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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In this civil action for declaratory relief, plaintiff Scottsdale Insurance Company contends that it has no duty to defend or indemnify any of the named defendants for liability resulting from a van crash that occurred in Rock County, Wisconsin on March 25, 1999. Jurisdiction is present under 28 U.S.C. § 1332, diversity of citizenship. Presently before the court is a motion filed by defendants Donald Wild and Diana Wild seeking to dismiss the complaints of Scottsdale and intervening defendant Acceptance Insurance Companies for failure to state a claim. The Wilds contend that it is the policy of the State of Wisconsin to bar an insurer from seeking declaratory relief against its insured and the injured party when the insurer is a defendant in the liability suit. Scottsdale and Acceptance have asked that the motion be summarily denied because it was filed more than three months after the court's deadline for filing dispositive motions, which was June 30, 2000. Although the Wilds' motion was filed in violation of the scheduling order, I will consider it on the merits. Because I conclude that federal law governs the availability of declaratory relief in a diversity action and because Wisconsin's policy is not eroded by allowing the coverage issues to be determined by this court, the Wilds' motion to dismiss for failure to state a claim will be denied.

It is unclear why the Wilds have waited until now to file this motion. There were no facts unknown at the time this case was initially filed that the Wilds needed to discover before

this motion could be brought. Furthermore, as noted above, the deadline for filing dispositive motions has long since passed. Under Fed. R. Civ. P. 12(b)(6), ordinarily motions to dismiss must be made before pleading. However, under Fed. R. Civ. P. 12(h)(2), the defense of failure to state a claim can be asserted at any time before the close of trial. See Romstat v. Allstate Insurance Co., 59 F.3d 608, 610-11 (6th Cir. 1995); Codest Engineering v. Hyatt International Corp., 954 F. Supp. 1224, 1231 (N.D. Ill. 1996). Therefore, motions to dismiss for failure to state a claim filed after pleading may be construed as a motion on the pleadings under Rule 12(c) or a motion for summary judgment under Rule 56. See Turbe v. Government of Virgin Islands, 938 F.2d 427, 428 (3d. Cir. 1991). In this case, it makes no difference how the Wilds' motion is construed because it fails as a matter of law regardless whether it is a motion to dismiss, a motion on the pleadings, or a motion for summary judgment.

For the sole purpose of deciding this motion, I find the following facts from the record.

FACTS

On March 25, 1999, a van accident occurred in Rock County, Wisconsin, resulting in seven deaths and numerous injuries. No fewer than four civil lawsuits were filed by the individuals injured in the accident as well as by the survivors of those that were killed. Three of the lawsuits were filed in Wisconsin state courts. In addition, Donald and Diana Wild filed

a case in Louisiana federal court on June 21, 1999, which was then transferred to this court (Wild v. Subscriptions Plus, Inc., 00-C-67-C). Both plaintiff Scottsdale Insurance Company and intervening defendant Acceptance Insurance Companies were named as defendants in each of the suits. Since the time of filing, all three of the state court cases have been consolidated into one case in Dane County Circuit Court (Forgues v. Heart of Texas Dodge, Inc., 99-CV-952).

Before the accident, Scottsdale 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, Acceptance issued a policy of excess liability indemnity insurance to Subscriptions Plus, which was also in effect at this time. 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. Intervening defendant Acceptance filed a complaint on December 14, 1999, requesting the same determination be made with regard to its own duty to defend and indemnify.

Defendants Donald Wild and Diana Wild are citizens of Lousiana. Plaintiff Scottsdale Insurance Company is a citizen of Arizona and Ohio. Intervening defendant Acceptance Insurance Companies is a citizen of Iowa and Nebraska.

OPINION

Unlike injured parties in many states, plaintiffs in Wisconsin may bring a negligence against the insurer of the alleged tortfeasor as well as, or even instead of, the alleged tortfeasor. See Wis. Stat. § 803.04(2)(a). If the insurance policy was issued outside the state, the injured party may name the insurer as a defendant only if the accident or injury occurred within the state. See id.

In interpreting this statute, the Supreme Court of Wisconsin has held that where the insurer is named as a defendant in the underlying liability suit brought by the injured party, "a separate and independent declaratory judgment action is not the proper method for resolution of insurance coverage issues." Fire Insurance Exchange v. Basten, 202 Wis. 2d 74, 83, 549 N.W.2d 690, 693 (1996) (internal quotations omitted); see also New Amsterdam Casualty Co. v. Simpson, 238 Wis. 550, 555, 300 N.W. 367, 369 (1941). Rather, the insurer must assert the coverage issues as defenses in the liability suit. The court has reasoned that the legislative policy behind the direct action statute is to "have all issues determined in a single action." Simpson, 238 Wis. at 555, 300 N.W. at 369. Allowing a separate declaratory judgment would lead to "separate trials between the same parties of issues bearing upon the same cause of action and a long delay before the merits of the claim for personal injury could be examined and fully disposed of by a court." Id.; see also American Motorists Insurance Co.

v. Trane Co., 544 F. Supp. 669, 696 n.21 (W.D. Wis. 1982) ("It is clear that the bringing of a declaratory judgment action is against public policy in Wisconsin where permitting such an action would result in separate trials between the same parties on issues arising out of the same cause of action . . . In that situation, a declaration of the applicability of the policy to the type of claim alleged would not necessarily terminate the controversy between the injured party and the insurer.")

Relying on this policy, defendants Donald and Diana Wild contend that the complaints of plaintiff Scottsdale Insurance Company and intervening defendant Acceptance Insurance Companies must be dismissed because Wisconsin law bars their claims. Because the Wilds have a wrongful death action pending in this court in which both Scottsdale and Acceptance, as insurers of Subscriptions Plus and Karleen Hillery, are named defendants, the Wilds argue that a separate declaratory action cannot be maintained under § 803.04(2)(a).

