IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30148
Summary Calendar

SEALED,

Plaintiff-Appellee,

VERSUS

SEALED,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-93-2193-H-2)

(August 18, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Appellee insurance company sought declaratory judgment from the district court that its insurance policy did not provide coverage for claims asserted in a pending state tort action. Concluding that the district court correctly entertained the declaratory judgment action and awarded summary judgment in favor of appellee, we affirm.

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

On July 6, 1993, appellee asked the court to declare that its insurance policy issued to appellant day care center did not provide coverage for claims asserted by separate parties in the state lawsuit.[1] At the time, appellee had not been impleaded in the state suit. On October 7, appellant did, however, file a third-party demand against appellee in the state court action, seeking a judgment that appellee was obligated to defend and to indemnify appellant in state court. Within two weeks of appellant's petition, appellee moved the district court for summary judgment as to the insurance coverage issue and requested the district court to dismiss the declaratory action and to defer resolution of the insurance coverage issue to the state court proceeding. The district court denied appellant's motion to dismiss and granted summary judgment in favor of appellee.

II.

Appellant first contends that the district court erred in denying its motion to dismiss the declaratory judgment action. Appellant alleges that the district court misapplied the relevant test for abstention as delineated by this court in Travelers Ins. Co. v. Louisiana Farm Bureau Fed'n, 996 F.2d 774 (5th Cir. 1993). Appellant challenges both the district court's denial of mandatory abstention and its discretionary decision not to abstain.

[1] Pursuant to this court's order that the briefs and record excerpts remain under seal, we refer to the parties as appellee and appellant only.

A.

We review a refusal to dismiss a declaratory judgment action under an abuse of discretion standard. Rowan Cos. v. Griffin, 876 F.2d 26, 30 (5th Cir. 1989). "`[A] district court abuses its discretion when it summarily denies or grants a motion to dismiss without either written or oral explanation' or `when it fails to address and balance the relevant principles and factors of the doctrine.'" Id. (quoting In re Air Crash Disaster Near New Orleans, 821 F.2d 1147, 1166 (5th Cir. 1987) (en banc), vacated on other grounds sub nom. Pan American World Airways v. Lopez, 490 U.S. 1032 (1989)). Where the court has balanced all of the relevant factors, and where the balancing has been done reasonably, the decision should be granted "substantial deference." Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) (discussing the abuse of discretion standard as it applies to forum non conveniens review). Though the district court's discretion is broad, requests for relief may not be dismissed "on the basis of whim or personal inclination." Hollis v. Itawamba County Loans, 657 F.2d 746, 750 (5th Cir. Unit A Sept. 1981).

B.

The ability of the district court to issue declaratory relief may be subject to either mandatory or discretionary abstention. Mandatory abstention attaches where

> (1) a declaratory defendant has previously filed a cause of action in state court against the declaratory plaintiff, (2) the state case involves the same issues as those involved in the federal case, and (3) the district court is prohibited

> from enjoining the state proceedings under the Anti-Injunction Act.

Travelers, 996 F.2d at 776 (emphasis in original).

The absence of any of the three factors defeats mandatory abstention, and the district court has broad discretion over whether to grant declaratory relief. Torch, Inc. v. LeBlanc, 947 F.2d 193, 194 (5th Cir. 1991).

> The relevant factors which the district court must consider include, but are not limited to, (1) whether there is a pending state action in which all of the matters in controversy may be fully litigated, (2) whether the plaintiff filed in suit in anticipation of a lawsuit filed by the defendant, (3) whether the plaintiff engaged in forum shopping in bringing the suit, (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist, (5) whether the federal court is a convenient forum for the parties and witnesses, and (6) whether retaining the lawsuit in federal court would serve the purposes of judicial economy.

Travelers, 996 F.2d at 778 (citations omitted).

