

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-3867

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SPHERE DRAKE INSURANCE PLC,

Plaintiff-Appellant,

versus

SCHADE & CO., INC., ERIC  
SCHADE, and ALFRED SCHADE,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
(CA 93-1951 B)

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(February 15 1995)

Before DAVIS, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:<sup>1</sup>

This being but one of several related actions concerning, among other things, denial of insurance coverage by Sphere Drake Insurance PLC, it appeals from the dismissal, on *res judicata* grounds, of its declaratory judgment action against Schade & Company, Inc., and Eric and Alfred Schade (collectively Schade). We **REVERSE** and **REMAND**.

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<sup>1</sup> 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

Sphere issued a marine insurance policy in 1991 to Marine Towing and others (Marine Towing), owners and operators of the M/V ST. JUDE. Schade served as Marine Towing's local insurance broker in procuring the policy. The vessel sank in March 1992, with a loss of four crewmembers. Sphere denied coverage on the ground that Marine Towing had violated the policy terms and conditions. The foregoing caused several actions, three of which are described below: one by Marine Towing in state court (on two occasions removed to federal court and remanded), and two by Sphere in federal court. Sphere's second action is in issue.

In April 1992, Marine Towing filed suit in Louisiana state court against both Sphere and Schade. Against Sphere, it sought a declaration that the policy provided coverage for the loss of the vessel and deaths of the crewmembers, as well as damages and statutory penalties for Sphere's coverage denial. As for Schade, and in the event that the court found no coverage, Marine Towing claimed that Schade was liable both for failure to exercise the standard of care expected of a reasonably prudent insurance broker in the procurement of the policy, and for breach of its contractual obligations as a broker.

Sphere removed the action to federal court, and moved to compel arbitration and stay the litigation pending arbitration.<sup>2</sup> On motions by both Marine Towing and Schade, the district court

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<sup>2</sup> The policy contained a provision requiring that all coverage disputes be resolved exclusively through arbitration.

remanded in November 1992, because Schade had not joined in the removal. In remanding, the district court held that Sphere's motion to compel arbitration had been rendered moot by the remand.<sup>3</sup>

After the above discussed removal, but prior to the November 1992 remand, Sphere filed its first of two actions in federal court. The first (June 1992) was against Marine Towing, not Schade; it sought a stay of litigation and an order compelling arbitration of Marine Towing's claims against Sphere.<sup>4</sup> In February 1993, the district court granted Sphere's motion to compel arbitration of Marine Towing's claims against it, and stayed litigation of those claims pending completion of arbitration. Our court affirmed in March 1994, rejecting Marine Towing's contention that Sphere's federal action was an impermissible collateral attack on the November 1992 remand order. ***Sphere Drake Insurance PLC v. Marine Towing, Inc.***, 16 F.3d 666 (5th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 115 S. Ct. 195 (1994) (***Sphere I***). (As discussed in part II, *infra*, that holding controls on the issue presented in this appeal.)

In March 1993, following both the November 1992 remand of Marine Towing's action, and the February 1993 order in the separate federal action (***Sphere I***), which stayed litigation of Marine Towing's claims against Sphere, Schade filed a cross-claim against

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<sup>3</sup> 28 U.S.C. § 1446(b) has been interpreted as requiring that all defendants join in and consent to removal. *E.g.*, ***Johnson v. Helmerich & Payne, Inc.***, 892 F.2d 422, 423 (5th Cir. 1990).

<sup>4</sup> At the time Sphere filed its action, Schade had not asserted a claim against Sphere; accordingly, Sphere did not include Schade as a defendant.

