IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARVIN A. FLATT and CATHLEEN FLATT, his wife,	)	
Plaintiffs,	)	
	)	C.A. No. 08C-04-266 ASB
v.	)	
VOLKSWAGEN GROUP OF AMERICA, INC., et al.,	)	
Defendants.	)	

Submitted: October 27, 2008
Decided: December 19, 2008

On Defendant Volkswagen Group of America, Inc.'s Motion to Dismiss or Stay on Grounds of Forum *Non Conveniens*
GRANTED

OPINION

Robert Jacobs, Esquire (argued), Jacobs & Crumplar, P.A., Wilmington, DE, Attorneys for Plaintiffs

Christian J. Singewald, Esquire (argued), Timothy S. Martin, Esquire, White and Williams LLP, Wilmington, DE, Attorneys for Defendant Volkswagen Group of America, Inc.

JOHNSTON, J.

Plaintiffs Marvin and Cathleen Flatt are Montana residents. Mr. Flatt was diagnosed with mesothelioma, allegedly caused by asbestos exposure. Plaintiffs filed suit in Montana on April 5, 2007. The Montana action was stayed on March 18, 2008. This Delaware action was filed on April 28, 2008. Defendant Volkswagen Group of America, Inc. had moved to dismiss or stay on grounds of forum *non conveniens*. The Court has determined to grant defendant's motion and stay the Delaware action.

PROCEDURAL CONTEXT

Mr. Flatt was born in Libby, Montana in 1941, where he lived for 18 years. Libby was the site of an asbestos mine. Libby asbestos was manufactured into insulation in Libby. Mr. Flatt's father worked in the mine. As a child, Mr. Flatt played in vermiculite, a mineral containing asbestos fibers. During his deposition, Mr. Flatt testified: "[I]t was a mountain of vermiculite. And we would go in there...we jumped on it, we rolled in it, we just played in it, like it was a great big sandbox." Libby is now an EPA designated Superfund site.

Plaintiffs allege that Mr. Flatt suffers from mesothelioma as a result of neighborhood and household exposure to asbestos. Plaintiff also claims occupational and personal use exposure to asbestos-containing brakes, and building products such as joint and spackling compounds. The neighborhood and

household exposures purportedly arose in Montana, and the occupational exposures occurred in Utah.

The United States Bankruptcy Court for the District of Delaware temporarily stayed the Montana action against defendants the State of Montana and BNSF Railroad Corporation.[1] On March 18, 2008 the Montana Eighth Judicial District Court, Cascade County, stayed plaintiffs' entire Montana action, consistent with the Bankruptcy Court order.[2] Plaintiffs filed this action in Delaware on April 28, 2008. Some defendants are named only in the Montana action, some are named only in Delaware, and some are named in both cases.

Defendant Volkswagen Group of America, Inc. filed its motion to dismiss or stay this lawsuit on forum *non conveniens* grounds.

ANALYSIS

Forum *Non Conveniens*

This Court previously has considered in detail Delaware's forum *non conveniens* jurisprudence in the context of mass tort litigation.[3] Delaware may exercise its discretion to decline jurisdiction when litigation would be

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[1] *In re W.R. Grace & Co., et al.,* Case No. 01-01139 (May 21, 2007) (ORDER) (W.R.Grace is the successor to Zonolite Company. Zonolite mined asbestos in Libby).

[2] *Meyer v. BNSF Railway Co.,* Cause No. DDV 07-467 (March 8, 2008) (ORDER).

[3] *In re: Asbestos Litigation,* 929 A.2d 373 (Del. Super. 2006).

inconvenient, expensive or otherwise inappropriate.[4] A plaintiff's choice of forum generally is preferred where there is no previously filed pending action.[5] A defendant has a heavy burden to rebut the presumption that plaintiff's forum choice is appropriate.

As this Court held in *In re Asbestos Litigation:*[6]

> The defendant's burden is to show "with particularity" that the so-called *Cryo-Maid*[7] factors, individually or together, demonstrate that litigating in Delaware would impose an "overwhelming hardship" on the defendant.[8] These factors are:
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> (1) the relative ease of access to proof;
> (2) the availability of compulsory process for witnesses;
> (3) the possibility of the view of the premises;

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[4]*See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507-508 (1947); *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 577 A.2d 305, 306 (Del. Super. 1989)(citing *Gulf Oil Corp.*, 330 U.S. at 507-508); *Williams Gas Supply Co. v. Apache Corp.*, 1991 WL 18091, at *1 (Del. Super.), *aff'd*, 594 A.2d 34 (Del. 1991).

