

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

In re:

Bky. No. 98-30207

Timothy P. Hurrle d/b/a Hurrle Farms,  
Debtor.

Terra International, Inc. Adv. No. 98-3080  
Plaintiff,

V.

ORDER

Jack Frost. Inc.,

Defendant.

This matter is before the Court on motion of plaintiff Terra International to remand the action to state district court from which it was removed by defendant Jack Frost. Hearing was held on June 11, 1998. The court, having reviewed the briefs, heard arguments of counsel, and being fully advised in the matter, now makes this Order pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.

The Debtor, Timothy Hurrle, filed for relief under Chapter 11 on April 6, 1998. On March 12, 1998, Terra had filed a Complaint against Jack Frost, Inc. ("Jack Frost") in the District Court for Sherburne County, Minnesota, seeking damages for conversion. Terra claims a first secured position in grain that the Debtor allegedly sold to Jack Frost without Terra's consent and without Terra's receipt of the proceeds. The collateral is alleged to secure notes executed by the Debtor and his parents, debtors in a related bankruptcy case, in the combined amount owing at bankruptcy filing of approximately \$1,450,155. The Debtor, and his parents, are mentioned in the complaint, but are not parties to the action. Jack Frost is the only defendant named in the complaint.

Jack Frost removed the action from the District Court of Sherburne County, Minnesota, to the Bankruptcy Court for the District of Minnesota, pursuant to the Defendant's Notice of Removal of Civil Action dated April 6, 1998.(1) The Defendant's

stated grounds for removal were based in part on "information and belief" that the Debtor intended to intervene in the action to assert defenses and/or cross claims. The Debtor has not intervened.(2)

Additionally, the Defendant premised its removal of this action on the assertion that "any relief granted pursuant to the Complaint will affect the administration of the bankruptcy estates." Jack Frost has filed proofs of contingent claims in each of the bankruptcy cases, alleging claims against the estates by right of contribution or indemnification for all amounts that might be paid by Jack Frost to Terra as a result of the complaint in this action.

The Debtor and his parents have pending, in the federal district court, a product liability action against Terra for damages resulting from Terra's chemical spraying of their 1996 potato crop.

According to the plaintiffs in that action, the spraying caused total loss of the crop. The damages sought exceed the balance owing on the notes. Terra has also filed claims in the Debtor's estate for the

In its motion for remand, Terra argues that the Court lacks subject matter jurisdiction in this action. Alternatively, if the Court finds jurisdiction, Terra urges discretionary abstention and remand to the state court pursuant to 28 U.S.C. Section 1334(c)(1) and 28 U.S.C. Section 1452(b). At the hearing, Terra argued that 28 U.S.C. Section 1334(c)(2), mandatory abstention applies, and the Plaintiff demands abstention and remand under that provision.

Defendant Jack Frost claims that the action is "related to" the bankruptcy within the meaning of 28 U.S.C. Section 1334(b). The Defendant argues against discretionary abstention, asserting that the claims of the Debtor, his parents, Terra, and Jack Frost, should all be determined in a single proceeding, preferably by joinder in the pending federal district court product liability action. Jack Frost claims that the Court need not consider Terra's mandatory abstention argument because the issue has not been properly raised in the filed motion.(3) Finally, the Defendant argues that, for several reasons, abstention is not required even if the issue is properly before the Court.

## II.

### COURT HAS JURISDICTION

28 U.S.C. Section 1334 provides, in pertinent part:

Section 1334. Bankruptcy cases and proceedings

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of

all civil proceedings arising under title 11, or arising in or related to cases under title 11.

The case most often cited in articulating the scope of "related to" jurisdiction is *Higgins v. Pacor*, 743 F.2d 984 (3rd Cir. 1984). In discussing the scope, the Pacor court said:

In enacting section 1471(b), Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate . . . . The jurisdiction of the bankruptcy courts to hear cases related to bankruptcy is not without limit, however, and there is a statutory, and eventually constitutional, limitation to the power of a bankruptcy court. For subject matter jurisdiction to exist, therefore, there must be some nexus between the "related" civil proceeding and the title 11 case.

. . . .

The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy . . . . Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.(4)

*Pacor v. Higgins*, 743 F.2d at 994, (citations omitted).

*Higgins* had sued *Pacor*, not the product manufacturer, in a state court product liability case for damages in connection with an asbestos related injury. *Pacor* commenced a third party action for contribution and indemnity against *Johns-Manville*, the product manufacturer. *Johns-Manville* filed for protection under Chapter 11 shortly thereafter. The third party action was then severed from the main state court action, which proceeded in pre-trial between *Higgins* and *Pacor*. On the eve of trial, *Pacor* removed the entire litigation, including the severed third party action, to the federal district court, asserting "related to" jurisdiction in connection with *Johns-Manville's* bankruptcy case.

Higgins had not filed a claim in the bankruptcy case. The district court retained the severed third party claim by Pacor against Johns-Manville, but ordered the main case remanded. The circuit court affirmed. The Pacor court found that Pacor's contingent claim against Johns-Manville was insufficient to establish the requisite nexus for "related to" jurisdiction in the main action. The court said:

Our examination of the Higgins-Pacor-Manville controversy leads us to conclude that the primary action between Higgins and Pacor would have no effect on the Manville bankruptcy estate, and therefore is not "related to" bankruptcy within the meaning of section 1471(b). At best, it is a mere precursor to the potential third party claim for indemnification by Pacor against Manville. Yet the outcome of the Higgins-Pacor action would in no way bind Manville, in that it could not determine any rights, liabilities, or course of action of the debtor. Since Manville is not a party to the Higgins-Pacor action, it could not be bound by res judicata or collateral estoppel . . . Even if the Higgins-Pacor dispute is resolved in favor of Higgins (thereby keeping open the possibility of a third party claim), Manville would still be able to relitigate any issue, or adopt any position, in response to a subsequent claim by Pacor. Thus, the bankruptcy estate could not be affected in any way until the Pacor-Manville third party action is actually brought and tried.

. . . . .

The fact remains that any judgment received by the plaintiff Higgins could not itself result in even a contingent claim against Manville, since Pacor would still be obligated to bring an entirely separate proceeding to receive indemnification Pacor v. Higgins, 743 F.2d at 995, (citations omitted).

The Pacor rationale has been adopted by the Eighth Circuit. See: National City Bank v. Coopers and Lybrand, 802 F.2d 990 (8th Cir. 1986) Pacor has also been favorably cited by the United States Supreme Court. See: Celotex Corporation v. Edwards, 115 S.Ct. 1493, 1498,1499 (1995).

In this case, Jack Frost's contingent claim for contribution and indemnity against the Debtor does not provide sufficient nexus to establish federal court jurisdiction over the main action. See: National City Bank, at 993, 994. However, Terra's

filed claim in the Debtor's estate on the notes, allegedly secured by the allegedly converted collateral, does provide sufficient nexus. In Pacor, plaintiff Higgins had not filed a claim in the Johns-Manville bankruptcy estate. The Pacor court specifically mentioned the claim as a missing element, which, the court inferred, would have established the requisite nexus for federal jurisdiction. The court said:

All issues regarding Manville's possible liability would be resolved in the subsequent third party impleader action. Furthermore, Higgins is not a creditor of Manville and has filed no claim against Manville. Any judgment obtained would thus have no effect on the arrangement, standing, or priorities of Manville's creditors. There would therefore be no effect on administration of the estate, until such time as Pacor may choose to pursue its third party claim.  
Pacor v. Higgins, at 995, 996, (emphasis added).

Here, Terra has filed a claim in the Debtor's estate that will necessarily be affected, should Terra be successful in its claim against Jack Frost. Recovery against Jack Frost for conversion would have an "effect on the arrangement, standing, or priorities of [Hurrle's] creditors," namely Terra, whose claim in the estate would be reduced. Under the broad interpretation of "related to" jurisdiction, sufficient nexus exists, and the federal district court has jurisdiction under 28 U.S.C. Section 1334(b). See: Pacor v. Higgins, 743 F.2d 984 (3rd Cir. 1984); National City Bank v. Coopers and Lybrand, 802 F.2d 990 (8th Cir. 1986); Celotex Corporation v. Edwards, 514 U.S. 300, 115 S.Ct. 1493 (1995).

#### MANDATORY ABSTENTION

28 U.S.C. Section 1334(c)(2) provides:

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

Terra argues that the statute requires abstention and remand; Jack Frost insists that it does not.

Jack Frost first argues that the statute can only be triggered by a timely motion for abstention, which Jack Frost claims has never been made. Although Terra timely moved for remand, the motion did not reference, nor did the supporting brief argue, application of the statute. The issue was raised for the first time by Terra at hearing on its motion. Nevertheless, the motion for mandatory abstention is fairly within the scope of the pleaded motion for remand, and is timely. See: *Personnette v. Kennedy (In re Midgard Corp.)*, 204 B.R. 764 (10th Cir. Bankr. 1997).

Jack Frost next argues that once the Debtor is impleaded on the contribution and indemnity claim, the proceeding will be core to the bankruptcy case, and, the statute will not apply. The Pacor court assumed that Pacor's contribution and indemnity claim was "related," not "core," to the Johns-Manville bankruptcy case. *Pacor v. Higgins*, 743 F.2d 984, 987 (3rd Cir. 1984). But, whether "core" or "related to," the mere joinder of Jack Frost's contribution and indemnity claim under either Minn. R. Civ. P. 19 or 20 would not turn the *Terra v. Jack Frost* main action into a core proceeding to Hurrle's bankruptcy case. Assuming the third party claim for contribution and indemnity to be core, under Pacor, an appropriate procedure upon removal would be to sever the third party action and remand the main "related to" action.(5) Joinder Rules 19 and 20 are jurisdictionally neutral. They are intended to promote efficiency in litigation where feasible; but, they are not sources of jurisdiction. Joinder of the contribution and indemnity third party action under the state rules would not alter the jurisdictional mandate of Section 1334(c)(2) regarding the main case in a removed action.

The main action could not become core unless the impleaded Debtor would counterclaim against Terra in the case, asserting its product liability claim presently pending in the federal district court. At that point, the main action might be core, to the extent that the Debtor would seek to offset Terra's filed claim against the Debtor on the notes,(6) as 28 U.S.C. Section 157(b)(2) (B) and (C) claims litigation.

Jack Frost next argues that Section 1334(c)(2) does not apply because Terra could have joined this action against Jack Frost, under Fed. R. Civ. P. 19(a)(7), in the pending federal district court product liability action brought by the Debtor against Terra. Therefore, according to Jack Frost, since Section 1334 is not the sole source of federal jurisdiction over the action, Section 1334(c)(2) does not require abstention. Jack Frost claims to have an interest relating to the subject matter of the product liability case in that, if the Debtor prevails against Terra in that litigation and can offset against the Terra notes, Terra's security interest in the grain purchased by Jack Frost would not support Terra's claim for conversion.

The claimed interest, however, is not one in which disposition of the action in Jack Frost's absence, would: "(I) as a practical matter impair or impede [Jack Frost's] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. "Fed. R. Civ. P. 19(a). Jack Frost is a stranger to the product liability action; a stranger to the Terra notes and security agreements; and, is a stranger to any issues that might arise out of the litigation regarding enforceability of the Terra notes and security agreements. The mere fact that the outcome of the product liability action could conceivably affect Jack Frost's position in the conversion action does not result in an interest relating to the subject matter sufficient to meet the threshold of Rule 19(a) joinder.

Finally, Jack Frost argues that Section 1334(c)(2) does not require abstention because the conversion action cannot be timely adjudicated in the state district court. Jack Frost claims that "in all likelihood the state court will either stay that case pending the outcome of [the product liability] case, or else Jack Frost will have to undertake the same kind of discovery that the Debtors have already done . . . ." The same would be true, however, if the removed case would be retained in this Court.

None of the arguments of Jack Frost is persuasive against mandatory abstention. 28 U.S.C. Section 1334(c)(2) requires that this Court abstain from hearing this "related" proceeding.

#### REMAND

28 U.S.C. Section 1452(b) provides:  
(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

Having determined that abstention is mandatory under 28 U.S.C. Section 1334(c)(2), it is appropriate to remand the case to state court pursuant to Section 1452(b), so that it can proceed.

#### III.

Accordingly, it is hereby ORDERED: this litigation, Terra International, Inc. v. Jack

Frost, Inc., originally brought and venued in Minnesota State District Court of Sherburne County, and removed to this Court by the Defendant on April 6, 1998, is hereby remanded to said State District Court for all further proceedings in the case.

Dated: August 11, 1998 By The Court:

Dennis D. O'Brien  
Chief U.S. Bankruptcy Judge

(1). The removal was pursuant to 28 U.S.C. Section 1452(a), which provides:

Section 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(2). Jack Frost has since filed a motion for relief from stay to implead the Debtor for contribution and indemnity. That motion was heard on July 8, 1998, and is under advisement.

(3). Section 1334(c)(2) is not alleged as a ground for remand in the filed motion, and it is not argued in Plaintiff's initial brief in support. The Court requested, and has now received, supplemental briefs from the parties on the issue of mandatory abstention.

(4). 28 U.S.C. Section 1471(b) was the predecessor of Section 1334(b), and was identical to the present statute.

(5). 28 U.S.C. Section 1334(c)(2) was enacted in 1984, and did not apply to Pacor's third party claim for contribution and indemnity, which the courts characterized as "related to" the Johns-Manville bankruptcy case. Therefore, the severed claim was retained by the bankruptcy court. In this case, another appropriate procedure might be to for this Court to abstain from hearing the third party claim, pursuant to 28 U.S.C. Section 1334(c)(1), and remand the entire litigation to state court.

(6). This case is far from such a situation. Jack Frost has pending in this Court a motion for



relief from stay to seek joinder of the Debtor in the state court action to assert the contribution claim, should the case be remanded. Granting the motion would necessarily require this Court's election to abstain from liquidating the claim, which Jack Frost characterizes as core, pursuant to 28 U.S.C. Section 1334(c)(1). Yet, Jack Frost has indicated that the Defendant would again remove the case, upon impleading the Debtor in the state court action, even though this Court would already have elected to abstain from hearing the third party claim. Under these circumstances, it is by no means certain that the state trial court would permit joinder of the third party claim in the state court action.

(7). The Rule provides:

Rule 19. Joinder of Persons Needed for Just  
Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (I) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.