IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

EASTERN ATLANTIC INSURANCE COMPANY,	:	**CIVIL NO. 1:CV-04-1555**
Plaintiff	:	
v.	:	
SWISS REINSURANCE AMERICA CORPORATION (*Successor in interest to Underwriters Reinsurance Company*),	:	
Defendant	:	

MEMORANDUM

Before the court is Defendant's "Motion to Dismiss Plaintiff's Complaint or, Alternatively, For Stay Pending Parallel State Court Proceedings." (Doc. 8.) The parties have briefed the issue, and the matter is ripe for disposition. For the reasons set forth below, the court will grant Defendant's motion.

I. Background

Plaintiff, Eastern Atlantic Insurance Company ("Eastern Atlantic") filed the captioned matter on July 16, 2004. On September 20, 2004, Defendant Swiss Reinsurance America Corporation ("Swiss Re") filed the instant motion to dismiss. The following facts are based on the allegations in Eastern Atlantic's complaint and matters set forth in the public record. Additionally, these facts are undisputed except where noted.

Swiss Re is the successor in interest to Underwriters Reinsurance Company ("Underwriters Re").[1] Prior to the instant complaint and subsequent motion in federal court, the parties appeared in Pennsylvania state court under the caption *Underwriters Reinsurance Company v. Eastern Atlantic Insurance Company*.[2] The issues before the state court revolved around certain retrocessional agreements mutually entered into by both parties.[3] The retrocessional agreements provided terms of payment and credit between the reinsurer, Underwriters Re and the reinsured, Eastern Atlantic. The retrocessional agreements established that "Underwriters Re shall pay Eastern Atlantic a 30% share of net premiums paid by insureds on account of Eastern Atlantic's motor vehicle insurance program." (Compl. ¶ 15.) The 1997 retrocessional agreement provided that Eastern Atlantic was to issue an irrevocable line of credit in the amount of $1,000,000 to Underwriters Re. (Pl.'s Mot. in Opp'n to Def.'s Mot. to Dismiss, Ex. G ¶¶ 5-6.)[4] The amount of the line of credit was to increase on a quarterly basis by $750,000 or an amount otherwise calculated. (*Id.*) Additionally, the line of credit was to remain in force until the disposition of all liability. (*Id.*) The 1997 retrocessional agreement was the last agreement executed by the parties and its terms superceded all other agreements.[5]

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[1]For ease of reference the court will refer to the Defendants as Swiss Re and Underwriters Re and Plaintiff as Eastern Atlantic.

[2]*See Underwriters Reinsurance Company v. Eastern Atlantic Insurance Company*, No. 5741 (Dauphin Ct. Com. Pl. 2000).

[3]Retrocession is defined as "[t]he process of transferring all or part of a reinsured risk to another reinsurance company; reinsurance of reinsurance." Blacks Law Dictionary 1056-57 (7th ed. 2000).

[4]Exhibit G of Plaintiff's Motion in Opposition to Defendant's Motion to Dismiss is the "Special Master Findings and Recommendations to the Court With Decree Nisi Dated January 21, 2004." It provides a thorough accounting of the factual issues that underline this case.

[5]There was a 1996 retrocessional agreement that the 1997 retrocessional agreement superceded.

(continued...)

On November 15, 2000, Underwriters Re filed a complaint in the Court of Common Pleas asserting that Eastern Atlantic was in material breach of the 1997 retrocessional agreement. Specifically, Underwriters Re asserted that the irrevocable letter of credit posted by Eastern Atlantic was not in accordance with the parties' 1997 retrocessional agreement. (*Id*. ¶ 8) Eastern Atlantic issued an irrevocable letter of credit for $2,275,000. (*Id.*) However, Underwriters Re asserted that $10,750,000 was the necessary amount to meet the requirements of the 1997 retrocessional agreement. (*Id.*) In July 2001, Underwriters Re moved for and was granted judgment on the pleadings. (*Id.* ¶ 11.) Additionally, the Court of Common Pleas ordered Eastern Atlantic to post an irrevocable letter of credit in the initial amount of $10,750,000. (*Id*.)

