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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

ARCH CHEMICALS, INC.,
a Virginia corporation, and
LEXINGTON INSURANCE CO.,

Plaintiffs

No. 07-1339-HU

v.

OPINION AND ORDER

RADIATOR SPECIALTY COMPANY,
a North Carolina corporation,

Defendant.

M. Robert Smith
Joseph Rohner IV
Dennis N. Freed
Ryan J. McClellan
Smith Freed & Eberhard
111 S.W. Third Avenue, Suite 4300
Portland, Oregon 97204

Thomas D. Allen
Amber E. Tuggle
Shawn D. Scott
Earl W. Gunn
Mark R. Johnson
Laura Voght
Weinberg, Wheeler, Hudgins, Gunn & Dial
50 East Paces Ferry Road, Suite 3000
Atlanta, Georgia 30326
Attorneys for plaintiffs

William G. Earle
Paul R. Xochihua

1 Jonathan Henderson
2 Davis Rothwell Earle & Xochihua
3 1300 S.W. Fifth Avenue, Suite 1900
4 Portland, Oregon 97201

5 Daniel F. Mullin
6 John A. McHugh
7 Mullin Law Group
8 101 Yesler Way, Suite 400
9 Seattle, Washington 98104
10 Attorneys for defendant

11 HUBEL, Magistrate Judge:

12 This is an action by Arch Chemicals, Inc. (Arch) and Lexington
13 Insurance Company (Lexington) against Radiator Specialty Company
14 (RSC), asserting a claim for contribution and Lexington also
15 alleges an unjust enrichment claim. Arch and Lexington seek
16 recovery of funds paid in settlement of a lawsuit against Arch
17 brought by members of the Davidson family. Before the court are
18 RSC's Motion Regarding Lexington's Participation at Trial [doc. #
19 279] and Arch/Lexington's Motion in Limine Precluding Any Reference
20 to Lexington Insurance Company or of Arch's Insurance at Trial
21 [doc. # 281].

22 **FACTS**

23 This case arises out of the wrongful death and bodily injury
24 claims brought by the Davidson family against Arch Chemicals. The
25 events leading up the injuries are summarized in other opinions and
26 will not be repeated here.

27 On April 20, 2004, the Davidson family brought a lawsuit
28 against Arch in Oregon Circuit Court alleging civil claims related
to the fire. The litigation was resolved by a confidential
settlement on December 7, 2006, which was jointly funded by Arch
and Lexington.

1 On September 7, 2007, Arch brought the instant lawsuit against
2 RSC, seeking contribution for RSC's role in causing the fire. On
3 June 30, 2009, on RSC's motion for joinder, the court granted
4 joinder of Arch's insurer, Lexington, as a real party in interest.
5 On May 6, 2010, the parties filed the motions presently before the
6 court, essentially asking the court to determine whether and how
7 Lexington will participate in the trial.

8 **DISCUSSION**

9 RSC asks that Lexington be treated at trial just as any other
10 plaintiff would be treated in any trial. Arch and Lexington, on
11 the other hand, ask that RSC be precluded from ever mentioning the
12 existence of Lexington at trial, thus concealing Lexington's
13 involvement from the jury.

14 I begin by noting that in their briefing and at oral argument,
15 neither party was able to cite a case where an insurance company
16 who was a party to a case remained anonymous at trial. Nor is this
17 court aware of such a case. On the contrary, the cases that Arch
18 and Lexington cite in support of their bid for anonymity generally
19 pertain to the question of whether insurers are real parties in
20 interest that should be joined, or to general comments about the
21 concerns regarding jury prejudice toward insurers.

22 In my Opinion and Order, [doc. # 166], dated June 30, 2009, I
23 ordered that Lexington be joined as a party in this case. The
24 question then, is whether an insurance company who is a real party
25 in interest should remain anonymous at trial.

26 The leading case relating to this topic in the Ninth Circuit
27 is Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 511 (9th Cir.
28 1974). The litigation in Wyller arose from a helicopter crash.

1 Id. at 507. The sole survivor of the crash, Wyller, sued the
2 helicopter manufacturer. Id. at 508. Prior to trial, Wyller
3 entered into an agreement with his former employer and co-
4 plaintiff, Livingston, who owned the crashed helicopter. Id. at
5 511. Under the agreement, Wyller released any claims he might have
6 had against Livingston in exchange for a loan that would be used
7 for attorneys fees and costs in the action against the helicopter
8 manufacturer. Id. Under the agreement, if Wyller prevailed in
9 court, the loan was to be repaid with interest. Id. In addition,
10 Wyller agreed not to settle his claims without Livingston's
11 consent. Id. The Ninth Circuit noted,

12 The instant agreement bears a marked similarity to the
13 'loan receipt' device by which indemnity and liability
14 insurers sometimes settle losses by advancing to the
15 insured the amount of his loss in the form of a loan,
16 repayable only in the event and to the extent that the
17 insured obtains a recovery for the loss from a third
18 party. Such agreements insulate the insurer from the
19 necessity of seeking to recoup its loss in its own name
20 and from the judicially recognized prejudice of juries
21 against insurance companies; they also enable injured
22 plaintiffs to avoid the acceptance of unjust settlements
23 out of necessity.

18 Id. On appeal, the helicopter manufacturer argued that in reality
19 the loan money had come from Livingston's insurer. Id. It
20 assigned error to the trial court's decision not to allow the
21 manufacturer's motion to add the insurer as a plaintiff or
22 alternatively to amend the pleadings to indicate that the
23 plaintiffs were suing on behalf of Livingston's insurer, an alleged
24 real party in interest. Id. at 511-12. On this issue, the Ninth
25 Circuit expressed no opinion because there was insufficient
26 evidence in the record to show that the insurer actually supplied
27 the money and was, therefore, a real party in interest. Id. at
28

1 512. The court noted, "Absent some substantial showing that this
2 particular insurer was in fact involved in [paying the settlement],
3 the district court would have exceeded its discretion in requiring
4 the insurer's joinder as a real party in interest." While the
5 mechanism of the loan receipt may have also kept that insurer
6 unnamed as a plaintiff, the lack of a record it funded the
7 settlement made that question unnecessary to reach.

8 In contrast, here, there is no question that Lexington jointly
9 funded the settlement, and is, therefore, a properly joined real
10 party in interest. To the extent Lexington seeks to avoid the
11 consequences of being a plaintiff in this case, as a sophisticated
12 business it could have, at the time of settlement, utilized the
13 loan receipt mechanism discussed by the Ninth Circuit. Such a
14 business decision would have eliminated Lexington's presence in
15 this lawsuit and the jury's knowledge of its existence. Lexington,
16 however, opted to take a different route. That route was discussed
17 in the court's June 30, 2009 opinion.

18 As a real party in interest, I find no persuasive precedent
19 that Lexington's identity and role in this case should be kept from
20 the jury. On the contrary, having failed to utilize a valid
21 mechanism to achieve its goal of keeping Lexington's identity out
22 of the case, plaintiffs now want the court to rescue them from the
23 consequences of their decision to use the ratification approach.
24 For the reasons stated in my opinion of June 30, 2009, and
25 September 25, 2009, ratification was not available on the facts of
26 this case and a loan receipt was not properly utilized. The
27 consequence is Lexington is in the case as a plaintiff and will be
28 treated as any other party during trial.

1 If the prejudice was so great as to justify the relief
2 plaintiffs seek, there would be ample cases allowing this relief
3 over the years. There are none.

4 ///

5 **CONCLUSION**

6 Defendant's Motion Regarding Lexington's Participation at
7 Trial [doc. # 279] is granted.

8 Plaintiffs' Motion in Limine Precluding Any Reference to
9 Lexington Insurance Company or of Arch's Insurance at Trial [doc.
10 # 281] is denied.

11 IT IS SO ORDERED,

12
13 Dated this 10th day of December, 2010.

14 /s/ Dennis J. Hubel

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16 Dennis James Hubel
17 United States Magistrate Judge
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