critical first step to the determination of the allowability of
17 the respective claims under Sections 502, 503 and 507 of the
18 Bankruptcy Code, and, therefore, involve claims predicated on a
19 right created by a provision of Title 11, namely those three
20 statutory sections. See Langston Law Firm v. Mississippi, 410
21 B.R. 150, 154 (S.D.N.Y. 2008), as well as Drexel Burnham
22 Lambert Group v. Vigilant Insurance Co., 130 B.R. 405, 407
23 (S.D.N.Y. 1991).

24 That argument is also central to the insurers'
25 argument that, contrary to the Michigan defendants' assertion,

1 this proceeding is a "core" proceeding under 28 U.S.C. §
2 157(b), which provides that bankruptcy judges may hear and
3 determine all cases under Title 11 and all core proceedings
4 arising under Title 11 or arising in a case under Title 11, and
5 may enter appropriate orders or judgments, subject to review
6 under Section 158 of 28 U.S.C. in such proceedings.

7 As provided in 28 U.S.C. § 157(c), a "non-core"
8 proceeding is, to the contrary, one in which the bankruptcy
9 judge is limited to submitting proposed findings of fact and
10 conclusions of law to the district court, and any final order
11 or judgment would then be entered by the district judge after
12 considering such proposed findings and conclusions and
13 reviewing, de novo as to the matters to which any party has
14 timely and specifically objected. Moreover, the core/non-core
15 distinction is relevant to certain of the other issues in
16 dispute in this motion to dismiss, namely issues regarding
17 abstention and the question of sovereign immunity.

18 28 U.S.C. § 157(b)(2) lists a number of matters that
19 are, per se, core proceedings, although it states that such
20 list is not exclusive.

21 The insurers, supported by DPH Holdings, contend that,
22 in addition to the catch-all provisions, or the most broadly
23 worded provisions, of 28 U.S.C. § 157(b)(2)(A) (that is,
24 matters "concerning the administration of the estate") and 28
25 U.S.C. § 157(b)(2)(O) (that is, "other proceedings affecting the

1 liquidation of the assets of the estate or the adjustment of
2 the debtor-creditor or the equity security holder
3 relationship"), this proceeding is also one that involves "the
4 allowance or disallowance of claims against the estate," which
5 is specifically listed as a core proceeding in 28 U.S.C. §
6 157(b)(2)(B). (The personal injury exception in both that
7 section and 28 U.S.C. § 157(b)(2)(O) would not apply here
8 because this is not a determination of personal injury claims
9 but, rather, of the insurers' and the Fund's claims by way of
10 subrogation or rights under the insurance policies and the
11 orders approving the debtor's assumption of them or entry into
12 them, as the case may be.)

13 The Second Circuit has noted that it has held that
14 core proceedings should be given a broad interpretation that is
15 close to or congruent with constitutional limits, as set forth
16 by the Supreme Court in Northern Pipeline Construction Company
17 v. Marathon Pipe Line Co., 458 U.S. 50 (1982). See In re U.S.
18 Lines, Inc., 197 F.3d 631, 637 (2d Cir. 1999); Resolution Trust
19 Corporation v. Best Products Company, Inc. (In re Best Products
20 Co.), 68 F.3d 26, 31 (2d Cir. 1995).

21 In the U.S. Lines case, the Second Circuit went on to
22 say that "Proceedings can be core by virtue of their nature if
23 either (1) the type of proceeding is unique to or uniquely
24 affected by the bankruptcy proceedings (claim allowance), or
25 (2) the proceedings directly affect a core bankruptcy

1 function." 197 F.3d at 637. Moreover, "Core bankruptcy
2 functions of particular import ... include '[f]ixing the order
3 of priority of creditor claims against a debtor.'" Id.

4 The Second Circuit also stated in In re U.S. Lines,
5 again at page 637, "The bankruptcy court has core jurisdiction
6 over claims arising from a contract formed post-petition under
7 Section 157(b)(2)(A)," citing Ben Cooper, Inc. v. Insurance
8 Company of the State of Pennsylvania (In re Ben Cooper, Inc.),
9 896 F.2d 1394, 1399-1400 (2d Cir.), vacated on other grounds,
10 498 U.S. 964 (1990); opinion reinstated, 924 F.2d 36 (2d Cir.
11 1991), which would appear to apply at least to this proceeding
12 as it pertains to the Retention and Deductible policies entered
13 into postpetition.

