UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-1692
Summary Calendar

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Plaintiff-Appellee,

versus

JAMES T. LONG,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Mississippi
(CA-S-90-0042(G))

(January 28, 1993)

Before GARWOOD, HIGGINBOTHAM, and WIENER, Circuit Judges.[*]

GARWOOD, Circuit Judge:

This diversity case arises out of an automobile accident. The primary issue before us concerns the extent of coverage of an automobile liability insurance policy. Defendant-appellant James T. Long (Long) appeals from a summary judgment rendered by the United States District Court for the Southern District of

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Mississippi in favor of plaintiff-appellee Universal Underwriters Insurance Company (Universal). The district court held that Universal owes no duty to defend or indemnify defendant William M. Anderson[1] (Anderson), the alleged insured, and that therefore Long has no rights against Universal in a related state court action against Anderson. We affirm.

Facts and Proceedings Below

On March 3, 1987, Anderson went to Precision Pontiac-Toyota, Inc. (Precision), an automobile dealership located in Pascagoula, Mississippi, to obtain information concerning the price of a Toyota truck. Anderson was permitted[2] to test drive the truck. While driving home to show the truck to his family, Anderson experienced problems getting the vehicle out of four-wheel drive. Distracted by his attempts to switch out of four-wheel drive, he rear-ended a vehicle driven by Everett C. Mayo (Mayo), in which Long was a passenger. Both Mayo and Long allegedly sustained personal injuries in this accident.

Precision was the insured under an automobile liability insurance policy issued by Universal (the policy). The policy, in effect from February 1, 1987, until February 1, 1988, was a "UNICOVER" policy, a multiple coverage insurance policy which was sold as a package of available "Coverage Parts." Precision

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[1] Anderson did not appeal from the adverse judgment of the district court.

[2] There is some dispute in the record as to whether Anderson was merely permitted to test drive the truck or whether Precision instructed him to drive the truck home to show his family. We need not resolve this dispute in order to rule on the issues before us.

purchased some but not all of the coverage available under the policy.

In June 1987, Long filed suit against Mayo, Anderson, and Precision in Mississippi state court (the Long suit). In this action, which (as far as we are informed) is still pending in the Mississippi trial court, Long claims that Anderson is an insured under the policy issued to Precision by Universal and that therefore Universal owes a duty to defend and indemnify Anderson. Universal is not a party to the Long suit.

In July 1987, Mayo brought a separate action in Mississippi state court against Anderson and Precision (the Mayo suit). Anderson filed a third-party complaint against Universal in the Mayo suit, requesting that the court declare that Universal owed duties to defend and indemnify Anderson in that action. Universal filed a motion for summary judgment, which was granted in March 1989. The state court held that Anderson was not an insured under Precision's policy with Universal and that Universal owed Anderson no duty of defense or indemnification. Mayo[3] appealed this ruling to the Mississippi Supreme Court, which affirmed the trial court's judgment without opinion on June 10, 1992 (after the instant appeal was filed).[4]

In January 1990, Universal instituted this declaratory action against Anderson and Long, requesting that the district court rule

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[3] Apparently, Anderson had assigned his rights against Universal to Mayo.

[4] The Mississippi Supreme Court denied Mayo's petition for rehearing on December 3, 1992.

that Universal owes no duty to defend or indemnify Anderson in the Long suit and that Long has no rights against Universal. The district court denied motions by Long and Anderson for dismissal or summary judgment and granted Universal's motion for summary judgment. Long challenges both the summary judgment itself and the power of the district court to render judgment.

Discussion

In reviewing the grant of summary judgment, we apply the same standard as the district court. *Skyline Air Serv., Inc. v. G.L. Capps Co.*, 916 F.2d 977, 978 (5th Cir. 1990). Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c).

Before we reach the merits of this action, we must address several preliminary issues raised by Long.

I. Diversity Jurisdiction

Long argues that the district court lacked jurisdiction over this action because no diversity exists among the parties.[5] He claims that this action is a direct action against an insurance company, which renders the insurance company a citizen of the same state as its insured. 28 U.S.C. § 1332(c).[6] Universal was

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[5] Universal brought this action pursuant to 28 U.S.C. § 2201(a) and Fed. R. Civ. P. 57, which provide for declaratory judgment actions. These provisions do not establish an independent basis for jurisdiction. Universal asserted in its complaint that the district court had diversity jurisdiction.