If this action had been brought in state court, I would be inclined to agree with the Wilds. The issue is not so easily resolved, however, because this case was brought in federal court under the Declaratory Judgment Act, 28 U.S.C. § 2201. Under Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), a federal court applies state substantive law and federal procedural law in a diversity case. Therefore, it must be determined whether the availability of declaratory relief is "procedural" or "substantive" under Erie in order to decide whether state

or federal law should govern this question.

As long ago as 1937, the United States Supreme Court stated that "[t]he operation of the Declaratory Judgment Act is procedural only." Aetna v. Haworth, 300 U.S. 227, 240 (1937). This principle was buttressed in Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 674 (1950), in which the Court stated in dicta that, in deciding whether declaratory relief is available in federal court, it is "immaterial" whether "the declaratory remedy which may be given by the federal courts may not be available in the state courts."

In spite of these statements by the Supreme Court, the Wilds rely on Allstate Insurance Company v. Charneski, 286 F.2d 238 (7th Cir. 1960), to support their argument that Wisconsin law on declaratory judgments must be applied. In Charneski, the plaintiff insurance company brought a diversity suit in Wisconsin federal court seeking a declaratory judgment that it did not have a duty to indemnify its insured for a car accident that was caused by the insured's negligence. See id. at 239. After noting that the federal courts' interest in controlling their own procedure was "slight," the court held that Wisconsin's policy against allowing declaratory judgments by insurance companies in these circumstance was "substantive" and therefore Wisconsin law regarding declaratory judgments must be applied. Id. at 244.

Charneski was decided in 1960. The Court of Appeals for the Seventh Circuit has not had the opportunity to revisit the present issue since then. However, five years after Charneski

was decided, the United States Supreme Court decided Hanna v. Plumer, 380 U.S. 460 (1965), and clarified the standard for choice of law in diversity actions brought in federal court. The Court stated:

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, *are rationally capable of classification as either.*

Id. at 472. (Emphasis added.) Under the above standard, if a rule is "arguably procedural," federal law applies. Id. at 476 (Harlan, J., concurring).

Charneski has been criticized as being inconsistent with even pre-Hanna Supreme Court precedent. See 10B Wright, Miller & Kane, Federal Practice & Procedure § 2756, at 466 (3d ed. 1998). Regardless of the soundness of Charneski at the time it was decided, however, it seems clear that its holding has been seriously undermined by Hanna. Rules regarding the availability of a declaratory judgment are at minimum "arguably procedural," if not plainly so. See 19 Wright, Miller & Cooper, Federal Practice & Procedure § 4505, at 69 (2d ed. 1996). Therefore, it would be inconsistent with Hanna to apply the Wisconsin rule in this case. This conclusion is underscored by the fact that all other circuits considering the issue since Hanna have held that whether declaratory relief can be sought in the context of insurance disputes is an issue of federal rather than state law. See Cincinnati Insurance Co. v. Holbrook, 867 F.2d

1330 (11th Cir. 1989) (holding that Declaratory Judgment Act is procedural not substantive law); Federal Kemper Insurance Co. v. Rauscher, 807 F.2d 345, 352 (3d Cir. 1986) ("It is settled law that, as a procedural remedy, the federal rules respecting declaratory judgment actions, apply in diversity cases"); 118 East 60th Owners, Inc. v. Bonner Properties, Inc., 677 F.2d 200, 203 (2d Cir. 1982) ("Normally, the availability of state declaratory relief would be irrelevant to whether federal court may grant such a remedy"); Farmers Alliance Mutual Insurance Company v. Jones, 570 F.2d 1384 (10th Cir. 1975) ("It is well recognized that the [Declaratory Judgment] Act involves procedural remedies and not substantive rights.")

However, concluding that federal law governs the availability of declaratory relief in this case does not mean that state policy is simply ignored. Rather, the general rule is that "the fact that the right of action is state-created and that the state would not allow a declaratory judgment under the circumstances are appropriate factors for the federal court to consider in exercising its discretion whether to hear the declaratory action." 10B Wright, Miller & Kane, § 2756, at 466.

In the opinion and order entered August 11, 2000, I determined that "considerations of practicality and wise judicial administration" did not bar Scottsdale from seeking declaratory relief in federal court. In reaching this conclusion, I considered the advanced stage of this case, the lack of a showing that there was fact-finding required in determining the duty to defend and

indemnify that would conflict with the liability suits and the fact that the parties in the other cases were not same as in this one. I also determined that principles of comity did not require that coverage issues be determined only in state court.

For similar reasons, I conclude that allowing the declaratory suit to continue would not have an adverse effect on the policy of the state of Wisconsin. As noted above, the purpose of the Wisconsin rule is to avoid multiple suits and minimize the delay in determining the merits of the negligence claims. It is disingenuous for the Wilds to appeal to this policy, after the case has proceeded for more than a year and parties on both sides have devoted massive amounts of time, energy and paper to it. Furthermore, comity interests would not be advanced by dismissing this case. Because the Circuit Court for Dane County has decided not to determine the coverage issues until after liability has been established, dismissal of this case would mean only that Scottsdale would assert the coverage issues as defenses in the Wild case, which is also pending in this court. Either way a federal court will be deciding this issue. There is little practical difference between deciding those issues in this case or in Wild.

In sum, I conclude that federal law governs the availability of declaratory relief in a diversity action. Moreover, Wisconsin's policy is not eroded by allowing the coverage issues to be determined by this court. Because this suit is not barred under federal law, the Wilds' motion must be denied.

ORDER

IT IS ORDERED that the motion to dismiss for failure to state a claim of defendants Donald Wild and Diana Wild is DENIED.

Entered this 12th day of October, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge