

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 97-10709

Chapter 11

NOXSO CORPORATION
Debtor

ALCOA GENERATING CORP.

Plaintiff

v

Adversary Proceeding

No. 97-1232

BLANKENBERGER BROTHERS, INC. and
NOXSO CORPORATION

Defendants

MEMORANDUM

Appearances: Thomas E. Ray, Ray & Associates, P.C., Chattanooga, Tennessee,
Attorney for Alcoa Generating Corp.

Harold L. North, Jr., Shumacker & Thompson, P.C., Chattanooga,
Tennessee, Attorney for Blankenberger Brothers, Inc.

Kyle R. Weems, Weems & House, Chattanooga, Tennessee,
Attorney for Noxso Corporation

HONORABLE R. THOMAS STINNETT,
UNITED STATES BANKRUPTCY JUDGE

Noxso Corporation (“Noxso”) is the debtor in a Chapter 11 reorganization case. Before its bankruptcy, Noxso and the Department of Energy began a construction project. The project was intended to demonstrate pollution control technology developed by Noxso. Alcoa Generating Corp. (“Alcoa”) agreed that the project could be built on its real property located in Indiana. Blankenberger Brothers, Inc., (“Blankenberger”) was one of Noxso’s subcontractors. Noxso allegedly failed to pay Blankenberger for services and materials. As a result, Blankenberger filed notice of a mechanic’s lien on Alcoa’s property. Blankenberger later filed suit against Alcoa in an Indiana state court to enforce the mechanic’s lien. Blankenberger did not include Noxso as a defendant in the state court suit. Alcoa then brought suit against Noxso and Blankenberger in this court. Alcoa wants this court to: (1) enjoin Blankenberger’s suit in Indiana and decide the issues in this suit, or (2) lift the automatic stay so that Noxso can be made a party to the lawsuit in Indiana. Blankenberger has responded with a motion to dismiss or abstain. This opinion deals with Blankenberger’s motion to dismiss or abstain.

A decision on Blankenberger’s motion requires an understanding of Alcoa’s complaint. Alcoa’s complaint alleges:

Blankenberger asserts a mechanic’s lien on Alcoa’s property in order to collect a debt that Noxso owes to Blankenberger.

A decision by the Indiana court on the question of whether Noxso owes a debt to Blankenberger, will be binding on Noxso *only if* Noxso is a party to the Indiana lawsuit. If Noxso is made a party to the Indiana lawsuit and Blankenberger wins, the judgment will establish that Noxso owes a debt to Blankenberger. It will also establish Alcoa’s right to a claim against Noxso for the amount paid to Blankenberger. Noxso can not object to Alcoa’s claim in the bankruptcy case on the ground that Noxso did not owe the debt to Blankenberger, since Noxso will be bound by the judgment.

On the other hand, if Noxso is not made a party to the Indiana lawsuit, and Alcoa is forced to pay Blankenberger, Noxso may not be bound by the judgment. Noxso may be able to object to Alcoa's claim in the bankruptcy case on the ground that it did not owe the debt to Blankenberger. Alcoa may be forced to try the same questions twice, once in Blankenberger's suit in Indiana and again in Noxso's bankruptcy case. The two courts may reach opposite results. Alcoa may be forced to pay Blankenberger but end up with no claim against Noxso in the bankruptcy case.

Therefore, Alcoa needs a decision among all three parties (Alcoa, Noxso, and Blankenberger) in one proceeding, either in the state court or in this court.

Alcoa's complaint contains other allegations in a similar vein. The complaint alleges that Noxso is an indispensable or essential party to the state court lawsuit, that the state court lawsuit can be resolved more efficiently with Noxso as a party, that Alcoa lacks knowledge of Noxso's defenses against Blankenberger, and that Blankenberger's claim may be paid under the Chapter 11 plan so that Blankenberger will not need to collect from Alcoa.

Alcoa's complaint also alleges that the court should not allow the state court lawsuit to proceed because it will interfere with Noxso's development of a Chapter 11 plan. Alcoa asserts it will need extensive discovery from Noxso's officers and employees. Alcoa points out that it agreed to let its property and plant be used, but it did not hire Noxso to be its contractor — the Department of Energy and Noxso were the principal parties to the construction contract. The result, according to Alcoa, is that it knows less about the construction project and will need more discovery than would normally be expected.

Blankenberger's motion to dismiss rests on the argument that Alcoa does not have standing to obtain an injunction to protect itself from Blankenberger's claim. In the alternative,

Blankenberger asks the court to abstain from deciding Alcoa's complaint and to allow the state court proceeding to continue. 28 U.S.C. § 1334(c).

Blankenberger filed a proof of claim in Noxso's bankruptcy case for about \$153,000. Noxso objected to the claim on the ground that it was filed after the bar date. The court combined a hearing on the objection with argument on Blankenberger's motion to dismiss or abstain.

At the hearing, Noxso and Blankenberger announced a proposed compromise that would allow Blankenberger's claim in the amount of \$149,000. Alcoa emphasized its contention that Blankenberger's suit in Indiana should be delayed, at least temporarily, because Noxso's plan of reorganization may propose to pay all or a large portion of the debt to Blankenberger. Blankenberger's counsel made it clear that it will not attempt to proceed with the state court suit until the court render's a decision on Blankenberger's motion. The court also questioned the parties as to whether Noxso might be bound by a judgment for Blankenberger in the Indiana lawsuit, even if Noxso is not a party. The parties submitted briefs on the issue after the hearing.

SUBJECT MATTER JURISDICTION

The Sixth Circuit Court of Appeals has given broad scope of the bankruptcy jurisdiction statute. The court's subject matter jurisdiction of Alcoa's complaint is not disputed. *See Lindsey v. O'Brien, Tanski, Tanzer and Young Health Care Providers (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996); *Dunkirk Limited Partnership v. TJX Companies, Inc.*, 139 B.R. 643 (N. D. Ohio 1992).

CORE PROCEEDING OR RELATED PROCEEDING

Alcoa contends that the dispute between it and Blankenberger should be decided in this court because it is a core proceeding. Alcoa asserts it is a core proceeding because it involves determination of a claim against Noxso. This contention is not entirely consistent with Alcoa's argument that a judgment in the state court suit will not be binding on Noxso if it is not a party. In any event, the bankruptcy court may allow other courts to determine the amount and existence of claims against the debtor. *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162 (9th Cir. 1990); *In re Marvin Johnson's Auto Service, Inc.*, 192 B.R. 1008 (Bankr. N. D. Ala. 1996); *Pieklik v. Hudgins (In re Hudgins)*, 102 B.R. 495 (Bankr. E. D. Va. 1989). The dispute need not be tried in this court even if the outcome will establish the amount of a claim against Noxso.

STANDING

Blankenberger contends the court should dismiss because Alcoa does not have standing to obtain an injunction under Bankruptcy Code § 105. The statute allows the court to issue an injunction if it is necessary or appropriate to carry out the provisions of the Bankruptcy Code. 11 U.S.C. § 105(a).

Other courts have held that the debtor, the debtor in possession, the trustee, or a creditor have standing to obtain an injunction against a suit in another court even if the debtor is not a party. Judge Stair discussed the reasoning in *Metropolitan Life Ins. Co. v. Alside Supply Center (In re Clemmer)*, 178 B.R. 160 (Bankr. E. D. Tenn. 1995); *see also Transcorp. v. Pioneer*

Liquidating Corp. (In re Consolidated Pioneer Mortgage Entities), 205 B.R. 422 (9th Cir. B.A.P. 1997).

A debtor, debtor in possession, bankruptcy trustee, or creditor is more likely to be able to prove an injunction is necessary or appropriate to carry out the provisions of the Bankruptcy Code. 11 U.S.C. § 105(a). Logic does not compel the conclusion that no other plaintiff can prove this. The focus should be on the requirements of § 105 without saying that some plaintiffs are automatically disqualified from obtaining an injunction under § 105. *Archambault v. Hershman (In re Archambault)*, 174 B.R. 923 (Bankr. W. D. Mich. 1994); *In re Monroe Well Service, Inc.*, 67 B.R. 746 (Bankr. E. D. Pa. 1986).

Consider this case. The debtor, Noxso, has not filed any pleading requesting an injunction, but it has stood in the wings urging the court to grant Alcoa an injunction. Noxso's answer agreed with Alcoa's arguments for enjoining the state court suit. At the hearing on Blankenberger's motion, Noxso continued to support Alcoa's request for an injunction. Noxso argued that subjecting it to discovery in the Indiana lawsuit will distract it from its attempts to formulate a plan or reorganization. Noxso has in effect taken the same position as Alcoa.

The court therefore rejects Blankenberger's contention that this proceeding should be dismissed because Alcoa lacks standing to obtain an injunction.

THE AUTOMATIC STAY

The filing of a bankruptcy case imposes an automatic stay. The stay is set out in Bankruptcy Code § 362. It generally prevents creditors from collecting debts from the debtor, Noxso in this case. 11 U.S.C. § 362(a). The first question is whether the automatic stay applies to Blankenberger's suit against Alcoa in the Indiana state court.

Of course, the automatic stay does not apply on the ground that Noxso is a defendant in the state court suit. 11 U.S.C. § 362(a)(1) & (6). Does it apply on the theory that Blankenberger is trying to collect from Noxso's property? 11 U.S.C. § 362(a)(3)–(6).

In a typical construction case the property owner hires the contractor who hires the subcontractor. If the contractor fails to pay the subcontractor, the subcontractor may recover from the owner to the extent it owes money to the contractor. The subcontractor collects by taking the contractor's property — the money due to the contractor from the owner. In this case, however, Alcoa did not contract with Noxso and does not owe Noxso any money for the construction. Thus, Blankenberger's suit does not seek to recover from Noxso's property.

The next question is whether the automatic stay applies because Alcoa may have a claim against Noxso for the amount it is forced to pay Blankenberger. The theory is that the automatic stay should apply because Blankenberger's state court suit will establish a claim against Noxso in its bankruptcy case.

In a similar situation, the Fourth Circuit Court of Appeals reasoned that it was more logical to apply the automatic stay than to require a separate injunction. *A. H. Robins Co. v. Piccinin*, 788 F.2d 994, 1000 (4th Cir. 1986), *cert. den.* 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986). The Fourth Circuit did not decide that the automatic stay applied because it did not need to decide; it affirmed on the ground that the lower courts were justified in granting a preliminary injunction. 788 F.2d at 1003–1008.

The court of appeals for this circuit appears to take the opposite view: a specific injunction is required. *Patton v. Bearden*, 8 F.3d 343, 349 (6th Cir. 1993); *see also In re Petroleum Piping Contractors, Inc.*, 211 B.R.[290] (Bankr. N. D. Ind. 1997); *Bidermann Industries U.S.A., Inc. v. Zelnik (In re Bidermann Industries U.S.A., Inc.)*, 200 B.R. 779 (Bankr. S. D. N. Y. 1996); *Town of Colchester v. Hinesburg Sand & Gravel, Inc.*, 112 B.R. 89 (Bankr. D. Vt. 1990). The court concludes, therefore, that the automatic stay does not apply to Blankenberger’s suit against Alcoa.

The next question is whether the automatic stay applies to discovery by Alcoa from Noxso that Alcoa will need in order to defend Blankenberger’s state court suit. The courts have hesitated to say the automatic stay does not apply, even though it is difficult to find a provision in § 362(a) that fits the situation. *Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.)*, 40 B.R. 219 (S. D. N. Y. 1984). This court concludes that the automatic stay does not apply, but Noxso may obtain a separate injunction. *Patton v. Bearden*, 8 F.3d 343, 349 (6th Cir. 1993); *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litigation*, 140 B.R. 969 (N. D. Ill. 1992).

INJUNCTION OR ABSTENTION

Should the court enjoin Blankenberger from continuing its suit in Indiana or abstain and allow the suit to continue? Alcoa contends a judgment for Blankenberger in the Indiana suit will not necessarily be binding on Noxso in this court. To avoid inconsistent judgments, Alcoa asks the court to stay the suit in Indiana and decide all the issues in this proceeding.

At the oral argument on Blankenberger's motion, the court questioned the attorneys as to whether Noxso might be bound by a judgment against Alcoa, even if Noxso does not take part in the Indiana lawsuit. The court had in mind the question of whether Noxso is in privity with Alcoa for the purpose of collateral estoppel. Noxso may be in privity with Alcoa if it has a duty to indemnify Alcoa for any claims Alcoa pays as a result of Noxso's activities on Alcoa's property.

After the hearing the parties submitted the Project Agreement between Noxso and Alcoa. One indemnity provision says:

NOXSO, for itself, its successors and assigns, agrees to indemnify [Alcoa], their successors and assigns, against any and all cost, expenses, including legal fees, claims, damages, losses, demands and penalties asserted by any person other than an employee of NOXSO for bodily injuries, death or property damage occurring before the first anniversary of the Start-Up Date and arising from any activity or work performed by NOXSO relating to this Agreement (including its directions and guidance relating to the Project Facilities, and their operation and maintenance), by its contractors or suppliers or the employees of any of them related to this Agreement except due to the willful action or negligence of [Alcoa] or [its] employees . . .

This provision leaves the scope of Noxso's indemnity duty unclear. The problem is caused by the exception that begins with "other than." The entire exception appears to be "other than an employee of Noxso." If this is correct, the indemnity provision relates only to claims by other persons "for bodily injuries, death or property damage occurring before the first anniversary of the Start-Up Date."

On the other hand, the exception could be for claims by "an employee of NOXSO for bodily injuries, death or property damage." This interpretation would not limit Noxso's indemnity duty to claims for bodily injury, death or property damage. It would only exclude such claims by employees of Noxso.

The first interpretation is simpler and makes more sense of the connectors. It imposes on Noxso a duty to indemnify Alcoa against liability "for" bodily injuries, death or property damage "occurring" before the first anniversary of the start-up date "and" arising from work by Noxso, its contractors and suppliers and their employees. The court accepts this interpretation as correct. It raises at least two questions regarding Blankenberger's claim. Is it a claim for property damage, and did it occur before the first anniversary of the start-up date? Since Blankenberger's claim against Alcoa does not appear to be a claim for property damage, this provision does not clearly require Noxso to indemnify Alcoa if Blankenberger recovers from Alcoa.

Paragraphs 6.2, 6.3 and 6.4 expressly require Noxso to prevent the attachment of liens:

NOXSO shall not allow any lien or security interest to be placed on or to continue in effect with respect to any portion of the Sulfur Production Facilities except for a Bond Creditors' Lien.

NOXSO shall not allow any lien or security interest to be placed on or to continue in effect with respect to any portion of the NOXSO Process Facilities except for a Bond Creditors' Lien.

NOXSO shall pay all suppliers, contractors and workmen promptly and shall promptly provide [Alcoa] with written evidence thereof, and NOXSO shall diligently use all measures to see that each contractor pays its suppliers and workmen and shall take all other appropriate measures to avoid mechanic's and materialman's liens attaching to any of the Project Facilities.

These provisions apply only to the three "facilities" that Noxso was supposed to construct. Indiana law, however, is essentially like the law of other states. When a mechanic or materialman obtains a statutory lien on the structure where it worked or supplied materials, the lien attaches to the owner's real property. *Ind. Code* § 32-8-3-1; see *Haimbaugh Landscaping, Inc. v. Jegen*, 653 N.E.2d 95 (Ind. Ct. App. 1995); *Miles Homes of Indiana, Inc. v. Harrah Plumbing and Heating Service Co.*, 408 N.E.2d 597 (Ind. Ct. App. 1980). Since the facilities were to be located on Alcoa' real property, a lien on any of them would be a lien on Alcoa's real property.

These provisions are in effect a promise by Noxso to prevent the attachment of mechanics' or materialmen's liens to Alcoa's real property. If Noxso breaches the promise, then it should be liable to Alcoa for damages. Thus, Noxso's promise amounts to an agreement by Noxso to reimburse or indemnify Alcoa for amounts it is forced to pay to remove such liens. *Baldwin Locomotive Works v. Edward Hines Lumber Co.*, 127 N.E. 275, 276 (Ind. 1920) (dicta).

Furthermore, the common law of Indiana apparently imposes on Noxso a duty to indemnify Alcoa for any amounts it is forced to pay Noxso's subcontractors or suppliers. *Complete Electric Co. v. Liberty National Bank & Trust Co.*, 530 N.E.2d 1216 (Ind. Ct. App. 1988); *Lafayette Tennis Club, Inc. v. C. W. Ellison Builders, Inc.*, 406 N.E.2d 1211 (Ind. Ct. App. 3rd Dist. 1980); *Midland Bldg. Industries, Inc. v. Oldenkamp*, 103 N.E.2d 45 (Ind. Ct. App. 1952) (en banc).

The court concludes that Noxso has a duty to indemnify Alcoa if it is forced to pay Noxso's subcontractors or suppliers to remove their liens from Alcoa's property. Therefore, Noxso has a duty to indemnify Alcoa for any payment to Blankenberger to remove its lien from Alcoa's property.

This brings the court back to the question of whether Noxso is in privity with Alcoa for purposes of collateral estoppel. In other words, will a judgment for Blankenberger in the state court suit be binding on Noxso and establish that it owes a debt for the amount Alcoa is forced to pay Blankenberger?

In this situation, Alcoa can give Noxso notice and an opportunity to defend. If Noxso chooses not to defend, it will still be bound by a state court judgment in favor of Blankenberger. Collateral estoppel will apply to Noxso because, for the purposes of collateral estoppel, Noxso is in privity with Alcoa. *Hoosier Casualty Co. v. Miers*, 27 N.E.2d 342 (Ind. 1940); *Progressive Casualty Ins. Co. v. Morris*, 603 N.E.2d 1380 (Ind. Ct. App. 1st Dist. 1992); *Restatement (Second) of Judgments* § 57 (1982).

Alcoa can raise Noxso's defenses against Blankenberger. See *Templeton v. Sam Klain & Son, Inc.*, 425 N.E.2d 89 (Ind. 1981); *Froberg v. Northern Indiana Constr. Co.*, 416 N.E.2d 451 (Ind. Ct. App. 1981); *Kendall Lumber & Coal Co. v. Roman*, 91 N.E.2d 187 (Ind. Ct. App. 1950) (en banc).

Furthermore, the court does not see any conflict of interest between Noxso and Alcoa that would prevent Alcoa from adequately representing Noxso's interest. *Snodgrass v. Baise*, 405 N.E.2d 48 (Ind. Ct. App. 2nd Dist. 1980); *Restatement (Second) of Judgments* § 57 (1982). Noxso's bankruptcy gives Alcoa an even stronger motive for making a diligent defense against Blankenberger's claim; Alcoa must assert its indemnity claim against Noxso in its bankruptcy case.

In this regard, the court disagrees with Alcoa's contention that Noxso is an indispensable or necessary party to Blankenberger's suit in Indiana. *Deluxe Sheet Metal, Inc. v. Plymouth Plastics, Inc.*, 555 N.E.2d 1296 (Ind. Ct. App. 1990).

Noxso could argue that it is not in privity and collateral estoppel should not apply because it can defend in the state court suit only if this court lifts the automatic stay. Some courts have held that a bankruptcy trustee or debtor-in-possession must obtain relief from the automatic stay in order to defend a pre-petition lawsuit against the debtor. *Parker v. Bain*, 68 F.3d 1131 (9th Cir. 1995); *In re Capgro Leasing Associates*, 169 B.R. 305 (Bankr. E. D. N. Y. 1994); see also *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60 (6th Cir. 1983); but see *Autoskill, Inc. v. National Educational Support Systems, Inc.*, 994 F.2d 1476 (10th Cir. 1993).

Those cases, however, involved pre-petition suits against the debtor. Blankenberger's suit against Alcoa is not a pre-petition suit against Noxso. Furthermore, Noxso can ask for the stay to be lifted so that it can defend if the court allows the Indiana suit to continue. If Noxso does not attempt to defend or obtain an order lifting the stay so that it can defend, then it should be bound by a judgment against Alcoa.

This conclusion leads the court to reject Alcoa's argument that an injunction is needed to protect it from possible inconsistent judgments by the state court and this court.

Ironically, Alcoa's reasoning for an injunction is just the opposite of the reasoning applied by some courts to justify an injunction. They have enjoined the plaintiff's suit in another court because a judgment against the defendant would be binding on the trustee or debtor in possession as a result of collateral estoppel. In other words, they have enjoined the suit in the other court because it would establish the amount of an indemnity claim against the debtor. Judge Walsh has covered this subject, including supporting cases, in *American Film Technologies, Inc. v. Taritero (In re American Film Technologies, Inc.)*, 175 B.R. 847 (Bankr. D. Del. 1994).

The court has already rejected Alcoa's argument that only this court can determine the amount and existence of its indemnity claim against Noxso. The court can allow Blankenberger's suit in Indiana to continue. The question is whether it should.

Alcoa and Noxso contend that Blankenberger's suit should be enjoined temporarily so that discovery will not interfere with Noxso's effort to obtain confirmation of a Chapter 11 plan.

Alcoa and Noxso also contend that a confirmed plan may convince Blankenberger not to proceed, depending on how the plan will pay Blankenberger's claim.

To decide whether to grant a preliminary injunction, the court must consider the plaintiff's likelihood of success on the merits. This criterion can be confusing in cases such as this. Generally, a preliminary injunction protects the plaintiff from irreparable harm until a final decision on claims raised by the complaint. 11A Charles A. Wright, et al., *Federal Practice and Procedure* § 2947 at 121 (2nd ed. 1995) (Emphasis added.). Alcoa is not asking for an injunction to protect it from irreparable harm until the court renders a final decision on its complaint. Obtaining a temporary injunction will be success on the merits of the Alcoa's complaint.

Ultimate success on the merits depends on Noxso's success in its Chapter 11 case. This point was recognized by the court of appeals in *American Imaging Services, Inc. v. Eagle-Picher Industries, Inc. (In re Eagle-Picher Industries, Inc.)*, 963 F.2d 855, 859-860 (6th Cir. 1992). Moreover, the grounds for staying Blankenberger's suit actually depend on Noxso's need for protection, not Alcoa's, and Noxso's need for protection depends in turn on events in Noxso's its Chapter 11 case.

This case fits the pattern of cases in which the courts have enjoined a creditor's suit against a third party because it will establish a claim against the debtor. *See, e.g., Johns-Manville Corp. v. Asbestos Litigation Group*, 40 B.R. 219 (S. D. N. Y. 1984), *rev'd in part* 41 B.R. 926 (S. D. N. Y. 1984); *American Film Technologies, Inc. v. Taritero (In re American Film Technologies, Inc.)*, 175 B.R. 847 (Bankr. D. Del. 1994); *Sudbury, Inc. v. Escott (In re Sudbury, Inc.)*, 140 B.R. 461

(Bankr. N. D. Ohio 1992); *see also* *A. H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), *cert. den.* 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986).

Courts have also entered injunctions to prevent discovery from the debtor from interfering with the debtor's efforts to obtain confirmation of a plan. *See, e.g., Zenith Laboratories, Inc. v. Sinay (In re Zenith Laboratories, Inc.)*, 104 B.R. 659 (D. N. J. 1989); *Johns-Manville Corp. v. Asbestos Litigation Group*, 40 B.R. 219 (S. D. N. Y. 1984), *rev'd in part* 41 B.R. 926 (S. D. N. Y. 1984); *Lazarus Burman Associates v. National Westminster Bank (In re Lazarus Burman Associates)*, 161 B.R. 891 (Bankr. E. D. N. Y. 1993); *Provincetown Boston Airline v. Miller (In re Provincetown Boston Airline, Inc.)*, 52 B.R. 620 (Bankr. M. D. Fla. 1985).

The court, however, can not ignore events in Noxso's Chapter 11 case since the hearing on Blankenberger's motion. Noxso has filed a proposed Chapter 11 plan, the court has approved a disclosure statement, and a hearing on confirmation of the plan has been scheduled.

Blankenberger's claim is apparently treated as a general unsecured claim. The primary funding for the plan is to come from money paid to Noxso by the Department of Energy. The plan provides that, if the original money is not sufficient to pay the general unsecured claims in full, then the reorganized Noxso intends to attempt to recover preferential transfers so that it can pay general unsecured claims in full. The plan sets up a disputed claims reserve to be retained until the disputes have been resolved. The money remaining after setting up the disputed claims reserved will be used to make a pro rata payment on the undisputed claims without waiting for the disputed

claims to be resolved. After the disputes are resolved, the disputed claims reserve can be distributed so that all general unsecured claims will be paid the same percentage.

Under these provisions, the final payment on general unsecured claims, including Blankenberger's claim, will be delayed while disputed claims are resolved and, if necessary, while the reorganized Noxso attempts to recover preferential transfers.

Blankenberger's suit has in effect been stayed since the hearing. The court would have enjoined the suit during this time only as necessary to benefit Noxso as it worked toward proposing a plan. There appears to be no need to continue delaying the suit for Noxso's benefit. Noxso has formulated and proposed a plan, and it is set for a hearing on confirmation. The plan, if confirmed, will remove doubts as to where the parties stand financially. Blankenberger and Alcoa should soon have a better idea of the percentage that will be paid on Blankenberger's claim without waiting for the recovery of preferential transfers.

The court has held that the automatic stay does not apply to Blankenberger's suit against Alcoa. In any event, confirmation of the plan will end the automatic stay. 11 U.S.C. §§ 362(c)(2) & 1141(d). Furthermore, the plan also contemplates that disputed claims can be resolved in courts other than this court.

The court will not grant an injunction to further delay Blankenberger's suit against Alcoa. The court will abstain. Judge Stair has recently dealt with the standards for abstention. His reasoning suggests this proceeding could be subject to mandatory abstention. *Beneficial National*

Bank USA v. Best Reception Systems, Inc. (Best Reception Systems, Inc.), 220 B.R. 932, 942-952 (Bankr. E. D. Tenn. 1998); 28 U.S.C. § 1334(c)(2).

Certainly this proceeding is appropriate for discretionary abstention. 28 U.S.C. § 1334(c)(1). Judge Stair's opinion also sets out the criteria relevant to discretionary abstention. *Beneficial National Bank USA v. Best Reception Systems, Inc. (Best Reception Systems, Inc.)*, 220 B.R. 932, 952-53 (Bankr. E. D. Tenn. 1998).

The court will not repeat the many criteria that may apply. A few considerations are sufficient to justify discretionary abstention. The progress of Noxso's Chapter 11 case means that efficient administration of the case does not require a decision by this court of the dispute between Blankenberg and Alcoa. The state court in Indiana is surely more familiar with the intricacies of Indiana lien law and should be able to dispose of the case more quickly. The burden of discovery from Noxso does not justify trying Blankenberger's claims in this court. Which court tries the issues should not make a substantial difference to Noxso with respect to the burden of discovery. Of course, Blankenberger's lien claim against Alcoa does not involve bankruptcy law. In light of these considerations, the court abstains from deciding Alcoa's complaint in this court.

The court will enter an order accordingly.

This Memorandum constitutes findings of fact and conclusions of law as required by
Fed. R. Bankr. P. 7052.

ENTER:

BY THE COURT

entered August 12, 1998

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 97-10709

Chapter 11

NOXSO CORPORATION
Debtor

ALCOA GENERATING CORP.

Plaintiff

v

Adversary Proceeding

No. 97-1232

BLANKENBERGER BROTHERS, INC. and
NOXSO CORPORATION

Defendants

ORDER

In accordance with the Memorandum Opinion entered this date,

It is ORDERED that the motion of Blankenberger Brothers, Inc., is GRANTED and the court hereby abstains from deciding the adversary proceeding brought by Alcoa Generating Corp., in this court and the complaint is hereby dismissed.

ENTER:

BY THE COURT

entered August 12, 1998

R. THOMAS STINNETT
U.S. BANKRUPTCY JUDGE