EXHIBIT K

LEXSEE 1997 U.S. DIST. LEXIS 16413

Dana Corporation, Plaintiff, v. Fireman's Fund Insurance Co., et al., Defendants. The Celotex Corporation, Plaintiff, v. Dana Corporation, Defendant.

3:83CV1153, 3:85CV7491

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

1997 U.S. Dist. LEXIS 16413

February 10, 1997, Filed

DISPOSITION: [*1] Anderson's objections to the jurisdiction of this court overruled.

COUNSEL: For DANA CORPORATION, plaintiff (83-CV-1153): Richard S. Walinski, Esq., Cooper, Walinski & Cramer, Toledo, OH.

For FIREMAN'S FUND INSURANCE COMPANY, AMERICAN INSURANCE COMPANY, THE, ASSOC INDEMNITY CORP, defendants (83-CV-1153): Steven Timonere, Doyle, Lewis & Warner, Toledo, OH.

For HARTFORD ACCIDENT AND INDEMNITY CO., defendant (83-CV-1153): Jack Zouhary, Robison, Curphey & O'Connell, Toledo, OH.

For CELOTEX CORPORATION, defendant (83-CV-1153): James F. Nooney, Esq., Eastman & Smith, Toledo, OH.

For FIREMAN'S FUND INSURANCE COMPANY, AMERICAN INSURANCE COMPANY, THE, ASSOC INDEMNITY CORP, CELOTEX CORPORATION, counter-claimants (83-CV-1153): James F. Nooney, Esq., Eastman & Smith, Toledo, OH.

For AMERICAN INSURANCE COMPANY, THE, ASSOC INDEMNITY CORP, counter-claimants (83-CV-1153): Steven Timonere, Doyle, Lewis & Warner, Toledo, OH.

For DANA CORPORATION, counter-defendant (83-CV-1153): James F. Nooney, Esq., Eastman & Smith, Richard S. Walinski, Esq., Cooper, Walinski & Cramer, Toledo, OH.

For FIREMAN'S FUND INSURANCE COMPANY, AMERICAN INSURANCE COMPANY, THE, ASSOC INDEMNITY CORP, [*2] cross-claimants (83-CV-1153): James F. Nooney, Esq., Eastman & Smith, Steven Timonere, Doyle, Lewis & Warner, Toledo, OH.

For HARTFORD ACCIDENT AND INDEMNITY CO., CELOTEX CORPORATION, cross-defendants (83-CV-1153): James F. Nooney, Esq., Eastman & Smith, Toledo, OH.

JUDGES: James G. Carr, United States District Judge.

OPINION BY: James G. Carr

OPINION:

Order

Pending in this cause is a motion by Dana Corporation (Dana) for an order finding that Anderson Memorial Hospital, of Anderson, South Carolina (Anderson), has violated an injunction which prohibits the Celotex Corporation (Celotex) and sundry of its agents "from instituting, directly or indirectly, new actions or claims in any courts" other than this Court, "which claims are based upon a claimed right of indemnity from Dana related to the product liabilities of Smith & Kanzler Company." Proceedings have been held with regard to Dana's motion during the past twelve months; most recently, argument was heard on February 6, 1997, on supplemental briefs filed by the parties pursuant to an order (entered December 27, 1996) requesting such briefs.

Contrary to the expectation of the parties and the undersigned, the issues raised by Dana's [*3] show cause motion have yet to become decisional, as I have again ordered further supplemental briefing, to be concluded in accordance with the schedule set herein, on the issue of whether certain acts by Anderson during judicial proceedings against Dana in a South Carolina state court constituted "instituting" a "claim" against Dana for in-

demnification under the Smith & Kanzler indemnity agreement.

Because my final decision on Dana's show cause order is, at best, still some weeks away, I have been asked to prepare and file a partial opinion on two predicate issues: namely, 1) whether I have jurisdiction in this district and these show cause proceedings over Anderson, which has no other contacts with this jurisdiction and whose alleged contumacious conduct occurred outside this district; and, 2) whether Anderson, as an assignee from Celotex of the Smith & Kanzler indemnity agreement, can take such assignment from Celotex (the party against whom the injunction issued) free and clear of any restrictions imposed on Celotex by the injunction which Anderson is alleged to have violated.

Although I have addressed both issues, at least in passing, during earlier stages of this proceeding, **[*4]** I deem Anderson's objections to my jurisdiction to be continuing. I likewise deem Anderson to be seeking dismissal on the basis that it is not bound by any limitations in the injunction that issued against Celotex, and prevented Celotex from instituting a claim or action for indemnity against Dana in any court other than this court.

