IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ACUITY, a Mutual Insurance Company,

Plaintiff,

OPINION and ORDER

v.

05-C-485-C

INTERLOG USA, INC.,

Defendant.

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This is a civil action under the Declaratory Judgment Act, 28 U.S.C. § 2201. Plaintiff ACUITY, a mutual insurance company, requests a declaration that it has no duty to defend or indemnify defendant Interlog, USA, Inc. from a lawsuit filed against defendant in Illinois state court. Presently before the court is defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), failure to join an indispensable party pursuant to Fed. R. Civ. P. 12(b)(7) or in the alternative for transfer of venue pursuant to 28 U.S.C. § 1404(a).

Plaintiff contends that this court has jurisdiction under the diversity statute, 28 U.S.C. § 1332(a)(1). Defendant argues that subject matter jurisdiction is lacking because the amount in controversy requirement is not met. I agree with defendant that plaintiff has

failed to prove to a reasonable probability that the amount in controversy exceeds $75,000. Therefore, I will grant defendant's motion to dismiss. Because this court does not have subject matter jurisdiction, I cannot and need not address defendant's motion to dismiss for failure to join an indispensable party and defendant's motion in the alternative for transfer of venue.

For the sole purpose of deciding this motion, I draw the following facts from the allegations of the complaint and the affidavits submitted in support of and in opposition to the motion.

FACTS

Plaintiff ACUITY is an insurance corporation incorporated under the laws of Wisconsin with its principal place of business in Sheboygan, Wisconsin. Defendant Interlog, USA, Inc. is a corporation incorporated under the laws of Minnesota with its principal place of business in Minneapolis, Minnesota. Defendant does business in the state of Wisconsin and creates continuing relationships with Wisconsin residents by selling integrated shipping services.

Plaintiff sold defendant an insurance policy with an effective period from October 16, 2002 through October 16, 2003. On February 24, 2004, Stonecrafters, Inc., filed suit against defendant in the 19th Judicial Circuit in McHenry County, Illinois. The lawsuit

includes a claim by Stonecrafters and all persons similarly situated against defendant for violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227. Stonecrafters alleges that in September of 2003 defendant transmitted an unsolicited advertisement to Stonecrafters' facsimile machine in violation the Telephone Consumer Protection Act. Stonecrafters seeks an award of statutory damages for each statutory violation.

Plaintiff brought this action seeking a declaratory judgment that it does not have a duty to defend or indemnify defendant in the Stonecrafters action. The insurance policy plaintiff issued to defendant provides coverage for "those sums that the insured becomes legally obligated to pay as damages because of bodily injury, property damage, personal injury or advertising injury to which this insurance applies." The policy contains an exclusion for damages because of personal injury or advertising injury "[a]rising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured." Also, the policy contains an exclusion for "bodily injury or property damage expected or intended from the standpoint of the insured."

Attached to plaintiff's complaint in this case is an affidavit by Terrence Guolee, a lawyer representing defendant in the state court action. In his affidavit Guolee makes the following averment: "I do expect that defense costs and attorney fees in this matter will exceed $75,000." As additional evidence, plaintiff attached the affidavit of John Ganga, plaintiff's Field Claims Manager. He states that, "to date, ACUITY has paid Querrey &

Harrow $24,284.48 for attorney Guolee and his associates' defense of Interlog in the Illinois matter entitled Sonecrafters, Inc. v. Interlog USA, Inc. and Matthew Fronzac." Attached to Ganga's affidavit are the bills plaintiff received from Querrey & Harrow. Ganga avers also that, "Attorney Guolee has advised ACUITY that Stonecrafters, Inc. v Interlog USA, Inc. and Matthew Fronzac is in the early stages of discovery at this time."

Attached to defendant's brief is the affidavit of Brent Koughan, its Vice President of Operations. Koughan avers that he is primarily responsible for handling matters pertaining to the Stonecrafters lawsuit for defendant and that he has been in contact with Guolee about the matter. He states further that it is his understanding that the Stonecrafters suit is still in the discovery phase, that the lawsuit is one of many brought by Stonecrafters under the Telephone Consumer Protection Act and that all of these cases have been assigned to the same judge. He states also that a class has not been certified and that absent class certification he believes the damages may be only as high as $1,500.

