IP 01-0531-C H/K Ball v. Versar
Judge David F. Hamilton Signed on 9/6/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BALL, ROY O ,AS TRUSTEE ON BEHALF OF ENVIRONMENTAL CONSERVATION AND CHEMICAL CORPORATION SITE TRUST FUND, BERNSTEIN, NORMAN W , AS TRUSTEE ON BEHALF OF ENVIRONMENTAL CONSERVATION AND CHEMICAL CORPORATION SITE TRUST FUND,	)	
Plaintiffs,	)	
vs.	)	
VERSAR, INC - 10/26/01 COUNTERCLAIM AGAINST PLAINTIFF TRUSTEES BALL/BERNSTEIN & THIRD PARTY CLAIM AGAINST ENVIRONMENTAL RESOURCES MANAGEMENT, INC. AND RADIAN INTERNATIONAL LLC,	)	
ENVIRONMENTAL RESOURCES MANAGEMENT, INC, RADIAN INTERNATIONAL, LLC,	)	CAUSE NO. IP01-0531-C-H/?
Defendants.	)	

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROY O. BALL and NORMAN W. BERNSTEIN, As Trustees On Behalf Of ENVIRONMENTAL CONSERVATION AND CHEMICAL CORPORATION SITE TRUST FUND,	)	
Plaintiffs,	)	
v.	)	
VERSAR, INC.,	)	
Defendant, Counterclaimant, and Third Party Plaintiff,	)	CAUSE NO. IP 01-0531-C H/K
v.	)	
ENVIRONMENTAL RESOURCES MANAGEMENT, INC. and RADIAN INTERNATIONAL, LLC,	)	
Third Party Defendants.	)	

ENTRY ON MOTIONS TO DISMISS

This diversity case concerns the remediation of a "Superfund" hazardous waste site north of Zionsville, Indiana. Plaintiffs Roy O. Ball and Norman W. Bernstein ("the Trustees") are trustees for the fund formed by hazardous waste generators to clean up the site under an agreement with the relevant government agencies. The Trustees filed this action against defendant Versar, Inc. for breach

of its contract to perform remediation services at the site. In its answer, Versar denied having breached and asserted counterclaims against the Trustees. Versar also filed a third party complaint against defendants Environmental Resources Management, Inc. ("ERM") and Radian International, LLC, companies which performed various services for the Trustees in connection with the remediation of the site. The Trustees, ERM, and Radian have filed motions to dismiss several of Versar's claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons stated below, the parties' motions to dismiss are granted with respect to all of Versar's challenged claims except its claim against the Trustees for unjust enrichment, which can proceed as an alternative theory of relief.[1]

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[1]The court acknowledges the Seventh Circuit's strong language in *May Department Stores Co. v. Federal Insurance Co.*, — F.3d —, 2002 WL 1895371 (7th Cir. Aug. 19, 2002), about the need to ensure that diversity jurisdiction is proper, especially when a party is neither a natural person nor a corporation. For purposes of diversity jurisdiction, a trust takes the citizenship of its trustees. 2002 WL 1895371 at *1, citing *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 464-66 (1980). Diversity is complete here between the original plaintiffs and the defendant. Trustees Ball and Bernstein are citizens of Illinois and the District of Columbia, respectively, and defendant Versar is a Delaware corporation with its principal place of business in Virginia. One of the third party defendants, Radian, is a citizen of Delaware, as is Versar. The court may exercise supplemental jurisdiction over Versar's third party claim against the non-diverse Radian because those claims are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a); cf. *Hartford Accident and Indem. Co. v. Sullivan*, 846 F.2d 377, 380 & 382 (7th Cir. 1988) (refusing to exercise "ancillary" [now supplemental] jurisdiction over third party state law claim between non-diverse parties where claims did not arise out of the same transaction or occurrence, and implying that such jurisdiction is proper when claims have arisen from same transaction or occurrence).

Discussion

I. *The Applicable Legal Standard*

For purposes of a motion to dismiss under Rule 12(b)(6), the court takes as true the factual allegations of the party asserting the claims (here, defendant Versar) and draws all reasonable inferences in favor of that party. *Veazey v. Communications & Cable of Chicago, Inc.*, 194 F.3d 850, 853 (7th Cir. 1999). "Dismissal under Rule 12(b)(6) is proper only if the plaintiff could prove no set of facts in support of his claims that would entitle him to relief." *Chavez v. Illinois State Police*, 251 F.3d 612, 648 (7th Cir. 2001). Because ERM filed its motion to dismiss after filing an answer to Versar's third party complaint, the court treats ERM's motion as one for judgment on the pleadings under Rule 12(c) rather than dismissal under Rule 12(b)(6). See Docket No. 72. However, this technical procedural point makes no practical difference. The same standard applies to both types of motions. See *Forseth v. Village of Sussex*, 199 F.3d 363, 368 n. 6 (7th Cir. 2000).

Versar attached several documents to its brief in opposition to the Trustees' motion to dismiss. Radian has moved to strike Exhibits B and C, which Versar incorporated by reference into its brief in opposition to Radian's motion to dismiss. By moving to strike, Radian seems to be trying to avoid having its motion converted from a motion to dismiss to a motion for summary judgment under Fed.

R. Civ. P. 12 (b). If a motion to dismiss is converted to a motion for summary judgment, the opposing party is entitled to offer additional evidence (and would often be entitled to conduct discovery on relevant matters) before the court rules on the converted motion. See *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998).

Radian's concern is misplaced here. The Seventh Circuit often has reminded district courts that a plaintiff may plead a conclusion in the complaint and then, if the conclusion is questioned in a motion to dismiss, may suggest a set of facts consistent with the allegations which, if proven, would establish the right to recover on the legal claim. *E.g.*, *Early v. Bankers Life and Casualty Co.*, 959 F.2d 75, 78-79 (7th Cir. 1992). In fact, the Seventh Circuit will consider such factual assertions even when they are made for the first time on appeal from dismissal, as long as the assertions are not inconsistent with the complaint. *Chavez*, 251 F.3d at 650. Versar was entitled to respond to the motions to dismiss with new factual assertions that are consistent with (or at least do not contradict) its complaint. There is no reason why Versar cannot emphasize those new assertions by submitting documents that might tend to support the allegations in its complaint. Such an effort is permissible under *Early*, and *Jackson v. Marion County*, 66 F.3d 151, 153 (7th Cir. 1995), as well as the line of cases cited in *Jackson*. Accordingly, Radian's motion to strike is hereby denied.

Radian submitted the affidavit of Mark Dowiak to supplement its motion to dismiss in the event the court denied the motion to strike. In this respect, however, the rules of civil procedure are asymmetric. The court may consider documents attached by a moving defendant for purposes of a Rule 12(b)(6) motion only if the documents are considered part of the pleadings. *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir. 1994). Such documents may be deemed part of the pleadings "if they are referred to in the plaintiff's complaint and are central to his claim." *Id.*, citing *Venture Associates v. Zenith Data Systems*, 987 F.2d 429, 431 (7th Cir. 1993); accord, *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) (affirming dismissal based on terms of treaties referred to in complaint). Versar's complaint does not refer to the Dowiak affidavit, of course, so the court could not consider it without converting Radian's motion into a motion for summary judgment. The court declines to do so. The court has not considered the Dowiak affidavit in ruling on Radian's motion to dismiss.

Based on Radian's submission of the Dowiak affidavit, Versar also argues that further discovery is necessary and that all the motions to dismiss should be converted to motions for summary judgment. However, the court has not converted the pending motions into motions for summary judgment because the pleadings alone provide a sufficient basis to determine the relevant issues. To the extent that Versar requests leave to conduct additional discovery on the choice-of-

law issue, that request is denied. Any further discovery on that issue would only cause the parties to waste time trying to pinpoint the "place of the tort" with respect to each of Versar's claims. As discussed below, that information would not affect the court's determination of the applicable law in this case.

II. *The Claims in Question*

Versar has pled counterclaims against the Trustees in six counts. Count I alleges breach of contract and is not at issue at this time. Count II alleges negligent misrepresentation and/or fraud regarding possible future incentives under the Trustees' contract with Versar. The contract provided that Versar could receive a bonus of $150,000 if it achieved compliance with clean-up standards within twelve months. Versar alleges that the Trustees "possessed information that indicated there were no circumstances" under which Versar could have achieved the needed standard, and that the Trustees failed to communicate that information to Versar. Count III alleges that the Trustees breached an implied duty of good faith and fair dealing by making "barraging [sic] comments" to Versar, withholding information, making complaints, and criticizing Versar's work. Count IV alleges the unjust enrichment of the Trustees. Count V alleges breach of an implied contract, and that count also is not at issue at this time. Count VI alleges negligent misrepresentation and/or fraud for failure to disclose information about groundwater contamination and information about the limits of the technology being used to clean the site.

Versar alleges that third party defendant Radian provided environmental consulting services to the Trustees and that third party defendant ERM provided engineering support and advice to the Trustees. In Count I of the third party complaint, Versar alleges that Radian and ERM were negligent in misrepresenting the conditions of the site and the ability of Versar to fulfill its obligations under the contract with the Trustees. Count II of the third party complaint alleges that Radian and ERM aided and abetted the Trustees' alleged breach of the duty of good faith and fair dealing. Count III of the third party complaint, which is labeled "Count V," alleges that Radian and ERM owe Versar indemnity and contribution for any loss Versar might suffer in this case.

III. *Choice of Law*

In response to all three motions to dismiss, Versar contends that the law of Pennsylvania or Illinois should apply to its tort claims. The choice of law is decisive for at least several of Versar's claims. For example, Versar concedes that Indiana law does not recognize the tort of negligent misrepresentation in the circumstances of this case. If Pennsylvania or Illinois law were to apply, however, Versar's negligent misrepresentation claims would survive dismissal at this stage. (The Trustees, Radian, and ERM have not put significant effort into disputing Versar's views of Pennsylvania and Illinois law.) Thus, the motions present genuine conflicts of laws requiring the court to determine which state's law should be applied to the tort claims in this case. See *Jean v. Dugan*, 20 F.3d 255, 260

(7th Cir. 1994) (before engaging in choice of law analysis, court should satisfy itself there is a genuine conflict).

As a preliminary matter, the parties agree that Indiana law applies to the claims arising out of Versar's contract with the Trustees, as that contract itself expressly provides. The application of Indiana law to the contract, however, would not necessarily bar application of another state's law to tort claims that are independent of that contract. See, *e.g.*, *Paper Manufacturers Co. v. Rescuers, Inc.*, 60 F. Supp. 2d 869, 874-75 (N.D. Ind. 1999) (analyzing choice of law issues separately for contract and tort claims where product allegedly failed to perform as promised). Versar argues that its tort claims are independent of the parties' obligations under the contract, so that the court must determine the law applicable to those claims. The problem for Versar is that its claims are not independent of the contract governed by Indiana law.

As a federal court exercising its diversity jurisdiction, this court applies the choice of law rules of Indiana. *Jean v. Dugan*, 20 F.3d at 261. The traditional choice-of-law rule for torts in Indiana was *lex loci delicti*, under which the substantive law of the place of the tort is applied. In *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987), the traditional rule was modified so that the law of the place of the tort is no longer applied in every case. Under the modified rule, there is a presumption that the law of the place of the tort applies unless the place

of the tort "bears little connection" to the legal action. *Matter of Estate of Bruck*, 632 N.E.2d 745, 747 (Ind. App. 1994). When the place of the tort has little connection to the legal action, the court considers other factors, such as the place where the conduct causing the injury occurred, the residence or place of business of the parties, and the place where the relationship between the parties is centered. *Hubbard*, 515 N.E.2d at 1073-74, citing Restatement (Second) of Conflicts of Laws § 145(2) (1971).

Versar alleges that the Trustees, Radian, and ERM made tortious representations or omissions from offices located across the United States. Versar notes that the Trustees "provided site investigative and contract proposed information" to Versar at an office in Pennsylvania. Versar Amend. Answer ¶ 114; Trustees' Answer to Counterclaims ¶ 114 (stating that some information was provided to Versar in Indianapolis). Further, from the time immediately prior to the contract and, at least weekly, the Trustees (from offices in Illinois, New York, and Washington, D.C.) and Versar, from its Pennsylvania office, had telephone conference calls and exchanged faxes. Versar Amend. Answer ¶ 115. Versar also notes that various reports were transmitted between Versar's office in Pennsylvania and Radian's and ERM's offices in Pennsylvania, New Jersey, and Illinois. Because most of the communication between the parties occurred during exchanges outside Indiana, Versar contends that Pennsylvania and Illinois are most likely the places where the alleged torts occurred.

However, even if the last event necessary to make the Trustees, Radian, or ERM liable occurred in Pennsylvania, New Jersey, Illinois, or some other state, Indiana law would still apply in this action. The location of the parties' offices has little or no significance to the legal action before the court.

First, the basis for Versar's claims is that the parties allegedly withheld material information about the condition of the waste site in Indiana, which is where Versar agreed to carry out its clean-up duties under its contract with the Trustees. The content of the information provided to Versar about that Indiana site, not whence the information came or whither it was sent, lies at the heart of Versar's claims.

Second, all of Versar's tort claims assume that the Trustees, ERM, and Radian owed Versar a duty to disclose certain information and to use due care in providing such information. What is the source of that duty? The only apparent source is the Trustees' *contract* with Versar. That contract is expressly governed by Indiana law, and it is a contract for clean-up services at an Indiana site. With the contract as the source of the relevant duty, Versar's effort to present its tort claims as "independent" of the contract simply will not wash. This reasoning also extends to Versar's claims against ERM and Radian. When ERM and Radian were dealing with Versar, they were providing services for the benefit of the Trustees, and related to the same contract between the Trustees and Versar. The center of

gravity of this entire lawsuit is Versar's agreement to perform remediation services at the waste site in Indiana, which agreement is governed by Indiana law.

In light of these factors, Versar's assertion that Pennsylvania or Illinois bears a significant connection to this case is without merit. Indiana has a compelling interest in the land at issue in this case, and it has the most significant relationship to the parties' claims and counterclaims, whether in contract or tort. Indiana law governs Versar's tort claims against the Trustees and third-party defendants Radian and ERM.

IV. *The Trustees' Motion to Dismiss*

A. *Versar's Counterclaims for Negligent Misrepresentation*

The Trustees have moved to dismiss Counts II and VI of Versar's counterclaim because Indiana law does not recognize the tort of negligent misrepresentation. The Trustees are correct, at least outside the context of employment relationships. See, *e.g.*, *Darst v. Illinois Farmers Ins. Co.*, 716 N.E.2d 579, 583-84 (Ind. App. 1999) (noting that Indiana has recognized the tort only in the "limited factual setting" of *Eby v. York-Division, Borg-Warner*, 455 N.E.2d 623 (Ind. App. 1983) involving an employment relationship). Versar concedes as much as a matter of Indiana law. Because Indiana law applies, the court must dismiss Versar's counterclaims for negligent misrepresentation in Counts II and VI.

Versar, however, maintains that Counts II and VI are still viable because they also allege counterclaims for fraud. The Trustees argue that the fraud counterclaims fail for several reasons, including that Versar has failed to allege that the Trustees had a duty to disclose any information to Versar independent of the duties imposed by their contract. Because the latter argument requires the dismissal of Versar's fraud counterclaims, the court does not address the Trustees' additional arguments.

Under Indiana law, the elements of fraud are: (1) a material misrepresentation of a past or existing fact which, (2) was false, (3) was made with knowledge or in reckless ignorance of the falsity, (4) was relied upon by the complaining party, and (5) proximately caused the complaining party's injury. *Park 100 Investors, Inc. v. Kartes*, 650 N.E.2d 347, 349 (Ind. App. 1995).

Versar's counterclaims do not allege affirmative misrepresentations of fact. They allege instead that the Trustees failed to disclose certain facts material to their contract. To base a fraud claim on a failure to disclose, the complaining party must show that a duty to disclose existed. *Anderson Drive-In Theatre, Inc. v. Kilpatrick*, 110 N.E.2d 506, 508 (Ind. App. 1953) (affirming dismissal of fraud claim where plaintiff did not allege that defendant had a duty to disclose; parties made a business deal at arm's length). A duty to disclose can be shown where "either one or each of the parties, in entering into the contract or other transaction

expressly reposes a trust and confidence in the other; or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence . . . is necessarily implied." *Vaughn v. General Foods Corp.*, 797 F.2d 1403, 1414 (7th Cir. 1986), quoting *Peoples Trust and Savings Bank v. Humphrey*, 451 N.E.2d 1104, 1112 (Ind. App. 1983).

In *Grow v. Indiana Retired Teachers Community*, 271 N.E.2d 140, 143 (Ind. App. 1971), the Indiana Court of Appeals stated that relationships of trust and confidence "generally arise where there is a blood, marital or fiduciary relationship." Further, "[i]t is essential that there be a dominant and a subordinate party, and it must be established by the facts that the alleged subordinate party was justified in relying upon a relationship of trust and confidence." *Id.* Accordingly, the relationship between parties in an arm's length, contractual arrangement cannot support a fraud claim based on a failure to disclose. *Comfax Corp. v. North American Van Lines, Inc.*, 587 N.E.2d 118, 125-26 (Ind. App. 1992).

Versar has not alleged or argued facts that could possibly support imposition of a duty on the part of the Trustees to disclose information to Versar beyond what was required by their contract. Thus, if Versar has any claim against the Trustees for failing to disclose certain information, its remedy is in contract, not tort. See *Orkin Exterminating Co. v. Walters*, 466 N.E.2d 55, 59 (Ind.

App. 1984) ("Absent a limiting statute or controlling public policy, parties may contract with one another on whatever terms they wish and the written contract defines the full extent of their rights and duties."), quoting *Orkin Exterminating Co. v. Stevens*, 203 S.E.2d 587, 592 (Ga. App. 1973)[2] ; see also *Sheridan Health Care Center, Inc. v. Centennial Healthcare Corp.*, 2001 WL 1029111 at *8 (S.D. Ind. 2001) (applying Indiana law and holding that an allegation that a party to a contract negligently performed a contractual duty is a claim for breach of contract). Accordingly, the court grants the Trustees' motion to dismiss Versar's counterclaims for negligent misrepresentation and fraud in Counts II and VI.

B. *Good Faith and Fair Dealing*

The Trustees have moved to dismiss Versar's counterclaim Count III for breach of a duty of good faith and fair dealing. The Trustees argue that their contract is governed by Indiana law, which does not imply a duty of good faith on contracting parties in the circumstances of this commercial contract. In response, Versar first contends that Pennsylvania law governs this issue and that Pennsylvania law implies a duty of good faith. Versar also contends that an earlier consent decree entered into by the Trustees imposed a duty of good faith in their contract. Finally, Versar argues that Indiana law would imply a duty of

[2]In *Mitchell v. Mitchell*, 695 N.E.2d 920, 922 n. 3 (Ind. 1998), the Indiana Supreme Court disagreed with *Orkin v. Walters* on a point of appellate procedure not relevant here.

good faith in this case because the parties' contract is ambiguous and was fraudulently induced.

The duty of good faith and fair dealing cannot exist independent of a valid contract in Pennsylvania, Illinois, or Indiana. See, *e.g.*, *Somers v. Somers*, 613 A.2d 1211, 1214 (Pa. 1992) (implying duty to perform contractual obligations in good faith under the doctrine of necessary implication); *Northern Trust Co. v. VIII South Michigan Associates*, 657 N.E.2d 1095, 1104 (Ill. App. 1995) ("Although the covenant of good faith and fair dealing is used as an aid in construing a contract, it does not form the basis of an independent tort recognized in Illinois."); *First Federal Savings Bank of Indiana v. Key Markets, Inc.*, 559 N.E.2d 600, 604-05 (Ind. 1990) (refusing to imply a duty of good faith in a commercial lease). Thus, to argue that a duty of good faith might exist, Versar must establish the existence of a valid contract. But once the existence of the contract is established, the parties are bound by its terms. One of those terms is the choice of law term providing that the contract shall be construed according to Indiana law. The contract does not expressly impose a duty of good faith and fair dealing on either party, so if such a duty were to be imposed at all, it would have to be implied under Indiana law.

Indiana has not adopted § 205 of the Restatement (Second) of Contracts, which states: "Every contract imposes upon each party a duty of good faith and

fair dealing in its performance and its enforcement." The Indiana Supreme Court has stated:

> It is not the province of courts to require a party acting pursuant to [a clear and unambiguous] contract to be "reasonable," "fair," or show "good faith" cooperation. Such an assessment would go beyond the bounds of judicial duty and responsibility. . . . The proper posture for the court is to find and enforce the contract as it is written and leave the parties where it finds them. It is only where the intentions of the parties cannot be readily ascertained because of ambiguity or inconsistency in the terms of a contract or in relation to extrinsic evidence that a court may have to presume the parties were acting reasonably and in good faith in entering into the contract.

First Federal Savings Bank of Indiana, 559 N.E.2d at 604. In *First Federal*, the plaintiff lessee brought an action challenging the cancellation of its lease. The lease provided that plaintiff could not assign or sublet any portion of the leased space without the defendant landlord's consent. When plaintiff attempted to assign its interest in the lease to a third party, defendant would not consent. Subsequent negotiations failed and defendant terminated plaintiff's lease due to the proposed assignment. Plaintiff argued that defendant had a legal duty to exercise his consent reasonably, even though the lease did not require defendant to be reasonable in refusing to consent to assignment.

The Indiana Court of Appeals, relying on a Florida case, agreed with plaintiff and imposed a reasonableness test on defendant's refusal to consent. The Indiana Supreme Court reversed, explaining: "The parties in the instant case entered into a lease contract clear in its terms and well understood in the business

community. Neither of the parties require 'paternalistic protection' . . . because they are experienced in business enterprises and fully understand the business." *Id.* at 606, distinguishing *Morin Building Products Co. v. Baystone Construction Co.*, 717 F.2d 413 (7th Cir. 1983) (applying Indiana law and implying a reasonableness requirement in a construction contract where terms regarding owner's right to determine acceptability of materials and workmanship were ambiguous).

In Indiana, the duty of good faith is implied in limited circumstances, such as in insurance contracts. See *Lake County Trust Co. v. Wine*, 704 N.E.2d 1035, 1039 (Ind. App. 1998) (refusing to imply duty of good faith and fair dealing into unambiguous lease). This case involves neither an insurance contract nor a situation in which equitable principles require the implication of a duty of good faith. Nothing in the contract imposes a duty of good faith on either party. Further, even if a contractual ambiguity is identified later in the case, so that the court might turn to an implied duty of good faith and fair dealing to help interpret the contract, that still would not support an independent tort claim.

Versar also contends that an earlier consent decree imposed a duty of good faith on the Trustees. The United States Environmental Protection Agency and approximately 225 settling defendants entered into the consent decree on September 10, 1991. See Contract, Art. 18.1.5. Section XXIX(A) of the consent decree states: "This Decree was negotiated in good faith by the Plaintiffs and

Settling Defendants." Based on this language, Versar argues that its contract with the Trustees, executed six years later on August 28, 1997, included a duty of good faith. On the contrary, Section XXIX(A) clearly refers to only the negotiations that led to the consent decree. It does not state or imply that the parties agreed to any continuing duty of good faith in their dealings with other entities that were not parties to the consent decree.

Finally, Versar contends that even though Indiana law ordinarily does not imply a duty of good faith in contracts, in this case such a duty would apply because the Trustees fraudulently induced Versar to enter the contract. Versar Mem. at 14, citing *Geiger v. Ryan's Family Steak Houses, Inc.*, 134 F. Supp. 2d 985, 999 (S.D. Ind. 2001). Although fraud can be a defense to enforcement of a contract, it is not a basis for implying additional terms for a contract. *Park 100 Investors, Inc. v. Kartes*, 650 N.E.2d 347, 349 (Ind. App. 1995); see also *First Federal Savings Bank of Indiana*, 559 N.E.2d at 604 (stating that "equitable principles . . . might require the court to refuse to recognize the provisions of a contract where there is allegation and proof of fraud, misrepresentation, overreaching, undue influence, unjust enrichment or undue advantage of one party over the other.").

In *Geiger*, the plaintiff brought suit against her employer under state law and Title VII of the federal Civil Rights Act of 1964. 134 F. Supp. 2d at 988. The

employer moved for an order compelling arbitration of plaintiff's claims pursuant to the Federal Arbitration Act. Plaintiff argued that the arbitration agreement was unenforceable on several grounds, including that the defendant materially breached an implied covenant of good faith and fair dealing. *Id.* at 999.

Applying Indiana law, Judge Barker noted that fraud is a defense to enforcement of a contract, and that the Indiana Court of Appeals had implied a duty of good faith and fair dealing in an employment contract in *Weiser v. Godby Bros., Inc.*, 659 N.E.2d 237, 240 (Ind. App. 1995). Without entering judgment on plaintiff's separate fraud claims, Judge Barker found that the evidence of fraud was sufficient to support a finding that the employer had breached its duty of good faith and fair dealing to plaintiff. This breach provided an alternative ground for Judge Barker's decision not to enforce the arbitration agreement.

The reasoning of *Geiger* does not apply here. In *Geiger*, there was no dispute whether the employer owed a duty of good faith and fair dealing to plaintiff. The contract at issue was an employment agreement between the employer, a national restaurant chain, and plaintiff, a server. The disparity in bargaining power between the parties placed their contract within the limited circumstances in which Indiana law has implied a duty of good faith and fair dealing. Also, the question in *Geiger* was whether the court should enforce the parties' arbitration agreement. Judge Barker did not hold that the employer's

fraud triggered a duty of good faith, but that the employer's fraud prevented the court from enforcing the arbitration agreement, which imposed a duty a good faith on the employer.

In this case, Versar cannot expect the court to enforce the contract despite alleged fraud, and at the same time to imply a duty of good faith and fair dealing in the contract because of the same fraud. Versar has not cited any authority that would grant the court such broad powers to reconstruct the parties' agreement. And in any event, because in this commercial setting there is no independent tort of breach of a duty of good faith and fair dealing, any claims Versar might have must be asserted in terms of a breach of an express or implied contract, or for unjust enrichment, as discussed below. Accordingly, the court grants the Trustees' motion to dismiss Count III of Versar's counterclaim.

C. *Unjust Enrichment*

The Trustees have moved to dismiss Versar's counterclaim Count IV for unjust enrichment because it arises out of the same transaction governed by the parties' contract. Citing *Engelbrecht v. Property Developers, Inc.*, 296 N.E.2d 798, 801 (Ind. App. 1973), the Trustees argue that if the subject matter of a dispute is covered by a valid contract, then the contract controls and there can be no recovery for unjust enrichment.

Unjust enrichment, also referred to as quantum meruit, is a "legal fiction invented by common-law courts in order to permit a recovery . . . where, in fact, there is no contract." *Clark v. Peoples Savings & Loan Ass'n*, 46 N.E.2d 681 (Ind. 1943). Between private parties, recovery under a theory of unjust enrichment may be permitted where there is a contract, but it is void due to duress or undue influence. See *Bayh v. Sonnenburg*, 573 N.E.2d 398, 409 & n.12 (Ind. 1991) (noting this exception, but distinguishing suit against state by state citizen where relationship is controlled by state constitution with express provision against taking of property or particular services without just compensation), citing Restatement of Restitution § 70 (1937); *Baldwin v. Hutchison*, 35 N.E. 711 (Ind. App. 1893) (permitting a mentally handicapped man to rescind a contract and recover in restitution money paid to a businessman who had threatened, without good cause, to have the man thrown in jail for damaging statements he made under oath in court). Generally, however, if a contract controls the parties' rights, there can be no recovery under a theory of unjust enrichment. *Engelbrecht*, 296 N.E.2d at 801.

Versar has asserted several defenses to the Trustees' claims for breach of contract, and Versar has asserted counterclaims based on tort, contract, and quasi-contract theories. At this stage in the proceedings, Versar is not required to choose a single legal theory from which to approach this lawsuit. Versar's Amended Answer appears to admit the existence of a contract but to deny its own

breach, see ¶ 51, and to seek to avoid its obligations under the contract altogether due to impracticability, fraud, waiver, and estoppel. See ¶¶ 79-81. The Trustees are correct that if Versar ultimately recovers under the contract, its claim for unjust enrichment must be denied. However, if Versar were to successfully avoid the contract – an issue that the parties have not addressed – then its unjust enrichment claim might retain some vitality.

On the subject of election of remedies, the Seventh Circuit has explained:

> The common law doctrine of election of (contract) remedies that the district judge invoked in so ruling has two aspects, a procedural and a substantive. The procedural aspect derives from the overriding goal of common law pleading, which was by successive rounds of pleading to narrow the issues until there was just one for trial. . . . It was essential to the attainment of this goal that a party be forbidden to plead in the alternative, for that would generate two or more issues for trial. He must therefore elect his remedy. . . . Common law pleading was superseded long ago, however – in the federal courts by the Federal Rules of Civil Procedure, which expressly abolish election of remedies. Fed. R. Civ. P. 8(e)(2). Those rules of course apply in all federal civil litigation, even if the issue being litigated is one of state law, as noted with specific reference to election of remedies in *Koedding v. Slaughter*, 481 F. Supp. 1233, 1237 (E.D. Mo. 1979), *aff'd*, 634 F.2d 1095 (8th Cir. 1980).
>
> In its substantive aspect, however, the doctrine of election of remedies is not affected by the federal rules of procedure. In that aspect the doctrine is a part of the law of remedies rather than of procedural law. It seeks to prevent double recovery. *Wynfield Inns v. Edward LeRoux Group, Inc.*, 896 F.2d 483, 488 (11th Cir. 1990).

Olympia Hotels Corp. v. Johnson Wax Development Corp., 908 F.2d 1363, 1371 (7th Cir. 1990). Accordingly, Versar is entitled to plead claims on theories of both

unjust enrichment and breach of contract, but it may recover damages based on only one of those theories. The Trustees' motion to dismiss Versar's counterclaim for unjust enrichment in Count IV is therefore denied.

V. *Third Party Defendants' Motions*

Third party defendants Radian and ERM have moved to dismiss Counts I, II, and III (mistakenly titled Count V) of Versar's third party complaint. Despite Versar's attempt to characterize Count I as an ordinary claim for negligence, it is undeniably a claim for negligent misrepresentation: Versar alleges that Radian and ERM negligently supplied Versar information regarding conditions at the hazardous waste site. Accordingly, the court grants Radian's and ERM's motions on Count I because Indiana law, as discussed above, does not recognize the tort of negligent misrepresentation in the circumstances of this case.

Similarly, Count II of Versar's third party complaint attempts to state a claim for "Aiding and Abetting Breach of Good Faith and Dealing." In short, Versar seeks to recover from Radian and ERM for whatever role they might have played in the Trustees' alleged breach of an implied duty of good faith and fair dealing. However, as discussed above, the Trustees did not have such a duty to Versar under Indiana law. Without a duty, there can be no breach, and without a breach, Radian and ERM cannot be held liable for aiding and abetting a breach.

Accordingly, the court also grants Radian's motion to dismiss and ERM's motion for judgment on the pleadings on Count II of Versar's third party complaint.

Count III seeks indemnification and/or contribution from Radian and ERM for "any costs, charges, refunds or attorney's fees in connection with Versar's defense and prosecution of this matter and any judgments entered herein." Versar Amend. Answer ¶ 184. Versar has not identified any contractual or statutory basis for indemnity or contribution in this case. The issue is whether Indiana common law would imply a right to indemnity in this case.

In Indiana, the law is well established that such an implied common law right of indemnity may arise only where a tortfeasor who has acted "without fault" has been required to pay damages because of the wrongful conduct of another for which he is only constructively liable. *Bituminous Casualty Corp. v. Hedinger*, 407 F.2d 655, 656-57 (7th Cir. 1969) (applying Indiana law); accord, *Indianapolis Power & Light Co. v. Brad Snodgrass, Inc.*, 578 N.E.2d 669, 671 (Ind. 1991) ("The right to indemnity may be implied at common law only in favor of one whose liability to a third person is solely derivative or constructive, and only as against one who has by his wrongful act caused such derivative or constructive liability to be imposed upon the indemnitee.").

Judge Dillin's often cited opinion in *McClish v. Niagara Machine & Tool Works*, 266 F. Supp. 987 (S.D. Ind. 1967), remains a useful and authoritative discussion of Indiana law on this point. Such derivative or constructive liability has been recognized, for example, where an employer is held liable under respondeat superior for the tort of an employee, or in other principal-agent relationships. See *McClish*, 266 F. Supp. at 990; accord, *Rotec, Division of Orbitron, Inc. v. Murray Equipment, Inc.*, 626 N.E.2d 533, 536 (Ind. App. 1993); *Sears, Roebuck & Co. v. Boyd*, 562 N.E.2d 458, 461 (Ind. App. 1990). Such derivative or constructive liability has also been recognized in breach of warranty cases where a retailer may be held liable on warranties identical to those given by a manufacturer. *McClish*, 266 F. Supp. at 990; accord, *Coca-Cola Bottling Co. – Goshen v. Vendo Co.*, 455 N.E.2d 370, 373 (Ind. App. 1983), citing *Frank R. Jelleff, Inc. v. Pollak Bros.*, 171 F. Supp. 467 (N.D. Ind. 1957).

In this case, the Trustees have sued Versar for breach of the contract between the Trustees and Versar, not for any tort. The issue here is not negligence but only alleged failure to fulfill promises. Thus, Versar can be held liable to the Trustees only if it is shown to have been "at fault" in the sense that it broke one or more promises. In opposing Radian's and ERM's motions to dismiss the indemnification claims, Versar has not identified any Indiana case finding an implied duty to indemnify under remotely comparable circumstances. Recognizing an implied duty to indemnify in this case would seem to effect a

sweeping change of Indiana law, a change that would authorize any party who breached a contract to implead as third party defendants any other person who might be blamed for causing the contracting party to breach its contract. In the absence of contractual or statutory obligations for indemnity, the court sees no basis in Indiana law for such a claim for indemnification on Versar's theory. Radian and ERM are entitled to dismissal of Count III of Versar's third party complaint for failure to state a claim upon which relief can be granted.

VI. *Other Matters*

A. *Versar's Motion to Compel*

Versar also has filed a motion to compel responses to its discovery requests from the Trustees. On January 18, 2002, Versar served its First Set of Interrogatories and Requests for Production of Documents on the Trustees. Ex. A to Mot. to Compel. On April 8, 2002, the Trustees responded to the request, and on May 1, 2002, the Trustees served an Amended Response to Versar's Requests for Production of Documents. In the Amended Response, the Trustees objected to Versar's request for production as overbroad and unduly burdensome.

The Trustees stated that the documents pertinent to the site are divided by year into essentially four categories: letters, faxes, memos and data (which includes test results, reports, maps, surveys and other technical data). The

Trustees contend that there are documents responsive to Versar's request for production from all four categories, dating as far back as 1983. With respect to the data category, the Trustees have agreed to produce all available documents to Versar regardless of date. However, the Trustees argue that the time and expense necessary to review documents from the other three categories for responsiveness and privilege makes Versar's request with respect to those documents unduly burdensome. The Trustees further contend that Versar has not shown that the production of all such documents is "reasonably calculated to lead to the discovery of admissible evidence." Trustees' Response at 6, quoting Fed. R. Civ. P. 26(b)(1). As a compromise, the Trustees have offered to produce all responsive non-data documents as far back as 1996 because allegedly that is when Versar first became involved in the remediation plans for the site.

Versar argues that all documents from 1983 forward are discoverable because the site has been the subject of remedial activity since 1983. Additionally, Versar notes that the parties' contract itself refers to ten documents that existed prior to January 1996. Versar's final argument is that the Trustees have exaggerated the burden of the request because "most of the documents are very likely technical documents, which are publicly available and need not be screened for privilege issues." Versar's Mem. in Support at 5.

In light of the court's ruling on the motions to dismiss, Versar's motion to compel loses considerable force. Versar's claims for negligent misrepresentation and fraud, both based on the alleged nondisclosure of information, have been dismissed. Versar has not argued that it had a contractual right to all the documents responsive to its request for production. Nor has Versar presented any other convincing legal or factual basis to justify the breadth of its request. See *Spears v. City of Indianapolis*, 74 F.3d 153, 158 (7th Cir. 1996) (affirming district court's determination that scope of subpoena was too broad and assessment of costs associated with the subpoena against its proponent). Versar's argument based on the contract's reference to documents created before 1996 also lacks merit. There is nothing in the record to suggest that the Trustees object to the production of those documents, or any other documents named in the contract. Further, the referenced documents appear to contain the kind of information that places them in the data category, which is the category of documents that the Trustees have agreed to produce regardless of date. See Contract ¶¶ 7.7.1 - 7.7.10. Versar's last argument does not save its motion to compel. Versar's contention that the Trustees' letters, faxes, and memos "most likely" contain technical information is belied by the Trustees' organizational scheme, which placed all data-related documents in a separate category.

The court grants Versar's motion to compel in part, and hereby orders the Trustees to produce to Versar no later than October 7, 2002 all "data documents"

regardless of date and all other responsive documents as far back as 1996, as the Trustees proposed in their response memorandum. In other respects, Versar's motion to compel is denied. In light of the mixed results, no costs are awarded on the motion to compel.

B. *Radian's Motion for Leave to Withdraw Request for Admission*

Radian has filed a motion to withdraw a request for admission served on Versar on May 14, 2002. Versar contends that the fourth request for admission served on Versar contained an inadvertent clerical error, rendering it inaccurate. Versar has not responded to Radian's motion on this issue. The deadline for response having passed, the court grants Radian's motion to withdraw its fourth request for admission served on Versar.

Conclusion

The court grants the Trustees' motion to dismiss Counts II, III, and VI of Versar's counterclaim, but denies their motion to dismiss Count IV. The court grants Radian's and ERM's motions to dismiss Counts I, II, and III of Versar's third party complaint against Radian and ERM. Versar's motion to compel responses to its discovery requests from the Trustees is granted in part and denied in part. Radian's motion to withdraw its request for admission is granted.

So ordered.

Date: September 6, 2002

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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