14 The insurers correctly turn to a lengthy decision by
15 Bankruptcy Judge Gerber for further elucidation of what
16 constitutes a core proceeding: In re PSINet, Inc., 271 B.R. 1
17 (Bankr. S.D.N.Y. 2001). In that case, the court noted that the
18 fact that the determination of a particular issue will hinge
19 solely upon non-bankruptcy law and that it could be heard in a
20 different context outside of the bankruptcy case is not a basis
21 for determining that it is a non-core matter. Id. at 29,
22 discussing, Ben Cooper and U.S. Lines, among other Second
23 Circuit precedent.

24 Moreover, Judge Gerber correctly determined that a
25 proceeding, and, in particular, a declaratory judgment

1 proceeding under Bankruptcy Rule 7001 that "set[s] the table
2 for the determination of matters under Title 11," including the
3 allowance and disallowance and priority of claims filed in the
4 case, should be viewed as a core matter, because it serves,
5 again, as the initial stage or gatekeeper in regard to that
6 core bankruptcy function. Id. at 11-12, 25-28

7 The insurers contend that this is exactly what the
8 present adversary proceeding would do, in that they are seeking
9 a determination that they do not have liability for the
10 coverage that the Funds and the Agency say they have, which, if
11 the Court rules in their favor, would lead to the disallowance
12 of their claims against Delphi. And it appears clear to me
13 that there's nothing wrong with their setting up the issue in
14 this procedural context. As insurers, they are focused as much
15 if not more on establishing that they don't have liability in
16 respect of the workers' compensation claims than on
17 establishing their related subrogation and contract claims
18 against Delphi, but the latter point is clearly closely tied to
19 the former one. Moreover, this appears to me to be the most
20 efficient way to deal with the potential claims against Delphi,
21 as the issue of the insurers' liability under their policies
22 (which, as has been made clear by oral argument as well as the
23 Michigan Defendants' pleadings, the Michigan defendants have
24 not been prepared to stipulate out of these proceedings) is a
25 clear potential gatekeeping issue for the underlying claims

1 allowance matters.

2 The Michigan defendants had contended that there is
3 nothing in the relief that the insurers are seeking in this
4 adversary proceeding that in fact would lead to their having a
5 claim against the debtor's estate, and the Court spent a great
6 deal of time during oral argument exploring that theory. I
7 believe that one could articulate the Agency's theory in a way
8 that would have precluded the insurers from having, under any
9 scenario, a claim against the debtor's estate. That is, it is
10 conceivable, and in fact Delphi circulated a proposed
11 stipulation to memorialize this concept, that the Agency and
12 the Funds would limit their contention as to the potential
13 responsibility of the insurers solely to the fact that the
14 insurers delivered the Form 400s and had entered into some form
15 of insurance policy that was referenced in the Form 400s, and,
16 therefore, notwithstanding anything contained in the policy
17 itself, the insurers would be liable for the workers'
18 compensation claims; that is, they would not be liable under
19 the insurance policies but could be potentially liable only
20 because of the application of Michigan law and their having
21 sent the Form 400s. If that were the case, this proceeding
22 would not involve the allowance or disallowance of claims
23 against Delphi.

24 However, it appears clear to me that the Michigan
25 defendants are not prepared to limit their legal theories to

1 the foregoing, but want also to be able to point to the
2 existence of the insurance policies and to deal with their
3 terms as a basis for establishing the insurers' liability for
4 the workers' compensation claims. And, therefore, it appears
5 to me that the underlying dispute involves the clear
6 possibility, depending on the dispute's outcome and the
7 determination by the trier of the dispute as to the basis for
8 that outcome, of either the allowance of substantial claims by
9 the insurers against the debtor's estate and the corresponding
10 disallowance of the Fund's claim (because, as noted, the Fund
11 that filed the proof of claim against the debtor's estate has
12 acknowledged that if the insurers are indeed found liable, its
13 claims would be moot, there being another source for payment by
14 a solvent entity, i.e., the insurers) or, alternatively, of the
15 disallowance of the insurers' claims, without necessarily the
16 allowance of the Fund's claims.

17 Under that logic, it appears to me to be clear that
18 this is a core proceeding under 28 U.S.C. § 157(b)(2)(B),
19 involving the allowance or disallowance of claims against the
20 estate, in that it is a reasonable and appropriate gatekeeping
21 proceeding for and perhaps, at least as far as the insurers
22 hope, rendering moot any further litigation over the
23 allowability of the insurers' claims against Delphi. I believe
24 also that it would affect the administration of the estate and
25 the liquidation of the assets of the estate under 28 U.S.C. §

1 157(b)(2)(A) and (O), in that the insurance policies at issue
2 are clearly assets of the estate and coverage under those
3 policies remains an issue in this litigation, as clarified by
4 the parties' good faith attempts to see if the issues
5 pertaining to the construction and application of the policies
6 could be excluded from the litigation, which have been
7 unavailing.

8 As Judge Gerber stated in In re PSINet, while the
9 Second Circuit has not curtailed the effect of 28 U.S.C. §
10 157(b)(2)(A) and (O), it has also stated that those sections
11 shouldn't be read to subsume every matter pending before the
12 bankruptcy court, as their broadest interpretation would
13 permit, which would be inconsistent with the separation of
14 related-to jurisdiction from arising-in and arising-under
15 jurisdiction. And, in particular, they shouldn't be used as an
16 argument that there is core jurisdiction when the underlying
17 issue would have merely the effect of augmenting the estate.
18 In re Orion Pictures Corp., 4 F.3d 1095, 1102 (2d Cir. 1993).
19 However, I believe that 28 U.S.C. 157(b)(2)(A) and (O) merely
20 supplement the per se core bankruptcy function of considering
21 the allowance and disallowance of claims under 28 U.S.C. §
22 157(b)(2)(B).

23 So, I conclude that this is a core proceeding under 28
24 U.S.C. Section 152(b)(2)(B) as well as (A) and (O).

25 That leaves the very significant question, however, of

1 whether the Agency and the Funds' Eleventh Amendment sovereign
2 immunity precludes this Court from exercising jurisdiction over
3 them. The insurers as well as DPH Holdings have asserted two
4 grounds for the Court's jurisdiction, notwithstanding the
5 Michigan defendants' sovereign immunity. The first and most
6 compelling is that, as I've noted, this is a proceeding with
7 respect to the allowance or disallowance of claims under
8 Sections 502 and 503 of the Bankruptcy Code.

9 Section 106(a)(1) of the Bankruptcy Code states that,
10 "Notwithstanding an assertion of sovereign immunity, sovereign
11 immunity is abrogated as to a governmental unit to the extent
12 set forth in this section with respect to the following," and
13 then it provides a list of sections of the Bankruptcy Code that
14 includes Sections 502 and 503. Section 106(a) then goes on to
15 say in subpart (2): "The Court may hear and determine any
16 issue arising with respect to the application of such sections
17 to governmental units," and then it states in subpart (3) that
18 "[t]he Court may issue against a governmental unit an order,
19 process, or judgment under such sections," with exceptions that
20 are not applicable here.

21 In addition, the allowance and disallowance of claims,
22 I believe, is at the center of the bankruptcy court's
23 jurisdiction, which, as stated by the Supreme Court in Central
24 Virginia Community College v. Katz, includes the whole process
25 of the proof, allowance and distribution of and on claims. 546

1 U.S. 356, 362 (2006), citing Gardner v. New Jersey, 329 U.S.
2 565, 574 (1947). In Katz, the Supreme Court held that under
3 the "bankruptcy clause" of Article I, Section 8, Clause 4 of
4 the Constitution, the states abrogated their sovereign immunity
5 as to the bankruptcy courts' key in rem jurisdiction, as well
6 as orders ancillary to that in rem jurisdiction. Id. at 374

7 As the Supreme Court found in Katz, the exercise of
8 such jurisdiction, which is, at its core, the distribution of
9 the estate to those whose claims are determined to be allowed,
10 in the priority that they're determined to be allowed in, is
11 not an improper impingement upon state sovereign immunity, but,
12 rather, an agreed abrogation of that sovereignty provided for
13 by the Constitution. 546 U.S. at 378.

14 The insurers assert, in the alternative, that the fact
15 that one of the Funds has filed a proof of claim in this case
16 also gives rise to a waiver of sovereign immunity, under
17 Section 106(b) of the Bankruptcy Code. However, it seems to me
18 that that section does not apply here in that it deals with
19 compulsory (and, as the Second Circuit recognized in In re
20 Charter Oak Associates, 361 F.3d 760 (2d Cir. 2004), under some
21 circumstances permissive) counterclaims by the debtor against a
22 claimant, which is not the case here because no one in this
23 proceeding is looking for a monetary recovery or setoff from
24 the applicable Fund.

25 Moreover, I conclude, based upon the materials filed

1 as well as representations made to the Court during oral
2 argument, which were not successfully controverted, that the
3 Agency is sufficiently distinguishable from the Funds in terms
4 of its function, as well as its not serving as a potential
5 creditor of Delphi or a payor to Delphi, for the Court to
6 determine, even if the Fund was covered by Section 106(b), that
7 the Agency would not also be subject to the Court's
8 jurisdiction under the "unitary creditor" doctrine discussed in
9 Charter Oak's interpretation of the precursor of Section
10 106(b). Id. at 770-772.

11 I say this not only because it appears to me that the
12 funding of the Agency and the Funds comes from different
13 sources, but also, again -- and in fact most importantly --
14 because the Agency does not appear to be acting in a creditor
15 role or as a potential payor to the debtor's estate. Id. at
16 771.

17 The insurers point out, however, that the Agency filed
18 a notice of appearance and request for service of all pleadings
19 and notices in this Chapter 11 case (on November 10, 2005
20 through the Attorney General of the State of Michigan, acting
21 specifically on behalf of the Agency). The insurers contend
22 that that is sufficient for the Agency to have voluntarily
23 submitted itself to the subject matter jurisdiction of the
24 Court, under Lapides v. Board of Regents of the Univ. System of
25 Georgia, 535 U.S. 613, 619 (2002), discussed in Charter Oak,

1 361 F.3d at 767. I note, however, that the Agency's appearance
2 was a limited one, so denominated for the purpose of the
3 receipt of pleadings and notices of hearings. It also appears
4 to me that the Agency never acted as a creditor in this Chapter
5 11 case but, rather, only in its regulatory function to monitor
6 the debtor's performance of its obligations under the Michigan
7 workers' compensation law. It wanted to get notice of all
8 pleadings to ensure that it was aware of any events or
9 transactions in which the debtor would not be abiding by those
10 obligations. And, indeed, its prior pleadings in the case were
11 all, I believe, addressed to trying to ensure that either the
12 debtor or a third-party acquirer would perform those
13 obligations.

14 I believe that the Lapides case and the cases that it
15 relied upon arose in a materially different context of direct
16 litigation, where the governmental agency invoked the Court's
17 jurisdiction for purposes of the disputed issue or a related
18 claim. In the collective proceeding that was Delphi's Chapter
19 11 case, the limited appearance filed by the Agency did not
20 serve that function and, therefore, also would not constitute a
21 separate basis for the Agency's waiver of sovereign immunity.
22 Thus, only Section 106(a) serves as a basis for the abrogation
23 of sovereign immunity here.

24 That still leaves a difficult issue, though, which is,
25 should this adversary proceeding, which clearly involves the

1 allowance or disallowance of the Fund's claim, as well as being
2 a gatekeeper proceeding for the allowance or disallowance for
3 the insurers' claims, include not only the Funds but also the
4 Agency under Section 106(a)?

5 In one respect, it doesn't matter, because I believe
6 the Funds would very aggressively oppose the insurers' position
7 in this proceeding; this would not be a collusive lawsuit if
8 only the Funds remained as defendants. On the other hand, the
9 insurers clearly want to bind the Agency, which would have the
10 effect, if the insurers ultimately prevail, of causing the
11 Agency to stop sending out notices to the parties in the
12 Michigan workers' compensation proceedings that the insurers
13 are potentially liable.

14 To answer the question of whether Section 106(a)
15 applies to the Agency, I turn again to the statutory language,
16 and I note that Section 106(a) is written broadly. First,
17 Section 106(a) states, "Notwithstanding an assertion of
18 sovereign immunity, sovereign immunity is abrogated as to a
19 governmental unit to the extent set forth in this section with
20 respect to the following." The phrase "with respect to" is
21 normally given a very broad interpretation as meaning "relating
22 to," as opposed to a statutory formulation that might say, for
23 example (and, of course, the statute doesn't say this) "to the
24 extent there is a dispute between a claimant and a person
25 objecting to the claim under Section 502 or 503 of Title 11".

1 In addition, Section 106(a)(2) states, "The Court may
2 hear and determine any issue arising with respect to the
3 application of such sections to governmental units." Again,
4 the statute's language is quite broad. And I believe, as
5 previously noted, that this dispute arises with respect to the
6 application of two of the enumerated sections, Bankruptcy Code
7 Sections 502 and 503 to the Agency as a governmental unit,
8 because the Agency is taking a position that could very well
9 lead to the Fund's claim being disallowed. The Agency takes
10 the position when it sends out the notices in connection with
11 the workers' compensation actions that the insurers are
12 potentially liable; if that liability is established, the Fund
13 has acknowledged that its claim against Delphi won't be
14 allowed.

