

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

UNITED STATES AIRCRAFT )  
INSURANCE GROUP, )  
 )  
Plaintiff, )  
 )  
v. ) Civ. No. 03-173-SLR  
 )  
DWIGGINS, L.L.C. and )  
BOMBARDIER CAPITAL, INC., )  
 )  
Defendants. )  
 )

**MEMORANDUM ORDER**

**I. INTRODUCTION**

This declaratory judgment action was filed by United States Aircraft Insurance Group ("USAIG") on February 5, 2003, against defendants Dwiggins, LLC ("Dwiggins") and Bombardier Capital, Inc. ("BCI"), seeking declaratory relief that an insurance policy issued to Dwiggins is void ab initio and unenforceable due to material misrepresentations made during the underwriting process and due to Dwiggins' failure to comply with policy conditions. (D.I. 1) Presently before the court is Dwiggins' renewed motion to dismiss. (D.I. 102) Because the court concludes that abstention is warranted, Dwiggins' motion will be granted.

## **II. BACKGROUND**

### **A. Facts as Alleged by USAIG**

The facts in the present case have been previously summarized in the court's October 15, 2003 memorandum opinion granting partial summary judgment to BCI and in its January 5, 2004 memorandum order denying Dwiggins' motion to dismiss. (D.I. 59, 80) The present dispute relates to a policy for general liability and hull risk insurance for a Lear 60 jet obtained by Dwiggins through USAIG for a policy period beginning on September 10, 2002, and ending on September 10, 2003. The aircraft was financed through an agreement with BCI, which is insured as a lender/lessor under the insurance policy. The insurance policy was procured with the assistance of Palmer & Cay and the Heath Lambert Group.

On October 7, 2002, the aircraft, on its inaugural flight, crashed while landing at the Santa Cruz Airport, State of Rio do Sul, SSSC, Brazil. On board the aircraft were Luiz A.D. Ferreira, Jose Maria Gelsi, Robert Luiz Catao Martinesz, Julio Sergio Soares Barbosa, and Telmos Goes. Barbosa was killed in the incident, and the other passengers sustained serious injuries.

### **B. USAIG Claims and Procedural History**

USAIG filed the present action on February 5, 2003, and asserted the following claims for relief: (1) rescission of the

policy as to both defendants alleging that Dwiggins and Bombardier made material misrepresentations during the underwriting process; (2) an order of invalidity as to each defendant on the basis of negligent misrepresentation during the underwriting process; and (3) declaratory judgment against defendant Dwiggins alleging that Dwiggins failed to comply with a condition precedent to coverage. (D.I. 1) BCI counterclaimed for enforcement of its rights under the lender/lessor endorsement. (D.I. 5)

On October 15, 2003, this court granted partial summary judgment to defendant BCI as to count one, except to the extent that Palmer & Cay may have been acting as an agent of BCI, and granted summary judgment to BCI with respect to count two. (D.I. 59, 60) On March 4, 2004, a joint stipulation of dismissal was entered into between BCI and USAIG. As a consequence, USAIG and Dwiggins are the only parties remaining in the action before the court.

On August 15, 2003, Dwiggins, in its first response to USAIG's complaint, filed the present motion to dismiss or, in the alternative, to stay the proceedings. (D.I. 42) The court denied Dwiggins' motion without prejudice to renew, concluding that the absence of BCI from the related state litigation cautioned against abstention. (D.I. 80) The court indicated, however, that "[i]n the event that USAIG's remaining claim

against BCI is resolved before trial, then retaining jurisdiction over the case may no longer be warranted.” (D.I. 80 at 12)

### **C. Florida Litigation**

Shortly after the filing of this case, Dwiggins and American Virginia Tabacaos, Industrisa e Comercio, Importacaco e Exportacao de Tabacos Ltda (“American Virginia”), filed a complaint for declaratory relief and damages in the Circuit Court in and for Broward County, Florida.<sup>1</sup> Named as defendants in that case were United States Aviation Underwriters, Inc. (“USAU”), individually and as manager of USAIG, Palmer & Cay of Florida, LLC (“Palmer & Cay”), and BCI.<sup>2</sup> Service was effected on USAIG on May 5, 2003. (D.I. 52, ex. B) Dwiggins’s Florida complaint seeks the following: (1) declaratory relief against USAU as to the insurance policy’s enforceability; (2) damages for breach of contract against USAU; (3) damages for negligence in the procurement of insurance against Palmer & Cay; (4) damages for negligent misrepresentation against BCI on the grounds that Dwiggins hired Telmos Goes as the pilot based on BCI’s recommendations; (5) damages for negligence against BCI with respect to Goes.

On March 17, 2003, the passengers on board the aircraft when

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<sup>1</sup>Dwiggins is a subsidiary of American Virginia formed for the purpose of purchasing the aircraft at issue.

<sup>2</sup>BCI was subsequently dismissed from the Florida action on Dwiggins’ motion for lack of joinder.

it crashed ("the Florida Claimants") filed personal injury actions in the Circuit Court of Dade County, Florida against Dwiggins and American Virginia. The Florida Claimants each have a relationship with American Virginia. Luiz A.D. Ferreira is the President and Principal of American Virginia. Jose Maria Gelsi is corporate counsel to American Virginia. Roberto Catao Martinez was an employee of American Virginia. Julio Sergio Soares Borbosa was also an employee of American Virginia.