OPINION

Defendant contends that this court lacks subject matter jurisdiction over plaintiff's claim because the amount in controversy does not meet the jurisdictional amount required for diversity jurisdiction under 28 U.S.C. § 1332(a), which states in relevant part: "The district courts shall have original jurisdiction in all civil actions where the matter in

controversy exceeds the sum or value of $75,000, exclusive of interests and costs." Generally, the amount in controversy alleged by a plaintiff in good faith will be determinative on the issue of the jurisdictional amount unless it appears to a legal certainty that the claim is for less than that required by the statute. Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1218 (7th Cir. 1995). However, if the court's jurisdiction is challenged by the court or the opposing party, the party seeking to invoke jurisdiction bears the burden of supporting its jurisdictional allegations by "competent proof." NLFC, Inc. v. Devcom Mid-America, 45 F.3d 231, 237 (7th Cir. 1995) (citing McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936)). See also Target Market Publishing, Inc. v. ADVO, Inc., 136 F.3d 1139, 1142 (7th Cir. 1998) (when defendant challenges amount in controversy, plaintiff must submit 'competent proof' that amount in controversy exceeds $75,000). The Court of Appeals for the Seventh Circuit has interpreted this burden to mean that a party must show "a reasonable probability that jurisdiction exists." Chase v. Shop 'N Save Warehouse Foods, 110 F.3d 424, 427 (7th Cir. 1997). See also Rexford Rand Corp., 58 F.3d at 1218 ("Competent proof means proof to a reasonable probability that jurisdiction exists").

In a suit seeking a declaratory judgment, the amount in controversy is the value to the plaintiff of the object of the litigation. America's Moneyline, Inc. v. Coleman, 360 F.3d 782, 786 (7th Cir. 2003). In this case, plaintiff seeks a declaration that it has no duty to

defend or indemnify defendant in the state court action. The value of that declaration to plaintiff is equal to the costs it would incur to defend and indemnify defendant in that action. However, the costs of indemnification do not count towards the amount in controversy because defendant has not been found liable in the state court action. Because no liability has been found, plaintiff's declaratory judgment action concerning its duty to indemnify defendant is not ripe for adjudication. Grinnell Mutual Reinsurance Co. v. Reinke, 43 F.3d 1152, 1154 (7th Cir. 1995) ("Illinois treats arguments about the duty to indemnify as unripe until the insured has been held liable.")(citing Outboard Marine Corp. v. Liberty Mutual Ins. Co., 154 Ill. 2d 90, 127 (1992)). Therefore, as both parties acknowledge, the costs plaintiff might incur in indemnifying defendant may not be considered in determining whether more than $75,000 is at stake in this case.

Thus, the only costs that may be counted toward the amount in controversy are the costs plaintiff will incur defending defendant in the state court action. Attorney fees incurred in defending the underlying action may be considered in determining whether the amount in controversy requirement has been satisfied. Grinnell Mutual Reinsurance Co. v Shierk, 121 F.3d 1114, 1117 (7th Cir. 1997).

The parties dispute whether plaintiff has provided competent proof that the attorney fees it will incur in defending defendant will exceed $75,000. Plaintiff notes that it has already paid over $24,000 in attorney fees and the case is in the early stages of discovery.

It argues that these facts constitute competent proof that it will incur more then $75,000 in the state court action. However, defendant argues that this statement is wholly conclusory and does not constitute competent proof. It notes that Ganga's statement in his affidavit that he was advised that the state court action is in the early stages of discovery is hearsay. Defendant argues that the state court action is actually in the late stages of discovery because the bills attached to Ganga's affidavit indicate that there has already been extensive discovery and motions, including third party discovery by both plaintiff and defendant.

Cases from other district courts suggest that claims similar to plaintiff's have not fared well. In Ohio Casualty Insurance Co. v. Lower Forty Gardens, Inc., 2003 U.S. Dist. LEXIS 21547 (N.D. Ill. Nov. 28, 2003), the plaintiff argued that since it had already paid $25,000 in attorney fees to defend its insured in a Telephone Consumer Protection Act suit, there was a reasonable probability that it would incur another $50,000 in fees. The court rejected this argument on the ground that it was wholly conclusory. Morever, the court noted that the discovery phase was set to conclude shortly and plaintiff had not explained why it was reasonable to conclude that it would incur over $50,000 to file dispositive motions and try the case. In another declaratory judgment case involving an insurer's duty to defend, a district court stated that it is necessary to use specific facts and "provide details about the scope of the underlying lawsuit so the Court can assess whether defense costs will satisfy the

jurisdictional minimum to a reasonable certainty." American Economy Insurance Co. v. Wholesale Life Insurance Brokerage, Inc., 2004 U.S. Dist. LEXIS 18519 (N.D. Ill. 2004)

In the present case, the only information plaintiff has provided concerning its attorney fees is that it has spent almost $25,000 and that the state court action is currently in the discovery phase. Plaintiff has not provided the court with any information about how much discovery remains, the scope of the underlying lawsuit or any explanation of why it is reasonable to conclude it will incur an additional $50,000 in defending defendant in the state court action. The possibility of class certification is no more than that. Plaintiff's affidavits are wholly conclusory and do not provide competent proof that the amount in controversy will be met.

ORDER

IT IS ORDERED that defendant's motion to dismiss for lack of subject matter jurisdiction is GRANTED. This case is DISMISSED without prejudice and the clerk of

court is directed to close the file.

Entered this 30th day of November, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge