



The following constitutes the
Memorandum Decision of the Court.
Signed August 24, 2017


Roger L. Efremsky
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re CFB LIQUIDATING CORPORATION,
f/k/a CHICAGO FIRE BRICK CO., an
Illinois Corporation, et al.,
Debtors.

Case No. 01-45483 rle
Chapter 11
Jointly Administered

MEMORANDUM DECISION DENYING CONTINENTAL CASUALTY COMPANY'S
MOTION FOR LEAVE TO REFILE STATE COURT COMPLAINT
NAMING THE TRUSTEE AS DEFENDANT

I. Introduction

On May 8, 2017, Continental Casualty Company ("Continental") filed a complaint in state court in Illinois naming Barry A. Chatz, the court appointed liquidating trustee for the CFB/WFB Liquidating Trust (the "Trustee" and the "Trust") as the defendant. The complaint sought declaratory relief regarding

1 Continental's insurance coverage obligations under policies
2 issued by Continental to Debtors (the "Policies").

3 On May 17, 2017, the Court issued an order to show cause
4 asking why Continental and its counsel should not be held in
5 contempt for filing the complaint without the permission of this
6 Court in violation of the *Barton* doctrine. In response to the
7 order to show cause, Continental dismissed the complaint.

8 On June 14, 2017, Continental filed the current motion (the
9 "Motion") seeking permission to file its Complaint for
10 Declaratory Judgment for Non-Coverage in Illinois state court.
11 Docket no. 571, Ex. A (the "Coverage Complaint"). The Trustee has
12 filed opposition. Docket no. 579. Continental has filed a reply.
13 Docket no. 581. The matter has been fully briefed and argued. For
14 the following reasons, the Court denies the Motion.

15 **II. Background**

16 The Court assumes the parties are familiar with the relevant
17 background facts necessary to the resolution of the Motion. The
18 Court incorporates here by reference Section II of its summary
19 judgment decision in Adversary Proceeding No. 15-4136 (the
20 "Adversary Proceeding"). AP Docket no. 44, p. 2-9. However,
21 certain matters bear repeating for the sake of context and
22 certain matters pertain only to this Motion.

23 **A. Continental's Proof of Claim**

24 This chapter 11 case was filed in 2001 and the Debtors
25 confirmed the Joint Chapter 11 Plan of CFB Liquidating
26 Corporation f/k/a Chicago Fire Brick Company, and WFB Liquidating
27 Corporation f/k/a Wellsville Fire Brick Company, as Modified, in
28 2012 (the "Plan" and the "Confirmation Order"). Docket nos. 421

1 and 470. Continental filed a proof of claim prior to confirmation
2 of the Plan, designated as claim no. 1689-1 on the claims
3 register (the "Proof of Claim"). The Proof of Claim states it is
4 "contingent and unliquidated" and is based on a "potential right
5 of setoff" and "confirmation of the pending plan may leave
6 Continental without the participation of the Debtor's other
7 insurance carriers" and Continental "may be asked to pay some or
8 all of others' share of payments due for defense of claims
9 against the Debtor." Continental demanded performance of Debtors'
10 "reciprocal obligations" under its insurance policies and, "to
11 the extent such obligations give rise to a 'Claim' within the
12 meaning of §101(5) of the Bankruptcy Code, Continental hereby
13 demands payment on its claim." Proof of Claim.

14 **B. The Plan**

15 The Plan was designed to provide a comprehensive mechanism
16 to resolve Asbestos Claims - as defined in the Plan - in an
17 efficient, centralized, and equitable manner. As Bankruptcy Code
18 §1123(b)(3) permits, certain sections of the Plan were negotiated
19 to provide a structure by which Continental would provide its
20 insurance coverage to pay Asbestos Claims that triggered its
21 Policies (the "Tendered Claims").

22 The Debtors settled with their insurers other than
23 Continental and these settlement agreements were incorporated
24 into the Plan. Because the Debtors did not have a similar
25 settlement with Continental, the Plan categorizes the Debtors'
26 insurers. First, the Plan defines a "Non-Settling Insurer" as
27 "any insurer against which the Liquidating Trust holds a Retained
28 Cause of Action and/or that has not settled its potential

1 liability under any Insurance Policy, *other than Continental.*"
2 Plan, §1.59 (emphasis added). Second, the Plan defines "Settling
3 Insurers" as "collectively, Hartford, Bituminous, ACE, Safety
4 National and, solely to the extent that the Debtors enter into an
5 agreement prior to the Effective date, Continental." Plan §1.78.
6 Because it did not enter into a settlement agreement with the
7 Debtors prior to the Effective Date, Continental is in a category
8 by itself; it is neither a Settling Insurer nor a Non-Settling
9 Insurer. Instead, it agreed to resolve its coverage obligations
10 according to the procedures in §8.3 of the Plan.

11 The Plan established the Liquidating Trust and appointed the
12 Trustee to liquidate the Debtors' assets and distribute the
13 proceeds according to the Plan, the Liquidating Trust Agreement,
14 and the Trust Distribution Procedures (the "TDP"). Plan, §8.1-
15 8.2. The holders of Allowed Asbestos Claims are beneficial owners
16 of the Trust. Docket no. 408-1, §2.5.

17 The powers and duties of the Trustee include performing the
18 Debtors' and the Trust's obligations under the Plan; resolving
19 the "Retained Causes of Action" and any other litigation
20 involving the Debtors, the Trust or the Plan. Plan, §8.2. Section
21 1.71 defines the "Retained Causes of Action" as "all causes of
22 action owned by the Estates, including but not limited to any and
23 all Claims, causes of action or rights relating to any Insurance
24 Policies, any other Claims for contribution or indemnification
25 from any third party, and any other Claim or cause of action
26 against any issuer of an Insurance Policy." Section 1.54 defines
27 "Insurance Policy" as "any policy of insurance or indemnification
28 issued by an insurance company in which the Debtors hold an

1 ownership or beneficial interest, whether known or unknown or
2 under which either of the Debtors is an insured."

3 Section 8.3 is entitled "Handling of Claims for which
4 Continental May Have Financial Responsibility." This section was
5 extensively discussed in section IV of the Court's summary
6 judgment decision and that discussion is incorporated herein by
7 reference. AP Docket no. 44, p. 13-22.

8 In short, the Trust agreed to submit Proposals to
9 Continental - including supporting evidence using a court
10 approved proof of claim form - stating the liquidated value of
11 each Asbestos Claim for which it contended Continental was
12 responsible. Continental had 90 days to respond to these
13 Proposals. The Trust was permitted to submit only 660 claims per
14 quarter and 2,500 per calendar year. During the 90-day period
15 after receipt of a Proposal, Continental could seek additional
16 information from the Trustee and the Claimant, and "shall inform
17 the Liquidating Trust in writing whether it accepts or rejects
18 the terms of the Proposal." Plan, §8.3.

19 Section 8.3(a) provides that if Continental accepted a
20 Proposal, it "shall pay" its allocated percentage of the
21 liquidated value of the Tendered Claims or any different amount
22 agreed upon with the Trustee.

23 Section 8.3(b)(i)-(iii) describe the three ways the Trust
24 and Continental agreed to proceed if Continental rejected a
25 Proposal: (i) the Trust could abandon seeking coverage from
26 Continental; (ii) if the Trust disputed the rejection, it could
27 pay the Claim without Continental's consent and reserved the
28 right to recover against Continental; and (iii) the Trust could

1 pay that portion of a Claim it contended was allocable to a
2 Settling Insurer and cede the Claim to the claimant to first
3 pursue a judgment against the Debtors and then pursue coverage
4 from Continental for its allocated percentage of such a judgment.

5 To the extent Continental had coverage defenses, the Plan
6 provided it with a way to assert them by rejecting any Tendered
7 Claim as provided above. In addition, §8.3(c) provides that "in
8 any suit brought pursuant to §8.3," Continental is entitled to
9 assert all defenses available to Continental in the absence of
10 the Plan, including a defense that the Debtors are not liable
11 with respect to a Claim.¹

12 Article 12 is entitled "Retention and Prosecution of
13 Claims." Section 12.1 provides that, subject to §16.19, Debtors
14 assigned the Retained Causes of Action to the Trustee to
15 investigate, prosecute, settle or compromise. Section 12.1 also
16 provides that, subject to §8.3, the Retained Causes of Action
17 include all rights and Claims under any Insurance Policy
18 including Continental's Policies.

19 Article 15 covers retention of jurisdiction. Section 15.1
20 provides that the Court will retain jurisdiction as is legally
21 permissible under applicable law, including under Bankruptcy Code
22 §105(a) and §1142, and jurisdiction to enforce all Retained
23 Causes of Action over which the Court otherwise has jurisdiction.
24 Plan, §15.1.

25 Section 15.3 also provides the Court will retain
26

27 ¹It is not entirely clear whether §8.3(c) addresses only
28 disputes between Continental and third parties, or includes
disputes between Continental and the Trust.

1 jurisdiction after confirmation to determine disputes concerning
2 the allowance of Claims, except as otherwise provided in the TDP
3 or §8.3; and to determine causes of action in which the Trustee
4 seeks to recover assets or otherwise pursue rights pursuant to
5 the provisions of the Bankruptcy Code. Plan, §15.3.

6 Section 16.19 is entitled "Insurance Neutrality." It
7 provides that:

8 [N]othing in the Confirmation Order, the Plan, the TDP, or
9 any settlement agreement shall in any way operate to impair
10 ... either (a) an insurers' [sic] legal, equitable or
11 contractual rights, ... including rights and arguments as to
12 jurisdiction and venue, except to the extent ... expressly
13 impaired or limited in a settlement agreement ..., or (b)
the legal, equitable or contractual rights of ... the
Liquidating Trust against the Debtor's Insurers, ... except:
(i) to the extent that such rights are expressly impaired or
limited in a settlement agreement ... and/or (ii) as
expressly provided in §7.3 herein.²

14 Section 16.20 is entitled "Judgment Reduction." By its
15 terms, this section only applies to a dispute between a Non-
16 Settling Insurer and a Settling Insurer.

17 **C. Continental's Participation Pre-Confirmation**

18 Counsel for Continental first appeared in this case in
19 September 2009. Docket no. 250. Over the next three years,
20 Debtors negotiated with Continental and their other insurance
21 carriers to confirm the consensual Plan.

22 **1. 2009 - 2010**

23 On November 5, 2009, Debtors filed their First Amended
24 Chapter 11 Plan and First Amended Disclosure Statement. Docket
25 nos. 254-255. Continental filed an objection to the First Amended
26

27 ²Section 7.3 covers the releases granted upon confirmation
28 of the Plan.

1 Disclosure Statement. Docket no. 262.

2 On June 29, 2010, Debtors' counsel filed a status report for
3 a July 6, 2010 status conference. Docket no. 278. The status
4 report explained that while Debtors had contemplated proceeding
5 to a contested confirmation hearing in July or August of 2010,
6 the Debtors had instead "engaged in substantial negotiations on
7 plan amendments that would resolve Continental's objections on
8 the merits." Docket no. 278, p. 5:4-10. These negotiations
9 resulted in a "comprehensive claim review process that will
10 preserve Continental's right to participate in the determination
11 of any Asbestos Claims it is asked to pay while also permitting
12 for the orderly liquidation of the claims." Docket no. 278, p.
13 5:13-25.

14 On July 2, 2010, Debtors filed the Second Amended Chapter 11
15 Plan and Second Amended Disclosure Statement. Docket nos. 280,
16 283. On August 9, 2010, Debtors' excess insurer, Safety National,
17 filed an objection to the Second Amended Disclosure Statement.
18 Docket no. 288. Debtors and Hartford Accident and Indemnity
19 Company filed a joint response to Safety National's objection.
20 Docket no. 292. With respect to Continental, they stated that
21 Debtors had engaged in "extensive arms-length negotiations" with
22 Continental and it "remains an 'unsettled carrier' that continues
23 to reserve all of its rights to dispute any and all claims for
24 insurance coverage. But it has reached an agreement regarding the
25 manner in which claims will be resolved, how the claims will be
26 tendered to it, and how it will respond to claims if and when it
27 receives them." Docket no. 292, p. 2:22-3:7. On September 9,
28 2010, the Court entered an order approving the Second Amended

1 Disclosure Statement. Docket no. 307.

2 **2. 2011 - 2012**

3 Despite approval of the Second Amended Disclosure Statement
4 in 2010, the confirmation process was delayed in order to resolve
5 the objection of Safety National. In April 2012, the case again
6 began to move toward confirmation when the Debtors filed their
7 Joint Chapter 11 Plan and Disclosure Statement. Docket nos. 407
8 and 408. In a joint status report filed at this time, Debtors and
9 Safety National stated that the Debtors had been informed that
10 these versions of the Plan and Disclosure Statement were
11 acceptable to Continental. Docket no. 406, p. 2:21-26.³

12 On June 1, 2012, Debtors filed the final version of their
13 Joint Disclosure Statement which the Court then approved (Docket
14 no. 422) and the final version of the Plan that was ultimately
15 confirmed in September 2012. Docket nos. 421 and 470. These final
16 versions are substantially the same as those referred to in the
17 April status report.

18 **D. The Adversary Proceeding**

19 **1. The First Amended Complaint**

20 Between May 2015 and September 2015, the Trust submitted 249
21 Trust Claims to Continental with a liquidated value sufficient to
22 exhaust Continental's coverage. When Continental had not
23 responded when the 90 days had run from the September 2015
24 tender, the Trust sued Continental for declaratory relief and
25 breach of contract (the "Adversary Proceeding"). The Trust's

26
27 ³ Each of these status reports was served on Continental's
28 counsel. Docket nos. 278, 293, 406. The Court assumes Continental
would have spoken if these statements were inaccurate.

1 First Amended Complaint asked for declaratory relief regarding
2 the interpretation of the Plan and damages for breach of the Plan
3 and the Policies. The Trust also sought extra-contractual damages
4 for Continental's alleged vexatious and unreasonable conduct as
5 an insurer under Illinois law (the "§155 Issues"). AP Docket no.
6 15, First Amended Complaint.⁴ The First Amended Complaint alleged
7 that the Trust had tendered to Continental Asbestos Claims that
8 triggered Continental's policies, and when Continental did not
9 comply as it had agreed to do - by accepting and paying, or by
10 rejecting, or by asking for more information within 90 days -
11 Continental had breached its contractual obligations under the
12 Plan and under the Policies. The prayer sought \$2.5 million
13 breach of contract damages and a declaration that Tendered Claims
14 exceeding \$2.5 million triggered coverage under the Policies and
15 Continental was obligated to pay its Policy limits, plus it was
16 obligated to pay penalties pursuant to §155.

17 **2. Continental's Answer and Counterclaim**

18 Continental's Answer generally and specifically denied the
19 allegations of the First Amended Complaint and stated eighteen
20 affirmative defenses, many of which raised coverage issues. AP
21 Docket no. 19. Its Counterclaim alleged that in its "purported
22 tenders" the Trust had "refused to submit any contended percent
23

24 ⁴Under 215 ILCS 5/155, if an insurer vexatiously delays or
25 rejects a legitimate claim, it must bear the expense resulting
26 from the insured's efforts to prosecute the claim, including
27 reasonable attorney fees. Verbaere v. Life Ins. Co. of America,
28 226 Ill.App.3d 289 (1992). The purpose of §155 is to discourage
the insurer from using its superior financial position to profit
at the insured's expense. Valdovinos v. Gallant Ins. Co., 314
Ill.App.3d 1018, 1022 (2000).

1 allocation between Continental and the trust fund from the
2 insurance settlements as required by the Plan" and the Trust had
3 "failed to comply" with a condition precedent in the Plan. AP
4 Docket no. 19, ¶13-14. Continental sought a declaration that §8.3
5 required the Trust to so allocate, and precluded a contention
6 that Continental's allocated percentage was 100% of the
7 liquidated value of any Tendered Claim. AP Docket no. 19, ¶18.⁵

8 **3. The Trust's Answer to the Counterclaim**

9 The Trust's Answer to the Counterclaim alleged that
10 Continental had not questioned the validity or liquidated value
11 of any of the Tendered Claims and that the time period within
12 which to do so, or to seek additional information, had passed
13 with respect to hundreds of Tendered Claims. AP Docket no. 20.

14 **4. The Summary Judgment and §155 Briefing**

15 At the first Adversary Proceeding status conference on May
16 3, 2016, referring to the allocation issue, Continental's counsel
17 stated, if the Court "says that the allocated percentage means
18 100%, then the case is over, right? Because then that is
19 effectively saying we have to pay everything, and so we pay
20 *everything*." AP Docket no. 30, Hr'g Tr. (May 3, 2016) p. 21:19-
21 23, Raymond J. Tittman speaking (emphasis added). The Trustee's
22 counsel asked the Court to set a trial date, but Continental's
23

24
25 ⁵ Continental stated in its Answer and Counterclaim that the
26 Trust's claims for relief were not core and it did not consent to
27 entry of final judgment by this Court. AP Docket no. 19, ¶4. The
28 Court disagreed and stated so in the summary judgment ruling. AP
Docket no. 44, n.2. The Court acknowledged that to the extent the
claims were non-core, it had made proposed findings of fact and
conclusions of law for the district court to review.

1 counsel urged the Court to instead set a briefing schedule for a
2 summary judgment motion that he argued would resolve the entire
3 case. Continental prevailed on this and the Court set a briefing
4 schedule. AP Docket no. 26.

5 Continental then moved for summary judgment on paragraphs
6 18(a)-(d) of its Counterclaim. AP Docket no. 27. The motion was
7 fully briefed by both sides. AP Docket nos. 32-37. In November
8 2016, the Court ruled against Continental on its interpretation
9 of the Plan. AP Docket no. 44.⁶

10 The Court held a status conference on December 6, 2016 to
11 address the remaining §155 Issues: whether Continental had
12 engaged in vexatious and unreasonable conduct and the appropriate
13 remedy if the Court found that it had. The Trustee's counsel
14 requested a trial date for the §155 issues. AP Docket no. 77,
15 Hr'g Tr. (Dec. 6, 2016) p. 3:2-8. Counsel for Continental
16 disagreed, stating there was nothing left to try. Referring to
17 the summary judgment ruling, Continental's counsel said:

18 You decided that issue adverse to us and we think it did
19 decide the case . . . our view is that we're ready to enter
20 judgment in whatever procedural manner you would like, but I
21 just don't see that there's anything left to try. You know
22 we put up our best argument and we didn't win, but I think
23 the issue has been decided.

24 AP Docket no. 77, Hr'g Tr. (Dec. 6, 2016) 3:10-20.

25 Referring to the Trustee's request for extra-contractual
26 damages under §155, Continental's counsel stated:

27 [W]hat you'd need is you'd have to enter a judgment, which I
28 think we could do at this time, frankly. I think we could

27 ⁶By this time, there were more than 1,500 Tendered Claims
28 with a liquidated value of more than \$8 million. AP Docket no.
44, p. 7-9.

1 stipulate to enter a judgment because I think we've lost our
2 breach of contract argument, but I think that we'd have to
3 enter that judgment and then they'd have to [indecipherable]
tax costs, which Illinois allows them to do under certain
circumstances.

4 AP Docket no. 77, Hr'g Tr. (Dec. 6, 2016) p. 7:10-19.

5 Continental's counsel also suggested the parties ought to
6 "get together and resolve it" but they had not yet had a chance
7 to do that. AP Docket no. 77, Hr'g Tr. (Dec. 6, 2016) p. 7:22-
8 8:2. The Court continued the status conference to December 12,
9 2016 to allow the parties to discuss the next steps.

10 At the December 12, 2016 status conference, counsel for both
11 parties explained they had agreed to brief whether the Trustee
12 could make the requisite showing for recovery of extra-
13 contractual damages under §155 and the Court did not need to set
14 a trial date. The Trustee's counsel explained:

15 Mr. Tittman isn't going to seek entry of a judgment right
16 now, because we had talked about trying to enter an agreed
17 judgment on the insurance part, the coverage part of the
18 case, because we only want one appeal and he doesn't want
his time to appeal to run on that.

19 AP Docket no. 75, Hr'g Tr. (Dec. 12, 2016) p. 6:13-18.⁷

20 With the parties' agreement, the Court set a briefing
21

22 ⁷ Continental's counsel restated this position in its
23 opposition to the §155 Motion, where the argument was that
24 Continental had not caused unnecessary delay in the litigation.
25 "I acknowledged that the Trustee had prevailed and consequently I
26 suggested that, as predicted, the Court's Order did indeed
27 resolve the issues in dispute. The Trustee's counsel sought a
28 trial but I advised that we had already lost and judgment should
be entered against Continental. I also acknowledged that the
Trustee had a right to seek fees and a penalty under 215 ILCS
5/155 but that a judgment need not be delayed on that account,
and that the expense of a trial would not be necessary." AP
Docket no. 59, Declaration of Raymond J. Tittman, ¶18-19.

1 schedule for the parties to address the §155 Issues (the "§155
2 Motion"). AP Docket no. 48.

3 **E. Continental's Efforts to Delay the §155 Motion**

4 Briefing on the §155 Motion was complete as of February 15,
5 2017, and the initial hearing was set for March 7, 2017. AP
6 Docket nos. 52-54, 57-59, 63-65, 66. However, on February 27,
7 2017, the Court moved the initial hearing to March 27, 2017. The
8 Court anticipated issuing its ruling shortly after the March 27
9 hearing. Starting on March 20, Continental took the following
10 steps relevant to the resolution of the §155 Motion and relevant
11 to this Motion:

12 **1. Ex Parte Application**

13 On March 20, 2017, Continental filed an Ex Parte Application
14 for Court Approval to File the Declaration of Raymond J. Tittman
15 (the "Ex Parte Application"). AP Docket no. 69. By the Ex Parte
16 Application, Continental sought to raise - for the first time -
17 an argument that there were factual issues regarding the merits
18 of the Tendered Claims. The Trust filed opposition to the Ex
19 Parte Application. AP Docket no. 71. On March 29, 2017, the Court
20 denied the Ex Parte Application. AP Docket no. 73. On March 27,
21 2017, the Court entered an order continuing the hearing on the
22 §155 Motion to May 31, 2017. AP Docket no. 70.

23 **2. State Court Complaint and Letter**

24 On May 10, 2017, Continental's new counsel docketed a letter
25 to the Court (the "Letter"). AP Docket no. 83.⁸ The Letter
26 _____

27 ⁸ In the Letter, counsel from Duane Morris LLP says the firm
28 was "recently retained." This may explain, but does not excuse,
some of the apparent misapprehension of the history of this case.

1 advised the Court that Continental had filed the state court
2 complaint on May 8, 2017, and that "significant insurance
3 coverage issues have emerged as to whether the tendered claims
4 'trigger' the Continental policies," Continental had "newly-
5 discovered evidence" showing that "any exposure" would have
6 occurred years prior to the inception of Continental's policies,⁹
7 there was "no evidence" that the claimants were diagnosed with an
8 asbestos related disease or sickness during its policy periods so
9 "no coverage is available" for the Tendered Claims. The Letter
10 continued in this vein, concluding "in light of these new
11 important and significant developments and our recent involvement
12 in this case," the Court should set a status conference "so we
13 can more fully advise the Court of these new developments." AP
14 Docket no. 83.

15 **3. Motion to Stay and Motion to Abstain**

16 On May 10, 2017, Continental filed a Motion to Stay or Abate
17 the Hearing and Further Proceedings on the §155 Motion (the
18 "Motion to Stay"). AP Docket no. 84. The Motion to Stay is
19 supported by a Declaration of Raymond J. Tittman. AP docket no.
20 89. In this Declaration, Mr. Tittman states his office "recently
21 discovered" evidence that Debtor Chicago Fire Brick did not sell
22 asbestos containing products after 1972 and "this evidence" meant
23 that there was no coverage for the Tendered Claims. Continental
24 also asked for a hearing on shortened time on the Motion to Stay
25 or a continuance of the hearing on the §155 Motion. AP Docket no.

27 ⁹By the terms of the TDP, exposure had to have occurred
28 prior to 1980.

1 85. In the Motion to Stay, Continental argued that the §155
2 Issues were not ripe, its coverage obligations had not been
3 determined, and the Court did not have jurisdiction to decide the
4 coverage issues.

5 The Trustee filed an objection to the Motion to Stay and to
6 the request for a hearing on shortened time. AP Docket no. 93.
7 The Trustee argued, among other things, that the "recently
8 discovered evidence" had been given to Continental's counsel in
9 October 2009 and Continental should be estopped from pursuing its
10 efforts to derail the resolution of the §155 Motion. The Court
11 denied Continental's request for a hearing on shortened time. AP
12 Docket no. 94.

13 On May 10, Continental also filed a Motion to Abstain and
14 Remand from Insurance Coverage Issues, with a notice of hearing
15 for June 15, 2017 (the "Motion to Abstain"). AP Docket nos. 86-
16 87. The Court later instructed Continental to withdraw the Motion
17 to Abstain and on May 30, 2017, Continental withdrew its notice
18 of hearing. Docket no. 103.

19 **4. Orders to Show Cause**

20 In response to the Letter, which the Court viewed as an
21 improper ex parte contact, and the filing of the state court
22 complaint, which the Court viewed as a violation of the *Barton*
23 doctrine, on May 17, 2017, the Court issued two orders to show
24 cause directed at Continental and its counsel. AP Docket nos. 95
25 and 96. These were set for hearing on June 15, 2017.¹⁰

26
27
28 ¹⁰ Continental withdrew the Letter on May 22, 2017. AP Docket
no. 100.

1 The Court also continued the hearing on the §155 Motion to
2 June 15, 2017. On June 14, Continental filed this Motion seeking
3 permission to sue the Trustee in state court. At the June 15
4 hearing, the Court ordered supplemental briefing on the §155
5 Motion and discharged the orders to show cause.¹¹

6 **III. Discussion**

7 **A. The *Barton* doctrine**

8 The *Barton* doctrine provides that no suit may be brought
9 against a receiver without leave of the receiver's appointing
10 court. Barton v. Barbour, 104 U.S. 126, 136-37 (1881) ("[W]hen
11 the court of one State has ... property in its possession for
12 administration as trust assets, and has appointed a receiver to
13 aid it in the performance of its duty by carrying on the business
14 to which the property is adapted ... a court of another State has
15 not jurisdiction, without leave of the court by which the
16 receiver was appointed, to entertain a suit against him").

17 The Ninth Circuit recognizes that the *Barton* doctrine
18 extends to bankruptcy trustees as well as receivers and to
19 liquidating trustees such as the Trustee in this case. Beck v.
20 Fort James Corp. (In re Crown Vantage, Inc.), 421 F.3d 963, 970
21 (9th Cir. 2005) ("We join our sister circuits in holding that a
22 party must first obtain leave of the bankruptcy court before it
23 initiates an action in another forum against a bankruptcy trustee
24 or other officer appointed by the bankruptcy court for acts done
25 in the officer's official capacity.") (Hereafter, Crown Vantage).

26
27
28 ¹¹ Briefing on the §155 Motion is complete as of August 10,
2017 and the matter is under submission.

1 The Ninth Circuit also pointed out that a confirmed plan operates
2 as a final judgment and to raise identical issues in a different
3 forum in contravention of the liquidating procedure approved in a
4 plan is an impermissible collateral attack on a confirmed plan.
5 Crown Vantage, 421 F.3d at 972-73.

6 **B. The *Barton* Doctrine Applies Here**

7 Continental argues that the *Barton* doctrine is limited to
8 suits seeking damages. This is not correct. See Curry v. Castillo
9 (In re Castillo), 297 F.3d. 940, 945 (9th Cir. 2002) (without
10 leave of the bankruptcy court, *no suit* may be maintained against
11 a trustee for actions taken in the administration of the estate
12 (emphasis added)); McIntire v. China MediaExpress Holdings, Inc.,
13 113 F.Supp.3d 769, 773-74 (D. S.D.N.Y. 2015) (rejecting insurers'
14 argument that *Barton* doctrine only applied to suits seeking
15 damages).

16 Continental next argues that *Barton* doctrine does not apply
17 to the Coverage Complaint because it seeks only declaratory
18 relief regarding the "critical question of whether there is
19 coverage" under its Policies and it is simply a "suit at common
20 law" that raises a claim that did not arise from the bankruptcy
21 case, was not resolved in the claims allowance process, and thus
22 is not core. For this proposition, Continental refers to Stern v.
23 Marshall, 564 U.S. 462 (2011) but cites no authority for such a
24 blanket exclusion of its vaguely described Stern claim from the
25 reach of the *Barton* doctrine. In fact, the question of whether a
26 foreign action affects the bankruptcy estate is to be addressed
27 to the bankruptcy court as an initial matter. Crown Vantage, 421
28 F.3d at 973, n.6.

1 The *Barton* doctrine clearly applies to the Coverage
2 Complaint and Continental needs this Court's permission before it
3 can sue the Trustee in state court.

4 **C. Should Permission to Sue the Trustee be Granted?**

5 In Kashani v. Fulton (In re Kashani), 190 B.R. 875 (9th Cir.
6 BAP 1995), chapter 11 debtors asked for permission to sue their
7 chapter 11 trustee for allegedly mishandling their estate. The
8 bankruptcy court denied their request when they failed to file a
9 proposed complaint as the court had ordered. The BAP considered
10 whether the bankruptcy court had abused its discretion by
11 requiring the debtors to show the complaint they proposed to file
12 and by refusing to grant permission to sue the trustee in another
13 court when they failed to do so. The BAP held that the bankruptcy
14 court did not abuse its discretion when it required the debtors
15 to file a proposed complaint; the requirement ensured that enough
16 information was given to the court to understand the grounds upon
17 which the debtors wished to proceed. The bankruptcy court is in
18 the best position to know whether the proposed suit involves
19 claims that may have already been litigated in the bankruptcy
20 court or may lack merit. Id. at 886-87. The BAP then described
21 five factors to consider in deciding whether to grant permission
22 to proceed in a foreign court. Id. at 887.

23 By conducting such an analysis, the bankruptcy court will
24 determine whether the issues raised in the proposed
25 complaint affect solely the administration of the bankruptcy
26 estate and should be heard by the bankruptcy court. The
27 bankruptcy court will also be able to determine whether the
28 claims have been previously decided on the merits and should
not be pursued by the proposed plaintiffs on the basis of
res judicata or collateral estoppel.
Id.

These factors were cited with approval in Crown Vantage, 421

1 F.3d at 976, and were applied in Blixseth v. Brown (In re
2 Yellowstone Mountain Club), 841 F.3d 1090, 1095 (9th Cir. 2016)
3 (*Barton* doctrine applied to claims against creditor's committee
4 member because committee members are statutorily obliged to
5 perform tasks related to the administration of the estate,
6 lawsuit would seriously interfere with complicated bankruptcy
7 proceedings). See also Matter of Linton, 136 F.3d 544, 545 (7th
8 Cir. 1998) (pointing out that if a trustee is burdened with
9 having to defend against suits by litigants disappointed by his
10 actions on the court's behalf, his work for the court will be
11 impeded, and if the case is still open, the threat of a trustee
12 being distracted or intimidated is very great).

13 The factors described in Kashani are:

14 (1) whether the acts or transactions alleged in the proposed
15 complaint relate to the carrying on of the business connected
16 with the property of the bankruptcy estate.

17 (2) whether the claims in the proposed complaint pertain to
18 actions of the trustee while administering the estate.

19 (3) whether the claims involve the trustee acting within the
20 scope of his or her authority under the statute or orders of the
21 bankruptcy court so that the trustee is entitled to quasi-
22 judicial or derived judicial immunity.

23 (4) whether the proposed plaintiff is seeking to surcharge
24 the trustee; that is, a judgment against the trustee personally.

25 (5) whether the claims involve breach of a fiduciary duty
26 either through negligent or willful misconduct.

27 190 B.R. at 886-87.

28 One or more of these factors may be a basis for the

1 bankruptcy court to retain jurisdiction over the claims and will
2 assist the court in determining which claims should be tried in
3 another forum. Id.

4 **D. Application of the Kashani Factors**

5 **1. Whether the acts in the proposed complaint relate to**
6 **the carrying on of the Debtors' business.**

7 This factor involves the statutory exception to the *Barton*
8 doctrine in 28 U.S.C. §959(a). It provides:

9 Trustees, receivers or managers of any property, including
10 debtors in possession, may be sued, without leave of the
11 court appointing them, with respect to any of their acts or
12 transactions in carrying on business connected with such
13 property.

14 This exception only applies to acts or transactions in
15 conducting a debtor's business in the ordinary sense of the words
16 or in pursuing that business as an operating enterprise. It does
17 not apply to suits against trustees for administering or
18 liquidating a bankruptcy estate. Crown Vantage, 421 F.3d at 972.

19 The Debtors stopped operating their business in 2002 when
20 they sold their assets and have conducted no business since that
21 sale closed in early 2003. Docket no. 422. Continental argues
22 that §959(a) applies here because from 2003 onward, the Debtors -
23 through their responsible individual - continued to "liquidate"
24 their insurance policies as the primary assets of the estate, and
25 the same liquidation was pursued by the Trustee following his
26 appointment in 2012. As such, Continental contends this sheer
27 passage of time shows that the Trustee is conducting the Debtors'
28 pre-confirmation business.

This argument strains credulity. The Debtors' business - in
the ordinary sense of the word - was manufacturing and

1 distributing refractory products. The Debtors' business did not
2 become an operating enterprise engaged in the business
3 liquidating insurance policies after the operating assets were
4 sold. Between 2003 and 2012, Debtors worked to settle with their
5 insurers and to confirm the Plan. The Debtors did not pay
6 Asbestos Claims until after the Plan had been confirmed and the
7 order allowing Asbestos Claims had been entered.

8 The Ninth Circuit's statement regarding the liquidating
9 trustee in Crown Vantage is instructive here:

10 [T]he Liquidating Trustee was not operating the business
11 previously conducted by the debtor; he was liquidating the
12 assets of the estate. This is precisely the type of activity
13 that the *Barton* doctrine was designed to protect. Thus, the
14 limited exception to the *Barton* doctrine contained in
15 §959(a) does not apply.

16 421 F.3d at 972.

17 Because this exception does not apply, the Court's task is
18 to determine whether permission to allow the Coverage Complaint
19 to proceed in state court is an appropriate exercise of its
20 discretion.

21 **2. Whether the claims in the proposed complaint pertain**
22 **to actions of the Trustee while administering the**
23 **estate.**

24 Does the Coverage Complaint raise issues regarding the
25 actions of the Trustee in administering the estate? "By asking
26 this question, the court may determine whether the proceeding is
27 a core proceeding or a proceeding which is related to a case or
28 proceeding under Title 11." Kashani, 190 B.R. at 886.

The Plan, the Confirmation Order, the Liquidating Trust
Agreement and the TDP determine the actions that the Trustee is
to take and the assets of the estate he is to administer. As

1 described above, under §8.1, all property of Debtors was
2 transferred to the Liquidating Trust, and the Trustee, as
3 successor to the Debtors, was to liquidate Trust Claims pursuant
4 to terms of the TDP. Plan, §8.1. See also, Docket no. 408-1,
5 Liquidating Trust Agreement, §2.2. The Trustee's powers and
6 duties include prosecuting the Retained Causes of Action and
7 pursuing any other litigation involving the Debtors, the
8 Liquidating Trust, or the Plan, and taking any other actions
9 necessary or appropriate to implement or consummate the Plan and
10 operate the Liquidating Trust. Plan, §8.2.

11 The "administration of the estate" includes pursuit of the
12 insurance coverage Continental agreed to provide in the manner it
13 agreed to provide it by the Plan. Obtaining payment from
14 Continental from the coverage provided by its Policies using the
15 procedures in §8.3 was undeniably the Trustee's duty. Because the
16 Plan is a binding contract affecting Continental's coverage
17 obligations, it was also Continental's duty to perform as it had
18 agreed to do. When the dispute with Continental arose, it was
19 also the Trustee's duty to sue Continental if this was necessary
20 in order to resolve the dispute.

21 Against this backdrop, the Court considers whether the
22 Coverage Complaint raises a core claim or a claim that is related
23 to this chapter 11 case.

24 28 U.S.C. §1334(b) gives federal district courts subject
25 matter jurisdiction over all civil proceedings arising under
26 title 11, or arising in, or related to cases under title 11. 28
27 U.S.C. §157(a) allows district courts to refer any of these
28 proceedings to bankruptcy courts. 28 U.S.C. §157(b)(1) provides

1 bankruptcy courts authority to make binding decisions only in
2 core proceedings that arise under or arise in a case under title
3 11. A bankruptcy court may hear a non-core proceeding that is
4 otherwise related to a case under title 11 and submit proposed
5 findings of fact and conclusions of law to the district court
6 which will enter any final order or judgment for de novo review.
7 28 U.S.C. §157(c)(1). However, with the consent of all parties,
8 a bankruptcy court may hear and determine, and enter final orders
9 and judgments subject to review under §158. 28 U.S.C. §157(c)(2).

10 Core proceedings are listed in 28 U.S.C. §157(b)(2). They
11 include but are not limited to matters concerning the
12 administration of the estate, §157(b)(2)(A); and other
13 proceedings affecting the liquidation of the assets of the
14 estate, §157(b)(2)(O). "A determination that a proceeding is not
15 a core proceeding shall not be made solely on the basis that its
16 resolution may be affected by State law." 28 U.S.C. §157(b)(3).

17 A bankruptcy court's post-confirmation subject matter
18 jurisdiction over matters that are related to a bankruptcy case
19 is analyzed under the test stated in Montana v. Goldin (In re
20 Pegasus Gold Corp.), 394 F.3d 1189, 1194 (9th Cir. 2005)
21 (adopting the "close nexus" test from In re Resorts Int'l, Inc.,
22 372 F.3d 154, 166-67 (3rd Cir. 2004) because it recognizes the
23 limited nature of post-confirmation jurisdiction but retains the
24 flexibility which can be important in cases with continuing
25 trusts; holding claims and remedies that could affect the
26 implementation and execution of the confirmed plan had a
27 sufficiently close nexus to the bankruptcy proceeding to uphold
28 related to jurisdiction). (Hereafter, Pegasus Gold.) Matters

1 affecting the interpretation, implementation, consummation,
2 execution, or administration of a confirmed plan will typically
3 have the requisite close nexus for "related to" jurisdiction. See
4 also Wilshire Courtyard v. Cal. Franchise Tax Bd. (In re Wilshire
5 Courtyard), 729 F.3d 1279, 1289 (9th Cir. 2013)(affirming use of
6 the close nexus test stated in Pegasus Gold for post-confirmation
7 litigation in a reopened case of a partnership debtor requiring
8 interpretation of tax aspects of a confirmed plan *vis a vis*
9 debtor's partners).

10 Continental argues that the Coverage Complaint concerns only
11 application of the Policies - pre-petition contracts - to the
12 Tendered Claims which is governed by Illinois law; therefore, the
13 Coverage Complaint does not involve any actions by the Trustee
14 and is not a core proceeding. Continental recognizes that the
15 appropriate test for post-confirmation "related to" jurisdiction
16 is stated in Pegasus Gold. Nonetheless, Continental argues that
17 there is no "related to" jurisdiction for the Coverage Complaint
18 because its resolution will not require the interpretation,
19 implementation, or execution of the Plan.

20 The Court acknowledges that an insurance coverage dispute
21 may not be core. See Matter of United States Brass Corp., 110
22 F.3d 1261 (7th Cir. 1997) (finding insurance coverage case was
23 non-core); Ace Insurance Co., Ltd. v. Smith (In re BCE West,
24 L.P.), 2006 WL 8422206, at *8 (D. Az. Sept. 20, 2006) (finding an
25 insurance coverage dispute involving a post-petition breach of a
26 pre-petition contract was a non-core proceeding); cf. United
27 States Lines, Inc. v. American S.S. Owners Mut. Protection &
28 Indem. Ass'n (In re United States Lines, Inc.), 197 F.3d 631 (2d

1 Cir. 1999) (finding coverage complaint was core because of "pay
2 first" structure of insurance policies).

3 Seen in isolation, a court might see a coverage complaint as
4 non-core. But viewing the Coverage Complaint in isolation is
5 inappropriate and the Court declines Continental's invitation to
6 do so. As the Ninth Circuit pointed out in Wilshire Courtyard
7 "the Pegasus Gold 'close nexus' test requires particularized
8 consideration of the facts and posture of each case, as the test
9 contemplates a broad set of sufficient conditions and retains a
10 certain flexibility. Such a test can only be properly applied by
11 looking at the whole picture." 729 F.3d at 1289 (internal
12 citation and quotation marks omitted). The "whole picture" here
13 requires acknowledging that coverage issues were raised in
14 Continental's Proof of Claim; by agreement, a way for Continental
15 to satisfy its coverage obligations was incorporated into the
16 Plan; when litigation with the Trust began, Continental raised
17 the coverage issues in its Answer and Counterclaim, and in its
18 motion for summary judgment.¹²

19 Based on the foregoing, the Court concludes that it has
20 "related to" jurisdiction to resolve the issues raised in the
21 Coverage Complaint. These issues are inextricably intertwined
22 with the Plan, the Confirmation Order, the TDP and the
23 Liquidating Trust Agreement and significantly overlap with the
24 issues raised, and poised to be decided, in the §155 Motion.

25
26 ¹²Continental's conduct in the Adversary Proceeding may also
27 support a finding that it has consented to this Court's
28 jurisdiction over any coverage issues. See Wellness Int'l
Network, Ltd. v. Sharif, 135 S.Ct. 1932, 1942 (2015) (litigants
may validly consent to adjudication by bankruptcy courts).

1 Resolution of these issues undeniably requires the interpretation
2 and implementation of these documents as well as the Court's
3 summary judgment ruling. Also, as pointed out in Wilshire
4 Courtyard, interpretation of the Plan is the only way for a court
5 to determine the essential character of the negotiated Plan
6 transactions in a way that reflects the deal the parties struck
7 in the chapter 11 proceeding. 729 F.3d at 1290. This is reason
8 enough for the Court to exercise jurisdiction in this case.

9 Continental contends that §16.19, §16.20 and §8.3 of the
10 Plan preserved its right to pursue a coverage litigation in state
11 court. But Continental also takes the inconsistent position that
12 the Coverage Complaint raises no issues regarding the
13 interpretation, implementation, or execution of the Plan. If the
14 Coverage Complaint were to proceed in state court, there is
15 certainly a risk that Continental would ask the state court to
16 agree with its interpretation of these sections of the Plan. This
17 is not a risk the Trustee should be exposed to, nor should he be
18 put to the task of explaining bankruptcy jurisdiction to a state
19 court.

20 A confirmed plan operates as a final judgment with res
21 judicata effect. Unsec. Cred's Comm. v. Southmark (In re Robert
22 L. Helms Const. & Dev. Co., Inc.), 139 F.3d 702, 704 (9th Cir.
23 1998). A plan proponent has broad latitude in drafting a plan.
24 See generally Bankruptcy Code §1123(b)(3)(A)-(B); The Alary Corp.
25 v. Sims (In re Assoc. Vintage Group, Inc.), 283 B.R. 549, 560
26 (9th Cir. BAP 2002) (describing chapter 11 as essentially a
27 structured negotiation; discussing estoppel issues). In this
28 case, the Plan contained an agreed upon streamlined method for

1 Continental to review Tendered Claims and to provide its coverage
2 - that is - to pay the Trust. The Plan also preserved
3 Continental's right to contest coverage according to §8.3(b). The
4 so-called "insurance neutrality" provisions of the Plan do not
5 provide the broad escape path that Continental posits. In short,
6 if it is allowed to proceed, the Coverage Complaint is, in
7 effect, a collateral attack on the confirmation order. See also
8 Lauren Assoc. v. Morton Reed (In re California Litfunding), 360
9 B.R. 310, 312 (Bankr. C.D. Cal. 2007) (bankruptcy court has core
10 jurisdiction over action collaterally attacking confirmation
11 order).

12 Finally, the Coverage Complaint raises issues regarding the
13 actions of the Trustee in administering the estate for the simple
14 reason that it seeks to stop the Trustee from taking the actions
15 he is required to take and impedes his ability to finally resolve
16 the §155 issues that remain pending in the Adversary Proceeding.
17 Allowing Continental to litigate the Coverage Complaint outside
18 this Court interferes with the Trustee's performance under the
19 Plan and interferes with this Court's duty to supervise the
20 Trustee's performance of these duties. The *Barton* doctrine is
21 designed to protect against this. The Coverage Complaint seeks to
22 derail the Trustee's efforts to obtain payment from Continental
23 under the terms to which Continental agreed, and if it proceeds,
24 it allows Continental to avoid the binding provisions of the Plan
25 and jeopardizes a benefit negotiated in the Plan. This factor
26 weighs strongly in favor of denying the Motion.

27 //

28 //

1 **3. Whether the claims involve the Trustee acting within**
2 **the scope of his authority so that the Trustee is**
3 **entitled to derived judicial immunity.**

4 Continental argues the Trustee is not entitled to quasi-
5 judicial immunity "because it attaches only to those functions
6 essential to the authoritative adjudication of private rights to
7 the bankruptcy estate" and only applies to claims arising from a
8 trustee's functions relating to the administration of the estate.
9 Curry v. Castillo (In re Castillo), 297 F.3d 940, 951 (9th Cir.
10 2002). Continental asserts that administration of an estate does
11 not include liquidating estate assets, citing Fed'l Ins. Co. v.
12 Glen Ivy Management Co. (In re Glen Ivy Resorts, Inc.), 171 B.R.
13 98, 102-03 (Bankr. C.D. Cal.1994). This case is not binding and
14 does not actually stand for this proposition. See also Crown
15 Vantage, 421 F.3d at 972 (stating liquidating assets is precisely
16 the type of activity that the *Barton* doctrine was designed to
17 protect).

18 Continental also argues there is no immunity here because
19 Continental does not seek any relief at all *against* the Trustee,
20 it seeks only a declaration of non-coverage. To the contrary,
21 judicial immunity is available to suits seeking declaratory
22 relief. See Mullis v. U.S. Bankruptcy Court for Dist. of Nevada,
23 828 F.2d 1385 (9th Cir. 1987) (holding that the quasi-judicial
24 immunity available to federal officers is not limited to immunity
25 from damages, but extends to actions for declaratory, injunctive
26 and other equitable relief).

27 In Castillo a chapter 13 trustee had mis-calendared the
28 confirmation hearing and had failed to give notice of the
29 confirmation hearing. The chapter 13 debtor wanted to sue the

1 trustee for damages when, as a result of these mistakes, her home
2 was sold at a foreclosure sale. Castillo, 297 F.3d at 944. The
3 Ninth Circuit held that the chapter 13 trustee enjoyed absolute
4 quasi-judicial immunity for scheduling and noticing the
5 confirmation hearing. Castillo, 297 F.3d at 952. The Ninth
6 Circuit pointed out that in Antoine v. Byers & Anderson, Inc.,
7 508 U.S. 429 (1993) the Supreme Court "announced that absolute
8 quasi-judicial immunity will be extended to nonjudicial officers
9 only if they perform official duties that are functionally
10 comparable to those of judges, i.e., duties that involve the
11 exercise of discretion in resolving disputes." Id. at 949. In
12 Antoine, the Supreme Court held that a court reporter did not
13 enjoy this immunity from suit for failing to provide a transcript
14 of a criminal trial; this was a task that did not involve the
15 exercise of discretion. Antoine, 508 U.S. at 435.

16 In order to determine whether immunity was appropriate for
17 the chapter 13 trustee, the Castillo court first inquired as to
18 the immunity historically accorded a bankruptcy trustee. "The
19 common-law and nineteenth century antecedents of the modern
20 bankruptcy trustee were entrusted with both administrative and
21 adjudicatory functions. To the extent the trustee performed the
22 functions of a modern-day bankruptcy judge, immunity would have
23 extended to the performance of these common-law adjudicatory
24 functions." 297 F.3d at 950. The Bankruptcy Code now defines the
25 role of a chapter 13 trustee. Essentially, the chapter 13 trustee
26 gathers and liquidates the property of the estate, is accountable
27 for the estate, ensures the debtor performs his or her
28 obligations, investigates the finances of the debtor, reviews

1 proofs of claims, opposes discharge where appropriate, prepares a
2 final report and an accounting. See Bankruptcy Code §704, §1302.
3 In short, the chapter 13 trustee has both administrative duties
4 and adjudicatory functions and immunity attaches only to those
5 functions essential to the authoritative adjudication of private
6 rights to the bankruptcy estate. Id. at 951, citing Antoine, 508
7 U.S. at 433.

8 The Castillo court then considered whether the particular
9 functions at issue in the case - calendaring and noticing the
10 confirmation hearing - involved the exercise of discretionary
11 judgment. Id. at 947. The court concluded that the ultimate act
12 was the scheduling and convening of an adjudicatory hearing, an
13 "act that neatly meets the definition of a judicial function."
14 Id. at 952.

15 In applying this approach here, the Plan, the Liquidating
16 Trust Agreement, and the TDP guide the Court's analysis. The Plan
17 provisions described above identify the Trustee's duties and the
18 scope of his authority. Like any bankruptcy trustee, the Trustee
19 in this case has both administrative and judicial functions. He
20 reviewed Asbestos Claims and liquidated them pursuant to the
21 terms of the TDP, he filed a motion seeking their allowance and
22 disallowance and approval of his audit procedures. These were
23 judicial functions that involved the exercise of discretionary
24 judgment. He tendered claims to Continental that triggered its
25 Policies under controlling Illinois law and then filed the
26 Adversary Proceeding to resolve the Trust's dispute with
27 Continental. These were also judicial functions that required the
28 exercise of his discretionary judgment. Because the Coverage

1 Complaint implicates these same functions, the Trustee is immune
2 from suit in state court. This factor weighs in favor of denying
3 permission to sue the Trustee in state court.

4 **4. Whether the party seeking to surcharge the Trustee**
5 **or seeks a judgment against the Trustee personally.**

6 The Coverage Complaint does not seek a judgment against the
7 Trustee personally. This factor does not outweigh the factors
8 that support denying leave to sue in state court.

9 **5. Whether the claims involve breach of fiduciary duty.**

10 The Coverage Complaint does not raise any breach of
11 fiduciary duty issues. This factor does not outweigh the factors
12 that support denying leave to sue in state court.

13 **IV. Judicial and Equitable Estoppel**

14 The Trustee also argues that the doctrines of judicial and
15 equitable estoppel provide another basis to deny Continental's
16 request to begin new litigation against the Trustee. Both parties
17 have briefed the estoppel issues in connection with the §155
18 Motion and have incorporated their arguments here. Because these
19 issues are treated extensively in the §155 Motion, and the
20 Kashani factors provide the pertinent analysis for the *Barton*
21 issues, the Court will treat the estoppel arguments in summary
22 fashion here.

23 **A. Judicial Estoppel**

24 Federal law governs the application of judicial estoppel in
25 federal courts. Milton H. Greene Archives, Inc. v. Marilyn Monroe
26 LLC, 692 F.3d 983, 992 (9th Cir. 2012); Risetto v. Plumbers and
27 Steamfitters Local 343, 94 F.3d 597, 603 (9th Cir. 1996).
28 Judicial estoppel's purpose is to protect the integrity of the

1 judicial process by prohibiting parties from deliberately
2 changing positions according to the exigencies of the moment. New
3 Hampshire v. Maine, 532 U.S. 742, 749 (2001). The factors that
4 typically inform a decision to apply the doctrine in a particular
5 case were described in New Hampshire v. Maine: First, a party's
6 later position must be clearly inconsistent with its earlier
7 position. Second, courts regularly inquire whether the party has
8 succeeded in persuading a court to accept that party's earlier
9 position, so that judicial acceptance of an inconsistent position
10 in a later proceeding would create the perception that either the
11 first or second court was misled. The third consideration is
12 whether the party seeking to assert an inconsistent position
13 would derive an unfair advantage or impose an unfair detriment on
14 the opposing party if not estopped. Id. at 750-51. The Supreme
15 Court cautioned that these were not inflexible prerequisites or
16 an exhaustive formula for determining applicability of judicial
17 estoppel and additional considerations may inform its application
18 in specific contexts. Id. at 751.

19 The Trustee argues that Continental's first position was
20 that it had lost on the coverage issues and a judgment should be
21 entered against it. Continental said the factual and legal issues
22 under §155 that remained - whether there was vexatious and
23 unreasonable delay, the appropriate amount of attorneys' fees,
24 the amount of the statutory penalty under §155 - could be
25 determined on the briefs and no trial was necessary. Continental
26 persuaded both the Trustee and the Court to adopt this position.
27 Now Continental wants to be permitted to go to state court to
28 litigate coverage issues which it claims have never been raised

1 or considered by this Court. This is clearly an inconsistent
2 position - and an inaccurate one - as it pertains to the coverage
3 issues never having been raised or considered here. If
4 Continental is permitted to start over in state court,
5 Continental derives an unfair advantage by prolonging its ability
6 to stall paying valid claims and by avoiding its obligations
7 under the Plan. The Trust (and its beneficiaries) will suffer an
8 unfair detriment from the expense and delay this proposed state
9 court litigation will impose.

10 Continental argues it has never taken any inconsistent
11 position as to the "trigger of coverage" and the only position it
12 took was that a trial date was not necessary. Continental now
13 claims it took this position because this Court does not have
14 jurisdiction over coverage issues. Continental insists this Court
15 did not rely on any position it advanced, again narrowing this to
16 a position regarding the determination of coverage, because no
17 evidence on this topic has ever been presented to the Court.
18 Continental also argues it is not going to derive an unfair
19 advantage or impose an unfair detriment on the Trustee if a case
20 proceeds in state court because the Trustee has always had an
21 obligation to establish the Tendered Claims are covered.
22 Continental also claims any inconsistency in its prior positions
23 - described as the "off-the-cuff remarks" of its counsel trying
24 to be cooperative and efficient rather than misleading - were
25 based on inadvertence or mistake so estoppel is not appropriate.
26 See Johnson v. Oregon, 141 F.3d 1361, 1369 (9th Cir. 1998)
27 (discussing judicial estoppel, pointing out that if incompatible
28 positions are based on inadvertence or mistake they may not

1 support judicial estoppel).

2 The Trustee is correct regarding the application of judicial
3 estoppel to the facts before the Court. Applying the approach as
4 instructed in New Hampshire v. Maine, Continental is judicially
5 estopped from proceeding in state court with its Coverage
6 Complaint. Continental's counsel told this Court on many
7 occasions, and in no uncertain terms, that Continental "had lost"
8 and judgment should be entered against it and in favor of the
9 Trust. The judgment prayed for in the First Amended Complaint was
10 for the remaining coverage under Continental's Policies.

11 Counsel's statements were not "off-the-cuff remarks" as
12 Continental's revisionist history would have it.¹³ The Court
13 understood them as an unequivocal concession that Continental was
14 prepared to have judgment entered against it on its coverage
15 obligations - that is, a judgment for its remaining Policy
16 limits. Viewed in context, these statements were not made because
17 Continental believed this Court lacked jurisdiction. The Court
18 and the Trustee both relied on these statements in the course of
19 litigating the Adversary Proceeding and took these statements at
20 face value: Continental had agreed it would pay its Policy limits
21 to the Trust. If Continental proceeds in state court, it will no
22 doubt downplay the significance of its counsel's statements, or

24
25 ¹³ The Court also notes litigants are bound by the conduct of
26 their attorneys absent egregious circumstances which are not
27 present here. See Anderson v. Air West, Inc., 542 F.2d 522, 526
28 (9th Cir. 1976) (plaintiff may not benefit from her attorney's
failure to complete service of process, leniency for plaintiff in
the face of actual prejudice to the other parties would permit
her to benefit).

1 deny these statements were made. Litigation in state court will
2 also impose an unfair delay on the beneficiaries of the Trust and
3 an unwarranted expense on the Trustee and his counsel to their
4 detriment and the detriment of the Trust's beneficiaries. Either
5 this Court was misled or a state court will be misled if this
6 succeeds. This is both unfair to the Trustee and is an affront to
7 this Court and the integrity of the judicial process.

8 **B. Equitable Estoppel**

9 Continental argues equitable estoppel is analyzed under
10 Illinois law.¹⁴ Under Illinois law, equitable estoppel requires
11 demonstration by clear and convincing evidence that (1) one
12 party's words or conduct amount to a misrepresentation or
13 concealment of material facts; (2) that party knows that the
14 representations are untrue at the time they are made; (3) the
15 other party did not know that the representations were untrue
16 when they were made and acted upon; (4) the party to be estopped
17 intended or reasonably expected that the other party would act
18 upon the representations; (5) the party claiming estoppel
19 reasonably relied upon the representations in good faith and to
20 its detriment; and (6) the party claiming estoppel would be
21 prejudiced by its reliance on the representations if the other
22 party were permitted to deny their truth. The party claiming
23 estoppel does not need to show that the other party intentionally
24 misled or deceived it; it is sufficient that a fraudulent or
25 unjust effect results from allowing another person to raise a
26

27 ¹⁴ California law is essentially the same. See City of Goleta
28 v Superior Court, 40 Cal. 4th 270, 279 (2006).

1 claim inconsistent with his or her former declarations. Falcon
2 Funding, LLC v. City of Elgin, 399 Ill.App.3d 142, 157-58 (2010)
3 (relying on and summarizing Illinois Supreme Court cases
4 including Geddes v. Mill Creek Country Club, Inc., 196 Ill.2d
5 302, 313-14 (2001).

6 Continental argues that none of these elements are present
7 here. It asserts that its counsel did not misrepresent anything,
8 or intend to mislead, he simply made certain statements in an
9 effort to be "creative in ways to manage" the case and did not
10 make any statements which he believed to be untrue when he made
11 them. AP Docket no. 125-2, Declaration of Raymond J. Tittman,
12 ¶17. He tried to correct these statements in March 2017 based on
13 asserted "newly discovered evidence" regarding the merits of the
14 Tendered Claims. As to the third element, Continental argues the
15 Trustee "had more information about the claims than Continental
16 and must know that most, if not all, of the tendered claims do
17 not trigger the Continental 1985-1987 policies." AP Docket no.
18 125, p. 18:5-8. The Court finds this last statement deeply
19 troubling. It insinuates that the Trustee is trying to defraud
20 Continental into paying Tendered Claims. This sort of underhanded
21 attack on a fiduciary is unwarranted and disgraceful. While it is
22 not necessary to rely on equitable estoppel to deny this Motion,
23 it does add support to the outcome.

24 **V. Conclusion**

25 Continental first violated the *Barton* doctrine by filing a
26 complaint in Illinois state court. It dismissed that first
27 complaint only in response to the order to show cause.
28 Continental does not believe it needs this Court's permission to

1 proceed in state court, and only reluctantly asks for permission.
2 For the reasons explained above, the Court exercises its
3 discretion to deny Continental permission to file its Coverage
4 Complaint.

5 Resolving the Trustee's declaratory relief and breach of
6 contract claims is integral to the Court's ability to preserve
7 and equitably distribute the Trust's assets according to the
8 Plan. The purpose of *Barton* doctrine is to protect the Trustee in
9 the pursuit of these actions. It would be manifestly unfair to
10 sidetrack the Trustee with this state court litigation that would
11 almost certainly impede his progress toward wrapping up this
12 sixteen year old chapter 11 case. Accordingly, the Motion is
13 denied. A separate order will follow.

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15 *** End of Memorandum Decision ***
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1 Court Service List:

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3 Service on all parties by ecf
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Memo. Decis. Barton

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