Two weeks after the filing of suits by the Florida Claimants, settlement agreements and assignments were entered into, in which Dwiggins assigned any rights against USAIG to the Florida Claimants, and final judgments were entered in the Dade County actions in favor of the Florida Claimants and against Dwiggins totaling \$30 million. Following their settlements with Dwiggins, the Florida Claimants filed four suits against USAIG and Palmer Cay in Broward County, Florida, on May 14, 2003. The suits allege breach of contract claims against USAIG and negligence claims against Palmer & Cay.

### **III. DISCUSSION**

It is well established that district courts should exercise discretion in determining whether to entertain an action brought pursuant to the Declaratory Judgment Act. See State Auto Ins. Co. v. Summy, 234 F.3d 131, 133 (3d Cir. 2001). Careful scrutiny should be given to such actions where there is pending state

court litigation between the same parties concerning the same issues. See Brillhart v. Excess Ins. Co. Of America, 316 U.S. 491, 495 (1942).

The Third Circuit has set forth general guidelines that a district court should consider in exercising its discretion under the Act including: (1) whether the issues in controversy between the parties are foreclosed under the applicable substantive federal law and whether these issues may be settled better in the proceeding pending in the state court; (2) the likelihood that the declaration will resolve the uncertainty of obligation which gave rise to the controversy; (3) the convenience of the parties; (4) the public interest in a settlement of the uncertainty of obligation; and (5) the availability and relative convenience of other remedies. See Terra Nova Ins. Co. v. 900 Bar, Inc., 887 F.2d 1213, 1225 (3d Cir. 1989) (citations omitted).

As the court indicated in its January 5, 2004 memorandum order, the litigation in Florida state court raises all of the issues present before this court. (D.I. 80) The central issue is the same, namely, the validity and scope of insurance coverage. The issues of validity which USAIG seeks to adjudicate here are available defenses in Florida court.<sup>3</sup> Moreover, a

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<sup>3</sup>USAIG asserts that any claims BCI might have against Dwiggins have been assigned to USAIG and are not before the Florida court. (D.I. 106 at 9) Prior to its dismissal, however, BCI had not asserted any cross-claims against Dwiggins and there is nothing to suggest that any potential counter-claims USAIG

resolution of the issues in the present action would not necessarily resolve all of the defenses and claims available in the Florida cases, such as the USAIG's contention that the Florida settlement agreements were collusively reached. The court denied Dwiggins' original motion to dismiss without prejudice largely because BCI was not joined in the Florida litigation and dismissal as to Dwiggins might create the kind of piecemeal litigation that abstention is intended to avoid. As BCI has been voluntarily dismissed, all the parties present before the court are also joined in the Florida litigation. (D.I. 108) Moreover, there are additional parties in the Florida litigation that are not present here, particularly Palmer & Cay and the Florida Claimants.<sup>4</sup>

Considering the first and second Terra Nova factors, the court does not find that it is better able to determine USAIG's obligations of the interested parties under the policy than the state courts of Florida. In particular, as there are additional parties in the Florida litigation that have an interest in the resolution of this dispute, these factors weigh in favor of

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might have as BCI's assignee are unavailable in the Florida courts.

<sup>4</sup>The court's January 5, 2004 decision that the Florida Claimants were not parties necessary for adjudication does not render their absence from the case irrelevant for purposes of determining whether retaining the case is consistent with principles of judicial economy.

abstention. Under the third and fifth Terra Nova factors, the court finds that these too support abstention. There is nothing in the record to suggest either that the district court of Delaware is more convenient or has remedies not available to the parties in the Florida litigation. Finally, considering the fourth Terra Nova factor, there is not a compelling public interest in resolution of a rather ordinary insurance coverage dispute. See Summy, 224 F.3d at 135 (“The desire of insurance companies and their insureds to receive declarations in federal court on matters of purely state law has no special call on the federal forum.”).

Contrary to USAIG’s assertions, the court finds that continuing the present action while identical litigation exists in Florida state court would be unnecessarily duplicative and vexatious. As the Supreme Court articulated in Wilton v. Seven Falls Co., “[i]n the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.” 515 U.S. 277, 288 (1995). In the present case, the court concludes that, because all of the issues and parties are present in the Florida litigation and because the Florida litigation has additional interested parties and issues relevant to the practical and timely disposition of claims, abstention is warranted.

Consequently, this 31<sup>st</sup> day of March, 2004, having concluded that principles of judicial economy support abstention in the present case;

IT IS ORDERED that:

1. Dwiggins' renewed motion to dismiss (D.I. 102) is **granted**.
2. USAIG's motion for reconsideration (D.I. 63) is **denied** as moot.
3. USAIG's motion to compel BCI (D.I. 86) is **denied** as moot.
4. Dwiggins' motion for a stay of deadline in which to file an answer (D.I. 95) is **denied** as moot.
5. USAIG's motion for the issuance of a request for international judicial assistance pursuant to Fed. R. Civ. P. 28(b) and the Hague Convention (D.I. 112) is **denied** as moot.

Sue L. Robinson  
United States District Court