Appellant first alleges that the district court erred in determining that this case was not subject to mandatory abstention. According to appellant, the relevant time frame in which to evaluate the presence of the mandatory factors is the time at which the court disposes of the issue, rather than the time at which the declaratory action is filed. Hence, appellant contends that appellee's July 6 filing date for the petition for declaratory judgment is irrelevant in determining whether appellant had previously filed a similar cause of action in state court; appellant would have this court hold that its October 7 filing of a third-party demand against appellee in the parallel state court action is dispositive. Under appellant's rationale, the fact that

the district court promulgated its decision on December 15, a date subsequent to the third-party demand, evidences appellant's prior filing of a state court action addressing the same issues. We are unpersuaded that the relevant time frame is the date of the district court disposition of the declaratory judgment motion.

First, prior caselaw does not support appellant's position. Appellant's suggestion that the Travelers language, "may not consider the merits of the declaratory judgment action," id. at 776, establishes the relevant time frame for reviewing the three factors, is unfounded. Rather, the language merely prefaces the enumeration of the three factors for mandatory abstention, providing no mention or inference of any controlling date.

Furthermore, although the facts of Travelers are not dispositive, they do not support appellant's assertion. The declaratory defendant in Travelers had filed, previous to the declaratory plaintiff's federal action, a similar state court petition for declaratory judgment. Hence, because the declaratory defendant's petition in state court pre-dated the federal action, the timing was irrelevant to the district court's decision. See also St. Paul Fire & Marine Ins. Co. v. Lupin, No. 94-253, 1994 WL 261935 (E.D. La. June 3, 1994) (holding that mandatory abstention was inapplicable where the declaratory plaintiff filed his complaint in federal court prior to the declaratory defendant's filing a third party demand in state court).

The plain language of Steffel v. Thompson, 415 U.S. 452 (1974), from which this court drew its declaratory judgment

standards in Texas Employers' Ins. Ass'n v. Jackson, 862 F.2d 491 (5th Cir. 1988), cert. denied, 490 U.S. 1035 (1989), makes the date at the time of the filing dispositive. "When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system." Steffel, 415 U.S. at 462. Under the Steffel rationale, the district court's use of the declaratory judgment filing date is consistent with the policy rationale underlying federal pre-emption: "[C]onsiderations of equity, comity, and federalism have little vitality," id., where no state court proceeding is pending.[2]

We also agree with appellee that the adoption of appellant's position would frustrate the court's goals of fairness and consistency. If we were to hold that the district court's disposition date was the relevant time at which to consider whether a state action was pending, we would subordinate fairness to the fortuities of the district court calendar. The affirmative and timely actions of the declaratory plaintiff, who in this case filed the federal claim within a month of the original state suit and who was not even a named party to the state suit at the time, could be held captive to the crowded district court docket. Under these circumstances, the declaratory defendant could nullify the plaintiff's motion by naming the plaintiff in a third-party demand at any time prior to the district court's resolution of the matter;

[2] We view as irrelevant the fact that Steffel involved a state criminal proceeding.

this is inconsistent with the equity and efficiency goals that underlie declaratory actions.

Finally, appellee does not appear to be trying to do "an end run around the Anti-Injunction Act," Travelers, 996 F.2d at 776, such that mandatory abstention would be necessary and appropriate. The timing of appellee's filing of the declaratory action))within a month of the filing of the original state tort claim and three months prior to appellant's third party demand))evinces the legitimate nature of the action.

Therefore, we hold that the date at which appellee filed the declaratory action (July 6) is controlling as to the application of the mandatory abstention factors. Because appellant did not file its third-party demand in the state court proceeding until October 7, we find that there was no pending state court action addressing the same issue as that raised in the declaratory judgment and thus affirm the district court's decision to reject mandatory abstention.

C.

We also reject appellant's contention that the district court abused its discretion in deciding not to dismiss the declaratory judgment action. We note that the court did not summarily reject appellant's motion to dismiss without providing even a cursory analysis of the relevant facts and law. As such, we look to the district court's decision for evidence of reasonable weighing and construction of the Travelers factors, according substantial

deference consistent with the standard of review.

We agree with the district court that there exists a pending state court proceeding in which the insurance coverage issue can be resolved. Although appellee's motion for declaratory judgment preceded appellant's third-party demand in the state court proceeding, we have recognized that the chronological order of filing is not dispositive in evaluating this factor of discretionary abstention. Travelers, 996 F.2d at 779 n.15. Precedence in time does not trump automatically where the pace of the state court proceedings trails that in the federal court. Id. at 779. As both parties had submitted summary judgment evidence to the district court, the issue was ripe for disposition and, as such, the fact that a state court action was pending is insufficient to require abstention.

The second factor))whether appellee filed in the district court in anticipation of being named in state court))cuts in favor of abstention. Appellee))unlike the Travelers declaratory plaintiff))did not file the declaratory judgment motion to avoid multiple lawsuits in numerous different fora, an action that would have been consistent with the purposes of the Declaratory Judgment Act. Id. at 779. Appellee likely anticipated being named in the state court suit and brought this action to race to res judicata. See Lupin, 1994 WL 261935 at *3 (reasoning that where declaratory plaintiff must have known that defendant would seek relief in response to plaintiff's denial of insurance coverage, the second factor counsels in favor of abstention).

On the issue of forum shopping, we disagree with the district court, not because of its determination that appellee was forum shopping, but rather because of its weighing of the relative forum shopping of appellant. The district court conceded that appellee's action evidenced forum shopping but offset this factor against the forum shopping of both appellant and the other parties to the state suit. The plain language of the Travelers factors does not invite such weighing, and neither does the relevant caselaw. See Travelers, 996 F.2d at 778; Lupin, 1994 WL 261935 at *3. Hence, we discard the district court's discussion of the weighing of forum shopping and take at face value its concession that appellee "may be said to be forum shopping."

The district court correctly found that the possible inequities in issuing declaratory judgment did not favor abstention. As the district court noted, although two of the other parties to the state action were not parties to the federal action, the fact that neither of them would be covered by the insurance policy in question was adequate to discount this apparent inequity. Similarly, the fact that appellee filed this action within one month of the state tort action gave appellant sufficient and timely notice of the claim before the state court proceedings had become overly burdensome. Compare Lupin, 1994 WL 261935 at *3 (concluding that where declaratory plaintiff had withdrawn its defense of declaratory defendant after three years of litigation and settlement discussion in state court, the equities favored the defendant).

Appellant's contention that the district court's appointment nunc pro tunc of one of the declaratory defendants' mother as guardian ad litem does not resolve the claims of that defendant is incorrect. The district court properly followed FED. R. CIV. P. 17(c), which allows for the appointment of a guardian where the state has not appointed a tutrix, irrespective of the representative's procedural capacity under state law. Slade v. La. Power & Light Co., 418 F.2d 125, 126 (5th Cir. 1969) (per curiam), cert. denied, 397 U.S. 1007 (1970). As such, the court remedied properly this party's procedural capacity as a defendant, and the court's exercise of jurisdiction over this party will not create inequities by subjecting this decision to collateral attack in state court.

Finally, we agree with the district court's findings that the interests of convenience and judicial economy support retention of the declaratory judgment. The parties have completed all discovery relevant to the summary judgment motion; "[a]ll that remains in this case is the resolution of one, solitary, legal question on which the district court has already been thoroughly briefed." Travelers, 996 F.2d at 779. Furthermore, the disposition of the insurance coverage may be relevant to the decision of the parties to the state court action to continue that litigation or seek settlement options. Although efficiency may be served by the resolution of all aspects of the case in a single forum, Lupin, 1994 WL 261935 at *3, we agree with the district court that efficiency is better served by the timely disposition in federal court of this ripe matter.

Appellant's reliance upon Lupin and Sphere Drake Ins. Co. v. Tiger Tennis Camp, 839 F. Supp. 403 (M.D. La. 1993), is inapposite. First, Lupin is distinguishable on the facts))the declaratory plaintiff in that case had represented the defendant in the parallel state court action for three years before filing a motion for declaratory judgment in federal court. In that case, the equities overwhelmingly favored the defendant. Appellee's timely filing in this case presents no such inequities. Second, the court in Tiger Tennis was disposed to abstain at least partially because other insurance policies involving similar questions appeared to be at issue. Appellants do not contend that more than one issue is before the district court and, as such, judicial economy may be served by ruling on appellee's summary judgment motion.

