

IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

HOMELAND INSURANCE)	CIVIL ACTION NUMBER
COMPANY OF NEW YORK)	
)	11C-01-089-JOH
Plaintiff)	
v.)	
)	
CORVEL CORPORATION)	
)	
Defendant)	

Submitted: August 2, 2011
Decided: November 30, 2011

MEMORANDUM OPINION

*Upon Motion of the Defendant to Dismiss, or
In the Alternative to Stay Proceedings - **DENIED***

Appearances:

James W. Semple, Esquire, and Corinne E. Amato, Esquire, of Morris James LLP, Wilmington, Delaware, and Michael J. Rosen, Esquire, and Jeffrey T. Shaw, Esquire, of Boundas Skarzynski Walsh & Black, LLC, Chicago, Illinois, Attorneys for Plaintiff Homeland Insurance Company of New York

Josiah R. Wolcott, Esquire, and Bradley R. Aronstam, Esquire, of Connolly Bove Lodge & Hutz LLP, Wilmington, Delaware, and Seth D. Lamden, Esquire, and Jill B. Berkeley, Esquire, and Katherine D. Vega, Esquire, of Neal Gerber & Eisenberg LLP, Chicago, Illinois, Attorneys for Defendant CorVel Corporation

HERLIHY, Judge

Plaintiff Homeland Insurance Company of New York (“Homeland”) filed this declaratory judgment action against its insured Defendant CorVel Corporation (“CorVel”). Homeland seeks an order from this Court regarding its purported defense and indemnity obligations with respect to damages from a pending arbitration action. CorVel’s has moved to dismiss, or in the alternative, stay proceedings. CorVel argues that because there has been no finalized settlement or judgment, Homeland’s liability has not been triggered and Homeland’s action is, therefore, not ripe. Because sufficient events have occurred, the Court finds Homeland’s action ripe. CorVel has also moved to stay these proceedings pending the outcome of arbitration proceedings in Louisiana. The Court finds those proceedings will not resolve the fundamental issue of coverage. CorVel’s motion to dismiss, or in the alternative, to stay is DENIED.

Factual Background¹

CorVel is an insured on a Managed Care Organizations Errors and Omissions Liability Policy (the “Policy”) issued by Homeland. The original policy period ran from October 31, 2005 to October 31, 2006. CorVel renewed the policy until at least December 1, 2007. Under the terms of the Policy, CorVel received up to \$10 million in coverage, inclusive of defense expenses, in excess of a \$1 million self-insured retention. The Policy and renewals were all “claims made and reported” policies and it, therefore, only applied to claims made against, and reported by, the insured during the policy period or within 90 days after the policy period expired.

¹ The factual background is basically taken from Homeland’s Answering Brief.

In 1996, CorVel entered into a preferred provider organization (“PPO”) agreement (the “PPO agreement”) with Lake Charles Memorial Hospital (“LCMH”). The PPO agreement provided that LCMH and its medical staff became a PPO in the CorVel network of Payors. Under that agreement, LCMH agreed to discount rates for certain services performed. The agreement also contained a clause providing that disputes under the agreement must be submitted to arbitration.

In 2004 and early 2005, LCMH filed several claims against CorVel with the Louisiana Department of Labor – Department of Workers Compensation. These claims were brought because CorVel allegedly had been taking an improper discount -- paying only the discounted PPO agreement rate -- for services provided to worker’s compensation patients. The claims were that the discounted payments were below rates prescribed by Louisiana law for workers’ compensation services. Because the services provided to worker’s compensation patients were not included in the PPO agreement, LCMH sought to recover the amount of the discount and statutory fees and penalties provided by Louisiana law. By July 19, 2005, LCMH had filed seventy-five such claims against CorVel.

With the claims filed by LCMH pending, CorVel filed a complaint in the United States District Court for the Western District of Louisiana on July 19, 2005 requesting a declaration directing LCMH to bring all of its underpayment claims in an arbitration proceeding pursuant to the 1996 PPO agreement. On November 6, 2006, the Louisiana District Court entered an order compelling arbitration and staying further proceedings

pending that arbitration. Shortly thereafter, on December 22, 2006, LCMH instituted a class arbitration action for its claims. LCMH claimed CorVel had unlawfully discounted medical bills for worker's compensation patients (the "Worker's Compensation Claims") and the discounts pursuant to the PPO agreement were invalid because of lack of notice (the "Notice Claims"). LCMH sought statutory penalties from Homeland.

The PPO agreement contains the following provision regarding reporting of a claim:

(B) Reporting of Claims and Circumstances:

1. If, during the Policy Period or any applicable Extended Reporting Period, any Claim is first made against any Insured, the Insured must, as a condition precedent to any right to coverage under this Policy, give the Underwriter written notice of such Claim as soon as practicable thereafter and in no event later than:
 - a) with respect to a Claim made during the Policy Period, ninety (90) days after the end of the Policy Period; or
 - b) with respect to a Claim made during an Extended Reporting Period, ninety (90) days after such Claim is first made.

Homeland alleges that CorVel failed to report the arbitration proceeding as a Claim in accordance with the requirements of the Policy. On February 21, 2007, the Louisiana District Court held that the Notice Claims were also subject to arbitration. Homeland alleges the claims were first reported to it on September 24, 2010. CorVel reported the

claims to Homeland by letter and requested full defense and indemnity.² That letter briefly describes the procedural history of the arbitration proceeding, at that time, and requested a discussion with Homeland regarding defense of the claims. Homeland's claims manager, OneBeacon Professional Insurance, responded to CorVel notifying it that the claims would be investigated and Homeland reserved all rights pending the investigation.³ Counsel for both CorVel and Homeland subsequently exchanged e-mail messages regarding whether Homeland would be providing coverage for CorVel's claims. In one of those e-mail messages, CorVel's counsel requested a meeting to discuss potential liability exposure and settlement strategy.⁴

At some point in the following weeks, it became apparent to Homeland that it would not be able to reach an agreement with CorVel. On January 10, 2011, Homeland filed this action for declaratory judgment seeking an order determining its rights and responsibilities under the Policy regarding the arbitration proceeding. Homeland claims it is not responsible for defense or indemnity of the arbitration claims because: (1) the arbitration claims involve events that occurred prior to the inception date of the Policy - October 31, 2005; (2) the arbitration claims are not covered because the claims were

² Letter from Seth D. Lamden, Attorney for CorVel, Howrey LLP, to Virginia A. Troy, Claims Counsel, OneBeacon Professional Partners (Homeland's Claims Manager) (Sept. 24, 2010) (App. to Homeland's Ans. Br. at A87).

³ Homeland's Complaint ¶ 19 (App. to Homeland's Ans. Br. at A6-A7).

⁴ E-mail from Seth D. Lamden, Attorney for CorVel, Howrey LLP, to Michael J. Rosen, Attorney for Homeland, Boundas, Skarzynski, Walsh & Black, LLC (Nov. 15, 2010, 20:05 p.m.).

received by CorVel prior to the inception date of the Policy; (3) CorVel failed to report the arbitration proceeding in accordance with the terms of the Policy; and (4) LCMH seeks statutory damages which are not covered under the terms of the Policy.

Despite the fact that Homeland filed this declaratory judgment action in January, 2011 to determine its obligations and responsibilities related to the Louisiana litigation, counsel for CorVel requested that a representative of Homeland be present at a mediation scheduled for March 22, 2011.⁵

On March 15, 2011, CorVel filed this motion to dismiss or, in the alternative, to stay the proceedings based on an argument that Homeland's cause of action is not yet ripe for adjudication. On March 31, 2011, CorVel entered into a Memorandum of Understanding with the class in the arbitration proceeding whereby CorVel agreed to settle the claims against it by paying \$9 million and assigning its rights to insurance proceeds to the class.

This potential settlement has prompted the underlying plaintiffs to name CorVel and its insurers as additional defendants in an amended complaint filed in a Louisiana state court on September 27, 2011.⁶ This direct file action seeks a judgment against CorVel's insurers (including Homeland), and CorVel is no longer even a party to that

⁵ E-mail from Seth D. Lamden, Attorney for CorVel, Neal, Gerber & Eisenberg LLP, to Michael J. Rosen, Attorney for Homeland, Boundas, Skarzynski, Walsh & Black, LLC (Feb. 24, 2011, 16:25 p.m.).

⁶ Letter from James W. Semple, Attorney for Homeland, to The Honorable Jerome O. Herlihy, Judge, Superior Court of Delaware (Oct. 5, 2011) (See Ex. 2, Plaintiff's Amended Motion for Class Certification in the Louisiana 27th Judicial District Court in Landry Parish).

proceeding. Because the Louisiana Direct Action Statute allows this suit to be filed against Homeland, it must now prepare and launch a defense to the identical issue it first filed in this Court.

Parties' Contentions

CorVel contends this Court should dismiss, without prejudice, Homeland's Complaint because Homeland's coverage obligations are not ripe for adjudication as the underlying arbitration proceeding has not concluded. Delaware Courts use a balancing test to evaluate ripeness, and CorVel believes the balancing test dictates that Homeland's Complaint must be dismissed.

Homeland argues this matter is ripe for adjudication and should be decided without delay. Although it acknowledges there is no immediate funding obligation, Homeland contends declaratory judgment is still appropriate. Additionally, because of the recent settlement agreement and the fact that it has been named as a defendant in the Louisiana state court action, Homeland asserts it will be prejudiced by a delay in determining its rights and obligations. The delay could cause prejudice because its choice of Delaware as a forum for resolving this dispute is in jeopardy if the Louisiana state action proceeds with Homeland as a defendant. For these reasons, Homeland asks this Court to deny CorVel's motion.

Applicable Standard

A motion to dismiss based on lack of ripeness is properly considered under Superior Court Civil Rule 12(b)(1) for lack of subject matter jurisdiction.⁷ The burden of establishing the Court's subject matter jurisdiction rests with the party seeking the Court's intervention, here Homeland. Unlike a motion to dismiss pursuant to Superior Court Civil Rule 12(b)(6), the Court may consider documents other than the Complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1).⁸

This Court has the authority to entertain declaratory judgment actions pursuant to Delaware's Declaratory Judgment Act.⁹ Because of the nature of the relief provided in a declaratory judgment action and to avoid issuing advisory opinions, an actual controversy must exist between the parties to a declaratory judgment action.¹⁰ Courts will not consider a matter when there is no real likelihood that the issue "will be raised in the future by reason of actual contest between the parties."¹¹ The facts must present a

⁷ *Bebchuck v. CA, Inc.*, 902 A.2d 737, 740 ("Ripeness, the simple question of whether a suit has been brought at the correct time, goes to the very heart of whether a court has subject matter jurisdiction").

⁸ *NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417, 429 (Del. Ch. 2007).

⁹ 10 *Del. C.* § 6501.

¹⁰ *See Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. Ch. 1964).

¹¹ *Id.*

situation involving an immediate, or about to become immediate, controversy between the parties.¹²

Delaware courts require four prerequisites for adjudication of a declaratory judgment action, that a controversy must: (1) involve the rights or other legal relations of the party seeking declaratory relief; (2) be one in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) be between parties where interests are real and adverse; and (4) be ripe for judicial declaration.¹³

CorVel only challenges the presence of the fourth element -- that of ripeness -- in the present case. When deciding whether an issue is ripe for adjudication, the Court must conduct a balancing test.¹⁴ The balancing test necessitates that the Court weigh several competing interests in its determination of whether a declaratory judgment action is ripe for adjudication. On one hand, the party bringing the declaratory judgment action typically seeks an early resolution to the controversy. The party responding to the action typically opposes because further factual development could influence the ultimate determination. Additionally, the Court has an interest in only deciding matters where an actual controversy exists; but when such controversies exist, the Court's preference is to resolve the matter in the most efficient manner possible.

¹² *Id.*

¹³ *Playtex Family Products, Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 687 (Del. Super. 1989) (citing *Marshall v. Hill*, 93 A.2d 524, 525 (Del. Super. 1952)).

¹⁴ *Monsanto Co. v. Aetna Cas. And Sur. Co.*, 565 A.2d 268, 274 (Del. Super. 1989).

For these reasons the Court considers the following factors in its determination of whether a declaratory judgment action is ripe for adjudication: (1) an evaluation of the legitimate interests of the plaintiff in a prompt resolution of the controversy; (2) hardship inflicted in the event of further delay in deciding the matter; (3) possibility of future factual development that might be relevant to the determination made; (4) the need to conserve scarce judicial resources; and (5) a due respect for identifiable policies of the law touching upon the subject matter of the dispute.¹⁵

Discussion

The Court agrees with the parties that this case satisfies the first three prerequisites required prior to adjudication of a declaratory judgment action. The Court further agrees that the sole issue requiring analysis in this case is that of ripeness -- the fourth and final prerequisite required. This case presents the specific issue of whether a declaratory judgment action is ripe where an insurer's obligation to indemnify or defend has not yet created a liability to the insurer. CorVel contends the facts before this Court create a scenario where the issue is not ripe and, therefore, the Court lacks subject matter jurisdiction. Homeland cites cases with factual circumstances similar to this case where an insurer had not incurred liability at the time of a declaratory judgment action and the Delaware courts declined to dismiss the insurer from the action on the basis of

¹⁵ *Id.*

lack of ripeness. The Court must begin by balancing the interests of the parties involved through an analysis of the ripeness factors listed above.