[5]*See, e.g. Candlewood Timber Group, Inc. v. Pan Am Energy, LLC*, 859 A.2d 989, 1000 (Del. 2004); *Ison v. E.I. duPont de Nemours & Co., Inc.*, 729 A.2d 832, 845 (Del. 1999); *Mar-Land Indus. Contractors, Inc. v. Caribbean Petroleum Ref., L.P.,* 777 A.2d 774, 778 (Del. 2001); *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1199 (Del. 1997).

[6]929 A.2d at 381.

[7]*See Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964), *overruled in part on other grounds, Pepsico, Inc. v. Pepsi-Cola Bottling Co. of Asbury Park*, 261 A.2d 520 (Del. 1969).

[8]*Mar-Land*, 777 A.2d at 778. *See also Ison*, 729 A.2d at 837, (stating that analysis of a motion to dismiss for forum *non conveniens* "has been guided since at least 1964 by what has come to be known as the "*Cryo-Maid"* factors[.]").

(4) whether the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction;
(5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and
(6) all other practical problems that would make the trial of the case easy, expeditious and inexpensive.[9]

Analysis of the *Cryo-Maid* factors is not quantitative.[10] The Court does not take a tally of the number of factors that favor either party.[11] Indeed, the factors "do not, of themselves, establish anything."[12] They "merely provide the framework for an analysis of hardship and inconvenience."[13] Within this framework, the Court is not permitted to "compare Delaware, the plaintiff's chosen forum, with an alternate forum and decide which is the more appropriate location for the dispute to proceed."[14] Such comparisons are "irrelevant" to the mandated analysis.[15] Instead, when deciding a motion to dismiss for forum *non conveniens*, the Court must base its determination solely upon "whether any or all of the *Cryo-Maid* factors establish that defendant will suffer overwhelming hardship and inconvenience if

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[9]*Taylor*, 689 A.3d at 1198-99. *See also Cryo-Maid*, 198 A.2d at 684; *Parvin v. Kaufmann*, 236 A.2d 425, 427 (Del. 1967) (adding a sixth factor, the pendency or nonpendency of a similar action or actions in another jurisdiction, to the list of five factors first set forth in *Cryo-Maid).*

[10]*Taylor,* 689 A.2d at 1199.

[11]*Mar-Land*, 777 A.2d at 779.

[12]*Taylor,* 689 A.2d at 1199.

[13]*Id.*

[14]*Mar-Land*, 777 A.2d at 779.

[15]*Id.*

forced to litigate in Delaware."[16] Without such a showing, plaintiff's choice of forum will not be disturbed.[17]

Prior "Pending" Action

In this case, defendant argues that plaintiffs have a prior pending asbestos-related lawsuit. Therefore, the Court should dismiss or stay plaintiffs' Delaware action. Plaintiffs counter that although the Montana action is technically pending, the bankruptcy stay necessitates a finding that there is "in reality" no pending case.

A Delaware action will not be stayed or dismissed as a matter of right simply because a prior action is pending in another jurisdiction. However, Delaware courts freely exercise discretion in favor of a stay when there is a prior action involving the same parties and the same issues.[18]

The issue of whether a previously filed, but stayed, action is "pending" in another jurisdiction, for purposes of forum *non conveniens* in asbestos litigation, is one of first impression in Delaware. Plaintiffs have provided no legal authority to support their argument. Instead, plaintiffs rely on practical considerations. Plaintiffs contend that "there is an indeterminate time as to when within this next

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[16] *Taylor,* 689 A.2d at 1199.

[17] *Id.*

[18] *United Phosphorus, Ltd. v. Micro-Flo., LLC,* 808 A.2d 761, 764 (Del. 2002); *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g. Co.,* 263 A.2d 281, 283 (Del. 1970).

year or two [the] bankruptcy will be resolved. In the meantime, nothing will happen in the State of Montana. This is why this case was filed in Delaware."

If, as plaintiffs argue, plaintiffs' claims can be fully and fairly litigated in Delaware, during the pendency of the bankruptcy stay, there is no discernable reason why plaintiffs' case cannot proceed in the same manner in Montana. The only difference is that Montana has chosen to stay its action. The Montana court's decision to defer to bankruptcy proceedings, and stay the action, is not grounds for Delaware to adjudicate the second-filed lawsuit. Montana could exercise its discretion and lift the stay. Plaintiffs have not requested relief from the stay in Montana. The Montana court has not had an opportunity to consider whether it will proceed with the litigation, in the absence of those defendants involved in bankruptcy, for the same reasons plaintiffs have articulated that they wish to proceed in Delaware without those defendants.

Plaintiffs also argue that the Delaware action is based on occupational exposure,[19] while liability in the Montana action is grounded in household exposure.[20] Plaintiffs posit the unique theory that a determination of the cause of

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[19]The alleged occupation exposure took place in Utah. Therefore, Utah substantive law likely would apply.

[20]The alleged household exposure was in Montana, and Montana substantive law likely would apply.

Mr. Flatt's mesothelioma involves resolution of two "totally different issues." Plaintiffs contend that a court may sever: (1) whether the cause of mesothelioma is solely household exposure to products Mr. Flatt utilized in his own home during his youth; or (2) whether the cause of mesothelioma was exposure to his occupational use of products such as brakes and joint compounds.

This argument lacks merit. As in all mesothelioma cases, the jury may consider the evidence in the absence of alleged tortfeasors as actual parties to the lawsuit. Nevertheless, household and occupational exposures are not severable issues for purposes of causation. Severance would greatly increase the risk of inconsistent and contradictory rulings and factual findings, particularly in apportionment of liability.

Additionally, plaintiffs assert that there were only four defendants in the Montana case that are currently defendants in the Delaware case. Plaintiffs voluntarily dismissed those defendants from the Montana action, creating a situation in which no action is pending in Montana against any of the defendants in Delaware. The Court finds that the absence of the dismissed defendants in Montana is not grounds for proceeding in Delaware. It appears that Montana had personal jurisdiction over the voluntarily dismissed defendants. A party cannot file an action in one jurisdiction, and then voluntarily dismiss certain parties for the

sole purpose of opposing forum *non conveniens* dismissal in the subsequent jurisdiction.

The optimal situation in any litigation is to resolve the matter with all parties having any interest present at the same time, in the same court. This can only happen in Montana. Both Delaware and Montana have personal and subject matter jurisdiction over most of the defendants, whose businesses involve the manufacture and supply of automobile parts. There are two main defendants, however, over whom Delaware has no basis for jurisdiction - Montana Power & Light and the State of Montana itself. Other defendants over whom Delaware cannot exercise jurisdiction include Robinson Insulation, a small supply company that does no business in Delaware. There appear to be no defendants over whom Delaware could obtain jurisdiction, and Montana could not.[21]

It is clear that the only practical reason plaintiffs wish to litigate in Delaware is to obtain a relatively speedy trial. However, it is neither appropriate nor prudent for the citizens of Delaware to be burdened with the expense and strain on judicial resources to try cases that can just as easily and properly be tried in a forum that not only has more connection to the litigation, but was plaintiffs'

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[21] *See McWane*, 263 A.2d at 283 (discretion freely exercised in favor of a stay when the prior action involves the same parties and issues.)

first choice. If plaintiffs feel hindered by the stalled Montana action, the advisable remedy is to seek relief from the stay in Montana and proceed to trial with the same defendants as those in the Delaware action. It would be an improper exercise of this Court's judicial discretion to try a case when a plaintiff has filed in multiple jurisdictions for the mere purpose of discovering which court will grant the earliest trial date.

The Court finds that the first-filed Montana action is a pending action. The dispositive issues - negligence and proximate cause - are the same or nearly the same as those in the Delaware case.[22] Delaware's lack of jurisdiction over defendants Montana Power & Light and the State of Montana weighs in favor of resolving the matter in Montana. There is no reason to believe that Montana cannot do prompt and complete justice. The fact that the Montana action is temporarily stayed is not determinative, particularly because plaintiffs have not requested relief from the stay for the purpose of going to trial against all defendants not protected by bankruptcy.

[22] *See id.*

CONCLUSION

The first-filed Montana case is a pending action. The Court finds that the facts and circumstances warrant this Court's exercise of its discretion to stay this matter pending resolution of the Montana action.

IT IS SO ORDERED.

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The Honorable Mary M. Johnston