UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1910
Summary Calendar

HOME INSURANCE COMPANY, of Indiana,

Plaintiff-Appellee,

VERSUS

JACK A. MOFFITT, JR., ET AL.,

Defendants,

RAY G. BESING and RAY G. BESING & ASSOC, P.C.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(3:91-CV-0630-C)

March 22, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Ray G. Besing and Ray G. Besing & Associates, P.C., appeal the district court's grant of declaratory judgment and award of attorneys' fees in favor of Home Insurance Company, of Indiana, pursuant to 28 U.S.C. §§ 2201-02. We **AFFIRM**.

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Home issued two professional liability insurance policies to Jack A. Moffitt, as the named insured; the policy periods ran consecutively from January 1989 through January 1991. Both policies contained a claims-made-and-reported provision[2], as well as a provision that entitled Home to cancel Moffitt's policy for "[f]ailure to pay premiums when due". Because Moffitt failed to make payments to Imperial Premium Finance Company (Imperial), it requested that Home cancel the policy.[3] On September 12, 1990, Home issued a General Purpose Endorsement, returning the policy premium and cancelling the 1990-91 policy effective August 8, 1990. Moffitt negotiated the return premium check.

Earlier, in March 1988, before obtaining coverage with Home, Moffitt had been retained by Besing to represent him in Chapter 11 bankruptcy proceedings. Besing had also retained Jamie Wall to prepare and file a malpractice suit against Dallas and Austin

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[2] The claims-made-and-reported provision specified that Home agreed

> [t]o pay on behalf of the Insured all sums in excess of the deductible amount stated in the Declarations which the Insured shall become legally obligated to pay as damages as a result of CLAIMS FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD caused by any act, error or omission for which the Insured is legally responsible, and arising out of the rendering or failure to render professional services for others in the Insured's capacity as a lawyer or notary public.

[3] Moffitt gave Imperial a power of attorney that allowed it to cancel his policy for failure to make payments. Imperial provided Moffitt with notice of intent to cancel and notice of cancellation.

attorneys (Vanden Eykel), who had represented him in an earlier state court action, ***Besing v. Hawthorne***.[4] Moffitt, however, convinced Besing and Wall to delay filing the malpractice action until the bankruptcy court approved the Chapter 11 plan, stating that section 108 of the Bankruptcy Code extended the state limitations period by two years (*i.e.*, until March, 1990). The state court did not agree and, based on the defense of limitations, granted defendants' motion for summary judgment in May 1990.

Moffitt continued to represent Besing. In September 1990, Moffitt inadvertently received an internal memorandum from Wall, referring to Besing's intent to assert a malpractice claim against Moffitt. In early October, Moffitt approached Besing about the possibility of settlement. In a confidential letter dated October 11, 1990, Wall relayed to Moffitt a "Proposed Settlement of the Malpractice Problem", stating that he and Besing had reviewed Moffitt's insurance policy and "are proceeding on the assumption that there is malpractice insurance coverage for this claim".[5] Wall

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[4] The action concerned enforcement of a settlement agreement. According to Besing, his attorneys' negligence resulted in the rendering of an adverse final judgment in January 1988, subsequently affirmed by the Texas Court of Civil Appeals.

[5] Wall stated,

> [W]e believe it is very likely that, while your insurance policy was in force, you were aware of either the possibility or probability of a claim being made by Ray [Besing]; and we believe it is very likely that you notified your insurance carrier before the policy lapsed. However, even if you did not notify the carrier, the carrier still may be required to pay, since it appears inequitable for a claimant to make or strongly signal his claim to the insured attorney but be

demanded that Moffitt notify his insurance carrier of Besing's claim, if he had not already done so, and request coverage and defense. Wall then set forth the following proposal:

> c. On the assumption that there is malpractice insurance coverage, Ray (Besing) and the P.C. have authorized me to accept in their behalf the compromise sum of $205,000 in full settlement. This amount represents one-half of the old, original Hawthorne damages of $410,555; .... The reason for this greatly reduced settlement offer is because Ray believes it is in everyone's best interest that this matter be put to rest so that the matters in Section A above (Vanden Eykel litigation and Hawthorne case) can be pursued to conclusion;[6]
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> e. That, in the event it is later established that there is no insurance coverage under any malpractice insurance policy, then Ray and the P.C. will accept in full settlement the sum of $100,000. ...

By letter dated October 15, 1990, Moffitt notified Home of Besing's claim:

> Please be advised that I have had a claim asserted against me by Ray G. Besing & Associates, P.C., wherein the claimant contends his claim is covered by the above referenced policy. Enclosed please find a copy of my only correspondence regarding the claim and all attachments thereto.

