IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, *et al.*,	)	
Plaintiffs,	)	
v.	)	C.A. No. 4791-VCL
CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON SUBSCRIBING TO BOND NUMBERS B0391/FD020720g AND B0391/FD020730g, *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

Date Submitted: August 10, 2010
Date Decided: September 24, 2010

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LASTER, Vice Chancellor.

In this insurance coverage dispute, the plaintiffs seek to recover losses suffered as a result of the Bernie Madoff scandal and apportion them across two insurance towers. The first tower consists of a primary fidelity bond and excess bonds that generally follow form to the primary bond (the "Bond Tower"). The second tower consists of a primary directors and officers' liability insurance policy and excess policies that generally follow form to the primary policy (the "D&O Tower"). I raised *sua sponte* whether the case belonged in Chancery. Despite a consensus among the litigants that equitable jurisdiction exists (perhaps the only issue on which they agree), I conclude that the plaintiffs have an adequate remedy at law. This matter is therefore transferred to the Superior Court.

I. FACTUAL BACKGROUND

The plaintiffs entrusted money directly or through affiliates to Bernard L. Madoff. Rather than investing the money, Madoff stole it. Through this action, the plaintiffs seek to recover and apportion their losses, including for defense costs being incurred in numerous lawsuits arising out of the Madoff scandal.

The Complaint asserts six counts. Count I seeks equitable apportionment of defense costs between the Bond Tower and the D&O Tower. The other five counts assert claims for breach of contract and for declarations of the scope of policy obligations. None of the parties sought dismissal on jurisdictional grounds. The bond underwriters moved to dismiss for failure to state a claim on which relief can be granted. The D&O insurers answered and raised affirmative defenses.

Because insurance coverage disputes are typically heard by the Superior Court, I asked myself why this case should be in Chancery. But after reviewing Count I and

consulting the cited Court of Chancery decision, I accepted the sufficiency of the pleading. That was an oversight.

Instead, it occurred to me that if the bond underwriters' motion to dismiss were granted, then the Bond Tower no longer could buttress the equitable apportionment claim, and I would be able to transfer the case to its natural home in Superior Court. With that thought in mind, I embarked on considering the bond underwriters' motion to dismiss.

Over the ensuing months, three things happened. First, I denied the motion to dismiss. *See Mass. Mut. Life Ins. Co. v. Certain Underwriters at Lloyd's of London*, 2010 WL 2929552 (Del. Ch. July 23, 2010) (the "Dismissal Decision"). So ended the prospect of mooting the equitable apportionment claim.

Second, my foray into the merits revealed a docked equitable apportionment tail wagging a very large and complex insurance coverage dog. Although denominated as Count I of the Complaint, equitable apportionment is not the leading issue in the case. It cannot be reached until a series of prior coverage issues are addressed. As I determined in the Dismissal Decision, several of those issues turn on ambiguous policy provisions, and adjudicating them will require discovery and (potentially) a trial. Equitable apportionment will take place, if at all, only in a far-distant remedial phase.

Third, Vice Chancellor Strine issued a bench ruling in which he transferred to the Superior Court an insurance coverage dispute where the parties relied on equitable apportionment as their continuing basis for Chancery jurisdiction (the case previously involved corporate issues that Vice Chancellor Strine had resolved). *Viking Pump, Inc. v.*

Century Indem. Co., C.A. No. 1465-VCS, at 6, 14-15 (Del. Ch. June 9, 2010) (TRANSCRIPT), *appeal dismissed*, 2010 WL 3063304 (Del. July 22, 2010).

Together, these developments caused me to suspect I had erred by not evaluating the jurisdictional underpinnings of this matter more critically. By letter dated July 26, 2010, I asked the parties to address the issue of subject matter jurisdiction. They responded with submissions exhorting me to retain the case.

II. LEGAL ANALYSIS

The Court of Chancery is a court of limited jurisdiction. It has subject matter jurisdiction only when a case falls into one of three buckets: first, if the plaintiff states an equitable claim, 10 *Del. C.* § 341; second, if the plaintiff requests equitable relief for which there is no adequate remedy at law, 10 *Del. C.* §§ 341, 342; or third, if subject matter jurisdiction is otherwise conferred by statute, *e.g.*, 8 *Del. C.* § 111; 6 *Del. C.* §§ 17-111, 18-111. *See generally Candlewood Timber Gp., LLC v. Pan Am. Energy, LLC*, 859 A.2d 989, 997 (Del. 2004). "[U]nlike many jurisdictions, judges in the Delaware Court of Chancery are obligated to decide whether a matter comes within the equitable jurisdiction of this Court regardless of whether the issue has been raised by the parties." *IBM Corp. v. Comdisco, Inc.*, 602 A.2d 74, 77 n.5 (Del. Ch. 1991); *see also* Ct. Ch. R. 12(h)(3) ("Whenever it appears by suggestion of the parties *or otherwise* that the court lacks jurisdiction of the subject matter, the Court *shall* dismiss the action." (emphasis added)). "The issue of subject matter jurisdiction is so crucial that it may be raised at any time before final judgment." *Medek v. Medek*, 2008 WL 4261017, at *3 n.27 (Del. Ch. Sept. 10, 2008). If this Court lacks jurisdiction, the case can be transferred to an

appropriate Delaware court. *See* 10 *Del. C.* § 1902. The transfer statute "shall be liberally construed to permit and facilitate transfers of proceedings between the courts of this State in the interests of justice." *Id.*

The parties unanimously endorse Chancery jurisdiction. But equitable jurisdiction cannot be conferred by agreement. *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*, 669 A.2d 36, 39 (Del. 1995) ("It is a cardinal principle of the law that jurisdiction of a court over the subject matter cannot be conferred by consent or agreement." (quoting *Timmons v. Cropper*, 172 A.2d 757, 760 (Del. Ch. 1961))).

At heart, the plaintiffs assert that the D&O insurers and bond underwriters have not fulfilled their obligations under their respective policies. This is fundamentally a breach of contract action for money damages, which is the traditional province of the Superior Court. *See, e.g.*, *Candlewood Timber*, 859 A.2d at 998 ("Because plaintiffs can adequately seek monetary damages in a court of law for . . . breach of contract, [the Court of Chancery] . . . does not have jurisdiction to hear and decide this matter." (internal quotation marks omitted)); *Travelers Indem. Co. v. Reynolds Metals Co.*, 1995 WL 606317, at *2 (Del. Ch. Oct. 2, 1995) (staying equitable claim for reformation of insurance contracts in favor of litigation in Superior Court to determine "predicate coverage issues"; noting that declaratory judgment as to insurance coverage is "relief traditionally granted in an action at law"). Money damages provide an adequate remedy for breach of an insurance policy. *See Candlewood Timber*, 859 A.2d at 997-98. This Court does not have jurisdiction when an adequate remedy is available at law. 10 *Del. C.* § 342; *El Paso Natural Gas*, 669 A.2d at 39.

The parties' jurisdictional hook is Count I, which seeks equitable apportionment of defense costs between the two insurance towers. In support of equitable jurisdiction, they cite a long line of Court of Chancery decisions addressing contribution claims. As early as 1847, the Court of Chancery recognized an equitable right of contribution among co-sureties. *See Jefferson v. Tunnell*, 2 Del. Ch. 135, 139 (Del. Ch. 1847), *rev'd on other grounds*, 5 Harr. 206 (Del. 1849). The doctrine flowed from the premise that "[e]quality is equity." *Eliason v. Eliason*, 3 Del. Ch. 260, 263 (Del. Ch. 1869).

> One shall not bear a common burden in ease of the rest. Hence, if as often may be done, a lien, charge or burden of any kind, affecting several, is enforced at law against one only, he should receive from the rest what he has paid or discharged on their behalf. This is the doctrine of equitable contribution, resting upon as simple a principle of natural justice as can be put. Its most common application is to sureties and to owners of several parcels of land subject to a lien or charge for the payment of money. But . . . the principle is universal.

Id. *See generally* J. Travis Laster & Michelle D. Morris, *Breaches of Fiduciary Duty and the Delaware Uniform Contribution Act*, 11 Del. L. Rev. 71, 72-79 (2010) (tracing the history of the doctrine of contribution among joint tortfeasors under Delaware law).

Indisputably, contribution can give rise to equitable jurisdiction, and recent decisions from this Court have exercised that jurisdiction when appropriate. *E.g.*, *Godsell Mgmt., Inc. v. Turner Promotions, Inc.*, 2009 WL 1299344 (Del. Ch. May 4, 2009). Jurisdiction over contribution claims, however, does not lie exclusively in equity. Contribution is one of several remedies that

> belong to the concurrent jurisdiction of equity, since the final reliefs are the same in form and substance as that granted

> under like circumstances by a judgment at law,—a general pecuniary recovery,—and since the primary rights and interests of the parties are generally recognized and protected by the law.

4 *Pomeroy's Equity Jurisprudence* § 1416 (5th ed. 1941); *see* 18 Am. Jur. 2d *Contribution* § 74 (2010) (explaining concurrent jurisdiction of law and equity over contribution claims). Other loss-shifting doctrines that fall within this category include subrogation, the equitable assignment of a fund, and the remedy of an accounting. 4 *Pomeroy's Equity Jurisprudence* § 1416.

Delaware adheres to these jurisdictional rules. Nearly a century ago, the Delaware Supreme Court noted that contribution "was originally enforcible in equity only, but is now enforcible at law." *De Paris v. Wilm. Tr. Co.*, 104 A. 691, 695 (Del. 1918). The Delaware Superior Court regularly hears cases involving contribution claims.[1]

When presented with a cause of action or remedy falling within the concurrent jurisdiction of law and equity, this Court must determine whether "sufficient remedy may be had by common law, or statute, before any other court or jurisdiction of this State." 10 *Del. C.* § 342.

> For example, whenever an action at law will furnish an adequate remedy, equity does not assume jurisdiction because an accounting is demanded or needed; . . . nor because a contribution is sought from persons jointly indebted; nor even to recover money held in trust, where an action for money

[1] *E.g.*, *In re Daystar Const. Mgmt., Inc.*, 2006 WL 3026131 (Del. Super. Sept. 11, 2006); *Russell v. Universal Homes, Inc.*, 1993 WL 485920 (Del. Super. Sept. 17, 1993); *Hudson v. Bennett*, 1989 WL 12241 (Del. Super. Jan. 27, 1989); *Cooling v. Springer*, 27 A.2d 65 (Del. Super. 1942)

> had and received will lie. As stated by the United States Supreme Court: "Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. . . . The remedy at law is adequate and complete."

1 *Pomeroy's Equity Jurisprudence* § 178, at 248-50 (quoting *Gaines v. Miller*, 111 U.S. 395, 397-98 (1884)). Framed using contemporary procedural terminology, if a civil action for breach of contract provides an adequate remedy at law, equity will not assume jurisdiction. *See generally El Paso Natural Gas*, 669 A.2d at 39-40. Suits for equitable apportionment, equitable contribution, and equitable subrogation thus may be filed in Chancery, but whether Chancery will exercise jurisdiction depends on the absence of an adequate remedy at law. *See* 10 *Del. C.* § 342; *Capano v. Capano*, 2003 WL 22843906, at *3 (Del. Ch. Nov. 14, 2003) (holding that when there is no adequate remedy at law, the Court of Chancery "has subject matter jurisdiction of [plaintiff's] claim for equitable contribution"). The Court of Chancery has discretion in determining whether concurrent jurisdiction in the law courts and the resulting remedy at law are adequate. *See Williams v. Dowd*, 1982 WL 525139, at *1 (Del. Ch. Jan. 11, 1982).

Here, the plaintiffs have a remedy at law that will afford them full, fair, and complete relief. The Superior Court regularly handles suits seeking to allocate liability among insurers.[2] The Superior Court can apportion liability among the multiple insurers here, just as it has in other insurance cases.

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[2] *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 879 A.2d 929, 941 (Del. Super. 2004) (allocating liability among insurers jointly and severally); *Hercules Inc. v. Aetna Cas. & Sur. Co.*, 1998 WL 962089, at *12 (Del. Super. Sept. 30, 1998) (allocating

The availability of the Superior Court's Complex Commercial Litigation Division further ensures that a remedy in that court will be "as practical to the ends of justice and to its prompt administration as the remedy in equity." *El Paso Natural Gas*, 669 A.2d at 39. The Complex Commercial Litigation Division offers special procedures designed to ensure that cases are handled expeditiously. *See* Admin. Directive No. 2010-3, ¶ 6 (Del. Super. Apr. 26, 2010). The judges currently assigned to the Division have significant experience with complex insurance disputes.[3] In noting the availability of the Division, I do not presume to pre-empt the President Judge's discretionary decision over how to assign the case. The point is simply that complexity is no bar to the adequacy of a legal remedy in Superior Court. The Superior Court historically has handled many complex

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covered defense costs *pro rata* between insurers based on "equitable concerns"), *rev'd*, *Hercules Inc. v. AIU Ins. Co.*, 784 A.2d 481, 489-94 (Del. 2001) (holding that "all sums" provisions in insurance contracts required allocation between insurers on joint and several basis); *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 1995 WL 654020, at *11-16 (Del. Super. Oct. 27, 1995) (granting an "equitable allocation of liability among the insurers" based on "time on the risk"); *Monsanto Co. v. Aetna Cas. & Ins. Co.*, 1994 WL 161953, at *13-16 (Del. Super. 1994), *rev'd*, *Monsanto Co. v. C.E. Health Comp. & Liab. Ins. Co.*, 652 A.2d 30, 35 (Del. 1994) (holding, under Missouri law, that absence of allocation provisions in insurance contracts precludes *pro rata* allocation).

[3] Cases assigned to the division are currently being heard by Judge Silverman, Judge Slights, and Judge Jurden. *Id.* at ¶ 4; Admin. Directive No. 2010-4 (Del. Super. Apr. 26, 2010) (assigning judges to the Judge Panel). For examples of insurance decisions by these jurists, see *DynCorp v. Certain Underwriters at Lloyd's, London*, 2009 WL 3764971 (Del. Super. Nov. 9, 2009) (Jurden, J.); *TIG Ins. Co. v. Premier Parks, Inc.*, 2004 WL 728858 (Del. Super. Ct. Mar. 10, 2004) (Slights, J.); *State Farm Mut. Auto. Ins. Co. v. Dann*, 794 A.2d 42 (Del. Super. 2002) (Jurden, J.); *Hercules Inc. v. Aetna Cas. & Sur. Co.*, 1998 WL 962089 (Del. Super. Sept. 30, 1998) (Silverman, J.).

insurance cases, and the Complex Commercial Litigation Division is certainly up to the task.

Finally, if for some reason the Superior Court determines that its powers at law are inadequate, solutions are readily available. The transfer statute is not a one-way street. If the case ultimately requires equitable relief, it could be transferred back to me. *See* 10 *Del. C.* § 1902; *Draper v. Westwood Dev. P'rs, LLC*, 2010 WL 2432896, at *5 (Del. Ch. June 16, 2010) (transferring case back to Superior Court, where it was originally filed). Alternatively, if the Superior Court Judge, the Chancellor, and the Chief Justice deem appropriate, the Superior Court Judge can be temporarily appointed to sit in Chancery.[4]

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[4] Del. Const. art. IV, § 13(2) (authorizing the Chief Justice, "[u]pon written request made by the Chancellor . . . to designate one or more of the State Judges . . . to sit in the Court of Chancery . . . and to hear and decide such causes in such Court and for such period of time as shall be designated"). Ample precedent shows that designation can be used effectively. *See, e.g.*, *Caldera Properties-Lewes/Rehoboth VII, LLC v. Ridings Dev., LLC*, 2009 WL 2231716 (Del. Super. May 29, 2009) (Judge Graves presiding over consolidated case as both Superior Court Judge and Vice Chancellor by designation); *Reybold Venture Gp. XI-A, LLC v. Atl. Meridian Crossing, LLC*, 2009 WL 143107, at *6 & n.44 (Del. Super. Jan. 20, 2009) (dismissing case for lack of subject matter jurisdiction but recommending appointment as Vice Chancellor by designation); *AT&T Wireless Servs., Inc. v. Fed. Ins. Co.*, 2005 WL 2155695, at *4 (Del. Super. Aug. 18, 2005) ("The Delaware State Constitution gives the Supreme Court the authority to allow Superior Court judges to sit in the capacity of Vice Chancellor by Designation in order to adjudicate equitable issues in a case that involved both issues of law and equity and this is a practice that is accepted and recognized by the Supreme Court as an appropriate use of its limited judicial resources. The Court is confident that if requested such a designation would be approved in a case of this magnitude."); *New Castle Cty. v. Christiana Town Ctr., LLC*, 2004 WL 1835103 (Del. Ch. Aug. 16, 2004) (Judge Gebelein sitting as Vice Chancellor by designation); *Interim Healthcare, Inc. v. Spherion Corp.*, 2003 WL 22902879 (Del. Ch. Nov. 19, 2003) (Judge Slights sitting as Vice Chancellor by designation); *Employers Ins. Co. of Wausau v. Pinkerton's Inc.*, 2004 WL 1195369, at *1 (Del. Super. May 11, 2004) ("Subsequent to transfer . . . to the Court of Chancery, either party may petition for, or either court may *sua sponte* initiate, proceedings to

Two other arguments do not sway me. First, the plaintiffs point out that D&O coverage issues closely resemble the indemnification and advancement determinations that this Court regularly makes under Section 145 of the General Corporation Law, 8 *Del. C.* § 145. They go further and assert that under the operative insuring clauses in the D&O Tower, coverage only exists if expenses were properly indemnified in accordance with Section 145, the plaintiffs' constitutive corporate documents, and analogous alternative entity statutes and agreements. This Court, they say, should hear the coverage issues to ensure consistency of interpretation and because Chancery has exclusive jurisdiction over indemnification disputes, *see* 8 *Del. C.* § 145(k), and over "[a]ny civil action to interpret, apply, enforce or determine the validity of the provisions of . . . [t]he certificate of incorporation or bylaws of a corporation," 8 *Del. C.* § 111.

A connection between D&O insurance and indemnification admittedly exists. It does not, however, control the jurisdictional analysis. Prior to the adoption of Section 145(k), the Superior Court heard indemnification and advancement disputes because they resulted in a monetary award.[5] Although Section 145(g) authorizes Delaware

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consolidate the cases before one Judge or Chancellor in accordance with Article IV, Section 13(2) of the Delaware Constitution of 1897.") (Johnston, J.); *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1989 WL 997183, at *3 (Del. Super. Sept. 29, 1989) (defendant moved to dismiss or transfer in favor of parallel litigation in Court of Chancery; Judge Martin denied the motion after being designated to sit in Chancery by designation).

[5] *Yuen v. Gemstar-TV Guide Int'l, Inc.*, 2004 WL 1517133, at *3 n.15 (Del. Ch. June 30, 2004) ("Until 1994, suits to enforce the right to indemnification and advancement were litigated in the Delaware Superior Court, because such actions by their nature sought an award for money damages pursuant to contract." (internal quotation marks omitted)); *Salaman v. Nat'l Media Corp.*, 1992 WL 8795, at *3 (Del. Ch. Jan. 14,

corporations to "purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation," neither it nor any other Delaware statute gives this Court jurisdiction over D&O policy litigation. The plaintiffs have sued to enforce the policies in the D&O Tower. Until the General Assembly determines otherwise, jurisdiction over that species of case rests with the Superior Court. The plaintiffs' ability to point to one Court of Chancery decision in which this Court interpreted a D&O policy, *Cirka v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 2004 WL 1813283 (Del. Ch. Aug. 6, 2004), does not alter the core jurisdictional allocation to the Superior Court.

Second, the parties observe that I already issued the Dismissal Decision and that another judge would need to become familiar with the case. Although I regret that my failure to inquire more searchingly into equitable apportionment at the outset resulted in judicial sunk costs, that oversight does not alleviate this Court's jurisdictional obligations. *See Medek*, 2008 WL 4261017, at *3 n.27. As a practical matter, sunk costs are sunk. Given the Superior Court's greater expertise in the insurance arena, the relatively early stage of the case, and the potential for assignment to the Complex Commercial Litigation Division, this case should be heard by the Superior Court.

1992) (holding that the Court of Chancery lacked subject matter jurisdiction over indemnification suit, because an adequate remedy was available at law); *see, e.g.*, *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138 (Del. Super. 1974) (deciding actions for indemnification).

III. CONCLUSION

This Court lacks equitable jurisdiction because the Superior Court can provide an adequate remedy at law. 10 *Del. C.* § 342. The case is transferred to the Superior Court. 10 *Del. C.* § 1902. **IT IS SO ORDERED.**