Eastern Atlantic appealed the decision and order to the Superior Court of Pennsylvania. The Superior Court, in April 2002, affirmed the Court of Common Pleas's ruling and order. (*Id*.) On May 13, 2002, Eastern Atlantic filed a petition for appeal with the Supreme Court of Pennsylvania, but that court denied the petition on October 23, 2002. (*Id.* ¶ 12.)

On June 10, 2003, the Court of Common Pleas entered An Order of Appointment establishing that a special master would develop an overall plan for periodic review and adjustment between the parties. (*See* Def.'s Mot. to Dismiss, Ex. 2.)[6] The issuance of the Order of Appointment was agreed upon by both parties. (*Id.* at 1.) Per the Order of Appointment, the Special Master was given "complete discretion, [to] issue a comprehensive plan covering all aspects of

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[5](...continued)
(Compl. ¶¶ 8-11.) Additionally, there was a 1998 retrocessional agreement executed by Underwriters Re, however Eastern Atlantic did not execute the 1998 retrocessional agreement. (*Id.*)

[6]Exhibit 2 of Defendant's Motion to Dismiss is the Court of Common Pleas' Order of Appointment of the Special Master.

implementation for the entire matter." (*Id*. ¶ 3.) The Special Master was to "develop an overall plan for periodic review and adjustment between the parties and to consider granting the Defendant relief from '*unnecessary excess coverage, via Letters of credit*' and to make appropriate determinations regarding adjustments of coverage." (*Id*. ¶ 4.) The Order of Appointment also provided that the Special Master "shall make all initial determinations concerning the Plan implementation process, including resolving any disputes or controversies related thereto." (*Id.* ¶ 6.) Additionally, the Order of Appointment provided that the Court of Common Pleas would hear any matters that could not be resolved by the Special Master; however, the matter was to be fully briefed and heard by the Special Master who was to then make a recommendation to the Court of Common Pleas. (*Id*.) The Special Master was to issue a periodic nisi decree. (*Id.* ¶ 4.) Both parties were given ten days to appeal the nisi decree. (*Id*.) If no exceptions were filed, the nisi decree became final. (*Id.*)

On November 6, 2003, the Special Master issued a nisi decree and Underwriters Re filed a timely appeal. (Pl.'s Mot. in Opp'n to Def.'s Mot. to Dismiss, Ex. G ¶¶ 26-27.) A nisi decree issued by the Special Master in January 2004 overruled the November decree. In the January Nisi Decree, the Special Master ordered Eastern Atlantic to provide an irrevocable letter of credit of $8,250,943. (*Id.* Nisi Decree ¶ 3.) Additionally, the Special Master adopted as his findings that "the total amounts owed under the Agreement to Underwriters Reinsurance Company by Eastern Atlantic for past loses and estimated future loses is Eight Million Two Hundred Fifty-Thousand Nine Hundred Forty-Three and No/100 ($8,250,943.00) Dollars." (*Id.* ¶ 41) Eastern Atlantic did not appeal the January nisi decree to the Court of Common Pleas.

On January 28, 2004, Swiss Re submitted a written demand to Eastern Atlantic for payment of $4,578,561.39 "on account of sliding scale commissions, loss corridors, and loss caps prescribed in the parties' retrocessional agreements." (Compl. ¶ 18.) After some negotiations, the amount was reduced to $3,247,669.71. (*Id*. ¶ 22.)

Eastern Atlantic filed a petition for emergency injunctive relief with the Court of Common Pleas to enjoin Swiss Re's draw on Eastern Atlantic's letters of credit on or about March 3, 2004. Eastern Atlantic specifically averred that Swiss Re's threatened draw was without merit and contrary to law. (*Id*. ¶ 25.) By a May 24, 2004 order, the Court of Common Pleas stated "that it would be inappropriate to exercise our equity jurisdiction to issue an injunction in this matter." (*Id*., Ex. L at 1.) The order further provided that "this holding is without prejudice to either party's right to institute an action at law based upon the underlying contractual relationship rights and obligations of the parties." (*Id*.)

