

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CONTINENTAL CASUALTY COMPANY,

Plaintiff,

MEMORANDUM and ORDER

v.

07-C-048-S

WILLIAM A. SCHEMBERA, SCHEMBERA
& SMITH and EVAN ZIMMERMAN,

Defendants.

Plaintiff Continental Casualty Company commenced this action against defendants William A. Schembera, Schembera & Smith and Evan Zimmerman seeking a declaration that it has no obligation to defend or indemnify defendants William Schembera and Schembera & Smith for malpractice claims asserted by defendant Zimmerman. Plaintiff also sought a declaration that certain types of damages, if awarded in an underlying malpractice claim, were not covered under the terms of plaintiff's policy.

On May 1, 2007 plaintiff filed a motion for summary judgment on its claims that it had no obligation to defend or indemnify because defendant Shembera failed to disclose the claim at the time of the application for insurance. In response, defendants claimed entitlement to defense and indemnification. On June 13, 2007 the Court denied plaintiff's motion for summary judgment and entered judgment declaring that plaintiff owes a duty to defend and indemnify William A. Schembera and Schembera & Smith in actions by

defendant Evan Zimmerman for professional negligence. On June 30, 2007 Evan Zimmerman died.

Plaintiff now moves to alter or amend the judgment and to reopen the case to address unresolved issues on plaintiff's claims that certain types of damages are excluded under the policy. Plaintiff correctly notes that its alternative claims to limit the scope of insurance coverage were not raised or addressed in the previous summary judgment motion. The Court now concludes that it would be inappropriate to address those claims, but that judgment should be amended to reflect that the claims are dismissed without prejudice.

Even when the threat of suit is sufficient to satisfy the jurisdictional case or controversy requirement, a court is not compelled to declare all rights and relations of the parties because the granting of relief pursuant to 28 U.S.C. § 2201 is discretionary. Nationwide Ins. v. Zavalis, 52 F.3d 689, 692 (7th Cir. 1995). Among the considerations in exercising this discretion are judicial efficiencies and whether comparable relief is available to plaintiff in another forum at another time. Id. Certainly, resolving the issue of the insurer's duty to defend and the general availability of coverage are appropriate for resolution as a matter of declaratory relief and could not be efficiently resolved in the underlying action. However, resolving issues concerning whether hypothetical damages awarded in a presently

unfiled underlying action are subject to coverage is both inefficient and inappropriate.

Defendant Zimmerman's death reduces the likelihood that a malpractice action will be filed. Should such an action be filed it would be far more efficient to await its outcome resolving issues concerning the coverage of specific damages in that action only if they are actually awarded. Resolving such issues at this time would be premature, wasteful and of little benefit to the parties.

ORDER

IT IS ORDERED that plaintiff's motion to amend judgment is GRANTED to the extent that plaintiff's claims seeking a declaration concerning the scope of malpractice damages covered by the policy are dismissed without prejudice, and is in all other respects DENIED.

IT IS FURTHER ORDERED that judgment be amended accordingly.

Entered this 9th day of August, 2007

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge