UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
DPH HOLDINGS CORP., et al.,	:	Case No. 05-44481 (RDD)
Reorganized Debtors.	:	(Jointly Administered)
ACE AMERICAN INSURANCE COMPANY and PACIFIC EMPLOYERS INSURANCE COMPANY,	:	
Plaintiffs,	:	
v.	:	Adv. Pro. No. 09-01510(RDD)
DELPHI CORPORATION; STATE OF MICHIGAN WORKERS' COMPENSATION INSURANCE AGENCY; and STATE OF MICHIGAN FUNDS ADMINISTRATION,	:	
Defendants.	:	

ORDER (I) DENYING DEFENDANTS MICHIGAN WORKERS' COMPENSATION AGENCY'S AND MICHIGAN FUNDS ADMINISTRATION'S JOINT MOTION TO DISMISS FOR LACK OF JURISDICTION AND IN THE ALTERNATIVE, FOR ABSTENTION AND (II) DENYING IN PART DEFENDANTS MICHIGAN WORKERS' COMPENSATION AGENCY'S AND MICHIGAN FUNDS ADMINISTRATION'S JOINT AMENDED MOTION TO DISMISS PLAINTIFFS' ADVERSARY COMPLAINT AND DPH HOLDINGS CROSSCLAIM FOR FAILURE TO STATE A CLAIM, LACK OF JURISDICTION, AND IN THE ALTERNATIVE, FOR ABSTENTION

Upon the defendants' Michigan Workers' Compensation Agency And State of Michigan Funds Administration Joint Motion To Dismiss For Lack Of Jurisdiction And In The Alternative, For Abstention (Docket No. 15) (the "Motion to Dismiss"); defendants' Michigan Workers' Compensation Agency And Michigan Funds Administration Joint Memorandum Of Law In

Support Of Joint Motion To Dismiss For Lack Of Jurisdiction And In The Alternative, Abstention (Docket No. 17) and Exhibit Thereto (Docket No. 18); plaintiff's Brief In Opposition To Motion To Dismiss Of State of Michigan Workers' Compensation Insurance Agency And State of Michigan Funds Administration (Docket No. 28); Declaration of Lewis R. Olshin (Docket No. 29); Memorandum of DPH Holdings Corp. (Formerly Delphi Corporation) In Opposition to Defendants Michigan Workers' Compensation Agency's And Michigan Funds Administration's Joint Motion to Dismiss For Lack Of Jurisdiction And In The Alternative, For Abstention (Docket No. 30); defendants' Michigan Workers' Compensation Agency's And Michigan Funds Administration's Joint Amended Motion To Dismiss Plaintiffs' Adversary Complaint And DPH Holdings Crossclaim For Failure to State A Claim, Lack Of Jurisdiction, And In The Alternative, For Abstention (the "Amended Motion to Dismiss") (Docket No. 43); defendants' Michigan Workers' Compensation Agency's And Michigan Funds Administration's Brief In Support Of Joint Amended Motion To Dismiss Plaintiffs' Adversary Complaint And DPH Holdings Crossclaim For Failure to State A Claim, Lack Of Jurisdiction, And In The Alternative, For Abstention (Docket No. 44); defendants' Michigan Workers' Compensation Agency's And Michigan Funds Administration's Joint Reply To Memorandum of DPH Holdings Corp. (Formerly Delphi Corporation) In Opposition to Defendants Michigan Workers' Compensation Agency's And Michigan Funds Administration's Joint Motion to Dismiss For Lack Of Jurisdiction And In The Alternative, For Abstention (Docket No. 45); Joint Reply To Plaintiff's Brief In Opposition to Motion to Dismiss Of State Of Michigan Workers' Compensation Agency And Michigan Funds Administration (Docket No. 46); plaintiff's Reply To Memorandum of DPH Holdings Corp. (Formerly Delphi Corporation) In Opposition to Defendants Michigan Workers' Compensation Agency's And Michigan Funds Administration's

Joint Motion to Dismiss For Lack Of Jurisdiction And In The Alternative, For Abstention (Docket No. 51); Corrected Joint Reply To Plaintiffs' Brief In Opposition To Motion To Dismiss Of State Of Michigan Workers' Compensation Agency And Michigan Funds Administration (Docket No. 53); plaintiff's Brief In Response to the (I) Joint Reply and (II) Amended Motion to Dismiss of State of Michigan Workers' Compensation Agency And State of Michigan Funds Administration (Docket No. 54); Declaration of Lewis R. Olshin In Support of Plaintiff's Response (Docket No. 55); and upon the Supplemental Memorandum of DPH Holdings Corp. (Formerly Delphi Corporation) In Opposition To Defendants Michigan Workers' Compensation Agency's and Michigan Fund Administration's Joint Amended Motion to Dismiss Plaintiffs' Adversary Complaint And DPH Holdings Cross Claim for Failure To State A Claim, Lack Of Jurisdiction, And In The Alternative, For Abstention (Docket No. 57); and the Bankruptcy Court having considered the arguments of Counsel at the hearing held on January 8, 2010; and after due deliberation thereon, and for the reasons stated in the Court's Amended Bench Ruling, a copy if which is attached hereto as Exhibit A, which modifies and supersedes the Court's bench ruling set forth in the January 12, 2010 transcript, it is hereby

ORDERED that:

1. The Motion to Dismiss is DENIED.

2. The Amended Motion to Dismiss is DENIED to the extent that the Amended Motion to Dismiss seeks to dismiss the complaint and defendant DPH Holdings Corp.'s (formerly Delphi Corporation) crossclaim for lack of jurisdiction or, in the alternative, seeks abstention, but not as to that portion of the Amended Motion to Dismiss that seeks to dismiss the complaint and defendant DPH Holdings Corp.'s (formerly Delphi Corporation)

crossclaim under Fed.R.Civ.P. 12(b)(6), incorporated by Fed.R.Bankr.P. 7012(b), for failure to state a claim.

3. The Amended Motion to Dismiss is adjourned to the extent that the Amended Motion to Dismiss seeks to dismiss the complaint and defendant DPH Holdings Corp.'s (formerly Delphi Corporation) crossclaim pursuant to Fed.R.Bankr. P. 7012(b) and Fed.R.Civ.P. 12(b)(6).