15 So, based on my belief that Congress drafted section
16 language broadly, within the constitutional limits delineated
17 by Katz, I conclude that Section 106(a) abrogates sovereign
18 immunity not only as to the Fund which has actually filed a
19 claim against Delphi, but also as to the Agency. And, again,
20 the determination of that claim (as well as the closely related
21 claims of the insurers that depend, in the first instance, on a
22 determination that the insurers are, as the Agency has
23 asserted, liable under the respective policies) is clearly a
24 core function at the heart of the Court's bankruptcy
25 jurisdiction under the bankruptcy clause of the Constitution.

1 The Michigan defendants' other arguments may be more
2 briefly dealt with. First, and I'm going out of order here, I
3 should deal with their argument that this Court lacks
4 jurisdiction over this adversary proceeding because this
5 proceeding does not involve any of the enumerated issues to be
6 determined in an adversary proceeding under Bankruptcy Rule
7 7001.

8 It's true that a claim objection does not need to be
9 brought by way of an adversary proceeding, although the Court
10 may incorporate the adversary proceeding rules in a contested
11 matter, which would be the proper characterization of a claim
12 objection under Bankruptcy Rule 9014(c). In addition (and,
13 again, this has been clarified by the extensive discussion over
14 this issue during oral argument and before I started to give my
15 bench ruling today), this proceeding does, it appears to me,
16 unfortunately involve the determination of the extent of an
17 interest of the debtor in property, namely the extent of the
18 insurance coverage under the Deductible policies and the
19 Retention policies. The extent of coverage under those
20 policies is an issue that the parties cannot stipulate out of
21 this case, and, therefore, it would be covered by Rule 7001(2)
22 as well as Rule 7001(d), which requires an adversary proceeding
23 to be brought to obtain a declaratory judgment relating to any
24 of the foregoing types of proceedings, including one under Rule
25 7001(2) to determine the extent of an interest of the debtor in

1 property.

2 That leads to the issue, raised by the Michigan
3 defendants, of whether the Court should exercise its discretion
4 not to take jurisdiction over this declaratory judgment action
5 under the Declaratory Judgment Act. The Second Circuit has
6 recognized five factors to be considered when a court
7 determines whether to hear a declaratory judgment action under
8 28 U.S.C. § 2201.

9 The Second Circuit has consistently interpreted the
10 permissive language of that section as a grant of authority to
11 refuse to exercise jurisdiction over a declaratory action that
12 they would otherwise be empowered to hear. Dow Jones &
13 Company, Inc. v. Harrods Ltd., 346 F.3d 357, 359 (2d Cir.
14 2003). In that case the Second Circuit used a five-factor test
15 to determine whether the Court should exercise such discretion,
16 notwithstanding its jurisdiction, not to hear a declaratory
17 judgment request. Those factors are whether the judgment will
18 serve a useful purpose in clarifying or settling the legal
19 issues involved; whether a judgment would finalize the
20 controversy and offer relief from uncertainty; whether the
21 proposed remedy is being used merely for "procedural fencing"
22 or a "race to res judicata;" whether the use of a declaratory
23 judgment would increase friction between sovereign legal
24 systems or improperly encroach on the domain of a state court;
25 and whether there is a better or more effective remedy. Id.

1 The issue here, as well as the related issue of
2 permissive abstention, is not an easy one for the Court,
3 because, first and foremost, there are pending proceedings in
4 Michigan, and, therefore, there is a potential for friction
5 and/or inconsistent results if I retain jurisdiction of this
6 action. On the other hand, until the Rule 5 proceeding was
7 brought, the hundreds of actions in Michigan also all raised
8 the possibility of inconsistent results, since I've been
9 informed at oral argument that the Michigan tribunals (and I'm
10 using that term not as a term of art but as a loose description
11 of the Board of Magistrates that presides over those
12 determinations) do not, as among themselves, follow stare
13 decisis and only would follow the lead of the first to rule on
14 the insurance coverage/Form 400s issues as a practical matter.

15 Moreover, the Rule 5 proceeding was brought well after
16 this adversary proceeding was commenced, and, indeed, after a
17 schedule had been set on both this motion to dismiss as well as
18 a subsequent request for summary judgment by the insurers,
19 which the Court would be hearing in January under the current
20 schedule, a date I believe would preclude the determination of
21 the Rule 5 proceeding in advance. Therefore, while I believe
22 there would be friction between this Court and the state body,
23 the friction is very clearly not of this Court's making, or,
24 frankly, of the plaintiffs' making, in all respects. It would
25 seem to me that, therefore, that I should not focus on the so-

1 called "procedural fencing" factor or the "friction" factor but
2 on whether ultimately the question is raised before me in a way
3 that leads to the most final, useful and inclusive result.

4 Clearly the individual workers' compensation claimants
5 are not parties to the adversary proceeding before me. On the
6 other hand, it is clear to me from reading the Rule 5 pleading
7 filed by the Agency, that it is the Agency, assisted by the
8 Funds and their counsel, who will be taking the laboring oar in
9 the Rule 5 proceeding, because the Michigan defendants are the
10 originators of the theory that would subject the insurers to
11 liability.

12 Moreover, as I noted at the beginning of this ruling,
13 although this issue is not before me, DPH Holdings has taken
14 the position that, to the extent that I find that the Michigan
15 proceedings seek a determination of claims that ultimately
16 would be assertable against the debtor, the Michigan
17 proceedings would violate the Chapter 11 plan injunction.
18 Again, I don't know, and therefore I have not determined,
19 whether that would be the case, but it would seem to me that
20 that issue would also need to be decided before the Rule 5
21 proceeding could go forward, or there would be a risk that the
22 parties to the Rule 5 proceeding would be acting in
23 contravention of an injunction, and, therefore, that the
24 proceeding itself might be, or its result might be, void.

25 So, therefore, weighing all of those factors, it seems

1 to me that I'm not compelled to refrain from exercising
2 jurisdiction under the Declaratory Judgment Act here,
3 notwithstanding, as I've noted, the potential for friction with
4 the Michigan workers' compensation system and the potential
5 that, notwithstanding a ruling by me would bind the primary
6 parties, the individual workers' compensation claimants would
7 not necessarily be bound by any ruling on insurance coverage
8 and the insurers' liability that I would ultimately issue in
9 this case.

10 Of course, if I rule against the insurers they would
11 be bound in subsequent litigation with the underlying workers'
12 compensation claimants on that issue. Thus, the only issue of
13 uncertainty as to the finality of the issues before me would be
14 if I ruled in favor of the insurers. It would seem to me,
15 however, based, again, upon the colloquy during oral argument,
16 that at a minimum the judgment would serve a useful purpose in
17 clarifying the legal issues and, in particular, whether in fact
18 there would be a resulting claim against the debtor's estate,
19 which of course, again, falls within my core jurisdiction.

20 So, all things considered, and weighing these issues
21 carefully, I've determined that I should not refrain from
22 exercising jurisdiction under the Declaratory Judgment Act.

23 A similar analysis applies to the issue of permissive
24 abstention. But before turning to that issue, I should address
25 first the issue of mandatory abstention under 28 U.S.C. §

1 1334(c)(2), which the Michigan defendants contend governs here
2 and requires my abstention from presiding over this adversary
3 proceeding.

4 They bear the burden of proof on that issue, and it
5 has been determined that the factors that the courts in this
6 jurisdiction have uniformly applied pursuant to the statute
7 must be shown completely in the conjunctive for mandatory
8 abstention to be imposed. That is, the Michigan defendants
9 must show each of the following factors: the motion to abstain
10 was timely; the proceeding before me is based on a state law
11 claim; the action is related to but not arising in a bankruptcy
12 case or arising under the Bankruptcy Code; 28 U.S.C. § 1334
13 provides the sole basis for federal jurisdiction; and another
14 action is commenced in state court, and that action can be
15 timely adjudicated in state court. See In re WorldCom, Inc.
16 Securities Litigation, 293 B.R. 308, 331 (S.D.N.Y. 2003); In re
17 Adelphia Communications Corp., 285 B.R. 127, 141 (Bankr.
18 S.D.N.Y. 2002).

19 I have focused on a couple of these provisions. I
20 accept that the motion to abstain was timely; that the
21 underlying action is governed by applicable non-bankruptcy law;
22 and that the Court's jurisdiction over this action is premised
23 upon 28 U.S.C. § 1334. I inquired during oral argument about
24 whether the pending action can be timely adjudicated, and I
25 also have focused on whether the action is related to but not

1 arising in the bankruptcy case or arising under the Bankruptcy
2 Code.

3 Before turning to those issues, I should note,
4 however, that the identification of "an action pending" in a
5 non-bankruptcy forum is an issue that courts view in different
6 ways. Some courts have contended that the pending non-
7 bankruptcy action in favor of which the bankruptcy court must
8 abstain would have to be pending before the commencement of the
9 adversary proceeding in the bankruptcy court. See, for
10 example, In re Container Transp., Inc., 86 B.R. 804, 805
11 (E.D.Pa. 1988). However, other courts, including at least one
12 district court in this District, have decided, based on the
13 plain language of the statute, which does not speak to the
14 timing of the commencement of the pending non-bankruptcy action
15 vis a vis the commencement of the bankruptcy action, that the
16 non-bankruptcy action only must be pending at the time of the
17 motion to abstain. Langston Law Firm v. Mississippi, 410 B.R.
18 150, 155-56 (S.D.N.Y. 2008). I believe that's the better view,
19 so I have included in my analysis not only the hundreds of
20 pending workers' compensation proceedings, which, as I said,
21 troubled me in that they're not subject to stare decisis, but
22 also the Rule 5 proceeding that was commenced in mid-December
23 after this proceeding.

24 I have explored with counsel for the Agency and
25 counsel for the Funds whether that Rule 5 proceeding can be

1 timely adjudicated. Clearly it is in Michigan's interests to
2 have the proceeding determined quickly, in that numerous former
3 employees of Delphi are without workers' compensation coverage
4 during the time it's pending. And it does appear to me that
5 the Agency and the Funds have the ability to seek expedited
6 relief in Michigan.

7 On the other hand, the Michigan appellate process (and
8 I'm convinced that there would be an appeal of the Rule 5
9 proceeding regardless of its outcome) is lengthy and somewhat
10 convoluted. In addition, the finality of the Rule 5 proceeding
11 is complicated by the fact that the insurers have sought, in a
12 colloquial term, mandamus to the state court, contending that
13 the purpose of the Rule 5 proceeding is not covered by the
14 applicable statute and that the issues it raises therefore
15 should properly be before the Michigan state court, not a
16 hearing officer selected by the Agency, who also, they contend,
17 lacks the power even to consider the issue of reformation of
18 the policies. The litigation of that issue also would delay
19 any ultimate ruling.

20 Because the claims against Delphi's estate that
21 ultimately would potentially devolve from a determination of
22 these issues include administrative and priority claims, the
23 prompt determination of these issues is very important to the
24 outcome of the Chapter 11 case. As I have noted previously,
25 cash is in short supply for this debtor, and the need to

1 reserve significant cash will significantly constrain this
2 debtor and potentially affect its ability to perform under the
3 Chapter 11 plan, which requires administrative claims to be
4 paid in full in cash unless the claimants themselves agree to a
5 different treatment, which they've clearly not done.

6 So, I do have some real concern over whether the Rule
7 5 proceeding can be timely adjudicated in the context of this
8 Chapter 11 case.

9 But, more importantly, I believe that, as I've said
10 before, the underlying action here is a core proceeding; that
11 is, it is more than related to this bankruptcy case; it really
12 arises under the Bankruptcy Code, for the reasons I've
13 previously stated. Because that mandatory abstention factor
14 (as laid out in WorldCom and Adelphia) is not met, therefore,
15 mandatory abstention would not lie.

16 That leaves the issue of permissive abstention under
17 28 U.S.C. § 1334(c)(1). The courts are clear that "federal
18 courts should be sparing in the exercise of discretionary
19 abstention and that they have a duty to exercise their
20 jurisdiction, barring extraordinary circumstances." Metromedia
21 Fiber Network, Inc. v. Various State and Local Taxing
22 Authorities, 299 B.R. 251, 280 (Bankr. S.D.N.Y. 2003), quoting
23 Texaco Inc. v. Sanders (In re Texaco Inc.), 182 B.R. 937, 946
24 (Bankr. S.D.N.Y. 1995).

25 The courts have developed twelve factors for

1 consideration when deciding whether permissive abstention under
2 28 U.S.C. § 1334(c)(1) should be ordered. Those factors,
3 however, are heavily weighted, or should be viewed with an eye
4 that heavily weighs them, in favor of the exercise of
5 jurisdiction. In re Ionosphere Clubs, Inc., 108 B.R. 951, 954
6 (Bankr. S.D.N.Y. 1989). They are the effect, or lack thereof,
7 on the efficient administration of the estate if a court
8 recommends abstention; the extent to which non-bankruptcy law
9 issues predominate over bankruptcy issues; the difficult or
10 unsettled nature of the applicable non-bankruptcy law; the
11 presence of a related proceeding commenced in state court or
12 other non-bankruptcy court; the jurisdictional basis, if any,
13 other than the 28 U.S.C. § 1334; the degree of relatedness or
14 remoteness of the proceeding to the main bankruptcy case; the
15 substance, rather than form, of an asserted core proceeding;
16 the feasibility of severing non-bankruptcy law claims from core
17 bankruptcy matters to allow judgments to be entered in non-
18 bankruptcy court, with enforcement left to the bankruptcy
19 court; the burden on the bankruptcy court's docket; the
20 likelihood that the commencement of the proceeding in a
21 bankruptcy court involves forum shopping by one of the parties;
22 the existence of a right to a jury trial; and the presence in
23 the proceeding of non-debtor parties. See, for example, In re
24 Cody, Inc., 281 B.R. 182, 190 (S.D.N.Y. 2002); In re Calpine
25 Corp., 361 B.R. 665, 669 (Bankr. S.D.N.Y. 2007).