Following the court order, on or about May 24, 2004, Swiss Re presented letters of credit to Fulton Bank and demanded an immediate draw. (*Id.* ¶ 27.) Fulton Bank, the holder of Eastern Atlantic's line of credit, was authorized via prior agreement with Eastern Atlantic to transfer the demanded funds. (*Id*. ¶ 28.) This agreement was to mitigate damages associated with Swiss Re's anticipated draw against Eastern Atlantic's letter of credit. (*Id*. ¶ 28.1.) Fulton Bank subsequently transferred the amount to Swiss Re. (*Id*.)

Eastern Atlantic filed the instant complaint in Federal Court in June of 2004. In August 2004, the Court of Common Pleas issued an order reinstating the Special Master, who had taken leave due to medical difficulties. Following his reinstatement, the Special Master issued an order on September 14, 2004, requesting

that the parties submit all correspondences and pleadings filed or exchanged in the year 2004 to date to him.

Eastern Atlantic's instant Complaint alleges that Swiss Re performed an unauthorized draw against Eastern Atlantic's letters of credit. According to Eastern Atlantic's Complaint, Swiss Re's alleged unauthorized draw resulted in tortuous conversion, two counts of replevin, two counts of unjust enrichment, and breach of contract.

II. Legal Standard: Motion to Dismiss pursuant to Rule 12(b)(1)

" 'A motion to dismiss under Rule 12(b)(1) challenges the jurisdiction of the court to address the merits of the plaintiff's complaint.' " *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 537 (M.D. Pa. 2002) (quoting *Ballenger v. Applied Digital Solutions, Inc.*, 189 F. Supp. 2d 196, 199 (D. Del. 2002)). The motion should be granted where the asserted claim is "insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Coxson v. Pennsylvania*, 935 F. Supp. 624, 626 (W.D. Pa. 1996) (citing *Growth Horizons v. Delaware County*, 983 F.2d 1277, 1280-81 (3d Cir. 1993)). Additionally, a motion to dismiss under Rule 12(b)(1) may present either a facial or factual challenge to subject matter jurisdiction. *See Carpet Group Int'l v. Oriental Rug Imps. Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000).

This case presents a facial challenge because Defendants do not dispute, at this juncture, the jurisdictional facts alleged in the complaint. *See* 2 James Wm. Moore et al., Moore's Federal Practice ¶ 12.30[4] (3d ed. 1999) (explaining the difference between a facial and factual challenge to subject matter jurisdiction pursuant to Rule 12(b)(1)). Therefore, the court must accept the facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff.

Zinermon v. Burch, 494 U.S. 113, 118 (1990); *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000).

III. Discussion

Swiss Re contends that Eastern Atlantic's claim should be dismissed because: (1) The court lacks subject matter jurisdiction based on the *Rooker-Feldman* doctrine, (2) the court lacks subject matter jurisdiction based on *Colorado River* abstention principles, and (3) Eastern Atlantic has failed to state a claim upon which relief can be granted.[7] For the reasons set forth more fully below, the court finds that Swiss Re's second argument is well-founded, and thus, dispositive of the case; therefore, the court need not address Swiss Re's remaining arguments.

It is well settled that "the general rule regarding simultaneous litigation of similar issues in both state and federal courts is that both actions may proceed until one has come to judgment, at which point that judgment may create a res judicata or collateral estoppel effect on the other action." *Univ. of Md. at Baltimore v. Peat Marwick Main & Co.*, 923 F.2d 265, 275-76 (3d Cir. 1991). However, in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), the Supreme Court carved out a narrow exception to this general rule, providing instances where a federal court may defer to parallel state court proceedings. The court finds that the present case is one of those exceptional instances where the *Colorado River* abstention doctrine applies.