(1) *Evaluation of the legitimate interests of the plaintiff in a prompt resolution of the question presented.* Homeland possesses an interest in a prompt resolution of the issue of its rights and obligations to indemnify and/or defend CorVel for costs associated with the pending class arbitration action in Louisiana. It desires a decision in this declaratory judgment action because it is currently in a state of uncertainty regarding its potential liability as a result of those actions. Although CorVel is technically correct that it has not incurred any liability at this time, Homeland has a legitimate interest in the results of the Louisiana proceedings. If Homeland is found to be liable to indemnify or defend CorVel in the Louisiana actions, it would probably desire to insert itself in those actions as soon as is practical for either litigation or settlement discussions. For these reasons, Homeland possesses a legitimate interest in seeing the instant matter resolved without delay and this factor weighs in favor of finding the matter is ripe for adjudication.

(2) *The hardship that further delay may threaten.* Recent developments in the Louisiana arbitration action have caused this factor to become a major concern to the Court. CorVel has apparently entered into a Memorandum of Understanding whereby it agreed to settle the claims in the class arbitration action for an amount that would implicate the Homeland Policy, depending on the outcome of this action. CorVel takes the position that no liability exists, and this action is not ripe, until the settlement

agreement is court approved and becomes non-appealable in the arbitration action. While this Court understands the risks associated with an agreement becoming final in a class action,¹⁶ it believes this situation presents a serious threat of hardship if this action is delayed. The Court recognizes there exists a risk that the settlement will not become final and non-appealable because of the contingencies that must be satisfied; however, it is likely that in the event that the settlement is not approved, the amount of the settlement will increase, and not decrease. Certainly, the amount of the proposed settlement is above the \$1 million self-insured retention above which Homeland's policy is triggered. The Court finds, therefore, that the proposed settlement has for all practical purposes triggered the monetary value requirements for the claim to be covered under the policy.

Homeland filed this declaratory judgment action in Delaware. Its choice of forum to resolve the issues presented in this case has already come under threat because it has been added as a defendant in a Louisiana state court action. This development requires Homeland to expend resources and time litigating issues presented in this case in another jurisdiction in a later-filed action. Where a Delaware action is first filed, Delaware Courts provide a great deal of respect and protection to the plaintiff's choice

¹⁶ According to the Form 8-K filed by CorVel, the settlement is contingent upon several further steps. The first step is that the parties must execute a mutually acceptable definitive settlement agreement. Then the parties must apply to the Louisiana court for approval of the settlement. The Court will only approve the settlement following notice to the class and an opportunity to be heard about the fairness of the settlement or to be excluded from the settlement.

of forum, and that choice will rarely be disturbed.¹⁷ Homeland's choice of Delaware as the forum to resolve the issues raised in this action has already been threatened by subsequent developments in the Louisiana litigation. Accordingly, this Court views this as an important factor in its analysis in favor of finding that this matter is ripe for adjudication.

(3) *The prospect of future factual development that might affect the determination made.* This factor does not provide a compelling reason for this Court to find that this matter is not ripe for adjudication. Although there is a possibility that future factual development could produce helpful material to the determination of the issues in this case, the Court views that possibility as remote and unlikely. Nor has CorVel argued there is a risk of future factual development. The issue presented is one that is typically able to be decided on the record presented by the parties without any factual disputes. The decision that must be made by the Court is one that will involve contract interpretation and application of what will likely be undisputed facts. The Court finds this factor is neutral in its consideration of whether this matter is ripe for adjudication.

(4) *The need to conserve scarce resources.* This factor requires that the Court consider its scarce resources in deciding whether it is appropriate to give attention to a matter at the current stage of the dispute. In situations where it appears to the Court that a current expenditure of resources will create resource savings in the future, it is advantageous for the Court to act early. That is precisely the state of the present case.

¹⁷ *Lisa, S.A. v. Mayorga*, 993 A.2d 1042, 1047 (Del. 2010).

A decision on the issue of Homeland's rights and obligations regarding the Louisiana actions could potentially save courts and the parties' considerable time and resources by preventing the need for excess litigation as a result of uncertainties in ultimate liability for past actions. As evidenced by the potential settlement agreement in the arbitration action and the direct filed action against Homeland in the Louisiana state court action, the most significant dispute seems to be which party is ultimately liable and not whether any liability exists. The purpose of this factor is to determine whether it is an efficient use of the Court's resources to address the claims before the Court at the present time. The Court notes that the Louisiana arbitration action does not appear to be addressing the issue of which party is liable – which is the issue presented in this Court. While the Court favors resolution of claims by the parties in arbitration, it must also consider whether the arbitration will obviate the need for further litigation in the case. Where it appears further litigation is required, regardless of the outcome of an arbitration proceeding, the issue presented to the Court may be addressed without delay.¹⁸ Because this declaratory judgment action could play a major role in determining which party is ultimately liable, it would be an economical use of resources for this Court to consider the issues presented at the present time. This factor weighs in favor of finding that this case is ripe for adjudication.

¹⁸ See *K&K Screw Products, LLC v. Emerick Capital Investments, Inc.*, 2011 WL 3505354, at * 11 (Del. Ch. Aug. 8, 2011) (pending arbitration proceeding is unlikely to preclude need for further litigation and, therefore, stay is unwarranted).

(5) *The Court's due respect for identifiable policies of law touching upon the subject matter in dispute.* This factor requires the Court to consider the appropriateness of determining an issue at the time it is presented to the Court. Cases are only able to be decided by Delaware courts when the issue is fully and fairly presented as an actual controversy. In situations where a case is not an actual controversy, facts might not be fully developed and the parties might not dedicate the same amount of resources – thereby affecting the development of law. This case does not present that problem. Homeland and CorVel are engaged in an actual dispute that can be resolved properly at this time. This factor weighs in favor of finding that this matter is ripe for adjudication.

The Court's analysis of the above-listed factors weighs heavily in favor of finding that this declaratory judgment action is ripe. Three prior Delaware cases involving similar facts are consistent with this determination.¹⁹ The Court finds these three prior cases instructive in its analysis of the present facts. In *Mt. Hawley Ins. Co. v. Jenny Craig, Inc.*, an insurance company's motion to dismiss was denied because primary coverage had been exhausted and plaintiff's excess coverage was implicated by a *potential* settlement.²⁰ Similarly, in *Hoechst Celanese Corp. v. National Union Fire*

¹⁹ See *Mt. Hawley Ins. Co. v. Jenny Craig, Inc.*, 668 A.2d 763 (Del. Super. 1995); See also *Hoechst Celanese Corp. v. National Union Fire Ins. Co of Pittsburgh*, 623 A.2d 1133 (Del. Super. 1992); See also *Monsanto Co. v. Aetna Cas. And Sur. Co.*, 565 A.2d 268 (Del. Super. 1989).

²⁰ 668 A.2d 763 (Del. Super. 1995).

*Ins. Co of Pittsburgh*²¹ and *Monsanto Co. v. Aetna Cas. And Sur. Co.*²² excess insurers' motions to dismiss were denied because the plaintiffs demonstrated a sufficient likelihood that the defendant insurers could be liable under the circumstances presented in the complaint. The Court appreciates the distinction between the facts of this case and the facts of those three prior cases – in which there was no question that the insured was liable to some extent. However, the Court still finds those cases helpful and instructive in its analysis.

The Court cannot determine, with certainty, that CorVel will incur liability as a result of the claims pending in Louisiana. This does not require that the Court dismiss the present action. The prior Delaware cases addressing this issue have required the plaintiff to show that there exists a substantial likelihood that the insurer's policy will be implicated. In this case, CorVel has already contacted Homeland and demanded a "full defense and indemnity." CorVel has also requested that Homeland participate in a mediation of the claims. Additionally, CorVel has entered into an agreement (although not finalized) which, based on the Policy, would require payment based solely on the amount involved. CorVel's actions are inconsistent with its arguments presented in this motion. Homeland has satisfied its burden to show that a substantial likelihood exists that the Policy will be implicated.

²¹ 623 A.2d 1133 (Del. Super. 1992).

²² 565 A.2d 268 (Del. Super. 1989).

Analysis of the factors leads the Court to conclude that the matter is, in fact, ripe, and Homeland has shown a substantial likelihood that the Policy coverage would be implicated if it is applicable. The Court holds that this matter is ripe for adjudication.

The Court is also concerned about the potential prejudice to Homeland arising out of the Louisiana direct-file action filed after this declaratory judgment action. Because of the potential prejudice caused by any delay in adjudicating this matter, the Court will make available to the parties, upon request, an expedited handling of this case.²³

Conclusion

For the reasons stated herein, CorVel's Motion to Dismiss or, in the alternative, to stay the proceedings is **DENIED**. CorVel shall file its answer to the complaint within 10 days of this order pursuant to Superior Court Civil Rule 12(a)(1).

IT IS SO ORDERED.

J.

²³ Superior Court Civil Rule 57 ("The Court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar.").