Most importantly, we distinguish Lupin and Tiger Tennis by pointing to the different standards under which those cases were decided. Both are district court decisions, where the court is given broad discretion to determine whether to abstain from declaratory judgment actions. See Tiger Tennis, 839 F. Supp. at 405. In contrast, we review the district court's decision for abuse of discretion and must grant substantial deference to the decision where the court has weighed reasonably the relevant factors. Piper Aircraft, 454 U.S. at 257. Although we have taken issue with some of the district court's findings (in particular, the balancing of forum shopping among the parties), we are unable to say that the district court in this case has failed to follow its mandate.

We therefore conclude that, under the appropriate standard of review, substantial evidence supports the district court's decision to deny appellant's motion to dismiss and to exercise jurisdiction over the summary judgment motion.

III.

We review a grant of summary judgment de novo. Thomas v. Price, 975 F.2d 231, 235 (5th Cir. 1992). In order to avoid a summary judgment, the non-moving party must present affirmative evidence that creates a factual issue regarding the existence of each and all elements of the allegation for which that party would have the burden of proof at trial. "Unsubstantiated assertions of an actual dispute will not suffice." Id. (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1977)).

An insurer has a duty, under Louisiana law,[3] to defend its insured unless the allegations in the complaint unambiguously exclude coverage. Meloy v. Conoco, Inc., 504 So. 2d 833, 838 (La. 1987) (citing American Home Assurance Co. v. Czarniecki, 230 So. 2d 253 (La. 1969)). If a liberal construction of any of the factual allegations in the complaint reveals the possibility of coverage under the policy, the insurer has a duty to defend. Czarniecki, 230 So. 2d at 259. "Coverage is determined by comparing the allegations in the complaint with the terms of the policy, and the court is to look only at the face of the complaint and the

[3] Because federal jurisdiction is based upon diversity of citizenship, we apply Louisiana substantive law. Erie R.R. v. Tompkins, 304 U.S. 64, 80 (1938).

insurance contract in reaching this determination." Alert Centre, Inc. v. Alarm Protection Serv., 967 F.2d 161, 163 (5th Cir. 1992) (citations omitted). "The insurer has the burden of proving an exclusion to a legal certainty by a preponderance of the evidence." Natural Gas Pipeline Co. v. Odom Offshore Surveys, 697 F. Supp. 921, 928 (E.D. La. 1988) (citations omitted), aff'd, 889 F.2d 633 (5th Cir. 1989).

A.

We first address whether the district court erred in finding that the factual allegations in the complaint precluded coverage under the Sexual Abuse Exclusion.[4] Under Louisiana law, an insurer's duty to defend its insured is broader than its liability for a judgment against him. Jensen v. Snellings, 841 F.2d 600, 612 (5th Cir. 1988).[5] Hence, although we apply the legal rules relevant to the duty to defend, we note that these rules represent the upper limit of the legal sufficiency of the district court's grant of summary judgment.

Appellant's assertion that the district court wrongly dismissed the supporting evidence that it contends created a factual issue as to the nature of the conduct alleged in the state

[4] We assume, for the purposes of conducting this analysis only, that the sexual abuse provision is unambiguous on its face. We examine in turn the validity of this assumption in the next section.

[5] Since neither of the parties has discussed whether the declaratory judgment includes the question of appellee's duty to defend, we assume that the issue of appellee's liability for a judgment against appellant is the only one at stake.

court complaint is unfounded. Louisiana law requires that the court look only at the face of the complaint and the insurance contract in determining coverage questions. Jensen, 841 F.2d at 612. Appellant does not dispute that the state court complaint alleges that sexual abuse occurred; it insists that the supporting affidavits))a statement from a corporate officer and a preliminary report from the Office of Community Services))create a material factual issue. Under Louisiana law, however, such materials are irrelevant for the purposes of this declaratory action. We agree with the district court that all the claims in the original state court petition "arise out of or result[] from" the alleged events and that all such claims are excluded expressly from appellee's insurance policy.[6]

Appellant next contends that the Sexual Abuse Exclusion is ambiguous and thus fails to provide adequate notice as to the coverage limits. "Under Louisiana law, exclusions in an insurance policy must be clearly expressed." Natural Gas Pipeline, 697 F. Supp. at 927 (citations omitted). Appellant first alleges that appellee's failure to state the negligent omission language in the Sexual Abuse Exclusion in the same form and with the same captioned headings as in the separate Assault and Battery and Negligent Supervision Exclusion evidences the ambiguity.

