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

SCOTTSDALE INSURANCE COMPANY,

Plaintiff,

v.

OPINION AND ORDER

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, 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, ACCEPTANCE INSURANCE COMPANIES, (INTERVENOR DEFENDANT),UNITY HEALTH PLANS INSURANCE CORPORATION, HEART OF TEXAS DODGE, INC., PPD PHARMACO,

99-C-539-C

Defendants.

Judgment was entered in this action for declaratory judgment on March 8, 2001, after the parties agreed to dismiss the case without prejudice. Shortly afterward, defendants Subscriptions Plus and Karleen Hillery moved for an award of attorney fees, contending that they are prevailing parties as to their claim that plaintiff Scottsdale Insurance Company must defend them in the underlying lawsuit against them. Plaintiff opposes the motion on a number of grounds, including the lack of a written judgment in defendants' favor. (For the remainder of this opinion, which affects only defendants Subscriptions Plus and Hillery, I will refer to them simply as defendants.)

Both sides have argued at length about the need for a judgment on which to base an award of attorney fees. I believe that plaintiff is correct in asserting that defendants cannot claim an entitlement to an award of fees unless they have a judgment in their favor. This does not mean, however, that because defendants have no such judgment, the dispute is over. It is evident that it was the court's error not to have included in the form of final judgment the two earlier holdings that defendants are entitled to a defense and that they are not entitled to indemnification for any awards of punitive damages. See Opin. and Order of Nov. 13, 2000. In that same order, plaintiff's motion for summary judgment on its duty to indemnify defendants for any non-punitive damage awards was denied because factual disputes prevented the resolution of the motion. The parties' agreement to dismiss the case without prejudice was based on their understanding that the factual disputes would be

determined in the civil action pending in the Circuit Court for Dane County, Wisconsin. I will vacate the judgment entered on March 8 and direct the clerk of court to enter an amended judgment incorporating the November 13, 2000 rulings.

Because there will be a formal judgment entered in favor of defendants on the question of plaintiff's duty to defend them, it is appropriate to move on to the question whether Okla. Stat. § 3629(B) permits an award to defendants. (Oklahoma law controls this case: the insurance policy was negotiated and issued there and defendants were located there when the policy issued. Under the law of the forum state, Wisconsin, Oklahoma law would govern because Oklahoma has the most significant contacts with the case.). On its face, the statute seems to permit such an award. It provides that "[u]pon a judgment rendered to either party, costs and attorney fees shall be allowed to the prevailing party." However, plaintiff contends that defendants do not qualify under the statute for three reasons. 1) They did not proffer proofs of loss to plaintiff, as required by § 3629(A); 2) § 3629 does not apply to declaratory judgment actions; and 3) this court should leave the whole matter of fees to the state court, which will be determining the issues of defendants' liability and plaintiff's duty to indemnify defendants for any such liability. Plaintiff's arguments are not persuasive.

Oklahoma does not allow suits for declaratory judgment on questions of coverage to be brought in state court. See, e.g., Horace Mann Ins. Co. v. Johnson, 953 F.2d 575 (10th

Cir. 1991). For that reason, there are no state cases on the availability of fee awards in declaratory judgment actions or on the need for proofs of loss in such cases. The federal courts allow suits for declaratory relief and they have interpreted § 3629 as mandating the award of fees and costs to the prevailing insured even in actions for declaratory relief and even when the insured has not filed a proof of loss. See Stauth v. National Union Fire, 236 F.3d 1260 (10th Cir. 2001). Plaintiff argues that this court should not follow Stauth, not only because it is a federal case interpreting state law and not entitled to any deference from a district court in another circuit, but because its reasoning is not persuasive. According to plaintiff, the court of appeals failed to recognize that the statute has been interpreted by the Oklahoma courts as requiring proofs of loss as a condition precedent to recovery of fees and costs and it extended the reach of the statute to make it applicable to declaratory judgment actions that the state does not recognize. Why, asks plaintiff, should this court give any deference to an opinion in which the court of appeals ruled both that the Oklahoma Supreme Court would hold that proofs of loss are not necessary, when the state court held to the contrary in Taylor v. State Farm, 981 P.2d 1253 (1999), and that the legislature would want § 3629 to apply to the recovery of fees and costs in actions the legislature does not even permit?

Given the fact that in Oklahoma, declaratory judgment actions can be brought only in federal court, it is necessary to look to federal court opinions on the subject. It is true that

this court is not bound by the opinions of courts in other circuits, but a court of appeals' opinion on a matter of law of a state in its circuit is likely to be useful to a court that lacks familiarity with the law of that state. The Court of Appeals for the Tenth Circuit has had several occasions to consider the anomaly of Oklahoma's procedure; its opinions have persuasive value if not binding effect.

On both of the substantive questions raised by plaintiff, the Stauth opinion is persuasive. On the issue of proofs of loss, the court of appeals found it "'odd' to speak of 'proof of loss' in the ordinary formal sense in [a declaratory judgment] action, as contrasted with a first-party action" in which the insured has sustained a loss and seeks reimbursement from the insurer. Stauth, 236 F.3d at 1264. In a declaratory judgment action, the "loss" is having to bring an action to enforce the insured's right to a defense and indemnification. It is not the sort of previously incurred and determinable loss that is involved in a first-party action brought by an insured. I agree with the Tenth Circuit that it is illogical to read the Oklahoma statute as requiring a written proof of loss in a declaratory judgment action. Instead, the court must determine whether the insured provided notice that complied with the terms of the insurance policy and was sufficient to advise the insurer of the claim.