Home filed suit in March 1991 against Moffitt, Besing, and Besing & Associates, P.C., requesting a judgment declaring, *inter alia*, that Moffitt's policies do not provide coverage for appellants' claims. In support, Home maintained that the claims

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> deprived of the insurance coverage because the insured attorney either refused or neglected to notify the carrier ....

[6] Wall and Moffitt agreed to jointly represent Besing on several bankruptcy matters involving Hawthorne, and others.

were "first made and reported" after the effective cancellation date of the 1990-91 policy.[7] Appellants answered and filed a cross-claim against Moffitt, requesting damages in excess of $400,000 for malpractice, and also asserted a counterclaim against Home, seeking coverage and benefits under Home's policies.

On April 23, 1992, the court granted Home's motion for summary judgment, and dismissed appellants' cross-claim.[8] It also granted attorneys' fees and costs to Home, pursuant to V.T.C.A. Civil Practice & Remedies Code § 37.009. In June 1992, appellants filed a response in opposition to Home's proposed judgment, setting forth disputed issues of fact, and contesting the award of fees and costs. In addition, appellants, for the first time, asserted that the court should not entertain Home's declaratory judgment action because, *inter alia*, the claims could be more effectively adjudicated in state court.

By court order, a magistrate judge held a hearing to determine the proper amount of attorneys' fees and costs, subsequently awarding $18,486.10 in fees and $1,712.88 in expenses against appellants. Over appellants' objections, the district court

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[7] Home also maintained that a "prior acts exclusion endorsement" provision excludes coverage because the basis for the claim occurred prior to January 11, 1989.

[8] In addition, the court denied appellants' motion for a stay, or alternatively, for a continuance, pending the Texas Supreme Court's ruling on Besing's application for writ of error in the ***Vanden Eykel*** case. Appellants had asserted that their claim against Moffitt was simply, "to preserve their ability to obtain relief against Moffitt and under Moffitt's malpractice insurance policy in the event the Texas Supreme Court denied Besing's Application for Writ of Error in the ***Vanden Eykel*** case". The court concluded that the motions were without merit.

adopted the report and recommendation and entered a final judgment granting Home declaratory relief and awarding it fees and costs. Moffitt did not appeal.

II.

A.

1.

Appellants contend that the district court lacked subject matter jurisdiction to grant declaratory relief.[9] "A federal court may not issue a declaratory judgment unless there exists an `actual controversy', i.e., there must be a substantial controversy of sufficient immediacy and reality between parties having adverse legal interests." ***Middle South Energy, Inc. v. City of New Orleans***, 800 F.2d 488, 490 (5th Cir. 1986) (quoting ***Maryland Casualty Co. v. Pacific Coal & Oil Co.***, 312 U.S. 270, 273 (1941)). In other words, a controversy is justiciable only where "it can presently be litigated and decided and not hypothetical, conjectural, conditional or based upon the possibility of a factual situation that may never develop". ***Rowan Companies. v. Griffin***, 876 F.2d 26, 28 (5th Cir. 1989) (*quoting* ***Brown & Root, Inc. v. Big Rock Corp.***, 383 F.2d 662, 665 (5th Cir. 1967)). If there is jurisdiction, whether to grant a declaratory judgment is within the sound discretion of the trial court; and we review only for abuse

[9] Appellants failed to raise this issue before the district court; nonetheless, we may -- indeed must -- always examine the basis of our jurisdiction. *E.g.*, ***Trizec Properties, Inc. v. United States Mineral Products Co.***, 974 F.2d 602, 604 (5th Cir. 1992).

of discretion. ***Mission Ins. Co. v. Puritan Fashions Corp.***, 706 F.2d 599, 601 (5th Cir. 1983).

Appellants maintain that the controversy was hypothetical and not of sufficient immediacy because (1) Moffitt's malpractice liability had not been determined; and (2) appellants had not filed suit against him. According to them, Moffitt filed a claim with Home simply to maintain and preserve appellants' legal rights. We disagree.

The October 11 letter from Wall documented the negotiation of a settlement of Moffitt's malpractice liability. Moffitt conveyed a desire to settle; Besing responded with a specific proposal and requested that Moffitt file a claim with Home; and Moffitt did so. The proposal contemplated settlement prior to resolution of the underlying litigation; accordingly, we do not find Home's desire to defeat coverage to be premature.