[6] The Sexual Abuse Exclusion reads in full: "In consideration of the premium charged, it is agreed that such coverage as is provided by this policy shall not apply to any claim, demand and causes of action arising out of or resulting from either Sexual Abuse, or Licentious, immoral, or sexual act, whether caused by, or at the instigation of, or at the direction of, or omission by, the insured, his employees, patrons, or any causes whatsoever."

Under Louisiana law, "[t]he court will not supply an ambiguity or allow recovery 'under the pretext of interpreting an ambiguity where none exists.'" Wallace v. Huber, 597 So. 2d 1247, 1249 (La. App. 3d Cir. 1992) (quoting Morrison v. Miller, 452 So. 2d 390, 392 (La. App. 3d Cir. 1984)). "The insuring agreement must be read together with applicable exclusions." Natural Gas Pipeline, 697 F. Supp. at 927 (citing Southwest La. Grain, Inc. v. Howard A. Duncan, Inc., 438 So. 2d 215, 218 (La. App. 3d Cir. 1983), writ denied, 442 So. 2d 447 (La. 1983)). The insurance contract must be construed as a whole; labels and headings are "not to be construed at the expense of disregarding other sections or placement." Scarborough v. Travelers Ins. Co., 718 F.2d 702, 707 (5th Cir. 1983).

We find no ambiguity in the negligent omission language. The policy excludes coverage for acts of sexual abuse, etc., whether caused by "or at the direction of, or omission by, the insured, his employees, patrons, or any causes whatsoever." This language is nearly identical to that which appellant points us to in the Assault and Battery section: "arising out of assault and battery or out of any act or omission in connection with the prevention or suppression of such acts." Both provisions expressly exclude coverage for acts resulting from negligent omissions; the fact that the Assault section delineates the negligent omission in the heading, whereas the Sexual Abuse section fails to do so, does not introduce any element of ambiguity into the Sexual Abuse Exclusion. We refuse to read into the contract an ambiguity where, on its

face, none exists.[7]

Appellant also contends that the acts alleged in the state court petition are not sexual abuse as defined by Louisiana statute and thus are not excluded under the policy. We agree with appellant that the acts alleged in the petition would not constitute sexual abuse under LA. REV. STAT. § 14:403 G(b) (West Supp. 1993). The policy exclusion, however, is not limited to those acts of sexual abuse proscribed by the legislature; other "licentious, immoral, or sexual act[s]" are expressly excluded. The allegations in the state petition fall undeniably into at least one of these broad categories.

Finally, we dismiss appellant's grammatical exceptions to the contract. Although it is true that the contract should read either "[a] licentious, immoral, or sexual act," or "licentious, immoral, or sexual act[s]," these drafting gaffes are insufficient to introduce any ambiguities into the meaning of the Exclusion. The insertion of either an "a" or an "s" is not tantamount to rewriting or reading into the policy language that it does not contain. Funderburk v. Metropolitan Life Ins. Co., 146 So. 2d 710, 715 (La. App. 3d Cir. 1962), overruled on other grounds, Jefferson v. Jefferson, 154 So. 2d 645 (La. App. 3d Cir. 1963), aff'd, 163 So. 2d 74 (La. 1964), upon which appellant relies, says nothing to the contrary.

Because we find that the Sexual Abuse Exclusion is unambiguous

[7] The term "omission" is not, as appellant contends, a "naked term." The legal definition of "omission" is "[t]he neglect to perform what the law requires." BLACK'S LAW DICTIONARY 1086 (6th ed. 1990).

on its face as to the exclusion from coverage of any of the acts alleged in the state court petition, we find no issue of material fact and AFFIRM the summary judgment.