Gonzales v. Nat'l Union Fire Ins. of Pittsburgh

United States District Court for the District of Montana, Butte Division

July 29, 2011, Decided; July 29, 2011, Filed

CV-11-20-BU-RFC-CSO

Reporter
2011 U.S. Dist. LEXIS 119244 *; 2011 WL 4899905

HERMAN GONZALES, FAWN LYONS; KEN LAUDATO; LAWRENCE WALKER; GARY MANSIKKA; GARRY GALETTI; GREG WHITING; MARVIN KRONE; RICHARD BLACK; JIM KELLY; CHRIS SOUSLEY; and all others similarly situated, Plaintiffs, v. NATIONAL UNION FIRE INSURANCE OF PITTSBURGH, PA, Defendant.

Subsequent History: Adopted by, Motion denied by *Gonzales v. Nat'l Union Fire Ins. of Pittsburgh, 2011 U.S. Dist. LEXIS 118882 (D. Mont., Oct. 14, 2011)*

Motion granted by, Motion denied by *Gonzalez v. Nat'l Union Fire Ins. of Pittsburgh, 2012 U.S. Dist. LEXIS 203643 (D. Mont., Jan. 6, 2012)*

Core Terms

underlying action, argues, state court, diversity jurisdiction, federal court, declaratory, factors, coverage, RECOMMENDED, state law issue, forum shopping, duplicative, parties, removal, costs, exercise jurisdiction, federal interest, insurance policy, district court, discretionary, needless, cases

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Judges: Carolyn S. Ostby, United States Magistrate Judge.

Opinion by: Carolyn S. Ostby

Opinion

FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON PLAINTIFFS' MOTION TO REMAND

Plaintiffs brought suit in state court seeking declaratory relief against National Union Fire Insurance of Pittsburgh, PA ("National"), which removed it to this Court.

Ripe for decision is Plaintiffs' motion to remand and fee request. Having considered the parties' arguments, the Court recommends that the motion be denied for the following reasons. [1]

I. BACKGROUND[2]

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[1] By order dated June 8, 2011, Chief Judge Cebull referred this case to the undersigned for pretrial purposes pursuant to *28 U.S.C. § 636(b)*, including submission **[*2]** of proposed findings and recommendations. *Court Doc. 18.* A split of authority exists with respect to whether a magistrate judge can rule on a motion to remand under *28 U.S.C. 636(b)(1)(A)*. *Compare Vogul v. U.S. Office Prods. Co., 258 F.3d 509, 515 (6th Cir. 2001)* (holding that remand orders are "dispositive" and can only be entered by a district judge) *with Franklin v. City of Homewood, 2007 U.S. Dist. LEXIS 47586, 2007 WL 1804411 (N.D. Ala. 2007)* (holding that a motion to remand is a non-dispositive issue and within the authority of a magistrate judge). Because the Ninth Circuit has not resolved this issue, the Court files these findings and recommendation rather than an order.

[2] The parties included in their briefs more extensive background information. *See Pltfs' Mem. in Support of Mtn. to Remand (Court Doc. 13) at 2-4; National's Mem. of Law in Opposition to Pltfs' Mtn. to Remand (Court Doc. 16) at 11-16* (page number references are to those designated by the Court's electronic filing system). The Court's background recitation is merely a summary for purposes of the pending motion and is not intended to be exhaustive.

Plaintiffs, in a pending state court certified class action (the "underlying action"), **[*3]** [3] claim that Montana Power Company ("Montana Power") and others wrongfully withheld workers' compensation benefits to which Plaintiffs were entitled. *Court Doc. 7 at Ex. B.* [4]Plaintiffs settled their claims against NorthWestern Corporation ("NorthWestern") and Putman and Associates, Inc. ("Putman") in the underlying action for $2.7 million, subject to conditions that have since been satisfied. *Court Doc. 4 at ¶ 17; Court Doc. 13 at 3.* Plaintiffs continue to pursue their claims against Montana Power in the underlying action. *Court Doc. 16 at 12-13.*

National issued three commercial umbrella liability insurance policies to Montana Power during the period from June 1, 1997 to December 31, 2001. *Court Doc. 16 at 13; Court Doc. 7 at Exs. L, M, and* ***[*4]*** *N.* Each policy provides $50 million of coverage in excess of a $2 million per-occurrence self-insured retention that applies regardless of Montana Power's "bankruptcy, insolvency or inability to pay the retention amount . . . ." *Court Doc. 16 at 13 (citing Court Doc. 7 at Ex. L at Endorsement No. 15, Ex. M at Endorsement No. 14, and Ex. N at Endorsement No. 7).*

On March 31, 2011, Plaintiffs filed this declaratory judgment action against National in Montana state court in Butte. *Court Doc. 4 at 1.* They seek declarations that: (1) "[t]he settlement and payment of $2.7 million . . . by joint tortfeasors [NorthWestern and Putman] satisfies the [self-insured retention] of $2 million" for any applicable policy that provides coverage for the underlying action, *id. at ¶¶ 25, 28-29;* and (2) "claims for [Montana Power's] negligent mishandling and adjustment of workers' compensation benefits as to [Plaintiffs] constitute one 'occurrence,' despite the number of class members[,]" *id. at ¶ 34.*

The parties do not dispute that, under *28 U.S.C. § 1332*, this Court has diversity jurisdiction over this action. National has alleged, and Plaintiffs have not disputed, that "the operative pleadings in the Underlying **[*5]** Action state[ ] that at least one of the Class Plaintiffs is a Montana citizen . . . [and] none of the Class Plaintiffs are citizens of New York or Pennsylvania[,]" which are states of National's principal place of business and incorporation, respectively. *Id. at ¶ 6.* Also, in light of the amounts claimed in the underlying action and the amounts of insurance coverage in the policies at issue, the amount in controversy satisfies the jurisdictional limit. *See 28 U.S.C. § 1332(a)* ("district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs").

II. PARTIES ARGUMENTS'

A. Plaintiffs' Arguments Supporting Remand

Plaintiffs argue that the Court, in discretion conferred under the Declaratory Judgment Act, *28 U.S.C. §§ 2201-2202*, should decline to exercise jurisdiction and remand this case. They advance two principal arguments supporting remand.

First, Plaintiffs argue that the factors outlined in *Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 495, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942)*, weigh against exercising discretionary jurisdiction. *Court Doc. 13 at 4-9.* They argue that this federal Court should avoid needlessly **[*6]** determining state insurance law issues. *Id. at 4-7.* They argue that because they filed this action in state court and because there exists a pending underlying action, this case is a "parallel proceeding." The state court, Plaintiffs argue, is the preferred forum for determining state insurance law issues raised in this case. *Id. at 7-9, 17.* Plaintiffs also argue that National has taken the position in its pending, but unripe, motion to dismiss that this Court should decline to exercise jurisdiction over this action. *Id. at 9-11.*

Second, Plaintiffs argue that "Montana practice regarding insurance issues" and this Court's recent decision in *Great Am. Assur. Co. v. Discover Prop. & Cas. Ins. Co., 779 F. Supp. 2d 1158, 2011 WL 1557916 (D. Mont., 2011)* (Molloy, J.), render the "so-called 'discretionary jurisdiction' . . . in practice, actually non-discretionary if a motion to remand is presented to the court." *Id. at 12.* They argue that "even when the parties do not file a motion to remand, the court will *sua sponte* decline consideration of insurance issues involving interpretation of Montana's insurance law." *Id.* (citing

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[3] *Herman Gonzales, et al. v. Montana Power Company, et al.*, Cause No. DV-98-253, Montana's Second Judicial District Court, Butte-Silver Bow County.

[4] In its "Notice of Filing Item," *Court Doc. 7*, National states it has filed Exhibits A-P to its "Memorandum of Law in Support of Defendant's Motion to Dismiss with the Clerk of Court for retention in the non-electronic record of the case." The Court will cite to these exhibits as "*Court Doc. 7 at Ex. __*."

Great American).

Finally, Plaintiffs argue that the Court should **[*7]** award them their attorneys' fees and costs in bringing this motion. They maintain that National lacks an objectively reasonable basis for removing this action to federal court making an award of fees and costs appropriate. *Id. at 14-19.*

B. National's Arguments Opposing Remand

National argues that this Court should retain jurisdiction. *Court Doc. 16 at 13.* First, National argues that as a non-citizen litigant, diversity jurisdiction principles are designed to protect it from any local prejudice in state court that may exist. Noting that "anti-Montana Power sentiment runs deep in Butte[,]" National argues that "[b]ecause [it] is the company responsible for Montana Power's sole remaining potential asset (*i.e.*, the Policies), anti-Montana Power sentiment is, for all intents and purposes, anti-National Union sentiment." *Id. at 19-20.* Thus, it argues it needs the protection diversity jurisdiction affords "to insulate [it] . . . from the consequences of deep-seated local prejudice." *Id. at 22.*

Next, National argues that the *Brillhart* factors do not support remand. It first argues that this case is not duplicative of other litigation. Plaintiffs' initiation of this case in state court, National **[*8]** argues, does not constitute a parallel proceeding because that case "was extinguished when [National] filed its notice of removal." *Id. at 23-24.* Also, National argues that the underlying action is not a parallel action because this action's issues are not dependent upon proceedings in that action. *Id. at 24-25.*

Second, National argues that this case does not require the Court to needlessly determine state law issues. *Id. at 25-28.* It argues that: (1) the Court can decide this case addressing "some of the most basic and fundamental [legal issues] in all of insurance law," *id. at 26*; and (2) cases supporting abstention based on this factor are inapposite, *id. at 27-28.*

Third, National argues that the Court's retention of this action does not encourage forum shopping. *Id. at 28-29.* It argues that in the Ninth Circuit, removal of an action does not, alone, represent forum shopping. *Id.*

Fourth, National argues that its pending motion to dismiss does not support the Court abstaining from exercising jurisdiction over this action. *Id. at 29-32.* It argues that its arguments presented in the motion to dismiss present no basis for the Court to remand this action. *Id.*

Finally, National argues that **[*9]** Plaintiffs are not entitled to fees and costs in moving to remand. *Id. at 32-35.* It argues that its removal of this action was objectively reasonable because the case satisfies the requirements for diversity jurisdiction and because the Court has complete discretion whether to exercise jurisdiction over this matter. *Id.*

C. Plaintiffs' Reply

In reply, Plaintiffs argue that: (1) Montana federal court practice is to summarily remand cases involving purely insurance coverage disputes, *Pltfs' Reply (Court Doc. 19) at 4-6*; (2) Montana law on the issue presented is unsettled and warrants remand, *id. at 6-7*; (3) National's position that the state district court judge and the Montana Supreme Court justices who would be hearing this case are prejudiced against it is unsupported, *id. at 7*; (4) the *Brillhart* factors weigh in favor of remand, *id. at 9-13*; and (5) Plaintiffs are entitled to reasonable attorney fees and costs in having to seek remand, *id. at 14-15.*

III. LEGAL STANDARD

National removed this action under *28 U.S.C. §§ 1441* and *1446(b)*. *Court Doc. 1 at 2.* As noted, National invokes the Court's diversity jurisdiction under *28 U.S.C. § 1332*, and Plaintiffs have not argued that this Court lacks **[*10]** subject matter jurisdiction. *Id.* Plaintiffs appropriately moved to remand under *28 U.S.C. § 1447(c)*, because "[a] motion to remand is the proper procedure for challenging removal." *Moore-Thomas v. Alaska Airlines, Inc., 553 F.3d 1241, 1244 (9th Cir. 2009)* (citing *28 U.S.C. § 1447(c)*).

In an opinion issued one day after Plaintiffs filed their reply brief, the Ninth Circuit reiterated that "[g]enerally, district courts have a 'virtually unflagging obligation ... to hear jurisdictionally sufficient claims. The [Declaratory Judgment Act ("DJA")] relaxes this obligation in cases where a party seeks declaratory relief." *Countrywide Home Loans, Inc. v. Mortgage Guaranty Ins. Corp., 642 F.3d 849, 852 (9th Cir. 2011)* (citation omitted). The discretion courts retain under the DJA is "the ability to 'accept' or 'decline' 'discretionary' jurisdiction, or to decide whether to 'exercise jurisdiction,' in an action seeking declaratory relief." *Id.* (citations omitted).

But "it is imprecise to describe the discretion provided by the DJA in terms of jurisdiction" because "[a] court's jurisdiction is distinct from its remedial powers. In passing the DJA, 'Congress enlarged the range of remedies available **[*11]** in the federal courts but did not extend their jurisdiction." *Id. at 852-53* (citations omitted). Thus, "while the DJA expanded the scope of the federal courts' remedial powers, it did nothing to alter the courts' jurisdiction, or the 'right of entrance to federal courts.'" *Id. at 853* (citation omitted).

In other words, "[t]he DJA ... does not confer jurisdiction, and therefore also does not afford the opportunity to decline it. The DJA gives district courts the discretion to decline to exercise the conferred remedial power, but in no way modifies the district court's jurisdiction, which must properly exist independent of the DJA." *Id.* (citation omitted).

Once the Court has satisfied itself, as here, that it has jurisdiction to hear the action, it "must also be satisfied that entertaining the action is appropriate." *Government Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1222-23 (9th Cir. 1998)* (en banc). The DJA "gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Id. at 1223* (citing *Public Affairs Associates v. Rickover, 369 U.S. 111, 112, 82 S. Ct. 580, 7 L. Ed. 2d 604 (1962)*). But the Court's "discretion is not unfettered. ... [It] cannot decline to entertain such **[*12]** an action as a matter of whim or personal disinclination." *Id.*

The Supreme Court's list of non-exclusive *Brillhart* factors "remain the philosophic touchstone" for the Court and guide its determination. *Id.* at 1225. The factors are: "(1) the district court should avoid needless determination of state law issues; (2) it should discourage litigants from filing declaratory actions as a means of forum shopping; and (3) it should avoid duplicative litigation." *Id.* (citation omitted). Essentially, the Court "must balance concerns of judicial administration, comity, and fairness to the litigants." *Chamberlain v. Allstate, Ins. Co., 931 F.2d 1361, 1367 (9th Cir. 1991)*.

IV. DISCUSSION

A. Needless Determination of State Law Issues

A "'needless determination of state law' may involve an ongoing parallel state proceeding regarding the 'precise state law issue,' an area of law Congress expressly reserved to the states, or a lawsuit with no compelling federal interest (*e.g.*, a diversity action)." *Keown v. Tudor Ins. Co., 621 F.Supp.2d 1025, 1031 (D. Hawai'i 2008)* (citing *Continental Cas. Co. v. Robsac Indus., 947 F.2d 1367, 1371-72 (9th Cir. 1991)* (overruled in part by *Dizol* on other grounds)). But "there **[*13]** is no presumption in favor of abstention in declaratory actions generally, nor in insurance coverage cases specifically." *Id.* (quoting *Dizol, 133 F.3d at 1225*).

The Ninth Circuit has noted that, in a declaratory action where, as here, "the sole basis for jurisdiction is diversity of citizenship, the federal interest is at its nadir. Thus, the *Brillhart* policy of avoiding unnecessary declarations of state law is especially strong[.]" *Robsac Indus., 947 F.2d at 1371*. In this case, however, there is no ongoing, parallel state action that presents the same legal issues as are presented here.

As Plaintiffs acknowledge, the underlying action "involves joint and several liability claims for the mishandling of workers' compensation benefits by [Montana Power] and [Montana Power's] successor, NorthWestern Corporation (NWC), and the Defendants' third-party administrator, Putman and Associates, Inc. (Putman)." *Court Doc. 19 at 2.* As noted, NorthWestern and Putman have settled with Plaintiffs. *Id.* This case's resolution, on the other hand, will turn on interpretation of specific insurance policy language under Montana law. No legal question in the underlying action appears to be similar to any legal **[*14]** question at issue here.

Also, in light of NorthWestern's and Putman's settlement with Plaintiffs, there appears to be no need for additional development of the factual record in the underlying action for there to be a determination of the parties' rights and responsibilities under the policies in this action. As noted above, "there is no presumption in favor of abstention in declaratory actions generally, nor in insurance coverage cases specifically." *Id.* (quoting *Dizol, 133 F.3d at 1225*). Federal court consideration of insurance coverage issues in declaratory judgment actions is "very common." *Wright, Miller & Kane Federal Practice and Procedure: Civil 3d § 2760.*

Nor is the Court persuaded by Plaintiffs' argument that because states hold the authority under the McCarran-Ferguson Act, *15 U.S.C. 1012(b)*, to regulate insurance companies, this case may result in the needless federal determination of state law issues. This case does not directly concern regulation of an insurance company. Rather, it involves interpretation of insurance policy

contract language under established principles of Montana law.

Finally, while this case does not raise a legal issue that directly involves a "compelling **[*15]** federal interest," it cannot reasonably be said that it involves no federal interest. National removed the action specifically to invoke the Court's diversity jurisdiction. *Court Doc. 16 at 7-9, 19-22.* "The purpose of diversity jurisdiction, and the citizenship determinations associated with it, is to avoid the effects of prejudice against outsiders." *Davis v. HSBC Bank Nevada, N.A., 557 F.3d 1026, 1029 (9th Cir. 2009)* (citation omitted); *see also Hertz Corp. v. Friend, 130 S.Ct. 1181, 1192, 175 L. Ed. 2d 1029 (2010)* (noting that the "general purpose of diversity jurisdiction . . . [is to] find the State where a corporation is least likely to suffer out-of-state prejudice when it is sued in a local court"). To assert that there is no federal interest in attempting to mitigate perceived prejudice against a litigant in a judicial proceeding ignores the purpose of federal court diversity jurisdiction.

For all of the foregoing reasons, this factor weighs against remand.

B. Discourage Forum Shopping

Plaintiffs filed this case in state court. National properly removed it to federal court. "Although occasionally stigmatized as 'forum shopping,' the desire for a federal forum is assured by the constitutional provision **[*16]** for diversity jurisdiction and the congressional statute implementing Article III." *First State Ins. Co. v. Callan, 113 F.3d 161, 162 (9th Cir. 1997)*. National cannot be deprived of a federal forum under the diversity jurisdiction statute implementing Article III merely because Plaintiffs prefer a state forum. *Huth v. Hartford Ins. Co. of Midwest, 298 F.3d 800, 804 (9th Cir. 2002)* (forum shopping not a concern where one party prefers state court and the other federal court). "While federal courts already sustain a heavy burden of litigation, their doors cannot be closed to a suitor who qualifies under the rigorous criteria for federal jurisdiction." *Callan, 113 F.3d at 162*. This factor does not support Plaintiffs' desire for remand.

C. Avoid Duplicative Litigation

This case is not duplicative of the underlying action. As noted, the underlying action involves claims for the mishandling of workers' compensation benefits. National is not a party to that action. In contrast, this action, in which National is a party, involves interpretation of insurance policies that may or may not provide coverage for some of the claims in the underlying action. Because the litigation here is not duplicative **[*17]** of litigation in the underlying action, this factor does not support remand.

D. Balancing Discretionary Factors

On balance, the *Brillhart* factors do not weigh in favor of remanding this case to state court. This declaratory judgment action does not involve the needless determination of state law issues. Rather, it calls upon this Montana federal court to construe insurance policy language, applying ordinary principles of Montana contract law. Plaintiffs identify no novel issues of Montana law that will arise in the Court's consideration of this dispute. Also, National's removal of this case is not, by itself, worthy of the "forum-shopping" stigma where diversity jurisdiction is properly invoked. And this action is not duplicative of the underlying action pending in state court.

In *Dizol, 133 F.3d 1220 n. 5*, the Ninth Circuit noted that the *Brillhart* factors are not exhaustive. The additional factors there identified also support denial of the pending motion. It appears that this action will settle all aspects of the controversy between Plaintiffs and National. It will clarify policy coverage issues which are not presented in the underlying action and do not depend on facts that will be **[*18]** there determined. It does not result from a race-to-the-courthouse, or a race-to-judgment. It will not result in entanglement between the federal and state court systems. The federal remedy appears as convenient for the parties, and the process available as promptly, as the state court remedy. For these additional reasons, remand should be denied.

The Court finally notes that it is not persuaded by Plaintiffs' oft-repeated argument that this Court's recent decision in *Great Am. Assur. Co. v. Discover Prop. & Cas. Ins. Co., 779 F. Supp. 2d 1158, 2011 WL 1557916 (D. Mont., 2011)* (Molloy, J.), renders the "so-called 'discretionary jurisdiction' . . . in practice, actually non-discretionary if a motion to remand is presented to the court." *Court Doc. 13 at 12.* First, this argument ignores nearly all of the authority cited above, including those decisions applying the *Brillhart* factors. Second, *Great American* involved complex issues not present here, in particular a conflict in Montana's choice of law rules which the Court determined was more appropriately

addressed by Montana state courts.

For all of these reasons, the Court concludes that remand is not appropriate. In light of this **[*19]** conclusion, the Court need not reach Plaintiffs' request for fees and costs.

V. CONCLUSION

Based on the foregoing, IT IS RECOMMENDED that Plaintiffs' motion to remand (*Court Doc. 12*) be DENIED.

IT IS FURTHER RECOMMENDED that, should the District Court adopt this recommendation, Plaintiffs be granted fourteen days to file their response to National's pending motion to dismiss (*see Court Doc. 9 at 2*).

NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendation of United States Magistrate Judge upon the parties. The parties are advised that pursuant to *28 U.S.C. § 636*, any objections to the findings and recommendation must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after service hereof, or objection is waived.

DATED this 29th day of July, 2011.

/s/ Carolyn S. Ostby

United States Magistrate Judge