4. This Court shall retain jurisdiction to hear and determine this Adversary Proceeding.

Dated: White Plains, New York
January 25, 2010

/s/Robert D. Drain
Robert D. Drain (U.S.B.J.)

EXHIBIT

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Lead Case No. 05-44481-rdd; Adv. Pro. No. 09-01510-rdd

- -x

In re:

DPH HOLDINGS CORP., et al.,

Debtors.

- -x

ACE AMERICAN INSURANCE COMPANY, et al.,

Plaintiffs,

v.

DELPHI CORPORATION, et al.,

Defendants.

- -x

United States Bankruptcy Court

300 Quarropas Street

White Plains, New York

January 12, 2010

2:04 PM

AMENDED BENCH RULING

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

HEARING re Amended Motion to Dismiss Case; Defendants Michigan Workers' Compensation Agency's and Michigan Funds Administration's Joint Amended Motion to Dismiss Plaintiff's Adversary Complaint and DPH Holdings' Crossclaim for Failure to State a Claim, Lack of Jurisdiction, and in the Alternative, for Abstention

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P R O C E E D I N G S

This is an adversary proceeding commenced by ACE American Insurance Company and Pacific Employers Insurance Company against both Delphi Corporation (which, since the confirmation and consummation of its Chapter 11 plan, is known as DPH Holdings Corp., but which I may still refer to as "Delphi") and the State of Michigan Workers' Compensation Insurance Agency (which I'll refer to as the "Agency") and the State of Michigan Funds Administration (which I'll refer to as the "Funds").

The Funds include a fund, the Michigan Self-Insurers' Security Fund, that has filed proofs of claim against Delphi's Chapter 11 estate for unsecured non-priority claims in the amount of 36.3 million, a priority claim of approximately 25.5 million, and an administrative expense claim of 5.6 million, all for amounts that it claims would be owed by Delphi to it in its capacity as, on a statutory basis, a surety or a backstop for Delphi's obligation to pay workers' compensation claims.

The Agency is also a creation of Michigan law tied into the Michigan workers' compensation system. It has a fairly limited, although important, function; it oversees the operation of the system and the operation of the administrative tribunals that consider workers' compensation claims, and it has the power, in a so-called "Rule 5 proceeding", to bring up a common question pending before the Michigan administrative tribunals that would affect the administration of the workers'

compensation statutes. It also is charged with giving notice to potentially responsible parties when it believes that a workers' compensation claim that has been filed before the workers' compensation, or the Board of Magistrates, is one that a particular third party may have responsibility for paying under Michigan law.

This dispute originally arose because the Agency made a determination last summer -- based upon, it appears, the fact that the Agency's records contain so-called "Form 400s" from the two insurer plaintiffs herein -- that those insurers would be potentially liable for a spate of workers' compensation claims that had been filed, and have since been filed as a result of Delphi's failure to pay workers' compensation in light of its liquidation.

In response, and as the number of Michigan workers' compensation proceedings involving them in front of the Board of Magistrates grew, the insurers commenced this action in this Court, seeking a declaration that the insurers are not liable under either the theory espoused by the Agency or under their respective insurance policies with Delphi, which are referred to in the complaint in two categories -- "Deductible policies" and "Retention policies" -- for the claims being raised against them under the Michigan Workers' Compensation Disability Act.

The primary theory of the insurers' complaint is that, by the policies' express terms and under Michigan law, Delphi

was self-insured except with respect to excess coverage (which has not been triggered, however, and which would apply only in respect of the Retention policies). Thus, the insurers contend that, by the policies' express terms, as intended by the parties, the insurers are not liable for the claims now being asserted against the insurers in the Michigan proceedings under the Agency's legal theory as previously communicated to the insurers.

In addition, the complaint requests that if, notwithstanding the foregoing, the Deductible policies are somehow determined to provide insurance coverage in any other respect to Delphi for the underlying self-insured Michigan workers' compensation claims, the Court find that the Deductible policies do so inadvertently through mutual mistake or scrivener's error and, therefore, that the Court enter an order reforming the policies to reflect the parties' actual intent.

The insurers note in their complaint that at times in this Chapter 11 case the Agency has taken a similar position to the insurers' and contrary to the position that the Agency has more recently been taking in the Michigan proceedings vis a vis the insurers, at least insofar as the Agency is on record in the Chapter 11 case as stating that, if, in fact, Delphi was not for some reason required to pay the claims (or a third-party acquirer was not required to pay the claims), the

workers' compensation claims would not be covered by insurance. Having recognized that Delphi will, in fact, not be able to pay the workers' compensation claims in full, except perhaps the administrative claims, and that a third-party acquirer will not be picking up these claims, the insurers make the point that they believe that the Agency now has reversed field in concluding that the insurers are liable. (I do not believe, however, that there is a basis for judicial estoppel of the Agency, since it did not prevail in the proceeding in this Court where it arguably took a contrary position to the position it now espouses. See New Hampshire v. Maine, 532 U.S. 742, 749-51 (2001); In re Oneida Ltd., 383 B.R. 29, 45-46 (Bankr. S.D.N.Y. 2008), rev'd on other grounds, 562 F.3d 154 (2d Cir. 2009); In re Allegiance Telecom, Inc., 356 B.R. 93, 107 (Bankr. S.D.N.Y. 2006). Moreover, because the Agency was not asserting a claim when it took the prior allegedly contrary position, it is not subject to the judicial admission doctrine.)

After the commencement of this adversary proceeding, the two Michigan defendants, the Agency and the Funds, moved to dismiss on several different grounds, and it is that motion that is before me today and upon which I'm ruling, with the exception of the Michigan defendants' motion under Federal Rule of Civil Procedure 12(b)(6), incorporated by Bankruptcy Rule 7012), for a determination that the complaint fails to state a

claim on the merits. Because the other bases for the motion to dismiss are jurisdictional in one form or another, or request mandatory or permissive abstention, I informed the parties that I would consider those bases first and, only if I first determined that I properly had jurisdiction and would not abstain, would I consider the Rule 12(b)(6) motion.

In addition, after the complaint was filed, DPH Holdings answered and agreed with the insurers as to the insurers' interpretation of the applicable policies and the fact that, as asserted by the insurers, those policies do not provide for coverage of the unpaid workers' compensation obligations with the exception of excess coverage in the Retention policies.

Finally, in addition to the filing of hundreds of more unpaid workers' compensation claims in Michigan, for which the Agency has noticed the insurers as potentially liable parties, the Agency has, on December 14th, 2009, called for a compliance hearing, a so-called "Section 5 proceeding," by a hearing officer appointed by the Agency, "to address whether the two insurers ... are the responsible carriers for the pending claims through their filing of the Form 400s giving notice of their insurance coverage for Delphi Automotive Systems and Delphi Corporation." That's a quote from the Corrected Joint Reply to Plaintiffs' Brief in Opposition to Motion to Dismiss of the two Michigan defendants. That corrected Joint Reply

also attaches the Rule 5 pleading filed by the Agency seeking the foregoing relief. The Rule 5 proceeding was voluntarily stayed, however, given the fact that the parties had agreed, and this Court had previously scheduled, the date of the hearing on the Agency and the Funds' motion to dismiss.

In addition, both DPH Holdings and the insurers have asserted that the pursuit of the Rule 5 proceeding violates the injunction that was entered under the order confirming Delphi's Chapter 11 plan and as set forth in that plan. That issue is not before me presently, but I believe that, in light of the parties' attempt to clarify what, in fact, the Agency is seeking to have determined in the Rule 5 proceeding, DPH may well continue to make such an assertion if the Rule 5 proceeding resumed.

As I stated, the Michigan defendants seek to dismiss this adversary proceeding on several jurisdictional and procedural grounds. I will address those grounds now.

The Michigan defendants apparently do not dispute that this Court has “related-to” jurisdiction under 28 U.S.C. § 1334(b), but contend that it has no more than related-to jurisdiction; that this is a non-core proceeding under 28 U.S.C. § 157(b); that the Court lacks jurisdiction in light of their Eleventh Amendment sovereign immunity; that the Court is required to abstain under 28 U.S.C. § 1334(c)(2); that, even if the Court is not required to abstain, it should use its

discretion to abstain under 28 U.S.C. § 1334(c)(1); that the Court should abstain not only under the traditional twelve-part test for permissive abstention in bankruptcy matters but also under the Burford abstention doctrine; that the Court should decline to hear this proceeding by exercising its discretion the Declaratory Judgment Act, 28 U.S.C. § 2201; and, finally, that this is not an enumerated proceeding permissibly brought under Bankruptcy Rule 7001 as an adversary proceeding.

The insurers and DPH Holdings strongly disagree with all of the foregoing.

Obviously, the Court's jurisdiction is a threshold issue. The Bankruptcy Code itself does not confer jurisdiction, but 28 U.S.C. § 1334(b) provides that the Court "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".

Before focusing on that section in more detail, I should also note that it's well-recognized, although nowhere found in 28 U.S.C., that after the confirmation of a Chapter 11 plan the Court's jurisdiction shrinks. It is generally held that for the bankruptcy court to have jurisdiction over an action commenced after the confirmation of a Chapter 11 plan, the dispute must have a close nexus to the plan and/or the Chapter 11 case, and that the plan or confirmation order must have reserved jurisdiction over such a dispute. See Krys v.

Sugrue, 2008 U.S. Dist. LEXIS 86149 at pages 19-22 (S.D.N.Y. October 23, 2008); Penthouse Media Group v. Guccione (In re General Media, Inc.), 335 B.R. 66, 73-74 (Bankr. S.D.N.Y. 2005).

Here, the Chapter 11 plan fully reserved jurisdiction -- to the extent that I had it pre-confirmation. In addition, for all intents and purposes, and certainly for purposes of this dispute, the plan was a liquidating Chapter 11 plan. DPH Holding's purpose in life is to deal with claims against the estate, to liquidate the estate's remaining assets, of which there are few, and to make distributions of cash on hand as well as the proceeds of those remaining assets to the holders of allowed claims. It's well-recognized that the Court's post-confirmation jurisdiction is greater in such a liquidation context, because it relates much more directly to proceedings "under" Title 11 or "arising in" Title 11 proceedings, and there's no risk of untoward prolonged bankruptcy court supervision of an ongoing reorganized business. See In re General Media Inc., 335 B.R. at 73-74, citing Boston Regional Medical Center v. Reynolds (In re Boston Regional Medical Center), 410 F.3d 100, 106-107 (1st Cir. 2005).

I conclude, therefore, that, nothing flowing from the confirmation and consummation of Delphi's Chapter 11 plan circumscribes my jurisdiction over this proceeding, which, as I'll discuss in a moment, pertains to the core post-

confirmation bankruptcy function of dealing with claims against the estate and the estate's remaining assets for distribution to holders of allowed claims.

As I noted, there appears to be no dispute that I have "related-to" jurisdiction under 28 U.S.C. § 1334(b). In any event, as defined by the Second Circuit, “related-to” jurisdiction extends to my determination of litigation whose outcome has any “conceivable effect" on the bankruptcy estate. In re Cuyahoga Equipment Corp., 980 F.2d 110, 114 (2d Cir. 1992). Here, it's evident to me that, particularly as clarified by the parties' unsuccessful efforts to narrow the issues raised or that would remain open in this proceeding, the outcome of this proceeding would have not only a conceivable effect but a potentially significant effect on Delphi’s estate.

Delphi assumed the prepetition Retention and Deductible policies at issue and entered into certain new insurance policies with the plaintiff insurers during the course of its Chapter 11 case, and, in so doing, Delphi agreed that it would be liable for all amounts owing to the insurers under those policies. I believe it's uncontroverted that both the debtor and the insurers -- at least the debtors -- believed that the assumption of the policies and the entry into the new policies postpetition would not render the debtors liable to the insurers for the insurers paying the types of claims at issue in the subsequently filed Rule 5 proceeding or the

hundreds of workers' compensation proceedings now pending in Michigan. But the insurers have contended, based on the debtor's assumption of the policies and its entry into the new policies that they will have a claim against the debtor, against DPH Holdings, that is, if, in fact, it is determined, contrary to their claims in this adversary proceeding, that they are liable under the policies. The scope of the debtor's insurance, as well as the existence of the insurers' possible claims against the debtor's estate if the scope of such insurance is determined as the Agency has argued, is thus at issue in this proceeding.

In addition, the Michigan Self-Insurers' Surety Fund has conceded that if it is determined that the insurers are liable (and, of course, if they pay, although there's no reason to doubt they would pay after such a determination, by final order), the Fund would not have a claim against the debtor's estate and, therefore, that the multimillion dollar claims filed by it would then be resolved in Delphi's favor.

Either of those outcomes clearly would have a very substantial effect on the debtor's estate, or at least they would, in particular, with respect to any allowed priority or administrative claim under Section 507 and 503 of the Bankruptcy Code, since, as is clear from the entire record of this Chapter 11 case, especially the record of the confirmation hearing, the debtors' cash position is very tight and, of

course, any administrative claim would need to be paid in full, in cash, under the plan unless the holder agreed to a different treatment.

It is argued by the insurers, contrary to the contention of the Agency and the Funds, that this adversary proceeding should properly be viewed as one that "arises under" the Bankruptcy Code for purposes of 28 U.S.C. § 1334(b), in that it is essentially, according to the insurers, a proceeding to determine the existence (and therefore the allowability, since existence is a precondition to allowability) of their claims against DPH Holdings that would stem from the Agency's theory and Delphi's assumption of or postpetition entry into the policies, and, on the flip side, the allowability of the Self-Insurers' Security Fund's claim. It would "arise under" the Bankruptcy Code because it would be an efficient and critical first step to the determination of the allowability of the respective claims under Sections 502, 503 and 507 of the Bankruptcy Code, and, therefore, involve claims predicated on a right created by a provision of Title 11, namely those three statutory sections. See Langston Law Firm v. Mississippi, 410 B.R. 150, 154 (S.D.N.Y. 2008), as well as Drexel Burnham Lambert Group v. Vigilant Insurance Co., 130 B.R. 405, 407 (S.D.N.Y. 1991).

That argument is also central to the insurers' argument that, contrary to the Michigan defendants' assertion,

this proceeding is a "core" proceeding under 28 U.S.C. § 157(b), which provides that bankruptcy judges may hear and determine all cases under Title 11 and all core proceedings arising under Title 11 or arising in a case under Title 11, and may enter appropriate orders or judgments, subject to review under Section 158 of 28 U.S.C. in such proceedings.

As provided in 28 U.S.C. § 157(c), a "non-core" proceeding is, to the contrary, one in which the bankruptcy judge is limited to submitting proposed findings of fact and conclusions of law to the district court, and any final order or judgment would then be entered by the district judge after considering such proposed findings and conclusions and reviewing, de novo as to the matters to which any party has timely and specifically objected. Moreover, the core/non-core distinction is relevant to certain of the other issues in dispute in this motion to dismiss, namely issues regarding abstention and the question of sovereign immunity.

28 U.S.C. § 157(b)(2) lists a number of matters that are, per se, core proceedings, although it states that such list is not exclusive.

The insurers, supported by DPH Holdings, contend that, in addition to the catch-all provisions, or the most broadly worded provisions, of 28 U.S.C. § 157(b)(2)(A) (that is, matters "concerning the administration of the estate") and 28 U.S.C. § 157(b)(2)(O) (that is, "other proceedings affecting the

liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship"), this proceeding is also one that involves "the allowance or disallowance of claims against the estate," which is specifically listed as a core proceeding in 28 U.S.C. § 157(b)(2)(B). (The personal injury exception in both that section and 28 U.S.C. § 157(b)(2)(O) would not apply here because this is not a determination of personal injury claims but, rather, of the insurers' and the Fund's claims by way of subrogation or rights under the insurance policies and the orders approving the debtor's assumption of them or entry into them, as the case may be.)

The Second Circuit has noted that it has held that core proceedings should be given a broad interpretation that is close to or congruent with constitutional limits, as set forth by the Supreme Court in Northern Pipeline Construction Company v. Marathon Pipe Line Co., 458 U.S. 50 (1982). See In re U.S. Lines, Inc., 197 F.3d 631, 637 (2d Cir. 1999); Resolution Trust Corporation v. Best Products Company, Inc. (In re Best Products Co.), 68 F.3d 26, 31 (2d Cir. 1995).

In the U.S. Lines case, the Second Circuit went on to say that "Proceedings can be core by virtue of their nature if either (1) the type of proceeding is unique to or uniquely affected by the bankruptcy proceedings (claim allowance), or (2) the proceedings directly affect a core bankruptcy

function." 197 F.3d at 637. Moreover, "Core bankruptcy functions of particular import ... include '[f]ixing the order of priority of creditor claims against a debtor.'" Id.

The Second Circuit also stated in In re U.S. Lines, again at page 637, "The bankruptcy court has core jurisdiction over claims arising from a contract formed post-petition under Section 157(b)(2)(A)," citing Ben Cooper, Inc. v. Insurance Company of the State of Pennsylvania (In re Ben Cooper, Inc.), 896 F.2d 1394, 1399-1400 (2d Cir.), vacated on other grounds, 498 U.S. 964 (1990); opinion reinstated, 924 F.2d 36 (2d Cir. 1991), which would appear to apply at least to this proceeding as it pertains to the Retention and Deductible policies entered into postpetition.

The insurers correctly turn to a lengthy decision by Bankruptcy Judge Gerber for further elucidation of what constitutes a core proceeding: In re PSINet, Inc., 271 B.R. 1 (Bankr. S.D.N.Y. 2001). In that case, the court noted that the fact that the determination of a particular issue will hinge solely upon non-bankruptcy law and that it could be heard in a different context outside of the bankruptcy case is not a basis for determining that it is a non-core matter. Id. at 29, discussing, Ben Cooper and U.S. Lines, among other Second Circuit precedent.

Moreover, Judge Gerber correctly determined that a proceeding, and, in particular, a declaratory judgment

proceeding under Bankruptcy Rule 7001 that "set[s] the table for the determination of matters under Title 11," including the allowance and disallowance and priority of claims filed in the case, should be viewed as a core matter, because it serves, again, as the initial stage or gatekeeper in regard to that core bankruptcy function. Id. at 11-12, 25-28

The insurers contend that this is exactly what the present adversary proceeding would do, in that they are seeking a determination that they do not have liability for the coverage that the Funds and the Agency say they have, which, if the Court rules in their favor, would lead to the disallowance of their claims against Delphi. And it appears clear to me that there's nothing wrong with their setting up the issue in this procedural context. As insurers, they are focused as much if not more on establishing that they don't have liability in respect of the workers' compensation claims than on establishing their related subrogation and contract claims against Delphi, but the latter point is clearly closely tied to the former one. Moreover, this appears to me to be the most efficient way to deal with the potential claims against Delphi, as the issue of the insurers' liability under their policies (which, as has been made clear by oral argument as well as the Michigan Defendants' pleadings, the Michigan defendants have not been prepared to stipulate out of these proceedings) is a clear potential gatekeeping issue for the underlying claims

allowance matters.

The Michigan defendants had contended that there is nothing in the relief that the insurers are seeking in this adversary proceeding that in fact would lead to their having a claim against the debtor's estate, and the Court spent a great deal of time during oral argument exploring that theory. I believe that one could articulate the Agency's theory in a way that would have precluded the insurers from having, under any scenario, a claim against the debtor's estate. That is, it is conceivable, and in fact Delphi circulated a proposed stipulation to memorialize this concept, that the Agency and the Funds would limit their contention as to the potential responsibility of the insurers solely to the fact that the insurers delivered the Form 400s and had entered into some form of insurance policy that was referenced in the Form 400s, and, therefore, notwithstanding anything contained in the policy itself, the insurers would be liable for the workers' compensation claims; that is, they would not be liable under the insurance policies but could be potentially liable only because of the application of Michigan law and their having sent the Form 400s. If that were the case, this proceeding would not involve the allowance or disallowance of claims against Delphi.

However, it appears clear to me that the Michigan defendants are not prepared to limit their legal theories to

the foregoing, but want also to be able to point to the existence of the insurance policies and to deal with their terms as a basis for establishing the insurers' liability for the workers' compensation claims. And, therefore, it appears to me that the underlying dispute involves the clear possibility, depending on the dispute's outcome and the determination by the trier of the dispute as to the basis for that outcome, of either the allowance of substantial claims by the insurers against the debtor's estate and the corresponding disallowance of the Fund's claim (because, as noted, the Fund that filed the proof of claim against the debtor's estate has acknowledged that if the insurers are indeed found liable, its claims would be moot, there being another source for payment by a solvent entity, i.e., the insurers) or, alternatively, of the disallowance of the insurers' claims, without necessarily the allowance of the Fund's claims.

Under that logic, it appears to me to be clear that this is a core proceeding under 28 U.S.C. § 157(b)(2)(B), involving the allowance or disallowance of claims against the estate, in that it is a reasonable and appropriate gatekeeping proceeding for and perhaps, at least as far as the insurers hope, rendering moot any further litigation over the allowability of the insurers' claims against Delphi. I believe also that it would affect the administration of the estate and the liquidation of the assets of the estate under 28 U.S.C. §

157(b)(2)(A) and (O), in that the insurance policies at issue are clearly assets of the estate and coverage under those policies remains an issue in this litigation, as clarified by the parties' good faith attempts to see if the issues pertaining to the construction and application of the policies could be excluded from the litigation, which have been unavailing.

As Judge Gerber stated in In re PSINet, while the Second Circuit has not curtailed the effect of 28 U.S.C. § 157(b)(2)(A) and (O), it has also stated that those sections shouldn't be read to subsume every matter pending before the bankruptcy court, as their broadest interpretation would permit, which would be inconsistent with the separation of related-to jurisdiction from arising-in and arising-under jurisdiction. And, in particular, they shouldn't be used as an argument that there is core jurisdiction when the underlying issue would have merely the effect of augmenting the estate. In re Orion Pictures Corp., 4 F.3d 1095, 1102 (2d Cir. 1993). However, I believe that 28 U.S.C. 157(b)(2)(A) and (O) merely supplement the per se core bankruptcy function of considering the allowance and disallowance of claims under 28 U.S.C. § 157(b)(2)(B).

So, I conclude that this is a core proceeding under 28 U.S.C. Section 152(b)(2)(B) as well as (A) and (O).

That leaves the very significant question, however, of

whether the Agency and the Funds' Eleventh Amendment sovereign immunity precludes this Court from exercising jurisdiction over them. The insurers as well as DPH Holdings have asserted two grounds for the Court's jurisdiction, notwithstanding the Michigan defendants' sovereign immunity. The first and most compelling is that, as I've noted, this is a proceeding with respect to the allowance or disallowance of claims under Sections 502 and 503 of the Bankruptcy Code.

Section 106(a)(1) of the Bankruptcy Code states that, "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following," and then it provides a list of sections of the Bankruptcy Code that includes Sections 502 and 503. Section 106(a) then goes on to say in subpart (2): "The Court may hear and determine any issue arising with respect to the application of such sections to governmental units," and then it states in subpart (3) that "[t]he Court may issue against a governmental unit an order, process, or judgment under such sections," with exceptions that are not applicable here.

In addition, the allowance and disallowance of claims, I believe, is at the center of the bankruptcy court's jurisdiction, which, as stated by the Supreme Court in Central Virginia Community College v. Katz, includes the whole process of the proof, allowance and distribution of and on claims. 546

U.S. 356, 362 (2006), citing Gardner v. New Jersey, 329 U.S. 565, 574 (1947). In Katz, the Supreme Court held that under the "bankruptcy clause" of Article I, Section 8, Clause 4 of the Constitution, the states abrogated their sovereign immunity as to the bankruptcy courts' key in rem jurisdiction, as well as orders ancillary to that in rem jurisdiction. Id. at 374

As the Supreme Court found in Katz, the exercise of such jurisdiction, which is, at its core, the distribution of the estate to those whose claims are determined to be allowed, in the priority that they're determined to be allowed in, is not an improper impingement upon state sovereign immunity, but, rather, an agreed abrogation of that sovereignty provided for by the Constitution. 546 U.S. at 378.

The insurers assert, in the alternative, that the fact that one of the Funds has filed a proof of claim in this case also gives rise to a waiver of sovereign immunity, under Section 106(b) of the Bankruptcy Code. However, it seems to me that that section does not apply here in that it deals with compulsory (and, as the Second Circuit recognized in In re Charter Oak Associates, 361 F.3d 760 (2d Cir. 2004), under some circumstances permissive) counterclaims by the debtor against a claimant, which is not the case here because no one in this proceeding is looking for a monetary recovery or setoff from the applicable Fund.

Moreover, I conclude, based upon the materials filed

as well as representations made to the Court during oral argument, which were not successfully controverted, that the Agency is sufficiently distinguishable from the Funds in terms of its function, as well as its not serving as a potential creditor of Delphi or a payor to Delphi, for the Court to determine, even if the Fund was covered by Section 106(b), that the Agency would not also be subject to the Court's jurisdiction under the "unitary creditor" doctrine discussed in Charter Oak's interpretation of the precursor of Section 106(b). Id. at 770-772.

I say this not only because it appears to me that the funding of the Agency and the Funds comes from different sources, but also, again -- and in fact most importantly -- because the Agency does not appear to be acting in a creditor role or as a potential payor to the debtor's estate. Id. at 771.

The insurers point out, however, that the Agency filed a notice of appearance and request for service of all pleadings and notices in this Chapter 11 case (on November 10, 2005 through the Attorney General of the State of Michigan, acting specifically on behalf of the Agency). The insurers contend that that is sufficient for the Agency to have voluntarily submitted itself to the subject matter jurisdiction of the Court, under Lapides v. Board of Regents of the Univ. System of Georgia, 535 U.S. 613, 619 (2002), discussed in Charter Oak,

361 F.3d at 767. I note, however, that the Agency's appearance was a limited one, so denominated for the purpose of the receipt of pleadings and notices of hearings. It also appears to me that the Agency never acted as a creditor in this Chapter 11 case but, rather, only in its regulatory function to monitor the debtor's performance of its obligations under the Michigan workers' compensation law. It wanted to get notice of all pleadings to ensure that it was aware of any events or transactions in which the debtor would not be abiding by those obligations. And, indeed, its prior pleadings in the case were all, I believe, addressed to trying to ensure that either the debtor or a third-party acquirer would perform those obligations.

I believe that the Lapides case and the cases that it relied upon arose in a materially different context of direct litigation, where the governmental agency invoked the Court's jurisdiction for purposes of the disputed issue or a related claim. In the collective proceeding that was Delphi's Chapter 11 case, the limited appearance filed by the Agency did not serve that function and, therefore, also would not constitute a separate basis for the Agency's waiver of sovereign immunity. Thus, only Section 106(a) serves as a basis for the abrogation of sovereign immunity here.

That still leaves a difficult issue, though, which is, should this adversary proceeding, which clearly involves the

allowance or disallowance of the Fund's claim, as well as being a gatekeeper proceeding for the allowance or disallowance for the insurers' claims, include not only the Funds but also the Agency under Section 106(a)?

In one respect, it doesn't matter, because I believe the Funds would very aggressively oppose the insurers' position in this proceeding; this would not be a collusive lawsuit if only the Funds remained as defendants. On the other hand, the insurers clearly want to bind the Agency, which would have the effect, if the insurers ultimately prevail, of causing the Agency to stop sending out notices to the parties in the Michigan workers' compensation proceedings that the insurers are potentially liable.

To answer the question of whether Section 106(a) applies to the Agency, I turn again to the statutory language, and I note that Section 106(a) is written broadly. First, Section 106(a) states, "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following." The phrase "with respect to" is normally given a very broad interpretation as meaning "relating to," as opposed to a statutory formulation that might say, for example (and, of course, the statute doesn't say this) "to the extent there is a dispute between a claimant and a person objecting to the claim under Section 502 or 503 of Title 11".

In addition, Section 106(a)(2) states, "The Court may hear and determine any issue arising with respect to the application of such sections to governmental units." Again, the statute's language is quite broad. And I believe, as previously noted, that this dispute arises with respect to the application of two of the enumerated sections, Bankruptcy Code Sections 502 and 503 to the Agency as a governmental unit, because the Agency is taking a position that could very well lead to the Fund's claim being disallowed. The Agency takes the position when it sends out the notices in connection with the workers' compensation actions that the insurers are potentially liable; if that liability is established, the Fund has acknowledged that its claim against Delphi won't be allowed.

So, based on my belief that Congress drafted section language broadly, within the constitutional limits delineated by Katz, I conclude that Section 106(a) abrogates sovereign immunity not only as to the Fund which has actually filed a claim against Delphi, but also as to the Agency. And, again, the determination of that claim (as well as the closely related claims of the insurers that depend, in the first instance, on a determination that the insurers are, as the Agency has asserted, liable under the respective policies) is clearly a core function at the heart of the Court's bankruptcy jurisdiction under the bankruptcy clause of the Constitution.

The Michigan defendants' other arguments may be more briefly dealt with. First, and I'm going out of order here, I should deal with their argument that this Court lacks jurisdiction over this adversary proceeding because this proceeding does not involve any of the enumerated issues to be determined in an adversary proceeding under Bankruptcy Rule 7001.

It's true that a claim objection does not need to be brought by way of an adversary proceeding, although the Court may incorporate the adversary proceeding rules in a contested matter, which would be the proper characterization of a claim objection under Bankruptcy Rule 9014(c). In addition (and, again, this has been clarified by the extensive discussion over this issue during oral argument and before I started to give my bench ruling today), this proceeding does, it appears to me, unfortunately involve the determination of the extent of an interest of the debtor in property, namely the extent of the insurance coverage under the Deductible policies and the Retention policies. The extent of coverage under those policies is an issue that the parties cannot stipulate out of this case, and, therefore, it would be covered by Rule 7001(2) as well as Rule 7001(d), which requires an adversary proceeding to be brought to obtain a declaratory judgment relating to any of the foregoing types of proceedings, including one under Rule 7001(2) to determine the extent of an interest of the debtor in

property.

That leads to the issue, raised by the Michigan defendants, of whether the Court should exercise its discretion not to take jurisdiction over this declaratory judgment action under the Declaratory Judgment Act. The Second Circuit has recognized five factors to be considered when a court determines whether to hear a declaratory judgment action under 28 U.S.C. § 2201.

The Second Circuit has consistently interpreted the permissive language of that section as a grant of authority to refuse to exercise jurisdiction over a declaratory action that they would otherwise be empowered to hear. Dow Jones & Company, Inc. v. Harrods Ltd., 346 F.3d 357, 359 (2d Cir. 2003). In that case the Second Circuit used a five-factor test to determine whether the Court should exercise such discretion, notwithstanding its jurisdiction, not to hear a declaratory judgment request. Those factors are whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; whether a judgment would finalize the controversy and offer relief from uncertainty; whether the proposed remedy is being used merely for “procedural fencing” or a “race to res judicata;” whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state court; and whether there is a better or more effective remedy. Id.

The issue here, as well as the related issue of permissive abstention, is not an easy one for the Court, because, first and foremost, there are pending proceedings in Michigan, and, therefore, there is a potential for friction and/or inconsistent results if I retain jurisdiction of this action. On the other hand, until the Rule 5 proceeding was brought, the hundreds of actions in Michigan also all raised the possibility of inconsistent results, since I've been informed at oral argument that the Michigan tribunals (and I'm using that term not as a term of art but as a loose description of the Board of Magistrates that presides over those determinations) do not, as among themselves, follow stare decisis and only would follow the lead of the first to rule on the insurance coverage/Form 400s issues as a practical matter.

Moreover, the Rule 5 proceeding was brought well after this adversary proceeding was commenced, and, indeed, after a schedule had been set on both this motion to dismiss as well as a subsequent request for summary judgment by the insurers, which the Court would be hearing in January under the current schedule, a date I believe would preclude the determination of the Rule 5 proceeding in advance. Therefore, while I believe there would be friction between this Court and the state body, the friction is very clearly not of this Court's making, or, frankly, of the plaintiffs' making, in all respects. It would seem to me that, therefore, that I should not focus on the so-

called “procedural fencing” factor or the “friction” factor but on whether ultimately the question is raised before me in a way that leads to the most final, useful and inclusive result.

Clearly the individual workers’ compensation claimants are not parties to the adversary proceeding before me. On the other hand, it is clear to me from reading the Rule 5 pleading filed by the Agency, that it is the Agency, assisted by the Funds and their counsel, who will be taking the laboring oar in the Rule 5 proceeding, because the Michigan defendants are the originators of the theory that would subject the insurers to liability.

Moreover, as I noted at the beginning of this ruling, although this issue is not before me, DPH Holdings has taken the position that, to the extent that I find that the Michigan proceedings seek a determination of claims that ultimately would be assertable against the debtor, the Michigan proceedings would violate the Chapter 11 plan injunction. Again, I don't know, and therefore I have not determined, whether that would be the case, but it would seem to me that that issue would also need to be decided before the Rule 5 proceeding could go forward, or there would be a risk that the parties to the Rule 5 proceeding would be acting in contravention of an injunction, and, therefore, that the proceeding itself might be, or its result might be, void.

So, therefore, weighing all of those factors, it seems

to me that I'm not compelled to refrain from exercising jurisdiction under the Declaratory Judgment Act here, notwithstanding, as I've noted, the potential for friction with the Michigan workers' compensation system and the potential that, notwithstanding a ruling by me would bind the primary parties, the individual workers' compensation claimants would not necessarily be bound by any ruling on insurance coverage and the insurers' liability that I would ultimately issue in this case.

Of course, if I rule against the insurers they would be bound in subsequent litigation with the underlying workers' compensation claimants on that issue. Thus, the only issue of uncertainty as to the finality of the issues before me would be if I ruled in favor of the insurers. It would seem to me, however, based, again, upon the colloquy during oral argument, that at a minimum the judgment would serve a useful purpose in clarifying the legal issues and, in particular, whether in fact there would be a resulting claim against the debtor's estate, which of course, again, falls within my core jurisdiction.

So, all things considered, and weighing these issues carefully, I've determined that I should not refrain from exercising jurisdiction under the Declaratory Judgment Act.

A similar analysis applies to the issue of permissive abstention. But before turning to that issue, I should address first the issue of mandatory abstention under 28 U.S.C. §

1334(c)(2), which the Michigan defendants contend governs here and requires my abstention from presiding over this adversary proceeding.

They bear the burden of proof on that issue, and it has been determined that the factors that the courts in this jurisdiction have uniformly applied pursuant to the statute must be shown completely in the conjunctive for mandatory abstention to be imposed. That is, the Michigan defendants must show each of the following factors: the motion to abstain was timely; the proceeding before me is based on a state law claim; the action is related to but not arising in a bankruptcy case or arising under the Bankruptcy Code; 28 U.S.C. § 1334 provides the sole basis for federal jurisdiction; and another action is commenced in state court, and that action can be timely adjudicated in state court. See In re WorldCom, Inc. Securities Litigation, 293 B.R. 308, 331 (S.D.N.Y. 2003); In re Adelphia Communications Corp., 285 B.R. 127, 141 (Bankr. S.D.N.Y. 2002).

I have focused on a couple of these provisions. I accept that the motion to abstain was timely; that the underlying action is governed by applicable non-bankruptcy law; and that the Court's jurisdiction over this action is premised upon 28 U.S.C. § 1334. I inquired during oral argument about whether the pending action can be timely adjudicated, and I also have focused on whether the action is related to but not

arising in the bankruptcy case or arising under the Bankruptcy Code.

Before turning to those issues, I should note, however, that the identification of "an action pending" in a non-bankruptcy forum is an issue that courts view in different ways. Some courts have contended that the pending non-bankruptcy action in favor of which the bankruptcy court must abstain would have to be pending before the commencement of the adversary proceeding in the bankruptcy court. See, for example, In re Container Transp., Inc., 86 B.R. 804, 805 (E.D.Pa. 1988). However, other courts, including at least one district court in this District, have decided, based on the plain language of the statute, which does not speak to the timing of the commencement of the pending non-bankruptcy action vis a vis the commencement of the bankruptcy action, that the non-bankruptcy action only must be pending at the time of the motion to abstain. Langston Law Firm v. Mississippi, 410 B.R. 150, 155-56 (S.D.N.Y. 2008). I believe that's the better view, so I have included in my analysis not only the hundreds of pending workers' compensation proceedings, which, as I said, troubled me in that they're not subject to stare decisis, but also the Rule 5 proceeding that was commenced in mid-December after this proceeding.

I have explored with counsel for the Agency and counsel for the Funds whether that Rule 5 proceeding can be

timely adjudicated. Clearly it is in Michigan's interests to have the proceeding determined quickly, in that numerous former employees of Delphi are without workers' compensation coverage during the time it's pending. And it does appear to me that the Agency and the Funds have the ability to seek expedited relief in Michigan.

On the other hand, the Michigan appellate process (and I'm convinced that there would be an appeal of the Rule 5 proceeding regardless of its outcome) is lengthy and somewhat convoluted. In addition, the finality of the Rule 5 proceeding is complicated by the fact that the insurers have sought, in a colloquial term, mandamus to the state court, contending that the purpose of the Rule 5 proceeding is not covered by the applicable statute and that the issues it raises therefore should properly be before the Michigan state court, not a hearing officer selected by the Agency, who also, they contend, lacks the power even to consider the issue of reformation of the policies. The litigation of that issue also would delay any ultimate ruling.

Because the claims against Delphi's estate that ultimately would potentially devolve from a determination of these issues include administrative and priority claims, the prompt determination of these issues is very important to the outcome of the Chapter 11 case. As I have noted previously, cash is in short supply for this debtor, and the need to

reserve significant cash will significantly constrain this debtor and potentially affect its ability to perform under the Chapter 11 plan, which requires administrative claims to be paid in full in cash unless the claimants themselves agree to a different treatment, which they've clearly not done.

So, I do have some real concern over whether the Rule 5 proceeding can be timely adjudicated in the context of this Chapter 11 case.

But, more importantly, I believe that, as I've said before, the underlying action here is a core proceeding; that is, it is more than related to this bankruptcy case; it really arises under the Bankruptcy Code, for the reasons I've previously stated. Because that mandatory abstention factor (as laid out in WorldCom and Adelphia) is not met, therefore, mandatory abstention would not lie.

That leaves the issue of permissive abstention under 28 U.S.C. § 1334(c)(1). The courts are clear that "federal courts should be sparing in the exercise of discretionary abstention and that they have a duty to exercise their jurisdiction, barring extraordinary circumstances." Metromedia Fiber Network, Inc. v. Various State and Local Taxing Authorities, 299 B.R. 251, 280 (Bankr. S.D.N.Y. 2003), quoting Texaco Inc. v. Sanders (In re Texaco Inc.), 182 B.R. 937, 946 (Bankr. S.D.N.Y. 1995).

The courts have developed twelve factors for

consideration when deciding whether permissive abstention under 28 U.S.C. § 1334(c)(1) should be ordered. Those factors, however, are heavily weighted, or should be viewed with an eye that heavily weighs them, in favor of the exercise of jurisdiction. In re Ionosphere Clubs, Inc., 108 B.R. 951, 954 (Bankr. S.D.N.Y. 1989). They are the effect, or lack thereof, on the efficient administration of the estate if a court recommends abstention; the extent to which non-bankruptcy law issues predominate over bankruptcy issues; the difficult or unsettled nature of the applicable non-bankruptcy law; the presence of a related proceeding commenced in state court or other non-bankruptcy court; the jurisdictional basis, if any, other than the 28 U.S.C. § 1334; the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; the substance, rather than form, of an asserted core proceeding; the feasibility of severing non-bankruptcy law claims from core bankruptcy matters to allow judgments to be entered in non-bankruptcy court, with enforcement left to the bankruptcy court; the burden on the bankruptcy court's docket; the likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties; the existence of a right to a jury trial; and the presence in the proceeding of non-debtor parties. See, for example, In re Cody, Inc., 281 B.R. 182, 190 (S.D.N.Y. 2002); In re Calpine Corp., 361 B.R. 665, 669 (Bankr. S.D.N.Y. 2007).

Here, as I've noted repeatedly, I have previously focused on whether non-bankruptcy law claims could be severed from core bankruptcy matters, to permit those non-bankruptcy matters that would not lead to the allowance or disallowance of claims to go forward in Michigan. It appears, however, that effort (although the parties, I believe, undertook it in good faith) did not bear fruit. And I believe that I am left with, again, the exercise of core bankruptcy jurisdiction, given that, again, the issues in this proceeding would set the table for (and even potentially determine) the issue of the allowance of the insurers' and/or the Fund's claims against Delphi. That clearly affects the efficient administration of the estate, as I've noted in discussing the timeliness issue with regard to mandatory abstention.

The Michigan defendants argue that the issues here are solely state law issues, which in fact they are, and, therefore, that I should abstain on that basis. They also go further and state that those issues are so central to the Michigan workers' compensation scheme that they implicate the Burford abstention doctrine under Burford v. Sun Oil Company, 319 U.S. 315 (1943), and I've considered that argument carefully.

Clearly, the issues are important to the State of Michigan. However, they are issues that involve interpretation of Michigan statutes that both parties believe can be decided

readily, the Michigan defendants on a Rule 12(b)(6) basis and the insurance company plaintiffs on a summary judgment basis. Moreover, this Court like bankruptcy courts across the country routinely determines non-bankruptcy law issues when it determines the allowability of claims.

I do not believe that the issues before me in this proceeding, were I to keep it, would be so tied up in the operation of the Michigan workers' compensation scheme that the Burford doctrine would apply, nor do I believe that there is, at a high level, an impending determination by the courts in Michigan that I should defer to. (At one point it appeared that that would be the case, given the existence of the Nyhuis litigation before the Michigan Court of Appeals, but at oral argument I was informed that that litigation had settled.)

Therefore, it would appear to me (although, again, the issue is not a simple one) that the factors that I've listed do not weigh heavily in favor of permissive abstention; rather, they are, at best, balanced. And, given the core nature of this dispute, my confidence that I can determine it quickly, and the importance of the dispute, at least insofar as it pertains to the insurers' and the Fund's administrative claims against Delphi, I will not exercise my discretion to abstain in favor of the Rule 5 proceeding.

It may be that once I deal with the Michigan defendants' Rule 12(b)(6) motion and the insurers' pending

summary judgment motion (if I get to it; that is, if I deny the 12(b)(6) motion, which I haven't decided, of course), the dispute can be structured in a way that preserves significant issues for decision in Michigan, as I had earlier unsuccessfully tried to accomplish. But, again, presently it does not appear that any issues can be severed in a way that would permit only the core bankruptcy issues to be decided by me. Therefore, at least at this time, and, again, subject to dealing with the 12(b)(6) motion and, potentially, the motion for summary judgment, I will not abstain.

I believe that I've dealt, therefore, with each of the grounds on a procedural/jurisdictional basis that have been raised by the Michigan defendants for dismissal of this proceeding. And, for the reasons stated, I have denied each of them.

Counsel for the insurers should submit an order consistent with my ruling. I would prefer an order that simply states that the motion is denied for the reasons stated in the Court's bench ruling and that the Court will retain jurisdiction over the proceeding, as stated on the record at the hearing.