1 Here, as I've noted repeatedly, I have previously
2 focused on whether non-bankruptcy law claims could be severed
3 from core bankruptcy matters, to permit those non-bankruptcy
4 matters that would not lead to the allowance or disallowance of
5 claims to go forward in Michigan. It appears, however, that
6 effort (although the parties, I believe, undertook it in good
7 faith) did not bear fruit. And I believe that I am left with,
8 again, the exercise of core bankruptcy jurisdiction, given
9 that, again, the issues in this proceeding would set the table
10 for (and even potentially determine) the issue of the allowance
11 of the insurers' and/or the Fund's claims against Delphi. That
12 clearly affects the efficient administration of the estate, as
13 I've noted in discussing the timeliness issue with regard to
14 mandatory abstention.

15 The Michigan defendants argue that the issues here are
16 solely state law issues, which in fact they are, and,
17 therefore, that I should abstain on that basis. They also go
18 further and state that those issues are so central to the
19 Michigan workers' compensation scheme that they implicate the
20 Burford abstention doctrine under Burford v. Sun Oil Company,
21 319 U.S. 315 (1943), and I've considered that argument
22 carefully.

23 Clearly, the issues are important to the State of
24 Michigan. However, they are issues that involve interpretation
25 of Michigan statutes that both parties believe can be decided

1 readily, the Michigan defendants on a Rule 12(b)(6) basis and
2 the insurance company plaintiffs on a summary judgment basis.
3 Moreover, this Court like bankruptcy courts across the country
4 routinely determines non-bankruptcy law issues when it
5 determines the allowability of claims.

6 I do not believe that the issues before me in this
7 proceeding, were I to keep it, would be so tied up in the
8 operation of the Michigan workers' compensation scheme that the
9 Burford doctrine would apply, nor do I believe that there is,
10 at a high level, an impending determination by the courts in
11 Michigan that I should defer to. (At one point it appeared
12 that that would be the case, given the existence of the Nyhuis
13 litigation before the Michigan Court of Appeals, but at oral
14 argument I was informed that that litigation had settled.)

15 Therefore, it would appear to me (although, again, the
16 issue is not a simple one) that the factors that I've listed do
17 not weigh heavily in favor of permissive abstention; rather,
18 they are, at best, balanced. And, given the core nature of
19 this dispute, my confidence that I can determine it quickly,
20 and the importance of the dispute, at least insofar as it
21 pertains to the insurers' and the Fund's administrative claims
22 against Delphi, I will not exercise my discretion to abstain in
23 favor of the Rule 5 proceeding.

24 It may be that once I deal with the Michigan
25 defendants' Rule 12(b)(6) motion and the insurers' pending

1 summary judgment motion (if I get to it; that is, if I deny the
2 12(b)(6) motion, which I haven't decided, of course), the
3 dispute can be structured in a way that preserves significant
4 issues for decision in Michigan, as I had earlier
5 unsuccessfully tried to accomplish. But, again, presently it
6 does not appear that any issues can be severed in a way that
7 would permit only the core bankruptcy issues to be decided by
8 me. Therefore, at least at this time, and, again, subject to
9 dealing with the 12(b)(6) motion and, potentially, the motion
10 for summary judgment, I will not abstain.

11 I believe that I've dealt, therefore, with each of the
12 grounds on a procedural/jurisdictional basis that have been
13 raised by the Michigan defendants for dismissal of this
14 proceeding. And, for the reasons stated, I have denied each of
15 them.

16 Counsel for the insurers should submit an order
17 consistent with my ruling. I would prefer an order that simply
18 states that the motion is denied for the reasons stated in the
19 Court's bench ruling and that the Court will retain
20 jurisdiction over the proceeding, as stated on the record at
21 the hearing.

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