Nor do we agree with appellants' reliance on ***Middle South Energy, Inc.***, 800 F.2d at 489-90. There, New Orleans Public Service, Inc. (NOPSI), an electrical utility company, sought declaratory relief to prevent the city from exercising an option to purchase the utility. Because the actions of the City Council supported its testimony that it "ha[d] no present intent to purchase NOPSI's facilities, but ha[d] merely undertaken steps to maintain and preserve its legal rights under the option", we held that there was no actual controversy. ***Id.*** at 490. In addition to the fact that ***Middle South Energy, Inc.*** involved the sensitive realm of public law, the case at bar is distinguishable because,

here, the record does not support appellants' assertion that they were "merely taking steps to preserve their rights"; rather, it indicates that they were seeking immediate settlement.

And, finally, appellants' reliance on Texas state law is misplaced. Although state substantive law governs in this diversity action, justiciability is, of course, a federal issue to be determined by federal law. Accordingly, we find subject matter jurisdiction.

2.

Appellants contend that the district court abused its discretion in granting declaratory relief because relevant factors, such as judicial economy and public interest, militate against its issuance. They did not raise this issue before the district court until after the court granted judgment against them. The court did not explicitly address this contention in its judgment; we therefore assume that the court either chose not to consider appellants' belated argument or implicitly rejected it. In either event, the court did not abuse its discretion.

B.

1.

Appellants maintain that the award of attorneys' fees constitutes reversible error. We review for abuse of discretion. ***Gulf Union Industries, Inc. v. Formation Security, Inc.***, 842 F.2d 762, 767 n.9 (5th Cir. 1988). The Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, does not provide an independent basis for the award of fees; however, in a diversity action, the court may award

fees if available under state law. ***Mercantile Nat'l Bank v. Bradford Trust Co.***, 850 F.2d 215, 218 (5th Cir. 1988). Texas law so provides. *See* Tex. Civ. Prac. & Rem. Code § 37.009 ("[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just").[10]

Nonetheless, appellants assert that the award was improper because, under the Texas Constitution, no "controversy" exists between an insurer and a potential third party claimant. This contention has no merit. The inquiry is whether state law provides for the award of fees,[11] not whether appellants could have brought the action in state court. We also reject appellants' contention that the award is "unjust". The court properly considered the equities involved. It noted the "essentially offensive" posture of appellants as compared to Moffitt, and excluded fees and costs incurred prior to appellants' answer. The award was not an abuse of discretion.

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In addition, appellants contest the reasonableness of the amount awarded, contending that the fees are excessive in view of

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[10] The referenced "chapter" provides for an action for declaratory judgment.

[11] As part of this inquiry, we question whether the language "under this chapter" is substantive state law; if so, an action brought solely pursuant 28 U.S.C. § 2201-02, may not fulfill state law requirements for the award of fees. *See* ***Volpe v. Prudential Property and Casualty Insurance Co.***, 802 F.2d 1, 4-5 (1st Cir. 1986). We do not address this issue, however, because appellants do not raise it.

the "minimal routine activity by Home's attorneys". We review the award for abuse of discretion. Appellants' challenge is essentially a challenge to the subsidiary factual findings of the district court. They are reviewed for clear error. ***Gulf Union Industries, Inc.***, 842 F.2d at 767 n.9.[12]

Home presented itemized time records and submitted an affidavit that addressed each of the factors outlined in ***Johnson v. Georgia Highway Express***, 488 F.2d 714 (5th Cir. 1974). Based upon the evidence, the court found that "Plaintiff has carried its burden of establishing that the expenses and attorneys' hours expended were reasonable and necessary". Appellants fail to provide a basis for reducing the number of hours and we find none; accordingly, the court's challenged findings are not clearly erroneous.

C.

Appellants contend that the court erred in granting summary judgment; however, they fail to present this contention with requisite specificity.[13] We therefore consider it waived. *See*

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[12] Appellants' failed to object to the magistrate's findings and conclusions regarding the reasonableness of the award; however, they contend that our review should not be limited to plain error because the magistrate failed to properly notify them of the need to file objections within ten days. We note that appellants so filed, thus indicating they had actual knowledge of the filing requirements. Nonetheless, because the record does not adequately reflect that the magistrate provided appellants with sufficient notice we review for clear error. *See* ***Rodriguez v. Bowen***, 857 F.2d 275, 277 (5th Cir. 1988).

[13] Appellants state, "[t]he affidavits and supporting exhibits of Mr. Besing and his trial attorney, Mr. Wall ... contain facts which directly contradicted the skimpy summary judgment presented by Home".

Fed. R. App. P. 28(a)(4), ***Weaver v. Puckett***, 896 F.2d 126, 128 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 427 (1990).[14]

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

[14] That appellants set forth an argument in the reply brief does not preclude a finding of waiver. We do not consider issues raised for the first time in a reply brief absent manifest injustice. ***Najarro v. First Federal Savings and Loan Ass'n***, 918 F.2d 513, 516 (5th Cir. 1990).