Plaintiff has not argued that defendants did not provide written notice of their claim that was sufficient to advise plaintiff of their claim and trigger plaintiff's obligation to defend and indemnify them. The proof is in the pudding: the "pudding" being plaintiff's filing of

this action for declaratory relief from that obligation. Moreover, plaintiff has never contended that defendants' written notice did not comply with the terms of the insurance policy. I conclude, therefore, that neither the Oklahoma statute nor the terms of the insurance policy required defendants to submit proofs of loss in order to obtain a determination of plaintiff's obligations to them under the terms of its policy.

In holding that the fee award provisions of § 3629 apply to a declaratory judgment action, the Stauth opinion relies upon an earlier holding in An-Son Corp. v. Holland-America Ins. Co., 767 F.2d 700 (10th Cir. 1985). In An-Son, the court of appeals noted that the Oklahoma courts had given § 3629 a broad reading and had held uniformly that an award of attorney fees to the prevailing party in a suit by an insured against the insurer is the general rule under the statute. See id. at 703. The court gave weight to the comments in 7C John Appleman, Insurance Law and Practice § 4691, p. 283 (1979), to the effect that fairness requires an award of attorney fees to the insured who has to litigate to enforce the insurer's obligation to defend the insured according to the terms of the insurance contract. See An-Son, 767 F.2d at 704. "After all, the insurer had contracted to defend the insured and it failed to do so. It guessed wrong as to its duty and should be compelled to bear the consequences thereof." Appleman, supra, at 283. If this is not the rule, the insured is "no better off financially than if he had never had the contract right mentioned above." Id.

Plaintiff argues that it is illogical to extend the right to attorney fees to cover actions

the legislature has refused to authorize. Were the legislature's refusal to authorize declaratory judgment actions a matter of public policy related to its regulation of the insurance industry plaintiff's argument would have more force. However, as the Court of Appeals for the Tenth Circuit has held, Oklahoma's exclusion of liability insurance coverage from its declaratory judgment act does not reflect any regulatory policy. See Horace Mann Ins. Co., 953 F.2d at 577, in which the court of appeals held that because the Declaratory Judgment Act is not part of the insurance code but a rule of civil procedure, it was not intended to express a legislative policy that no declaratory judgment actions be brought in any court, including a federal court.

I conclude, therefore, that § 3629 allows an award of fees and costs to a prevailing party in a declaratory judgment action. Defendants prevailed on their contention that they are entitled to a defense by plaintiff and to that extent are entitled to an award of fees and costs under the Oklahoma statute. This conclusion leaves open only the question whether a decision on the award should be left to the state court to determine after the questions of liability and the duty to indemnify have been resolved.

Although plaintiff argues that confusion might result if two different courts decided the issue of fees and costs and also that it might be entitled to an offset if the state court finds that it is the prevailing party on the duty to indemnify, it has not shown that there is any real danger of confusion or overlap of judicial responsibilities. Defendants are entitled

to an award of fees and costs for that portion of this lawsuit that related to the duty to defend; they are not entitled to any reimbursement at this point for the work performed in relation to the duty to indemnify, which has not been decided, or to any reimbursement at any time for the fees and costs incurred in opposing plaintiff's motion for a judgment in its favor on its duty to indemnify defendants for awards of punitive damages. This court's determination of an amount to be awarded to defendants will have no bearing on the state court's determination whether defendants are entitled to an award or the amount of the award, if any. Whether plaintiff might be entitled to an award for its own fees and costs, should it prevail in state court, is an entirely separate question for the state court to answer.

The possibility of an offset is no reason to put off making a determination of the size of the award to defendants at this stage. It is impossible to know how long it will be before the state court proceedings are completed. It would be unfair to defendants to refrain from making an award to them at this point simply because of the possibility that they might be required to make a similar award to plaintiff sometime in the future.

ORDER

IT IS ORDERED that the judgment entered herein on March 8, 2001, is VACATED. The clerk of court is directed to enter a new judgment to read as follows:

IT IS DECLARED that

1. Plaintiff Scottsdale Insurance Company is required to defend its insureds, defendants Subscriptions Plus, Inc. and Karleen Hillery, against claims arising out of the March 25, 1999 crash of the van driven by defendant Jeremy Holmes;

2. Plaintiff Scottsdale Insurance Company and intervening defendant Acceptance Insurance Corporation have no duty to indemnify defendants Subscriptions Plus, Inc. and Karleen Hillery for punitive damages arising out of the March 25, 1999 van crash; and

3. Intervening defendant Acceptance Insurance Corporation has no duty to defend defendants Subscriptions Plus, Inc. and Karleen Hillery against claims arising out of the March 25, 1999 van crash.

IT IS ORDERED that

1. Defendant Progressive Insurance Company is DISMISSED pursuant to Fed. R. Civ. P. 21;

2. This case is DISMISSED without prejudice as to all other parties by agreement of all the parties that have appeared in the suit; and

3. Defendants Subscriptions Plus, Inc. and Karleen Hillery are entitled to an award of attorney fees and costs for the expenses incurred in defending this suit insofar as those expenses relate to the issue of plaintiff's obligation to provide defendants a defense against the claims arising out of the March 25, 1999 van crash, in an amount to be determined.

FURTHER, IT IS ORDERED that defendants Subscriptions Plus, Inc. and Karleen Hillery may have until July 26, 2001, in which to submit an itemized statement of time and expenses attributable solely to the issue of plaintiff's obligation to defend them; plaintiff Scottsdale Insurance Company may have until August 16, 2001, in which to respond to the itemization. If defendants are unable to disentangle their expenses, they are free to argue

what proportion of those expenses they believe should be attributed to the obligation to defend and why; plaintiff may respond to the proposal in its opposition brief.

Entered this 6th day of July, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge