

PHARMACIA LLC,

Plaintiff,

V.

AGEAS INSURANCE LIMITED f/k/a
BISHOPSGATE INSURANCE
COMPANY, et al.,

Defendants.

Civil Action No. 2:15-cv-920

Jury Trial Demanded

**PLAINTIFF’S SUR-REPLY TO INDIVIDUAL DEFENDANTS’ MOTION TO DISMISS
OR ABSTAIN**

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INTRODUCTION

In their Reply Brief, counsel for Individual Defendants (hereinafter PCB Counsel) make a series of new arguments not raised in their initial Motion to Dismiss or Abstain. These new arguments focus on two topics—federal subject matter jurisdiction and abstention—and are each contradicted by statutory text or Fifth Circuit case law.

Federal Subject Matter Jurisdiction: PCB Counsel do not genuinely contest this Court’s diversity of citizenship jurisdiction. Instead, they attack the “complete preemption” grounds for federal question jurisdiction alternatively alleged in Pharmacia’s Complaint. Because there is no genuine dispute regarding diversity jurisdiction, this Court need not reach federal question jurisdiction. Nevertheless, as set forth in more detail below:

1. Contrary to PCB Counsel’s arguments (at 4-5), there is no “savings clause” in the Toxic Substances Control Act (TSCA) that can contradict the plain language of TSCA’s express preemption clause. The “savings clause” they cite is *limited by its own terms* to the statutory section where it appears, and does not apply to the separate express preemption provision, which is in an entirely different section of TSCA. Indeed, the U.S. Supreme Court has already rejected the same type of atextual argument PCB Counsel makes here.

2. Also contrary to PCB Counsel’s brief (at 5-6), TSCA’s preemption clause unambiguously applies whenever EPA has promulgated rules for PCBs under 15 U.S.C. § 2605. Hundreds of pages of EPA PCB rules have been promulgated under that section. Under the preemption clause, preemption applies whether or not there is an actual conflict with EPA’s rules; and, in any event, Individual Defendants’ PCB claims are unavoidably in conflict with EPA regulations.

3. To attempt to sidestep the plain text of the preemption clause, PCB Counsel also cite (at 7) draft legislative history from a recent Senate bill that *has not* been passed. This

ignores existing law but also ignores *directly contrary legislative text and intent* from a House bill *that has recently passed*.

Abstention: Likewise, PCB Counsel’s abstention arguments (at 8-10) disregard contrary case law in this Circuit. “Mandatory” abstention is inapplicable where different issues are raised in the federal action or where the federal declaratory judgment is intended to resolve a multiplicity of suits. And PCB Counsel’s argument (at 9) that no federal court ever issued a declaratory judgment on preemption of asbestos suits **omits one very key point**: While PCB claims are expressly preempted by TSCA, Congress clearly *exempted* all asbestos claims from TSCA preemption in 15 U.S.C. § 2649(a). As to “permissive” abstention, PCB Counsel does not come close to making the showing required by Fifth Circuit precedent to remove this case from the restrictive abstention framework established by *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

In sum, PCB Counsel’s new arguments cannot support either dismissal or abstention.

ARGUMENT

I. THIS COURT HAS FEDERAL QUESTION JURISDICTION

PCB Counsel do not genuinely contest this Court’s diversity jurisdiction. Thus, it is not necessary to reach federal question jurisdiction. As indicated in Pharmacia’s Opposition Brief (at 15), the “complete preemption” federal question doctrine has two parts: (1) that substantive federal preemption applies; and (2) that the federal statute provides a substitute cause of action for the preempted claim.¹ PCB Counsel’s new arguments seem to focus principally on the first of these two prongs.

¹ As Pharmacia noted in its Opposition Brief (at 14 n.18), “complete preemption” is a subject matter jurisdiction concept, to be distinguished from the substantive preemption issue at the heart of Pharmacia’s claim.

Purported Savings Clause: PCB Counsel argue (at 4) that a purported “savings clause” at the end of the “Citizens’ civil actions” provision of TSCA saves all tort claims from preemption, arguing that the clause was intended to “specifically preserve[] the rights of plaintiffs to seek damages under common-law theories.” *See* 15 U.S.C. § 2619(c)(3). That argument is refuted by the clause’s plain text, which limits its application only to the section in which it appears (§ 2619). 15 U.S.C. § 2619(c)(3) (“Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of this chapter or any rule or order under this chapter or to seek any other relief.” (emphasis added)). By its own terms, the clause does not apply to the express preemption provision, which is in an entirely different section (§ 2617) and which broadly prohibits any instrumentality of the state from adopting PCB “requirements.” *See* Opposition Brief at 17-18 & n.24 (explaining that, for decades, the term “requirements” when used in a preemption clause has included state common law). The U.S. Supreme Court examined a very similar purported “savings clause” in the Clean Water Act’s citizen suit provision in *International Paper Co v. Ouellette*, 479 U.S. 481 (1987). The Court concluded that the savings clause there *did not* impact federal preemption of Vermont state law because it “merely says that ‘[nothing] *in this section*,’ *i.e.* the citizen suit provisions, shall affect an injured party’s right to seek relief under state law; ***it does not purport to preclude pre-emption of state law by other provisions of the Act.***” *Id.* at 493 (second emphasis added).

Any conceivable doubt about this point is further dispelled by comparing § 2619(c)(3) to text elsewhere in TSCA where Congress actually did intend to save state common law claims. For example, in TSCA Subchapter II regarding asbestos only (and not PCBs), Congress described with exacting clarity its intent to save common law claims from preemption:

- “**Nothing in this subchapter** shall be construed, interpreted, or applied to preempt, displace, or supplant any other State or Federal law, whether statutory or common.” 15 U.S.C. § 2649(a) (emphasis added)
- “**Nothing in this subchapter** shall be construed or interpreted as preempting a State from establishing any additional liability or more stringent requirements with respect to asbestos in school buildings within such State.” *Id.* § 2649(c) (emphasis added)
- “It is not the intent of Congress that **this subchapter** or rules, regulations, or orders issued pursuant to this subchapter be interpreted as influencing, in either the plaintiff’s or defendant’s favor, the disposition of any civil action for damages relating to asbestos.” *Id.* § 2649(e) (emphasis added)

The difference between these asbestos provisions and § 2619(c)(3) is stark. We know what Congress says when it intends to save common law claims, and § 2619(c)(3) is not such a clause.²

Text of Express Preemption Clause: Although the argument on page 5 of their brief is a bit difficult to follow, PCB Counsel seem to say that EPA’s PCB rules do not trigger the express preemption clause. If so, that argument is refuted by TSCA’s plain text. As Pharmacia explained in detail in its Opposition Brief (at 15-18), by its terms TSCA’s express preemption clause is triggered if “the Administrator prescribes a rule or order under section 2604 or 2605.” 15 U.S.C. § 2617(a)(2)(B). EPA’s PCB rules are promulgated under section 2605—in particular

² As relevant here, the savings clause in § 2619(c)(3) only prevents courts from giving implied preemptive effect to the federal cause of action created in § 2619(a). That could be important in situations, unlike here, where TSCA’s express preemption clause does not apply. For example, a state can request from EPA an exemption to express preemption that would permit the state to deviate from EPA’s regulations. *See* 15 U.S.C. § 2617(b). Likewise, the federal cause of action in § 2619(a) applies to subchapters of TSCA not governed by the express preemption clause, like the asbestos subchapter mentioned above. *See id.* § 2619(a) (creating federal cause of action for inter alia violations of “subchapter II or IV”). In these situations, the citizen’s suit provision could not itself be interpreted to preempt state law. But where the express preemption clause applies—like here—it is that clause that preempts state law and displaces all state remedies in favor of those provided by federal law. *See id.* § 2617(a)(2)(B). Notably, the New York State case relied upon by Individual Defendants, *Leo v. Gen. Elec. Co.*, 538 N.Y.S.2d 844, 847 (N.Y. App. Div. 1989), appears to have rejected an *implied* preemption argument; the court did not even acknowledge, much less analyze, TSCA’s express preemption clause.

section 2605(e), which is plainly under “section 2604 or 2605.” *See id.* § 2605(e) (titled “Polychlorinated biphenyls,” specifically applicable to EPA rule-making authority over PCBs).

PCB Counsel also argue (at 5-6) that Pharmacia must show an actual conflict between state tort law and EPA’s PCB rules for preemption to apply. Again, this is rebutted by the plain language of TSCA’s preemption provision: Congress preempted “**any requirement**” imposed by a state applicable to a “chemical substance or mixture” that EPA has regulated “under section 2604 or 2605” in order to “protect against a risk of injury to health or the environment.” *See id.* § 2617. Any requirement applicable to a chemical regulated under 2605, like state law duties of care with respect to PCBs, is therefore preempted unless an exception to preemption applies. PCB Counsel assert (at 5) that the preemption clause only “bars state requirements inconsistent with rules promulgated by EPA,” implying that various types of differing state law requirements might survive preemption. But that argument turns the preemption clause on its head. In order to avoid preemption, the clause’s exception requires state law to be “**identical**” to the federal requirement. 15 U.S.C. § 2617(a)(2)(B)(i). **Thus, the clause preempts not only state law requirements that are *inconsistent* with federal ones, but all state law requirements that are not “the very same” or “exactly alike or equal.”** *See Webster’s New World Dictionary* 669 (3d col. ed. 1988) (definition of “identical”). Individual Defendants do not even argue that their tort claims match exactly EPA’s rules.³ Nor could they—they have never alleged that Pharmacia

³ Individual Defendants also attempt to dismiss the Fifth Circuit’s opinion in *Rollins Environmental Services (FS), Inc. v. Parish of St. James*, 775 F.2d 627, 632-33 (5th Cir. 1985), claiming (at 6) that the Fifth Circuit found preemption because “a local ordinance ... conflicted with a specific set of disposal regulations promulgated pursuant to § 2605.” But that’s not what the Fifth Circuit said. The Court said that “EPA promulgated a comprehensive set of PCB disposal regulations pursuant to its authority under section 2605,” that no exception or exemption to preemption applied, and thus “all the conditions necessary to trigger the preemption provisions of TOSCA have been met.” *Id.* at 633-64. Rather than compare the local ordinance to the federal regulation to see if there is any conflict, the Court held that “Congress has *explicitly*

has violated EPA's regulations. *See* Defs' Mot. to Dismiss, Ex. B (state court complaint for Bowman and Chambers). And, in any event, PCB Counsel's claims *are* directly at odds with EPA's rules, which authorize numerous uses of PCBs and embody a federal determination that those uses do "not present an unreasonable risk of injury to health or the environment," 15 U.S.C. § 2605(e)(2)(B); *see, e.g.*, 40 C.F.R. § 761.30(f) (authorizing use of carbonless copy paper containing PCBs indefinitely); 44 Fed. Reg. 31514, 31535 (2012) (concluding that "risks to human health or the environment" posed by carbonless copy paper "are negligible"); 40 C.F.R. § 761.30(a), (1) (authorizing continued uses of electrical transformers and capacitors containing PCBs, subject to a number of regulatory requirements).

Legislative History: PCB Counsel point (at 7) to language in a Senate committee report for a pending bill to amend TSCA, arguing that "Congress itself understands that TSCA does not preempt tort claims." Of course, a *committee report* for a *bill* that has not even passed the Senate says nothing about what the entire Senate thinks, much less what the entire Congress thinks, much less what the Congress that enacted TSCA decades ago thought. Even if the bill had passed the Senate, and then passed the House after conference, and then been signed by the President, the Supreme Court has time and time again warned that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

PCB Counsel's reliance on the Senate bill committee report is particularly puzzling because ***there is a competing TSCA reform bill—that has actually passed the House—whose***

mandated that TOSCA, and regulations promulgated under it by the EPA, preempt state and local regulation of PCB disposal." *Id.* at 635. In order words, the local ordinance—which there did not even mention PCBs by name—was preempted because it intruded into the "field" of PCB regulation controlled by EPA.

statutory language (as opposed to a committee report) makes clear that the House does understand the currently existing version of TSCA to preempt PCB-related torts. The House bill generally reduces the preemptive scope of TSCA for chemicals *other than PCBs* by expressly altering the definition of “requirements” in 15 U.S.C. § 2617 to exclude common law duties—indicating that the House understands TSCA’s *current* use of “requirements” to *include* those claims. H.R. 2576, *TSCA Modernization Act of 2015*, § 7(b)(3). Critically, the House bill specifically exempts PCBs from this change, ensuring that preemption of common law requirements from EPA’s PCB rules would continue after passage of the new law. That bill expressly states that:

Nothing in this Act, or the amendments made by this Act, shall be construed as changing the preemptive effect of *an action taken by the [EPA] Administrator* prior to the date of enactment of this Act or *under section 6(e)*.

Id. § 7(c) (emphasis added). As discussed *supra* at 4-5, “section 6(e)” of TSCA (codified at 15 U.S.C. § 2605(e)) is the provision of TSCA authorizing EPA to promulgate PCB rules. Thus, the House bill provision above would maintain the status quo with respect to preemption of torts related to PCBs. In short, to the extent that any of this “post-enactment legislative history” could conceivably be relevant to interpreting the existing version of TSCA, it cuts decidedly in Pharmacia’s favor.

II. ABSTENTION IS UNWARRANTED HERE

PCB Counsel raise four new arguments regarding abstention, all of which are mistaken. Two of those arguments relate only to Individual Defendants Chambers and Bowman (which PCB Counsel label “mandatory” abstention), the other two relate to all Individual Defendants (permissive abstention).

Bowman/Chambers “Mandatory” Abstention: PCB Counsel cannot dispute that this case and the state case involve different parties and issues, or that the state court has not

addressed the preemption issue here. These are critical issues for “mandatory” abstention. *See* Opposition Br. at 26-27. Indeed, the Fifth Circuit has explained that the principal concern of *Texas Employers’ Insurance Ass’n v. Jackson*, 862 F.2d 491 (5th Cir. 1988), is with using a federal declaratory judgment to *interfere* with a pending state case about the same issues, such as by effectively overruling the prior decision of the state court. *See Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 866 (5th Cir. 1993) (“In *Jackson*, the federal suit offended principles of comity and federalism ***because the plaintiff sought an overruling of a state court decision on LHWCA preemption.***” (emphasis added)). PCB Counsel never explain how this suit will genuinely interfere with Individual Defendant Bowman and Chambers’s state court action, and it is difficult to see how it could given that nothing has happened in that case. Here, “[t]he only interference results from the potential for a race to judgment,” which is not enough to warrant abstention. *See id.* at 886 & n.9 (“A race to judgment often is condoned.”).

PCB Counsel also incorrectly state (at 9) that Pharmacia “cites no case in which a defendant has been allowed to obtain a declaratory judgment of nonliability as to existing or threatened state court tort claims.” But throughout its Opposition Brief, Pharmacia cited *Sherwin-Williams Co. v. Holmes Cty.*, 343 F.3d 383 (5th Cir. 2003), in which the Fifth Circuit permitted a declaratory plaintiff to seek to do exactly that. There, the Fifth Circuit reversed the district court’s decision to abstain because the declaratory plaintiff properly “asked the federal court to decide in a single declaratory judgment action four legal issues asserted to be common” to pending and threatened claims, including preemption, in order “[t]o avoid having to litigate numerous anticipated suits in different state courts.” *Id.* at 386-87. *Sherwin-Williams*, like *Travelers Insurance Co. v. Louisiana Farm Bureau Federation*, 996 F.2d 774 (5th Cir. 1993),

demonstrates the Fifth Circuit’s approval of using the declaratory judgment vehicle to avoid a multiplicity of suits.⁴

PCB Counsel dismiss (at 9) Pharmacia’s use of a declaratory judgment to avoid such a multiplicity of suits, claiming that if this use of a declaratory judgment were proper the “asbestos companies in this country [which] have been sued tens of thousands of times for decades” would have tried to obtain one long ago. **What PCB Counsel fail to note is that there is an express statutory reason that this is so. TSCA expressly *excludes asbestos claims* from the scope of its preemption, *supra* at 3-4, so there would have been no basis for the asbestos companies to sue for a federal declaratory judgment.**

Permissive Abstention: PCB Counsel’s Reply Brief does not challenge Pharmacia’s substantive analysis under either the *Colorado River* or *Brillhart* standard, but instead argues only about which standard applies. Without citation to a single case, PCB Counsel claim (at 10) that *Colorado River* does not apply because Pharmacia’s coercive claims are against the Insurer Defendants, rather than the Individual Defendants. But unlike the approach used in some other circuits, the Fifth Circuit uses a “bright-line” test.⁵ This Circuit looks to the entire “action” to see if there is a claim for coercive relief and, if so, applies *Colorado River* to the action. *See New Eng. Ins. Co v. Barnett*, 561 F.3d 392, 394-395 (5th Cir. 2009) (“However, when *an action*

⁴ As Pharmacia indicated in its Opposition Brief (at 30 n.28), if the Court finds that this existing suit is insufficiently multitudinous to prevent abstention, Pharmacia respectfully requests leave to amend its Complaint to assert claims against the 57 other Texas individuals currently suing Pharmacia over these same issues.

⁵ *See, e.g., R.R. St. & Co. v. Vulcan Materials Co.*, 569 F.3d 711, 715 (7th Cir. 2009) (surveying various approaches used by the circuits and concluding that: “The Fifth Circuit has adopted a *strict bright-line approach*: When *an action* includes *a claim* for declaratory relief along with any non-frivolous claim for coercive relief, *Wilton/Brillhart* abstention is completely inapplicable to *all claims*, and the *Colorado River* doctrine governs instead.” (emphasis added)); A. Andrews & K. Holmstrom, *The Possibility of Parallel Litigation: Federal Abstention and Declaratory Judgment Actions*, For the Defense, Sept. 2009, at 29, 32 (same).

involves coercive relief, the district court must apply the abstention standard set forth in *Colorado River*.” (emphasis added)); *Kelly Inv., Inc. v. Cont’l Common Corp.*, 315 F.3d 494, 497 n.4 (5th Cir. 2002) (similar).

Finally, PCB Counsel suggest (at 10) that the Fifth Circuit’s bright-line test does not apply because Pharmacia’s insurance claims “are a contrivance.” PCB Counsel do not argue that those claims are “frivolous” as a legal matter, so they must be saying the claims were made “*solely* to avoid application of the *Brillhart* standard.” *Black Sea Inv., Ltd. v. United Heritage Corp.*, 204 F.3d 647, 652 (5th Cir. 2000) (setting forth the only exceptions to the bright-line rule) (emphasis added). This is a bold accusation, given that Pharmacia has named 19 insurers as defendants and has alleged that they owe Pharmacia coverage obligations on specifically-identified insurance policies going back 50 years. *See* First Amended Complaint at ¶¶ 61-76. The only basis provided for PCB Counsel’s fanciful theory is that Pharmacia agreed to extend the deadlines for Insurer Defendants to answer. *See* Reply Br. at 2, 10. Pharmacia decided that it was not unreasonable to grant Insurer Defendants’ extension requests given that the extent to which they are obligated to provide coverage to Pharmacia could be directly impacted by this Court’s declaratory judgment on preemption. Specifically, if TSCA preempts PCB-related tort claims, then Pharmacia’s dispute with Insurer Defendants could be drastically reduced in scale. By contrast, if Pharmacia is wrong about preemption, the extent of Pharmacia’s coverage claim could increase significantly. These material differences could directly bear on the manner in which Pharmacia and the Insurer Defendants litigate or otherwise resolve the insurance dispute. Attempting to structure a case in an efficient way does not make it a “contrivance.”

CONCLUSION

Individual Defendants’ motion to dismiss or abstain should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2015 a copy of the foregoing Opposition was filed electronically with the Clerk of the Court using CM/ECF system. Notice of this filing will be sent by operation of the Court electronic filing system to all parties of record.

/s/ Jennifer Truelove
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