IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SCOTTSDALE INSURANCE COMPANY,

Plaintiff,

OPINION AND ORDER

v.

99-C-0539-C

SUBSCRIPTIONS PLUS, INC., KARLEEN HILLERY, ALLSTATE INSURANCE COMPANY, UNIVERSAL UNDERWRITERS INSURANCE, ALBERT L. ROBERTS, DEANNA ROBERTS, JANET HANSON, CHARLES HANSON, PHILLIP ELLENBECKER, BONITA LETTMAN, JOHN LETTMAN, DONALD WILD, DIANA WILD, MICHAEL McDANIEL, PAM CHRISTMAN, STACI M. BECK, NICOLE McDOUGAL, ELAINE McDOUGAL, MONICA FORGUES, NANCY ASHTON, KAILA BLAINE GILLOCK, CRAIG L. FECHTER, SHAWN KELLY-WEIR, JEREMY HOLMES, YES! INC., CHOAN A. LANE, DEBBIE McDANIEL, UNITY HEALTH PLANS INSURANCE CORPORATION, HEART OF TEXAS DODGE, INC. and PPD PHARMCO,

Defendants,

and

ACCEPTANCE INSURANCE COMPANIES,

Intervening Defendant.

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Plaintiff Scottsdale Insurance Company brought this civil action for declaratory relief in which it is requesting a determination whether it has a duty to defend or indemnify any of the named defendants for liability resulting from an accident that occurred in March 1999. Presently before the court are two motions: 1) defendants Donald and Diana Wild's motion to dismiss the complaints of plaintiff Scottsdale Insurance Company and intervening defendant Acceptance Insurance Companies for lack of personal jurisdiction; and 2) Progressive Northern Insurance Company's motion to intervene under Fed. R. Civ. P. 24(b)(2). The Wilds contend that plaintiff has not established personal jurisdiction could be exercised over them under Wisconsin's long-arm statute and due process. In addition, the Wilds argue that intervening defendant Acceptance's cross-complaint against them must be dismissed because they were never properly served.[1] Progressive wants to intervene after having been dismissed from this

[1] The Wilds also request that the case in its entirety be dismissed for lack of subject matter jurisdiction. This argument was presented by defendants Monica Forgues and Nancy Ashton and addressed in the opinion and order

case pursuant to Fed. R. Civ. P. 21 because it lacked diversity with Scottsdale.

I conclude that defendants Donald Wild and Diana Wild must be dismissed from this case because Scottsdale and Acceptance have failed to carry their burden of showing that personal jurisdiction exists over the Wilds. In addition, Progressive's motion to intervene will be denied. Progressive has failed to show that 28 U.S.C. § 1367 provides subject matter jurisdiction for its claim.

For the purpose of deciding the motion to dismiss for lack of personal jurisdiction, I find the following facts from the allegations in the complaint and the averments in the affidavits.

JURISDICTIONAL FACTS

On March 25, 1999, a van accident occurred in Rock County, Wisconsin, resulting in seven deaths and numerous injuries. Among those killed in the accident was Joseph Wild, a passenger in the van, At the time of the accident, all of the occupants of the van were returning from selling magazine subscriptions.

On June 21, 1999, defendants Donald and Diana Wild, the parents of Joseph Wild,

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entered on August 11, 2000. It will be dismissed as moot.

filed a wrongful death suit against plaintiff Scottsdale Insurance Company and intervening defendant Acceptance Insurance Companies, among others. Although the case was filed initially in Louisiana federal court, it has since been transferred to this court on a motion filed by one of the defendants (Wild v. Subscriptions Plus, Inc., 00-C-67-C).

Defendants Donald Wild and Diana Wild are citizens of Lousiana. Plaintiff Scottsdale Insurance Company is a citizen of Arizona and Ohio. Progressive Northern Insurance Company is a citizen of Wisconsin and Ohio.

For the purpose of deciding Progressive's motion to intervene, I find the following facts from the record.

FACTS

Before the accident, plaintiff Scottsdale Insurance Company issued a commercial general liability insurance policy to defendants Subscriptions Plus, Inc. and Karleen Hillery, its owner, which was in effect at the time of the crash. In addition, intervening defendant Acceptance issued a policy of excess liability indemnity insurance to defendant Subscriptions Plus, which was also in effect at this time. Finally, Progressive issued a policy to defendant Subscriptions Plus that may have covered the van.

Scottsdale initiated this suit on September 3, 1999, in order to resolve the question

whether it is obliged to defend or indemnify any of the named defendants. As a named defendant, Progressive filed a counterclaim against Scottsdale and cross-claims against its co-defendants also asking for a declaratory judgment regarding its duty to defend and indemnify the other parties. After it was discovered that Scottsdale and Progressive were both residents of Ohio, Progressive was dismissed from the suit.

OPINION

A. Motion to Dismiss for Lack of Personal Jurisdiction

Scottsdale and Acceptance have the burden of establishing personal jurisdiction over the Wilds by a preponderance of the evidence. See Steel Warehouse of Wisconsin, Inc. v. Leach, 154 F.3d 712, 714 (7th Cir. 1998); Turnock v. Cope, 816 F.2d 332, 333 (7th Cir. 1987). (Although only Scottsdale wrote a brief opposing the Wilds' motion to dismiss for lack of personal jurisdiction, in Acceptance's brief opposing the Wilds' motion to dismiss its complaint for insufficiency of process, Acceptance joined in the brief filed by Scottsdale. Accordingly, I will construe Scottsdale's arguments as being made by both Scottsdale and

Acceptance.) The allegations in plaintiff Scottsdale's complaint and defendant Acceptance's cross-complaint are accepted as true to the extent they are not controverted by the Wilds' affidavits. See Turnock, 816 F.2d at 333.

In a diversity case, a federal court has personal jurisdiction over a non-consenting, nonresident defendant to the extent authorized by the law of the state in which the court sits. See Heritage House Restaurants, Inc. v. Continental Funding Group, Inc., 906 F.2d 276, 279 (7th Cir. 1990). Under Wisconsin law, the requirements of both the Wisconsin long-arm statute, Wis. Stat. § 801.05, and due process must be satisfied before jurisdiction can be established. See Marsh v. Farm Bureau Mutual Insurance Co., 179 Wis. 2d 42, 52, 505 N.W.2d 162, 165 (Ct. App. 1993). The plaintiff must first show that the defendant comes within the grasp of the Wisconsin law arm-statute, which is to be liberally construed in favor of jurisdiction. See id.; see also Vermont Yogurt Co. v. Blanke Baer Fruit & Flavor Co., 107 Wis. 2d 603, 606, 331 N.W.2d 315, 317 (Ct. App. 1982). The burden then shifts to the defendant to show that jurisdiction would violate due process. See Vermont, 107 Wis. 2d at 60, 331 N.W.2d at 318; see also Leach, 154 F.3d at 714.

Scottsdale and Acceptance cite two provisions of the Wisconsin long-arm statute to support their contention that exercising jurisdiction over the Wilds is appropriate in this case: § 801.05(1)(d) (local presence or status) and § 801.05(12) (personal representative). Section

801.05(1)(d) provides that personal jurisdiction exists over a defendant who "is engaged in substantial and not isolated activities within this state." Section 801.05(12) provides that a court in Wisconsin can exercise jurisdiction over the "personal representative" of a deceased person "where one or more of the grounds stated in subs. (2) to (11) would have furnished a basis for jurisdiction had he been living." Therefore, to establish jurisdiction over the Wilds under § 801.05(12), Scottsdale and Acceptance have the burden to show both that (1) this court would have had jurisdiction over the Wilds' son, Joseph Wild; and (2) Donald Wild and Diana Wild are "personal representatives" of Joseph Wild within the meaning of § 801.05(12).

With regard to (1), Scottsdale and Acceptance list a number of contacts that Joseph Wild had with Wisconsin: he was in Wisconsin voluntarily at the time of the accident; he was selling magazines to Wisconsin citizens; he was a passenger in the van involved in the accident; and he died while in Wisconsin. Scottsdale and Acceptance then conclude that "[t]here is no question that, if he had survived the accident, Joseph Wild would be subject to the personal jurisdiction of the Court in this matter." Plf.'s Br., dkt. #203, at 5. However, the only provision of the Wisconsin long-arm statute that Scottsdale and Acceptance cite to support this assertion is § 801.05(1)(d). Regardless whether Joseph Wild's contacts with Wisconsin would constitute "substantial and not isolated activities," within the meaning of § 801.05(1)(d), Scottsdale and Acceptance cannot rely on that subsection because it is not included in § 801.05(12). Section

801.05(12) states expressly that the basis for jurisdiction over the deceased must be established on "one or more grounds stated in *subs. (2) to (11)*." (Emphasis added.) Therefore, even in the unlikely possibility that Joseph Wild would have been subject to the jurisdiction of this court if he were alive, Scottsdale and Acceptance have failed to meet their burden of demonstrating that his parents are within this court's jurisdiction.

Moreover, even if Scottsdale and Acceptance had demonstrated that jurisdiction could have been exercised over Joseph Wild, they have not alleged in their complaints or introduced any evidence that the Wilds have been appointed as the personal representatives of Joseph Wild. Again, it is the burden of Scottsdale and Acceptance to demonstrate that personal jurisdiction exists. They have failed to meet this burden under § 801.05(12) because they have not shown either that jurisdiction would have existed over Joseph Wild under subsections (2) to (11) or that the Wilds are his personal representatives.

To the extent Scottsdale and Acceptance intended to use § 801.05(1)(d) as an independent basis for establishing jurisdiction over the Wilds, they have waived this argument by failing to develop it, arguing instead that the focus should be on the actions of the Wilds' son. See Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments that are not developed in any meaningful way are waived."); see also Finance Investment Co. (Bermuda) Ltd. v. Geberit AG,

165 F.3d 526, 528 (7th Cir. 1998); Colburn v. Trustees of Indiana University, 973 F.2d 581, 593 (7th Cir. 1992) ("[plaintiffs] cannot leave it to this court to scour the record in search of factual or legal support for this claim); Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs, Benefits Review Board, 957 F.2d 302, 305 (7th Cir. 1992) (court has "no obligation to consider an issue that is merely raised, but not developed, in a party's brief").

It is doubtful, however, that Scottsdale and Acceptance could have used § 801.05(1)(d) to establish jurisdiction over the Wilds under the facts alleged in the complaints. The language "substantial and not isolated activities" suggests that § 801.05(1)(d) is a provision governing general rather than specific jurisdiction, similar to the "continuous and systematic" contacts test used for determining the existence of general jurisdiction under the due process requirements of the Constitution. See Logan Productions, Inc. v. Optibase, Inc., 103 F.3d 49, 52 (7th Cir. 1996). The only Wisconsin contact of the Wilds that Scottsdale and Acceptance allude to in their complaints is the Wilds' wrongful death suit. Scottsdale and Acceptance cannot argue that the wrongful death suit alone is substantial enough to allow the Wilds to be sued in this state on any matter, particularly when the Wilds' suit is here only because of a motion for a change of venue .

In sum, Scottsdale and Acceptance have failed to meet their burden of showing that this court can exercise personal jurisdiction over the Wilds in this case. Accordingly, the Wilds'

motion to dismiss for lack of personal jurisdiction must be granted. Because I conclude that Scottsdale and Acceptance have failed to show a basis for exercising personal jurisdiction over the Wilds, it is unnecessary to determine whether the Wilds were served properly by Acceptance. That motion will be denied as moot.

B. Motion to Intervene

At the same time as the Wilds are trying to get out of this case, Progressive is trying to get back in. Originally, Progressive was a named defendant, but in an opinion and order entered on August 11, 2000, I dismissed it from the case under Rule 21 because it lacked diversity with Scottsdale. (Both are citizens of Ohio). Progressive now seeks to intervene under Fed. R. Civ. P. 24(b)(2), permissive intervention, so that it can assert cross-claims against the other defendants. It does not seek to assert a claim against Scottsdale. Under Rule 24(b)(2), before a court may grant a motion to intervene, the proposed intervenor must show that there are both (1) a common question of law or fact; and (2) independent jurisdiction. See Security Insurance Co. of Hartford v. Schipporeit, 69 F.3d 1377, 1381 (7th Cir. 1995).

The parties do not dispute that Progressive's claim and the main action share a common question of law or fact. Both arise out of the same accident. The question is whether Progressive has shown that there is an independent basis for jurisdiction. Progressive points to

the supplemental jurisdiction statute, 28 U.S.C. § 1367. Under § 1367(a), "district courts shall have supplemental jurisdiction over all other claims that are so related to the 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." The statute further states that "[s]uch supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." Id.

Defendants Monica Forgues and Nancy Ashton argue that § 1367 can never be used as a basis for independent jurisdiction because by definition supplemental jurisdiction is not independent, but always relies on the jurisdictional basis of the original claim. However, this argument mischaracterizes the meaning of "independent" in the jurisdictional requirement. As Forgues and Ashton point out themselves, the independent jurisdiction requirement is not part of Rule 24, but rather comes from the basic principle that courts cannot adjudicate claims over which they have no subject matter jurisdiction. See Fed. R. Civ. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts.") In other words, the independent jurisdiction requirement reminds courts that it is not enough for a proposed intervenor to demonstrate that there is a common question of law or fact. She must also point to some federal statute that would provide jurisdiction for her claim. However, whether that statute is § 1331, § 1332 or § 1367 is not relevant. Section § 1367 empowers a

federal court to exercise jurisdiction over a claim just as § 1331 and §1332 do and federal jurisdiction is not being extended in cases where the requirements of § 1367 are satisfied. In this way, supplemental jurisdiction *is* an "independent" basis for jurisdiction and can be relied upon for the purpose of permissive internvention.

Although § 1367 may be used as a basis for intervening under Rule 24(b)(2), this does not mean that Progressive has shown that using it this way would be justified in this case. In the August 11 opinion, I concluded that Progressive satisfied the requirements of § 1367(a) because its claim arose from the same occurrence as Scottdale's claim, the van crash. However, I also noted that under § 1367(b), courts may not exercise supplemental jurisdiction in diversity cases over claims by absentee parties seeking to intervene as plaintiffs pursuant to Rule 24. Further, I noted that before Progressive could intervene under Rule 24, "it must be prepared to explain why it believes that a nondiverse intervening defendant may assert cross claims against other defendants."

In response, Progressive contends that the plain language of 1367(b) provides the necessary explanation. Because § 1367(b) refers only to *plaintiffs* who are attempting to intervene, Progressive argues, the statute does not act as a bar to a party proposing to intervene as a defendant. On this point, I cannot disagree with Progressive. In the August 11, I stated that, under American Motorists Insurance Co. v, Trane Co., 657 F.2d 146 (7th Cir. 1981), and

Truck Insurance Exchange v. Ashland Oil, Inc., 951 F.2d 787 (7th Cir. 1992), the interests of Scottsdale and Acceptance were "sufficiently adverse to justify their alignment as plaintiff and defendant" because Progressive would benefit from a finding that Scottsdale was liable to the other defendants. Therefore, because Progressive seeks to intervene as a defendant, there is nothing in the plain language of § 1367(b) that would prevent it from doing so.

However, the inquiry does not end there. Section 1367(c)(4) provides that a district court may decline to exercise supplemental jurisdiction when "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." I find that there are "compelling reasons" for declining jurisdiction over Progressive's claims in this case. Specifically, permitting Progressive to intervene, even though it is a defendant, would contravene the purpose behind § 1367 (a) and (b) by allowing Progressive to circumvent the requirements for diversity jurisdiction and would potentially expand this court's jurisdiction beyond what is allowed by 28 U.S.C. § 1332.

When jurisdiction is premised on § 1332 as in this case, the general rule is that a suit can be maintained only if there is complete diversity, that is, if there are no residents of the same state on both sides of the lawsuit. See Turner/Ozane v. Hyman/Power, 111 F.3d 1312, 1319 (7th Cir. 1997). It is undisputed that Progressive's presence in this case as either a plaintiff or defendant would destroy complete diversity and that, for this reason, Scottsdale is barred from

asserting a claim against Progressive. Both Progressive and Scottsdale are citizens of Ohio, while Progressive also shares Wisconsin residency with some of the other defendants. It is true that Progressive technically falls within the exception to the rule of complete diversity under § 1367 because it is intervening as a defendant. However, the issue cannot be resolved by slipping through the technical requirements of § 1367 when there is a danger of expanding jurisdiction beyond what is conferred by § 1332.

In Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978), the Supreme Court expressed its concern that supplemental jurisdiction (then referred to as ancillary jurisdiction) could be used by parties to circumvent the requirements of diversity jurisdiction and thereby extend jurisdiction in diversity cases beyond what was granted by Congress in § 1332. The Court stated that even in cases in which nondiverse parties have claims that form part of the same case or controversy, it must be determined whether Congress has "expressly or by implication negated the exercise of jurisdiction over the particular nonfederal claim." Id. at 373 (internal quotations omitted). In making this determination, "the context in which the nonfederal claim is asserted is crucial." Id. at 376. After setting forth these principles, the Court held that ancillary jurisdiction could not be exercised in that case because the plaintiff was seeking to assert a claim against a third-party defendant See id. Significantly, the Court noted that "ancillary jurisdiction typically involves claims by a defending party *haled into court*

against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court." Id. (Emphasis added). The Court also noted that the claim the plaintiff wanted to assert was "new and independent." Although it was factually related to the main action, the new claim did not depend on the issues to be resolved in the original case. See id.

Applying the principles annunciated in Kroger to this case, it is clear that exercising supplemental jurisdiction over Progressive's claim would not be appropriate. Although Progressive seeks to intervene as a defendant, the policy reasons identified in Kroger for excusing defendants from satisfying diversity requirements do not exist here. Progressive is not being haled into court against its will and its rights will not be irretrievably lost if it cannot intervene. Progressive cannot even argue that its claims will be banished to state court because I have granted Progressive's motion to amend its answer in Wild v. Subscriptions Plus, Inc., 00-C-67-C, so that it can seek a declaratory judgment that its insurance policy does not require it to defend or indemnify Subscriptions Plus, Inc. or Karleen Hillery. Furthermore, Progressive does not contend that resolution of its claims is dependent on the resolution of this case. Rather, Progressive is seeking to affirmatively assert its own claims against other defendants for its own convenience.

Although the holding in Kroger was superseded by the adoption of § 1367(b) in 1990,

it has generally been observed that the supplemental jurisdiction statute was intended to codify the holding in that case. See 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3523, at 72 (2000 Supp.) Therefore, the purpose for not including defendants in the prohibitions of § 1367(b) can be determined in light of Kroger. Because defendants cannot choose the forum in which a case is brought and because their rights may often be "irretrievably lost" if they are not allowed to defend against a claim, § 1367(b) recognizes the decreased danger of defendants' use of supplemental jurisdiction merely to avoid the complete diversity requirement. However, when a proposed intervenor is seeking not to defend a claim, but merely to assert its own claims against other defendants, the reasons for excusing the diversity requirement disappear. Although Congress may not have identified Progressive's particular situation explicitly, it is unlikely that Congress was thinking of intervening defendants such as Progressive when it excluded defendants from the application of § 1367(b). Cf. Russ v. State Farm Mutual Auto Insurance Co., 961 F. Supp. 808, 820 (E.D. Pa. 1997) ("To retain this case in this court is to say to Congress: 'We know what you meant to say, but you didn't quite say it. So the message from us in the judicial branch to you in the legislative branch is: Gotcha! And better luck next time.' Such a message is not required by the separation of powers. Nor is it in harmony with the fact that Congress and the courts, however different their respective roles, are parts of a single government.")

The cases Progressive cites to support its position involved either an intervenor seeking to assert a claim antagonistic to the plaintiff, see Development Finance Corp. v. Alpha Housing & Health Care, Inc., 54 F.3d 156 (3d Cir. 1995), or a defendant who satisfied the diversity requirement with regard to the plaintiff and was asserting cross-claims against nondiverse co-defendants. See Meritor Savings Bank v. Camelback Canyon Investors, 783 F. Supp. 455 (D. Ariz. 1991). In those cases, then, the party asserting the claim was either trying to protect a right that could be irretrievably lost or was already in the case against its will. Neither situation is present here. Progressive is unable to point to a case in the Seventh Circuit or elsewhere that allowed a party to do what Progressive is requesting, namely, to intervene as a defendant to seek only affirmative relief against co-defendants even though it lacks diversity with the plaintiff. These circumstances are undoubtedly "exceptional" within the meaning of § 1367(c)(4) and justify a denial of Progressive's motion to intervene.

Finally, I note briefly that even had Progressive satisfied the requirements of § 1367, I would nonetheless decline to exercise jurisdiction over its claim, as I am free to do. See Shea v. Angulo, 19 F.3d 343, 346 n.2 (7th Cir. 1994); B.H. by Pierce v. Murphy, 984 F.2d 196, 200 (7th Cir. 1993). Other than its own convenience, Progressive has not shown any interest that would be advanced by allowing its intervention. Progressive has not identified how its involvement would add value to the existing litigation or clarify the issues. If anything, adding

Progressive's claims to this case would cause more delay in a suit that has already been delayed too long.

Quoting Security Insurance Co. v. Schipporeit, 69 F.3d 1377, 1381 (7th Cir. 1995), Progressive notes that "the most obvious benefits of intervention in general are the efficiency and consistency that result from resolving related issues in a single proceeding." However, as I noted in my opinion and order entered August 11, 2000, with lawsuits regarding this accident now pending in both state and federal court, "there is no longer any hope for a 'complete, consistent, and efficient settlement' of this controversy in a single forum, regardless whether [] Progressive asserts its claimed lack of duty to defend or indemnify in this lawsuit." Therefore, Progressive's appeal to the benefits of an efficient resolution are unconvincing. Finally, as noted above, Progressive is not prejudiced because it can seek a declaratory judgment in Wild**.** Accordingly, Progressive's motion to intervene will be denied.

ORDER

IT IS ORDERED that:

1. The motion of defendants Diana Wild and Donald Wild to dismiss this case for lack of subject matter jurisdiction is DENIED as moot;

2. The motion of defendants Diana Wild and Donald Wild to dismiss them from this

case for lack of personal jurisdiction is GRANTED and the Wilds are DISMISSED from this case; accordingly, their motion to dismiss intervening defendant Acceptance Insurance Companies complaint against them for insufficiency of process is DENIED as moot; and

3. The motion of Progressive Northern Insurance Company to intervene is DENIED.

Entered this 20th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge