

PRESS RELEASE

Court Reverses Dismissal of Insurer's Declaratory Judgment Action, Adopting Arguments Wiley Rein Advanced for Insurer Trade Groups

March 27, 2008

In a case in which Wiley Rein LLP represented the Complex Insurance Claims Litigation Association as *amicus curiae*, the United States Court of Appeals for the Second Circuit, applying New York law, today reversed and remanded a federal district court's dismissal of an insurer's declaratory judgment action. It held that neither the insurers' decision to file their declaratory judgment action before disclaiming coverage, nor their decision not to name parties with stronger ties to a different forum as defendants in that action, provided a basis for dismissal of the insurers' action based on the "special circumstances" exception to the first-filed rule. *Employers Insurance of Wausau v. Fox Entertainment Group, Inc.*, No. 06-4652-cv (2d Cir. Mar. 27, 2008).

The policies at issue contained a condition requiring policyholders to give "prompt notice" of covered claims or suit to the insurer, and to cooperate with the insurer by keeping it informed of all developments with respect to any claims, including lawsuits brought against the policyholder. The policyholders were named as defendants in a copyright infringement class action suit, and submitted information regarding this suit to the claims managers acting on behalf of the insurers. The policyholder and the insurers then engaged in a lengthy correspondence regarding the matter. Ultimately, the insurers filed suit, seeking a declaration that the policyholders did not give timely notice, prior to issuing a formal denial of coverage. Soon thereafter, the policyholders filed a competing action in California against the insurers, seeking a declaration that the insurers had breached their

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contractual duties under the policies.

The policyholders then filed a motion to dismiss the New York action. In dismissing the action in favor of the policyholder's competing California suit, the New York federal district court departed from the "first-filed" rule (under which the court in which the action was first filed retains jurisdiction) due to what it termed to be a "special circumstance." Specifically, the trial court concluded that the insurer had only filed in New York because it was forum-shopping and "won the race to the courthouse under questionable circumstances." The court opined that the insurer's filing of the action in New York court without previously having sent a letter denying coverage to the policyholders was evidence of forum shopping.

On this appeal, the Second Circuit said that the district court abused its discretion in applying the special circumstances exception to the first-filed rule. It reasoned that dismissing a declaratory judgment action under the special circumstances exceptions is "quite rare" and should be done only if the action "is an improper anticipatory judgment action." The court concluded that: (1) the insurers did not file the declaratory judgment action in response to a specific litigation threat from the policyholders; and (2) the record reflects numerous requests and inquiries for coverage for the copyright infringement claim and that, under New York law, the insurers acted properly because they were entitled to "disclaim coverage by filing for declaratory judgment."

The court also rejected the district court's claims that the insurer's declaratory judgment action was purely a forum shopping tactic. The court concluded that, while the insurers did amend their complaint to include another policyholder with ties solely to California after that policyholder sued the insurers in California, the failure to include that policyholder initially was due only to a "lack of familiarity with [policyholders'] corporate structure rather than an improper attempt at manipulation."

The Second Circuit then remanded the case for a "determination of whether the balance of conveniences favor giving priority to the second-filed action." The court also reversed the district court's dismissal of two policyholders on the basis of lack of a justiciable case or controversy where the "record demonstrates that jurisdiction exists" as those parties had expressly reserved their rights to seek recovery from the insurers regarding the underlying liabilities at issue in the insurer's declaratory judgment action.

Wiley Rein's *amicus curiae* brief was designed to help the Second Circuit to see past the accusations leveled by policyholder counsel about the insurers' alleged forum-shopping and the alleged impropriety of the insurer filing suit prior to sending a denial of coverage directly to the policyholder. As Wiley Rein's submission urged, the Second Circuit reaffirmed the strength of the first-filed rule, rejecting a "special circumstances" exception here, and made clear that in New York an insurer may disclaim by filing a declaratory judgment action. Those rulings will benefit insurers generally in federal courts in New York.