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**Motions, Pleadings and Filings**

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United States District Court, S.D. New York.  
FEDERAL INSURANCE COMPANY, Plaintiff,  
v.  
SAFESKIN CORPORATION, et al., Defendants.  
No. 98 CIV. 2194(DC).

Nov. 25, 1998.

Cuyler Burk, By Stephen D. Cuyler, Esq., Jan C. Walker, Esq., New York, for Federal Insurance Co.

Zevnik Horton Guibord McGovern Palmer & Fognani, L.L.P., By John K. Crossman, Esq., David A. Luttinger, Jr., Esq., New York, for Safeskin Defendants.

**MEMORANDUM DECISION**

CHIN, D.J.

\*1 Defendants Safeskin Corporation and Safeskin Insurance Management, Inc. (together, "Safeskin") move to dismiss the first amended complaint on three alternative grounds: (1) the Court lacks subject matter jurisdiction over this action, (2) this action should be dismissed (or stayed) in favor of a state court action pending in California, and (3) plaintiff has failed to join indispensable parties. For the reasons that follow, the motion is granted and the first amended complaint is dismissed.

1. *Subject Matter Jurisdiction*

In *Indianapolis v. Chase National Bank*, 314 U.S. 63, 69, 62 S.Ct. 15, 86 L.Ed. 47 (1941), the Supreme Court held that "[d]iversity jurisdiction cannot be conferred upon the federal courts by the

parties' own determination of who are plaintiffs and who are defendants." Rather, the federal courts have subject matter jurisdiction based on diversity of citizenship of the parties only if an "actual, substantial controversy" exists between citizens of different states. 314 U.S. at 69-70. If the parties to an action are not aligned according to their "real interests," then they must be realigned "to ensure that the case truly involves the kind of adversarial relationship constitutionally required in a case or controversy in the federal courts." 1 James W. Moore, *et al.*, *Moore's Federal Practice* ¶ 0.74[1], at 771 (2d ed.1993) (quoted in *Maryland Casualty Co. v. W.R. Grace & Co.*, 23 F.3d 617, 622 (2d Cir.1993)). If realignment destroys diversity, then the court lacks subject matter jurisdiction over the action.

In *Maryland Casualty*, the Second Circuit adopted the "collision of interests" test, which requires "the existence of an actual, substantial controversy, or a collision of interests," between citizens of different states. 23 F.3d at 622. The Second Circuit rejected the "primary purpose" test, which aligns parties in accordance with the "primary dispute in the controversy." *Id.* Rather, the "broader" and "more flexible" "collision of interests" test permits courts "to consider the multiple interests and issues involved in the litigation." *Id.*

Here, I conclude that the parties must be realigned. The "actual and substantial" controversy--the collision of interests--lies between Safeskin as the insured seeking coverage and the various insurance companies that purportedly have failed to meet their obligations under their respective insurance contracts. Indeed, Safeskin has commenced a coverage action in the Superior Court of the State of California against Federal, all of the insurance companies named as defendants in this case, as well as additional insurance company defendants not party to the present case. Safeskin is the "true" plaintiff and the various insurance companies are

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the "true" defendants. *See Travelers Indemnity Co. v. Metropolitan Life Insurance Co.*, 798 F.Supp. 156 (S.D.N.Y.1992) (holding, in declaratory judgment action brought by primary insurer against insured and excess insurer, that primary insurer had to be realigned with excess insurer, defeating diversity) (Leval, J.).

\*2 Plaintiff Federal Insurance Company ("Federal") argues that an "actual controversy" exists between itself and the defendant insurance companies because of potential claims for contribution and/or indemnification, relying on *Maryland Casualty*. I am not persuaded, for Federal has failed to demonstrate the existence of an actual, substantial conflict between itself and the other insurers, in several respects.

First, Federal's own pleading demonstrates that no "actual and present controversy" exists between itself and the other insurance companies. Rather, the first amended complaint states unequivocally that Federal has "no dispute" with Steadfast Insurance Co. ("Steadfast"), National Union Fire Insurance Co. ("National Union"), First Specialty Insurance Co., Reliance National Indemnity Co., United States Fidelity & Guaranty Co., TIG Insurance Co. ("TIG"), and New Hampshire Insurance Co. (Am.Cmplt.¶¶ 36, 37, 38). Rather, the first amended complaint alleges that these other insurance companies have been joined because it is believed they issued insurance policies to Safeskin and therefore they have a "potential interest in the issues to be resolved in this litigation." (Am Cmplt. ¶¶ 36, 37, 38) (emphasis added). Although the first amended complaint alleges that "[a]n actual controversy exists between Federal and Safeskin," it makes no such allegation with respect to Federal and the insurance company defendants. (Am. Cmplt. ¶ 11; *see also id.* ¶ 35). *See Maryland Casualty*, 23 F.3d at 623 ("actual and substantial conflicts" must exist "at the initiation of the lawsuit").

Second, only one insurer has filed an answer in this case: National Union filed an answer to Federal's original complaint. That answer, however, alleges that Federal has failed "to establish a justiciable

controversy between plaintiff and National Union." (Nat'l Union Ans. ¶ 66). Hence, the only other pleading filed in the case also shows that there is no actual and present controversy between Federal and the other insurers.

Third, Federal's efforts to argue the existence of a potential conflict between itself and the other insurers only highlight the uncertain nature of the anticipated controversy. Federal relies on National Union's counterclaim, but that counterclaim does not identify any actual and present controversy between Federal and National Union. Rather, it alleges as follows: "In the event National Union is found to have any duty to defend or indemnify Safeskin, National Union requests that this court issue a declaration adjudging and declaring that any defense and/or indemnity obligation be allocated amongst all necessary parties ...." (Nat'l Union Ans. ¶ 70). The counterclaim does not purport to identify the "necessary parties" and it does not even mention Federal by name. Yet, it is this counterclaim that forms the basis for Federal's argument that the other insurance companies will file "similar counterclaims," and that these "anticipated counterclaims in fact constitute an actual 'controversy' for purposes of realignment and federal jurisdiction." (Pl. Mem. at 11-12). *See Maryland Casualty*, 23 F.3d at 623 ("Hypothetical conflicts manufactured by skillful counsel must not control because such an approach would reintroduce the notion of gamesmanship so disparaged by the Supreme Court."). [FN1]

FN1. That Federal is indeed engaging in "gamesmanship" is evident from the quality of its arguments. Federal, of course, named both Safeskin Insurance Management, Inc. ("SIMI") and TIG as defendants. Once it became apparent that the involvement of these two entities in the case would destroy diversity, Federal took the position that both SIMI and TIG were "sham part [ies]." (Pl. Mem. at 18). Federal also took the position that TIG was a "sham party" in the parallel California proceedings, a position that Judge Miller in the Southern District of California

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rejected in holding that diversity jurisdiction did not exist and remanding the case to the California state court. *Safeskin Insurance Management, Inc. v. Pacific Indemnity Co.*, No. 98-906 JM, slip op. at 3-4 (S.D. Cal. June 30, 1998).

\*3 Fourth, Federal's heavy reliance on *Maryland Casualty* is misplaced. Federal is correct, of course, that in *Maryland Casualty* the Second Circuit found an actual and present controversy, a "collision of interests," among different insurers. But there are significant differences between the facts of *Maryland Casualty* and the facts of this case. As the Second Circuit noted, the disputes among the insurers were "significant from the start of the lawsuit." 23 F.3d at 623. The insured's "current insurer" had never been "adverse" to the insured. *Id.* On the other hand, the "current insurer" had actually filed a \$60 million counterclaim against one of the other insurers. *Id.* Finally, although the Court deemed the delay insignificant, the controversy had been actively litigated for some ten years before the question of subject matter jurisdiction was raised. *Id.* at 621.

In the present case, once the parties are properly realigned, diversity is destroyed in at least two respects. First, both true "plaintiffs" are headquartered or were incorporated in California while TIG is also incorporated in California. Second, SIMI is headquartered in Illinois as is Steadfast. Consequently, this Court does not have subject matter jurisdiction over this case and the complaint must be dismissed.

## 2. The Pending State Court Action

Even assuming this Court has subject matter jurisdiction over this action, in the exercise of my discretion, I decline to entertain the action, which is filed pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.

In *Wilton v. Seven Falls Co.*, 515 U.S. 277, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995), the Supreme Court held that the discretionary standard set forth in *Brilhart v. Excess Ins. Co.*, 316 U.S. 491, 62

S.Ct. 1173, 86 L.Ed. 1620 (1942), rather than the "exceptional circumstances" test established in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), and *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), applies to a district court's determination whether to stay or dismiss a declaratory judgment action pending a parallel state court proceeding. Hence, even when a district court has subject matter jurisdiction over a declaratory judgment action, it has the discretion to determine whether and when to entertain the action if there is a parallel state court action pending. In exercising that discretion, the district courts are to weigh "considerations of practicality and wise judicial administration" to determine whether the issues can be better addressed in the state court proceeding. 515 U.S. at 282, 288. The district court should consider factors such as the "scope" of the state court proceedings, the defenses asserted there, whether the claims of all parties in interest can be adjudicated there, whether necessary parties have been joined, and whether such parties are amenable to process in that state. *Id.* at 282-83.

Considering these factors in this case, I conclude that this action should be dismissed in favor of the proceedings in California. The issues presented in this case are fully covered in that case, whereas the issues raised there are not fully covered here. Although the parties dispute which state's law applies, they agree that state, not federal, law applies. There are many contacts between this case and California; among other things, Safeskin is headquartered there and its claims-handling executives are located there. Certain interested entities (Pacific Indemnity Co. ("Pacific") and The Chubb Corp. ("Chubb")) are parties in that action but not in the instant one. If Pacific and Chubb are brought into this action, diversity would be destroyed, whether the case is realigned or not. [FN2]

FN2. Federal, Pacific, and Chubb are all headquartered in New Jersey. Pacific and Safeskin are headquartered or incorporated in California. Hence, whether Pacific and

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Chubb are aligned with Federal or with Safeskin, complete diversity would be lacking.

\*4 In its opposition papers, Federal ignores *Wilton* and *Brilhart*. Instead, it inexplicably relies on *Colorado River* and *Moses H. Cone*, even though the Supreme Court squarely held in *Wilton* that the *Brilhart* discretionary standard applies when a district court is asked to stay or dismiss a declaratory judgment action pending a parallel state court action. In arguing that Safeskin has failed to demonstrate the existence of "exceptional circumstances" that would provide this Court with a basis for abstaining from exercising its jurisdiction, Safeskin is relying on the wrong legal standard. See *Haagen-Dazs Shoppe Co. v. Born*, 897 F.Supp. 122, 125 & n. 1 (S.D.N.Y.1995).

Accordingly, even assuming that this Court has subject matter jurisdiction over this case, I decline to exercise it because the issues will be more than adequately presented in the California state court proceedings. Hence, the first amended complaint will be dismissed on this basis as well. [FN3]

FN3. As the Court suggested in *Wilton*, whether an action is dismissed or stayed is "of little moment," because the state court's decision will bind the parties under principles of res judicata. 515 U.S. at 283.

### 3. Indispensable Parties

Finally, the complaint should also be dismissed on the ground that Federal has failed to join at least one indispensable party, the joinder of which would destroy complete diversity.

As noted above, Pacific and Chubb are parties in the California case but not in the present case. Federal argues, however, that Pacific and Chubb have "absolutely no relationship to this matter" (Pl. Mem. at 20), and denies that they are necessary and indispensable parties. I disagree, at least with respect to Chubb.

Safeskin contends that Chubb performed the claims

handling functions for Federal and engaged in tortious conduct. Safeskin has presented substantial documentation to show that Chubb was involved in the claims-handling process. At minimum, there is at least a factual dispute as to whether Chubb was involved and thus there is a factual basis for Safeskin to assert claims against Chubb. These claims can only be properly resolved if Chubb is a party-- as it is in California. Its joinder is essential to a just and complete resolution of the issues presented. Fed.R.Civ.P. 19. Because its joinder would destroy diversity, the first amended complaint must be dismissed for this reason as well.

### CONCLUSION

Safeskin's motion is granted in all respects. The first amended complaint is dismissed, without prejudice to the California action, for three independent reasons: first, this Court lacks subject matter jurisdiction over this action; second, even assuming the Court has subject matter jurisdiction, the Court declines to exercise its jurisdiction because of the pending state court proceedings; and third, plaintiff has failed to join an indispensable party, the joinder of which would destroy complete diversity. The Clerk of the Court shall enter judgment accordingly, with costs.

SO ORDERED.

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