Sphere in Marine Towing's remanded state court action. Schade's cross-claim asserted, *inter alia*, Marine Towing's stayed claims against Sphere for insurance coverage.<sup>5</sup>

In response, Sphere removed Marine Towing's state court action a second time (May 1993), claiming that Schade's cross-claim against it constituted a change in circumstances requiring that Schade be realigned as a plaintiff, thus curing the procedural defect in the prior removal, and justifying the second removal. In June 1993, again on motions by both Marine Towing and Schade, the district court remanded again, holding that Schade could not be realigned as a plaintiff because Schade and Marine Towing had adverse interests in the action; and that, therefore, the case was not removable because, once again, Schade had not joined in the removal.<sup>6</sup> Accordingly, it did not address the merits of Sphere's request for a stay of Schade's cross-claim.

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<sup>5</sup> Schade's cross-claim asserted that it was made in the event the court should find that it was liable to Marine Towing, and to assert an independent action against Sphere for contribution or indemnity, for failure to honor its obligations. The cross-claim asserted further that Sphere had "wrongfully refused to honor its **POLICY**"; that it and Marine Towing had not agreed to the policy provisions at issue, and those provisions could not "be used as a grounds for denying coverage under" the policy; in the alternative, that Marine Towing had not breached any warranty under the terms of the policy; that Sphere's "refusal to defend and indemnify **MARINE TOWING** under the **POLICY** is arbitrary and capricious and without justification which has subjected **MARINE TOWING** to exposure for losses as well as costs and attorney's fees"; and that "[b]ecause of this exposure, **MARINE TOWING** has sued **SCHADE** claiming damages in regard to the procurement of the **POLICY**."

<sup>6</sup> On the other hand, the court denied Schade's request for attorney's fees and costs for improper removal, finding that Sphere had removed the action in good faith.

But, approximately two weeks before this second remand (June 1993), Sphere filed the instant action (**Sphere II**) against Schade, not Marine Towing. **Sphere II** sought a declaratory judgment that Schade, through its cross-claim against Sphere in Marine Towing's state court action, had "stepped into the shoes" of Marine Towing and was, therefore, subject to the February 1993 order in **Sphere I** staying litigation and compelling arbitration of the coverage dispute between Marine Towing and Sphere. In the alternative, Sphere sought an order staying litigation of Schade's cross-claim against it in Marine Towing's state court action, pending completion of the arbitration of Marine Towing's coverage claims.<sup>7</sup>

In August 1993, Schade moved, *inter alia*, to dismiss **Sphere II**, asserting that the subject matter of the action had been the subject of two removals and remands, and that the second remand order (June 1993) was *res judicata* as to the forum. The district court granted Schade's motion to dismiss, and denied as moot Sphere's motion (filed in response to Schade's dismissal motion) to stay litigation of Schade's claims, holding that it lacked jurisdiction because Sphere's "petition for declaratory relief [in **Sphere II**] is indubitably related to the action [by Marine Towing] that was remanded to state court".

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<sup>7</sup> Sphere asserted that it was necessary to stay Schade's cross-claim to protect and effectuate the court's order in **Sphere I** compelling arbitration of Marine Towing's coverage claims, and that it was necessary to file a separate action because Marine Towing's appeal of that arbitration order in **Sphere I** had divested the court of jurisdiction over Sphere's motion to stay and compel arbitration against Marine Towing. As noted, our court's decision in **Sphere I** was rendered in March 1994.

## II.

We review *de novo* the dismissal for lack of jurisdiction. *E.g.*, ***Shanbaum v. United States***, 32 F.3d 180, 182 (5th Cir. 1994). Sphere contends that the district court erred by concluding that the second remand deprived it of jurisdiction over Sphere's declaratory judgment action against Schade (***Sphere II***). It asserts that the action was not a collateral attack on the second remand order because the decision to remand was based on the conclusion that Schade and Marine Towing had sufficiently adverse interests to preclude realignment of Schade as a plaintiff; the court did not decide in the remand order whether Schade's cross-claim against Sphere should be stayed pending arbitration between Sphere and Marine Towing.