For the reasons that follow, Anderson's objections to this court's jurisdiction over it are overruled. I likewise hold that whatever rights Anderson obtained from Celotex by way of assignment were encumbered by the restrictions on the exercise of those rights resulting from the injunction issued against Celotex. The injunction runs with the indemnity and any assignment thereof, so that an assignee, such as Anderson, must obey the injunction or seek leave in this court to have it altered, amended, modified, or vacated.

1. Jurisdiction Over Anderson

Anderson contends, and has contended since service of the order to show cause, that this court is without jurisdiction over it and its alleged contumacious conduct. I disagree.

As the Fifth Circuit stated in *Waffenschmidt v. MacKay, 763 F.2d 711, 714 (5th Cir. 1985):*

> Nonparties who reside outside **[*5]** the territorial jurisdiction of a district court may be subject to that court's jurisdiction if, with actual notice of the court's order, they actively aid and abet a party in violating that order. This is so despite the absence of other contacts with the forum.

Accord, *United States v. Barnette, 902 F. Supp. 1522, 1532 (M.D. Fla. 1995).*

The court's rationale in Waffenschmidt is not accompanied by further explanation; and its holding is unadorned by citation to other authority. The court in Barnette simply repeats the first sentence of the above-quoted statement from Waffenschmidt.

The brevity of the holding in Waffenschmidt is not a basis for disregarding its weight or discounting its soundness. Any other ruling would impair substantially the power of a court to enforce its own orders, regardless of the circumstances leading to a violation of those orders. Whenever an enjoined party wanted to evade the injunction, he, she, or it could simply prevail on someone outside the issuing court's jurisdiction to do the enjoined party's forbidden deeds. If the proclamation by Waffenschmidt were not sound, any court issuing an injunction would be powerless to **[*6]** enforce its orders. A court powerless to enforce its orders is a court without power.

The ruling in Waffenschmidt represents not a expansion of this court's jurisdiction but a preservation of its jurisdiction. Anderson had notice of the injunction: if it acted alone or in concert with Celotex to violate the injunction, it can be held answerable to this court, whose injunction it is alleged to have violated.

In addition to diminishing the power of this court to enforce its orders (and the utility and integrity of those orders), a different ruling would allow other courts to interpret the orders of this court. Were putative contempts to occur multiply in diverse jurisdictions, the result would be the kind of forum shopping and risk of inconsistent decisions that the injunction in this case seeks to prevent with regard to the merits of the underlying dispute.

More importantly, those other courts would be called on to sit in judgment for purposes of reviewing the orders of a court of coequal and equivalent jurisdiction. One district court has no such jurisdiction over another district court. As pointed out by the Sixth Circuit in *Graves v. Sneed, 541 F.2d 159, 161 (6th Cir.* **[*7]** *1976),* "United States district courts are not courts of general jurisdiction [and they] have no jurisdiction except as prescribed by Congress pursuant to Article III." I am unaware of any jurisdictional grant by Congress that authorizes one district court to sit in review of judgments by another district court.

Finally, and most importantly, if this court cannot exercise jurisdiction over Anderson and its alleged contempt, the way is laid open, if Dana has to go elsewhere to preserve and enforce its rights under the injunction, to collateral attack on the injunction by Anderson or any other interested party. As the Supreme Court made clear in Celotex Corp. v. Edwards, U.S. , *514 U.S. 300, 115 S. Ct. 1493, 1501, 131 L. Ed. 2d 403 (1995),* "'It is for the court of first instance to determine the question of the

validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected.'" (quoting *Walker v. Birmingham, 388 U.S. 307, 314, 18 L. Ed. 2d 1210, 87 S. Ct. 1824 (1967)* (quoting *Howat v. Kansas, 258 U.S. 181, 189-90, 66 L. Ed. 550, 42 S. Ct. 277 (1922)).* **[*8]** n1 As a result of this doctrine, Anderson is not only amenable to this court's jurisdiction for any contempt, it is also compelled, if it has any dispute about the meaning, scope, or consequences of the injunction, to bring those disputes here, and not seek to have them adjudicated elsewhere.

n1 Jeffrey Warren, Esq., counsel for Celotex attended the February 6, 1997, argument as a non-participating observer. During the course of that hearing, I called on him to provide some general information about the status of the bankruptcy proceeding and objections thereto. During the course of responding to my inquiries, Mr. Warren noted that he had argued Celotex v. Edwards in the Supreme Court, and that, speaking solely personally, and not as counsel for Celotex (which has not been and is not a party to the instant proceedings before me), he shared my understanding of the Court's decision in that case: i.e., that no court has jurisdiction to entertain a collateral attack on an injunction issued by another court.

[*9]

On reflection, there should be little surprise that the holding of Waffenschmidt, despite its ex cathedra appearance and tone, encapsulates a jurisprudential doctrine that is as sound as its recitation is brief. In the typical situation, the enjoined party and putative contemnors either are already within the court's territorial jurisdiction or violate the court's order within its jurisdiction. Only on rare occasion, apparently, has a party been called to explain a "long distance" contempt, as in this case. The uniqueness of the situation is no reason to disregard Waffenschmidt or doubt its soundness. The doctrine espoused in that case is universal, even if the circumstances are unique.

This court's power to enforce its orders does not expire at the borders of the Northern District of Ohio. That power and the jurisdiction necessary to exercise that power extend beyond those territorial limits, and reach as far as necessary to uphold this court's orders. I conclude, accordingly, that Anderson's objections to this court's jurisdiction have no merit. My refusal to dismiss this proceeding on that basis shall be confirmed through this order.

2. As Assignee, Anderson Took **[*10]** Subject to the Injunction

Celotex has contended in this litigation and elsewhere that, as a result of the Smith & Kanzler indemnity, Dana is obligated to indemnify Celotex for damages incurred by Celotex as a result of Smith & Kanzler's asbestos business. As a result of the injunction that issued in this case, Celotex' right to secure judicial enforcement of its rights under the indemnity is restricted: Celotex can institute a new claim or action based on the indemnity provision only in this court. As noted in the foregoing discussion, only this court has jurisdiction to alter, amend, modify, or vacate its injunctions. In light of Celotex v. Edwards, supra, no other court has that power (except the Sixth Circuit or Supreme Court). If no court has that power, then no private party (even if that private party purports to act with judicial approval) has the power to undo the effect and effectiveness of this court's orders.

I conclude, accordingly, that when Anderson took the assignment of rights from Celotex, it subjected itself to the restriction on those rights imposed by the injunction. Celotex could give no more than it had, and Anderson, as an assignee, could take no more **[*11]** than Celotex could give. As is often expressed, "the assignee 'stands in the shoes' of the assignor: 'It is well established that an assignee stands in the shoes of the assignor, and that by assignment the assignee could acquire no greater rights than its assignor. . .'" 3 Williston on Contracts 182-83 (3d ed. 1960) (citations omitted). This is a universally acknowledged doctrine of long-standing, see, e.g., *Spain v. Hamilton's Adm'r, 68 U.S. 604, 624, 17 L. Ed. 619 (1863)* ("assignee . . . is subject to all the equities between the assignor and his debtor"), and enduring vitality. See, e.g., *Allstate Ins. Co. v. Administratia Asigurarilor De Stat, 875 F. Supp. 1022, 1026 (S.D.N.Y. 1995)* ("an assignee never stands in any better position than his assignor").

An assignee is in privity with his, her, or its assignor. See, e.g., *Rhode Island Hospital Trust Co. v. Ohio Casualty Ins. Co., 789 F.2d 74, 82 (1st Cir. 1986).* As stated expressly by the Supreme Court in *Regal Knitwear Co. v. N.L.R.B., 324 U.S. 9, 14, 65 S. Ct. 478, 89 L. Ed. 661 (1945),* an injunction issued under *Fed. R. Civ. P. 65(d)* enjoins not only the named party, but others, including those acting in privity with the named party. The **[*12]** powers of Rule 65(d), the Court stated in Regal Knitwear, are "derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." See also *Golden State Bottling Co. v. N.L.R.B., 414 U.S. 168, 179-83, 38 L. Ed. 2d 388, 94 S.*

Ct. 414 (1973) (party in privity to enjoined party is as bound by an injunction as is the named party).

In view of the black letter doctrines as stated in Williston's treatise and these cases, an assignment is not an alchemist's instrument for changing lead in the hands of the assignor into gold in the pocket of the assignee. Because an assignee can take no more than the assignor can give, and parties in privity are equally restrained by an injunction, there can be no doubt, in my view, that Anderson was limited, as was Celotex, in its choice of forum when instituting a claim under the Smith & Kanzler indemnity contract.

Conclusion

For the foregoing reasons, I conclude that I have jurisdiction over Anderson, and can properly call on it to show cause why it should not be held in contempt. I conclude, **[*13]** as well, that Anderson, in privity to Celotex by virtue of its status as an assignee of the subject matter of this litigation, took its assignment subject to the full force and effect of the restriction requiring Celotex to institute any new action or claim for relief in this court--and nowhere else.

It is, therefore,

ORDERED THAT Anderson's objections to the jurisdiction of this court be, and the same hereby are overruled; and it is

FURTHER ORDERED THAT the further supplemental briefing on the issue of whether Anderson instituted a new claim or action in the courts of South Carolina on or after January 10, 1996, is to be submitted by Dana on or before February 17, 1997; Anderson's response to be filed on or before February 27, 1997; Dana's reply to be filed on or before February 28, 1997.

So ordered.

James G. Carr

United States District Judge