The *Colorado River* abstention doctrine is not actually an abstention doctrine although it has come to be known as such. As the Supreme Court in

[7]To address a failure to state a valid claim, the court would analyze the claim under 12(b)(6) and not 12(b)(1). However, the court will not address Swiss Re's assertion that Eastern Atlantic failed to state a valid claim; therefore, no 12(b)(6) analysis is necessary.

Colorado River stated, "[a]lthough this case falls within none of the abstention categories, there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations." 424 U.S. at 817. The Court went on to state that "these principles rest on considerations of '(w)ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" *Id.* (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Engine Equip. Co.*, 342 U.S. 180 (1952)).

Before a court can apply the *Colorado River* abstention doctrine, it must first make a threshold determination that the claims are parallel. *Ryan v. Johnson*, 115 F.3d 193, 196 (3d Cir. 1997). The Third Circuit has stated that "cases are parallel when they involve the same parties and claims." *Id.* While Swiss Re was not an original party, it is a successor in interest to Underwriters Re and will be considered, for the purposes of this case, the same party as Underwriters Re.

The claims in the present case are also the same as those in the Pennsylvania state court proceedings. Claims are considered to be the same when they present "nearly identical allegations and issues." *Trent v. Dial Med. of Fla., Inc.*, 33 F.3d 217, 223 (3d Cir. 1994) *overruled in part on other grounds by Ryan v. Johnson*, 115 F.3d 193 (3d Cir. 1997). Additionally, the Seventh Circuit has aptly noted, "we look not for formal symmetry between the two actions, but for a substantial likelihood that the state litigation will dispose of all claims presented in the federal case." *Lumen Constr., Inc. v. Brant Constr. Co., Inc.*, 780 F.2d 691, 695 (7th Cir. 1985).

The present claims before the court arise out of a draw by Swiss Re against letters of credit held by Eastern Atlantic. These claims center on the liabilities of Eastern Atlantic to Swiss Re. Eastern Atlantic asserts that these claims are

"wholly distinct from those before the state court." (Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss at 18.) According to Eastern Atlantic, the Court of Common Pleas's Order of Appointment of the Special Master was for the limited purpose of "maintaining adequate security upon Eastern Atlantic's maximum potential liabilities to [Underwriters Re]." (*Id*.) Maintaining adequate security was one aspect of the Special Master's duties; however, the Order of Appointment also provided the Special Master with "complete discretion, [to] issue a comprehensive plan covering all aspects of implementation for the entire matter." **(**Def.'s Mot. to Dismiss, Ex. 2. at 2.**)** The "plan" referred to in the Order of Appointment is "an overall Plan for Periodic Review and Adjustment." (*Id*.) The periodic review and adjustment refer to the letters of credit that were in place to maintain adequate security upon Eastern Atlantic's liabilities to Underwriters Re. It would have been impossible for the Special Master to make a determination of adequate security without first making a determination of the parties' liabilities. The parties' liabilities are so intertwined with the letters of credit that they are the same issue for purposes of determining if the claims are parallel.

Eastern Atlantic's contention that the Special Master's appointment was for the limited purpose of maintaining adequate security upon its maximum potential liabilities is disputed by the broad overarching language of the Order of Appointment. The Order of Appointment stated that the Special Master "shall make all initial determinations concerning the Plan implementation process, including resolving any disputes or controversies related thereto." (*Id*. at 4.) This language indicates that the Special Master was designated to handle disputes, such as the one before the court. Furthermore, the issue of liability was clearly addressed by the Special Master. In the "Special Master Findings and Recommendations to the Court With Nisi Decree Dated January 21, 2004," the Special Master adopted as his own finding that

> [i]n the aggregate, the total amounts owed under the Agreement to Underwriters Reinsurance Company by Eastern Atlantic for past loses and estimated future loses is Eight Million Two Hundred Fifty-Thousand Nine Hundred Forty-Three and No/100 ($8,250,943.00) Dollars.

(Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss, Ex. G. ¶ 41.**)** Both the state and federal claims revolve around the issue of liability. For the reasons stated, the court finds that the state court claims are parallel to those presented to the district court.

Now that the court has determined that the claims are parallel it must determine if *Colorado River* abstention is proper. Courts in the Third Circuit have used a six factor test. These factors are as follows: "(1) whether one court has first obtained jurisdiction over property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the state and federal courts obtained and exercised jurisdiction; (5) the source of the law that will provide the rules of decision; and (6) the adequacy of the state court proceeding to protect the parties' rights." *Allied Nut & Bolt, Inc. v. NSS Indus., Inc*., 920 F. Supp. 626, 631 (E.D. Pa 1996) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 15-16, 21, 25-26 (1983)); *see also Colorado River Water Conservation Dist.,* 424 U.S. 800. The court will review each factor in turn.

While the six factor test has been promulgated by the Third Circuit, the Supreme Court has stated that the decision to dismiss a federal action under the *Colorado River* doctrine is not contingent upon a "mechanical checklist" nor is one factor to be determinative. *Moses H. Cone Mem'l Hosp.,* 460 U.S. at 937; *Colorado River Water Conservation Dist.,* 424 U.S. at 818-19. Instead, the court is to balance the factors as "apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Mem'l Hosp.,* 460 U.S. at 929.

Neither the state nor the federal actions involve *in rem* jurisdiction.

Therefore, the first factor, jurisdiction over property, is not applicable. The second factor, inconvenience of the federal forum, is not dispositive and weighs neither for nor against abstention in this case. The federal forum in this instance would not be inconvenient since the Federal Courthouse is within blocks of the Dauphin County Court of Common Pleas.

The third factor, avoiding piecemeal litigation, is not applicable. The Third Circuit has stated that "the 'avoidance of piecemeal litigation' factor is met, as it was in . . . *Colorado River* itself, only when there is evidence of a strong federal policy that all claims should be tried in the state courts." *Ryan v. Johnson*, 115 F.3d 193, 197-98 (3d Cir. 1997). However, just because there is no underlying federal policy, as in *Colorado River*, abstention may still be proper. *Colorado River Water Conservation Dist*., 424 U.S. at 820. In *Colorado River* one of the deciding factors was the federal policy underlying the McCarran Amendment, which provided for the state adjudication of water rights. Although, in that case, the Court stated that

> [w]e need not decide, for example, whether, despite the McCarran Amendment, dismissal would be warranted if more extensive proceedings had occurred in the District Court prior to dismissal, if the involvement of state water rights were less extensive than it is here, or if the state proceeding were in some respect inadequate to resolve the federal claims.

Colorado River Water Conservation Dist., 424 U.S. at 820.

The fifth factor, source of the law that will provide the rules of decision, and the sixth factor, adequacy of the state court proceeding to protect the parties' rights, may favor abstention, but are also not dispositive. The claims of the parties are governed by state law. The Pennsylvania courts are fully capable of adjudicating this matter. One example is the Court of Common Pleas's appointment of the Special Master to deal with the complex matters arising out of the state court proceedings. Additionally, Eastern Atlantic is headquartered in Pennsylvania

therefore making it difficult to claim that its interests would be prejudiced in state court. Eastern Atlantic has made no such assertions and there is no reason to think that a state court proceeding would not adequately protect Eastern Atlantic's rights.

In the instant case, the factor weighing most in favor of abstention is the fourth factor, the order in which the state and federal courts obtained and exercised jurisdiction. This factor alone tips the balance in favor of abstention. An analysis of this factor should look not only to which action was initiated first, but more important, which action has proceeded further. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 21-22.

The state court litigation began in November 2000, and most recently the Special Master issued an order in September 2004. Essentially, this litigation has been ongoing for almost four years. It has been appealed to the Pennsylvania Superior Court and the Pennsylvania Supreme Court, returning to the Court of Common Pleas fully intact. Following the appeals process, the Court of Common Pleas issued an Order of Appointment of a Special Master. This Order of Appointment was agreed to by both parties. As already noted by this court, the Order of Appointment provided the Special Master with broad powers to determine all relevant matters. The Special Master has exercised these powers and has spent a considerable amount of time and effort on this case.

Additionally, Eastern Atlantic's "Petition for Emergency Injunctive Relief to Enjoin Underwriters Re's / Swiss Re's Unauthorized Draw Against Eastern Atlantic's Letters of Credit" was denied by the Court of Common Pleas. (Compl. ¶ 26.) Neither party has submitted any accompanying memoranda associated with the Court of Common Pleas's order. The court will not speculate the reasons why the

Court of Common Pleas stated that "it would be inappropriate to exercise our equity jurisdiction to issue an injunction in this matter."[8] (Compl., Ex. L at 1.)

As stated, the decision to exercise abstention under the *Colorado River* is not contingent on a mechanical checklist. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 937 *Colorado River Water Conservation Dist.*, 424 U.S. at 818-19. Generally, one of the overarching goals of *Colorado River* abstention is "avoiding the generation of additional litigation through permitting inconsistent dispositions of property." *Colorado River Water Conservation Dist.*, 424 U.S. at 819. In the instant case, the need for consistent dispositions of property is paramount. Eastern Atlantic asserts that the Special Master's role was "maintaining adequate security upon Eastern Atlantic's maximum potential liabilities to Defendant." (Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss at 18.) The state court should not determine the "maximum potential liabilities" and the federal court determine the actual liabilities, which are the crux of the claims before the court. Not only would there exist a possibility that the federal court would issue inconsistent, if not wholly conflicting orders, it would be a waste of both state and federal judicial resources.

The Third Circuit has stated, "an abstention, even for 'considerations of wise judicial administration . . . can be justified . . . only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.'" *Spring City Corp. v. American Bldgs. Co.*, 193 F.3d 165, 172-73 (3d Cir. 1999). The court believes the aforesaid possibility of conflicting orders and the order in which state and federal courts

[8]However, the court does note that the Order of Appointment provided that "[i]n the event that [any dispute or controversies] cannot be so resolved by the Special Master, a party may request, for extraordinary cause shown, that the court decide such matter(s). However . . . the issue(s) must be fully briefed to and heard by the Special Master, who will make findings and a recommendation to the Court." (Def.'s Mot. to Dismiss, Ex. 2 at 4-5.) There is no indication that the Special Master was briefed before Eastern Atlantic motioned the Court of Common Pleas for injunctive relief.

obtained and exercised jurisdiction are exceptional circumstances that warrant abstention.

In the instant case, Eastern Atlantic's interests would not be prejudiced if its claims proceeded in state court. Pennsylvania state law controls the present case, and Pennsylvania courts are fully capable of handling it. The court also takes into consideration wise judicial administration and finds that concern weighs heavily in favor of abstention. Judicial economy is but one consideration, the court also considers there is a potential for the inconsistent dispositions of property. Finally, the action was commenced several months ago and has only reached a stage where a motion to dismiss is proper. The action in state court has progressed considerably further and in fact is ongoing. These factors add up to an exceptional circumstance, the court will defer to state court proceedings.[9]

[9]As to the issue of granting a stay or dismissing the case, the Supreme Court has stated, "that a stay is as much a refusal to exercise federal jurisdiction as a dismissal." *Moses H. Cone Mem'l Hosp,* 460 U.S. at 28. If one is essentially equal to the other, then in the interest of administrative ease this court will dismiss the present case.

IV. Conclusion

The court recognizes that, "abstention from the exercise of federal jurisdiction is the exception, not the rule." *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992). However, this case is so heavily weighted in favor of abstention that this court must grant Swiss Re's motion to dismiss. For the reasons stated, this court will grant the motion of Swiss Re to dismiss Eastern Atlantic's complaint. An appropriate order will issue.

s/Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: December 16, 2004.