In concluding that Sphere's federal declaratory judgment action against Schade (***Sphere II***) was an impermissible collateral attack on the second remand order, the district court relied on ***New Orleans Public Service, Inc. v. Majoue***, 802 F.2d 166 (5th Cir. 1986). There, Majoue filed suit in state court against his employer, New Orleans Public Service, Inc. (NOPSI), claiming wrongful discharge. ***Id.*** at 166. NOPSI attempted unsuccessfully to remove the action to federal court, asserting that Majoue's state law claims arose under federal law because they were preempted by ERISA. ***Id.*** at 166-67. Thereafter, it filed an action in federal court, seeking a declaration that Majoue's state law claims were preempted by ERISA. ***Id.*** at 167. The district court dismissed

NOPSI's declaratory judgment action, holding that Majoue's wrongful discharge claim was not preempted by ERISA. *Id.*

On appeal, however, our court found it unnecessary to decide the preemption issue, because it held that NOPSI's declaratory judgment action was "an artful, if not subtle, attempt to circumvent the plain language and meaning of 28 U.S.C. § 1447(d), which provides that a remand order 'is not reviewable on appeal or otherwise.'" *Id.* at 168 (emphasis in original). It held, therefore, that the order remanding Majoue's action was "*res judicata* as to the *forum*." *Id.* (emphasis in original).

Sphere maintains that *Majoue* is distinguishable, because the second remand order was based on a procedural defect; the district court did not address in that order whether Schade's cross-claim against Sphere should be stayed pending arbitration. We agree. The removal in *Majoue* was based on NOPSI's assertion that Majoue's state law claims arose under federal law because they were preempted by ERISA. In remanding, the court necessarily decided that the claims were not preempted and did not arise under federal law. Therefore, NOPSI's subsequent declaratory judgment action, seeking a declaration that Majoue's claims were preempted by ERISA, raised the identical issue that had already been adjudicated by the remand order, and thus constituted an impermissible collateral attack on that order.

Here, in contrast, the second remand order on Marine Towing's action decided only that, because there was sufficient adversity between Schade and Marine Towing, Schade could not be realigned as

a plaintiff, and the removal was, therefore, procedurally defective because Schade did not consent to it. In that order, the district court did not address the propriety of staying Schade's cross-claim pending the outcome of arbitration.

As noted, this case (***Sphere II***) is controlled by ***Sphere I***, rather than ***Majoue***. In ***Sphere I***, Marine Towing contended that the first remand order was *res judicata* as to Sphere's federal action against Marine Towing in which it sought to compel arbitration and stay litigation of Marine Towing's claims against it. 16 F.3d at 668. Our court stated:

The question whether [***Sphere I***] constitutes an impermissible collateral attack on the earlier remand order is determined by considering whether the remanding court decided the arbitrability question before remanding. If the first district court had adjudicated the merits of [Sphere's] motion to compel arbitration ... in its remand order, it is clear that [Sphere] could not attack that order collaterally by alleging an independent action involving the same parties and claims. If the remanding court did not consider the propriety of arbitration, however, the second suit is not an impermissible collateral attack on the remand order.

***Id.*** at 669 (internal quotation marks and citation omitted). Because the district court had not adjudicated Sphere's motion to compel arbitration in connection with the first remand, but "remanded only because of the removing party's failure to obtain the consent of codefendants", our court concluded that Sphere's action to compel arbitration and stay litigation of Marine Towing's claims did "not constitute a collateral attack on the order of remand." ***Id.***

Similarly, because, in the second remand order, the district court did not adjudicate Sphere's motion to stay litigation of Schade's cross-claim pending completion of arbitration, but instead remanded only because it concluded that Schade could not be realigned as a plaintiff and that its consent was necessary for removal, Sphere's action seeking to stay litigation of Schade's cross-claim did not constitute a collateral attack on the second remand order.

III.

For the foregoing reasons, the judgment is **REVERSED**, and the case is **REMANDED** to the district court for further proceedings.

**REVERSED and REMANDED**