[6] 28 U.S.C. § 1332(c) provides that "in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such

incorporated in Missouri and has its principal place of business in Kansas; both Long and Anderson are domiciled in Mississippi. Because Precision, Universal's insured, is a Mississippi corporation, Long claims that no diversity exists between the parties pursuant to section 1332(c).

We have held that section 1332(c) does not bar an action brought by an insurer seeking a declaration as to coverage under a policy. *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1189 (5th Cir. 1988); *Dairyland Ins. Co. v. Makover*, 654 F.2d 1120, 1124 (5th Cir. Unit B Sept. 1981). Following this precedent we hold that the district court had diversity jurisdiction.

A recent decision of the Supreme Court, holding that section 1332(c) is limited to actions against an insurer, supports our decision. *Northbrook Nat'l Ins. Co. v. Brewer* 110 S.Ct. 297, 299 (1989) ("The language of the proviso could not be more clear. It applies only to actions *against* insurers; it does not mention actions *by* insurers.") (emphasis in original).[7] Thus section 1332(c) is inapplicable here, because this action is by, rather than against, Universal. Long attempts to avoid this result by

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insurer shall be deemed a citizen of the State of which the insured is a citizen . . . ."

[7] *Northbrook* rejected a line of cases from this Circuit applying section 1332(c) to bar a diversity action brought by an employee against an out-of-state workers' compensation carrier of an in-state employer. *See Hernandez v. Travelers Ins. Co.*, 489 F.2d 721 (5th Cir. 1974); *see also Campbell v. Ins. Co. of North America*, 552 F.2d 604 (5th Cir. 1977). In the Fifth Circuit opinion in *Northbrook*, which was reversed by the Supreme Court, the court noted that *Campbell* stood on "weak jurisprudential legs" but felt bound to follow it. *Northbrook Nat'l Ins. Co. v. Brewer*, 854 F.2d 742, 745 (5th Cir. 1988).

arguing that the parties should be realigned and that this is in actuality an action against Universal, but he gives no reasons to support this claim and we find nothing in the record to suggest that realignment is necessary.

Further, application of section 1332(c) is inappropriate here because this is not a direct action. A direct action is one in which an injured third party sues an insurer directly without joining the insured who is allegedly responsible for the plaintiff's injury. This is a declaratory action, brought to determine the extent of coverage Universal owes Anderson; it is not an action by Long against Universal seeking recovery for personal injury.

II. Certification to the Mississippi Supreme Court

Long requests that we certify the coverage question in this case to the Mississippi Supreme Court, or in the alternative, that we stay our consideration of this issue until the Mississippi Supreme Court resolves the Mayo appeal. Because that Court has issued its decision in the Mayo case, there is no need for a stay.[8] Further, we should not abuse our ability to certify questions to the state supreme courts by resorting to it needlessly. *Transcontinental Gas Pipeline Corp. v. Transp. Ins. Co.*, 958 F.2d 622, 623 (5th Cir. 1992). Generally, we reserve certification for those cases in which we are unable to ascertain what the state courts would do were the question before them. *Owen v. United*

[8] Long states in his brief on appeal that the issue in this case is the same as that before the Mississippi Supreme Court in the Mayo appeal. Because we sit here in diversity, the ruling of the Mississippi Court is controlling.

States, 935 F.2d 734, 738-39 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 870 (1992). This is not the situation here. The Mississippi Supreme Court has ruled on this issue several times,[9] most recently in its affirmance of the Mayo suit. We decline to certify.

III. Estoppel to Deny Coverage

Long claims that Universal is estopped to deny coverage to Anderson and its duty to defend Anderson because for several years following the accident, Universal did provide a defense for Anderson in the state court actions brought by Long and Mayo.[10] The district court rejected this claim because there was no evidence that Anderson was prejudiced by Universal's refusal to continue its defense.

Mississippi law requires a showing of prejudice to the insured in order to establish estoppel. "A party asserting equitable estoppel must show (1) that he has changed his position in reliance upon the conduct of another and (2) that he has suffered detriment

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[9] *See State Farm Mut. Auto. Ins. Co. v. Mettetal*, 534 So. 2d 189, 193-94 (Miss. 1988).

[10] Universal claims that it defended Anderson in the state cases because, under Mississippi law in effect at that time, Anderson was arguably an insured under Precision's policy. *Southern Farm Bureau Casualty Ins. Co. v. Logan*, 238 Miss. 580, 119 So. 2d 268, 272 (1960) (an unjustified refusal to defend is a breach of the insurance contract rendering the insurer liable to the insured for all damages resulting from the breach). Universal's representation of Anderson began before the Mississippi Supreme Court issued its decision in *Mettetal*, which decided the issue of whether Anderson was covered by the policy.

Universal was allowed to withdraw its defense of Anderson in the Mayo suit in July 1989, after defending Anderson for two years. The court in the Long suit, however, refused to allow Universal to withdraw, finding that a fiduciary relationship existed, presumably between Universal and Anderson, and that all parties would be prejudiced if Universal withdrew.

caused by his change of position in reliance upon such conduct." *PMZ Oil Co. v. Lucroy*, 449 So. 2d 201, 206 (Miss. 1984). *See also Chapman v. Chapman*, 473 So. 2d 467, 470 (Miss. 1985) (discussing the essential elements of equitable estoppel: "'Conduct and acts . . . amounting to a representation or concealment of material facts, with knowledge or imputed knowledge of such facts, with the intent that representation . . . or concealment be relied upon, with the other party's ignorance of the true facts, and reliance to his damage upon the representation or silence.'") (citing *Crow v. Fotiades*, 224 Miss. 422, 80 So. 2d 478, 486 (1955)). The district court overruled the estoppel claim because Long produced no evidence that Anderson was prejudiced by Universal's refusal to defend him.

The requirement of a showing of prejudice applies in the context of an insurer withdrawing representation of an insured. "The general rule is that an insurer who withdraws from the defense of an action is estopped to deny liability under the policy if its conduct results in prejudice to the insured; but it is not estopped to do so if its action does not result in any prejudice to the insured." *Hartford Accident & Indem. Co. v. Lockard*, 239 Miss. 644, 124 So. 2d 849, 856 (1960). Long does not allege any facts showing that Anderson has been harmed in any way by Universal's refusal to continue defending him. There has been no showing of reliance upon the defense or of detriment resulting from its withdrawal. Without such evidence, the district court correctly held that Universal is not estopped to deny coverage to Anderson.

IV. Propriety of Declaratory Judgment

Long challenges the form of this suit, claiming a party may not seek a declaratory judgment in this type of action. *See* Fed. R. Civ. P. 57. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 61 S.Ct. 510 (1941), a case with facts similar to those before us, is dispositive of this issue. There the Supreme Court allowed an action by Maryland Casualty, in which it requested the court to declare that it was not liable to defend or indemnify the insured in a state court action arising out of an automobile accident. Like the present case, the alleged insured and the injured third party were named as defendants in the federal court declaratory judgment action. The Court held that an actual controversy existed between the parties because the injured third party could sue the insurer if the insured did not satisfy the judgment. *Id.* at 273, 61 S.Ct. at 512. As the district court noted in its opinion denying Long's motion for summary judgment, Long could proceed against Universal in a garnishment action if he obtains a judgment against Anderson in state court. We conclude that Universal's use of a declaratory judgment action here was proper.

Long also contends that Precision and Mayo are necessary parties and that the district court lacked power to render its judgment because these parties were not before the court. We agree with Universal that neither of these parties is required for resolution of the case before us. Mayo's rights arising from this incident were fully determined by the Mississippi state courts in the Mayo suit. Precision is not a necessary party, because nothing in the record reflects the existence of any relevant dispute

between Universal and Precision.

V. Coverage under the Policy

Long finally reaches the merits of this action with his claim that the district court erred in finding that Anderson was not an insured under Precision's insurance policy from Universal. Part 500 of the policy, which coverage Precision purchased, is entitled "Garage Insurance" and establishes insurance coverage for auto hazards. The policy provides that:

> "'AUTO HAZARD' means the ownership, maintenance, or use of any AUTO YOU[11] own or which is in YOUR care, custody, or control and:
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> (1) used for the purpose of GARAGE OPERATIONS or
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> (2) used principally in GARAGE OPERATIONS with occasional use for other business or non-business purposes or
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> (3) furnished for the use of any person or organization."

The policy defines who is an insured for purposes of Part 500:

> "With respect to the AUTO HAZARD:
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> 1. YOU;
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> 2. Any of YOUR partners, paid employees, directors, stock holders, executive officers, a member of their household or a member of YOUR household, while using an AUTO covered by this Coverage Part, or when legally responsible for its use. The actual use of the AUTO must be by YOU or within the scope of YOUR permission;
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> 3. Any other person or organization required by law to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission."

Because Anderson does not fall within either of the first two categories of insureds under Part 500 of the policy, Universal owes him the duties of defense and indemnification only if he is

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[11] "YOU" refers to Precision, the named insured under the policy.

"required by law to be an insured while using" a covered vehicle. The Mississippi courts have already decided this issue in favor of Universal on these precise facts. The state trial court, in the Mayo suit, granted summary judgment for Universal on Anderson's third-party claim, finding expressly that Anderson was not required by the Mississippi Motor Vehicle Safety Responsibility Law[12] (the Responsibility Law) to be an insured under the Universal policy. *Mayo v. Precision Pontiac-Toyota, Inc.*, No. 87-5317 (Circuit Court of Jackson County, Mississippi, March 1, 1989). The Mississippi Supreme Court affirmed this holding without opinion.

Section 63-15-43 of the Responsibility Law governs certain provisions in automobile liability insurance policies and requires an insurer to pay certain obligations on behalf of the insured and any other person, as insured, using the vehicle with the express or implied permission of the named insured. In *State Farm Mut. Auto. Ins. Co. v. Mettetal*, 534 So. 2d 189, 193-94 (Miss. 1988), the Mississippi Supreme Court held that section 63-15-43 does not apply to all automobile liability insurance policies issued in Mississippi but only to those certified as proof of financial responsibility.[13] *See also Perry v. State Farm Mut. Auto. Ins. Co.,*

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[12] This law is codified as Miss. Code Ann. §§ 63-15-1 *et seq.*

[13] An insurance policy may be certified by the insurer to provide the proof of financial responsibility required of an owner or operator who has been involved in an automobile accident while without liability insurance. Miss. Code Ann. § 63-15-11. In contrast, an owner or operator who, at the time of the accident, has an effective liability policy insuring his ownership or operation of the vehicle involved need not comply with the proof of financial responsibility requirements. Miss. Code Ann. § 63-15-11(4); *Mettetal*, 534 So. 2d at 192. Because Precision was insured at the time of Anderson's accident, it was

606 F.Supp. 270, 272 (S.D. Miss. 1985) (section 63-15-43(1) is limited to policies issued following an accident and certified as proof of financial responsibility). Because Precision's policy from Universal was not certified pursuant to the Responsibility Law, Anderson was not required by Mississippi law to be covered by the policy.

Long attempts to find coverage for Anderson under Part 900 of the policy. Boilerplate language in this section affords coverage to individuals in Anderson's position. It is clear, however, from the declarations pages of the policy, which set forth the coverage selected by Precision, that Precision did not purchase coverage under Part 900; thus it could not have been in effect at the time of the accident, and its terms do not apply here to render Anderson an insured under any other Part of the policy.[14]

Finally, Long argues that Anderson is insured by the policy under a theory of negligent entrustment. He contends that Precision negligently entrusted the truck to Anderson and that Anderson was therefore an agent of Precision. These claims do not

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not required to obtain certification from Universal on its policy.

The Mississippi Responsibility Law "is a 'first bite' law, in that it allows one accident before an owner or operator *without* liability coverage is required to furnish proof of financial responsibility." *Mettetal* at 192.

[14] The preamble to the policy states:

> "This entire document constitutes a multiple coverage insurance policy. Unless stated otherwise in a Coverage Part, each Coverage Part is made up of its provisions, . . . the General Conditions, and that portion of the declarations referring to the Coverage Part . . . . Each Coverage Part so constituted becomes a separate contract of insurance."

affect the issue before us of whether Universal owes a duty to Anderson under the policy, because Part 500 insures only "paid employees" of Precision, not agents. Instead, Long's claims, if established, would serve to render Precision liable to Long. Precision's rights and liabilities (including whether Precision is afforded coverage under the Universal policy in respect to a claim by Long against Precision) are not at issue in this action.

Conclusion

We find no merit in Long's varied attacks on the power of the district court to render judgment in this action. Further, we conclude that the decision of the district court is well-grounded in Mississippi law. For the reasons stated above, the judgment of the district court is

AFFIRMED.