IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40155

DAYTON INDEPENDENT SCHOOL DISTRICT, ET AL.,

Plaintiffs,

versus

U.S. MINERAL PRODUCTS CO., ET AL.,

Defendants.

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W.R. GRACE AND COMPANY-CONN,

Defendant-Third Party Plaintiff-Appellee,

and

DAYTON INDEPENDENT SCHOOL DISTRICT, ET AL.,

Intervenors-Appellees,

versus

ADMIRAL INSURANCE CO., ET AL.,

Third Party Defendants,

and

AIG INSURANCE CO., ET AL.,

Third Party Defendants, Appellants.

Appeals from the United States District Court
for the Eastern District of Texas
(1:87 CV 00507 B)

April 12, 1995

Before REYNALDO G. GARZA and HIGGINBOTHAM, Circuit Judges, and FELDMAN*, District Judge.

PER CURIAM:**

The background facts of this case are complex, but the issues now brought to us are straightforward. With the benefit of briefs and excellent oral argument, we affirm for essentially the reasons stated by the district court.

We have little difficulty with the jurisdiction of the trial court. Kokkonen v. Guardian Life Ins. Co. of Am., 114 S.Ct. 1673, 1677 (1994), is not apposite. The district court had diversity jurisdiction over the third party action and the authority to enforce a settlement of that case. It is no answer that the settlement of the case before Judge Fisher did more than resolve the case pending before him. There has been no showing that the absence of Illinois National Bank was fatal to the district court's power to enforce an agreement. In short, the district court had jurisdiction, and we see no impediment to its power to enter a settlement agreement. The issue is whether there was an enforceable agreement.

The district court found that the parties had reached a binding agreement to settle the case, and that nothing remained to

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*District Judge of the Eastern District of Louisiana, sitting by designation.

**Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

be done beyond the signatures on the written instrument. This finding engages paragraphs of the unexecuted written instrument, including 6.4, which recites: This "Agreement shall become effective" after the last party executes it. Other provisions of the written instrument contemplate a written document. The parties unquestionably all intended that the Settlement Agreement find expression in a formal instrument and, of course, that did not occur.

We are not persuaded, however, that the various provisions of the written document are conclusive on the question of whether the parties earlier had reached a binding oral agreement. Rather, they are signals of the parties' intent, albeit strong signals. That is, those provisions are relevant to the question of whether the parties intended to be bound before formal execution of the written instrument. This ultimately is a fact question, and our inquiry is whether the district court was clearly erroneous in its finding. We could not sustain the district court's finding but for one powerful set of circumstances--the partial performance of the contract itself. The unexecuted written instrument contemplated substantial installment payments beginning in the summer of 1993. AIG made the first two installment payments totalling $30.6 million to Grace "pursuant to the agreement in principle" and was preparing to make the third of $15.7 million in October when on September 1, 1993, the Second Circuit decided the Maryland Casualty case. See Maryland Casualty Co. v. W. R. Grace & Co., 23 F.3d 617 (2d Cir. 1993). This settlement was negotiated in the shadow of the

Maryland Casualty appeal, and that decision reduced AIG's maximum exposure under the excess policies from $523 million to $65 million.

We find the question of whether the district court's finding of the parties' intent was clearly erroneous to be close. We think the district court could conclude that these payments were partial performance of the agreement between the parties. The payments resist description as small good faith payments intended to keep the prospects of settlement alive. They were in the amount and paid at the times called for under the agreement yet to be finally signed. Adding this partial performance evidence to the mix created a fact issue regarding the parties' intent, an issue for the district court. We are not persuaded that it is clearly erroneous.

Counsel earnestly calls attention to the consequences of finding a contract from negotiating efforts of parties when their efforts have not found final expression in an executed instrument. We think those risks are allocated by the contract law of New York. These dire consequences are not posed on these unique facts. We have an agreement partially performed by payments in excess of $30 million where nothing else remained to be done in negotiations beyond the signature. While not a large percentage of the settlement sum, they remain large in absolute measure and sum to payments nearly half of AIG's total exposure after the Maryland Casualty case. The uncertainties in the Maryland Casualty case were presumably reflected in the settlement terms. A trier of fact

could conclude that if the parties did not intend that the agreement to be signed was enforceable in the summer of 1993, the settlement amounts, allocating as they did the risk of an adverse appellate decision, makes little sense. There are doubtless many explanations for these events and we do not mean to seize on one over others, or to suggest that there are not also inferences supporting the contentions of AIG. As we explained, this presents a close issue of fact. The findings of the district court were not clearly erroneous.

AFFIRMED.