Declaratory Judgments in Federal Court: The Forum Battle

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In its June 12, 1995, opinion in *Wilton v. Seven Falls Co.*, 115 S.Ct. 2137 (1995), the United States Supreme Court analyzed a classic forum battle involving a federal court coverage declaratory judgment action filed by an insurer and a state court suit brought by the insured. In a decidedly abstract opinion, the Court held that: (1) a federal district court has discretion whether to entertain a coverage declaratory judgment action in the face of a pending state court action presenting the same issues; and (2) a federal district court's decision to dismiss or stay a declaratory judgment action in deference to a parallel state court proceeding will be reviewed under an abuse of discretion standard and not *de novo*.

As discussed below, the *Wilton* decision may have little practical impact because some federal circuits were already operating under those rules. Accordingly, as far as insurance coverage litigation forum battles are concerned, it will probably be business as usual and *Wilton* probably will not significantly reduce insurer-filed federal declaratory judgment actions.

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Although certainly not unique to insurance, complex and elaborate battles over the type of forum (state court, federal court, or arbitration proceeding) and the forum situs (desired jurisdictions and venues) are commonplace in insurance coverage litigation. See generally, Allen, "Forum Battles from the Insurer's Perspective," 4 Coverage (ABA Section of Litigation) 27 (November/December 1994). A typical forum battle pits an insurer-filed federal court declaratory judgment action against a parallel state court indemnity action filed by the insured. See, e.g., *Granite State Insurance Co. v. Tandy Corp.*, 986 F.2d 94 (5th Cir. 1992). There are many reasons why an out-of-state or an out-of-country insurer might want to have coverage issues decided by a federal court. In fact, one of the historical justifications for federal diversity jurisdiction and a reason for its continued existence is to provide a neutral forum to combat the perceived tendency of local state courts to favor their own citizens. See Borchers, "The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for *Erie* and *Klaxon*," 72 Tex.L.Rev. 79 (1993). Likewise, a policyholder might conclude that it is advantageous to litigate coverage issues in state court, particularly in its home state.

Federal court versus state court forum battles pose some very complicated theoretical procedural issues, unlike the situation where two lawsuits are pending in different federal courts. When two federal courts are adjudicating the same issue, "the general principle is to avoid duplicative litigation." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976). On the other hand, "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *McLellan v. Carland*, 217 U.S. 268, 282 (1910).

The academic struggles many of us encountered in studying abstention principles in Federal Courts class in law school do not necessarily become easier to deal with as practitioners. In fact, the abstention principles articulated in *Colorado River Water*, supra, and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U. S. 1 (1983), were at the heart of the United States Supreme Court's analysis in *Wilton v. Seven Falls Co.*

THE *WILTON* FORUM BATTLE

Wilton v. Seven Falls Co. arose from litigation over the ownership and operation of oil and gas wells in Winkler County in west Texas. The oil and gas litigation culminated in a three-week trial in which a Winkler County jury awarded damages in excess of $100 million against several defendants, including members of the famous Hunt family.

The subsequent coverage litigation involved a specific group of defendants in the Winkler County dispute which the United States Supreme Court referred to as the "Hill Group." The Hill Group was insured under policies issued by a group known as London Underwriters. Prior to trial in the oil and gas litigation the Hill Group requested a defense from London Underwriters; this request was rejected.

After the verdict, the Hill Group again contacted London about coverage. Within two weeks, Underwriters struck first by filing a declaratory judgment action in Houston federal court seeking a declaration that their policies did not cover the Hill Group's liability for the Winkler County judgment. Underwriters voluntarily dismissed this action on the condition that the Hill Group provide them with two weeks' notice if they were inclined to bring suit on the policies. One month later, the Hill Group provided Underwriters with that notice, and Underwriters refiled their declaratory judgment action in Houston federal court the very next day.

Approximately one month after the refiling, the Hill Group brought suit against London Underwriters in a Travis County, Texas state district court. Some members of the Hunt family, the Hill Group's co-defendants in the Winkler County oil and gas litigation, joined the state court coverage action and asserted claims against their insurers, at least one of which was a Texas citizen. Accordingly, Underwriters was unable to remove the Travis County coverage action to federal court. This resulted in a classic forum battle pitting an insurer's first-filed federal court coverage declaratory judgment action against a state court indemnity action subsequently filed by the insured.

The forum battle did not last long because the Houston federal court granted the Hill Group's motion to stay the declaratory judgment action in deference to the parallel state court coverage action. The London Underwriters' appellate effort was rejected by the Fifth Circuit with very little analysis. See *Wilton v. Seven Falls Co.*, 41 F.3d 934 (5th Cir. 1994). In fact, the Fifth Circuit opinion initially was not published, but the publication ruling changed when the United States Supreme Court granted the London Underwriters' petition for *writ of certiorari*. 115 S.Ct. 571.

Federal courts have recognized that insurance disputes are particularly appropriate for declaratory judgment actions.

The federal court's order staying the coverage action focused appellate scrutiny on the extent of a court's discretion to decline to exercise subject matter jurisdiction over a declaratory judgment action in which the parties were properly before the court. In other words, the Houston suit did not involve a situation where parties were being forced to litigate in an inconvenient forum or in a forum that lacked personal jurisdiction over one or more parties. Rather, the Hill Group simply preferred, for whatever reasons, to litigate the coverage issues in a Texas state court.

THE DECLARATORY JUDGMENT REMEDY

The Federal Declaratory Judgment Act, 28 U.S.C. §2201, enacted in 1934, provides in pertinent part as follows:

> (a) In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Very shortly after the act became effective, the United States Supreme Court considered cases that raised issues dealing with the parameters of this remedy. For example, in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941), it held that identifying a justiciable controversy under the act involves "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 273. Furthermore, "[i]t is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case." *Id.* Shortly thereafter, in *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942), the Court determined the propriety of deciding a reinsurer's federal court coverage declaratory judgment action in the face of a pending state court garnishment action between the same parties presenting the same legal issues.

It has been held that declaratory relief exists "to afford one threatened with liability an early adjudication without waiting until his adversary should see fit to begin an action after the damage has accrued." *Rowan Cos. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989); *Government Employees Insurance Co. v. LeBleu*, 272 F.Supp. 421 (E.D.La. 1967); 3 Barron & Holtzoff, *Federal Practice & Procedure* (Wright Ed.) §1262, p. 273, n. 13.1. Accordingly, "the declaratory judgment ve-

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hicle . . . is intended to provide a means of settling an actual controversy before it ripens into a violation of the civil or criminal law, or a breach of a contractual duty." *Rowan Cos.*, 876 F.2d at 28. See also, *Scott-Burr Stores Corp. v. Wilcox*, 194 F.2d 989, 990 (5th Cir. 1952).

DIFFERING STANDARDS FOR EXERCISING JURISDICTION

The United States Supreme Court, in *Brillhart v. Excess Insurance Co.*, supra, recognized that a federal district court enjoys discretion whether to exercise its subject matter jurisdiction in a declaratory judgment action when "another proceeding [is] pending in a state court in which all the matters in controversy [can] be fully adjudicated." 316 U.S. at 495. In so doing, the Court announced that it was not attempting "a comprehensive enumeration of what in other cases may be revealed as relevant factors governing the exercise of a District Court's discretion." *Id.* Nonetheless, the Court provided some guidance when it stated (*id.*):

> Where a District Court is presented with a claim such as was made here, it should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court. This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.

Thirty-four years later, the Supreme Court analyzed a forum battle in which the federal court abstained from exercising subject matter jurisdiction over a declaratory judgment action on water rights in deference to a state court proceeding adjudicating the same issues. In *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), the Court held that federal district courts have a "virtually unflagging obligation" to exercise subject matter jurisdiction given to them. However, it recognized that in exceptional circumstances to be determined on the facts of the particular case, federal court abstention might be appropriate. *Id.*, 424 U.S. at 818-820. See generally, Ewald & Cataldo, "Navigating Colorado River Abstention," 45 F.I.C.C. Q. 181 (1995).

Since its *Colorado River* opinion in 1976, the Court has considered other cases that further define the parameters of the abstention principles it endorsed. For example, two years later in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), it analyzed *Colorado River* in the context of two competing suits for damages, one in federal court and the other in state court. The plurality opinion in *Will* addressed the apparent inconsistency between *Colorado River* and *Brillhart*, and held over a vigorous dissent that *Colorado River* "in no way undermine[d] the conclusion of *Brillhart* that the decision whether to defer to the concurrent jurisdiction of a state court is, in the last analysis, a matter committed to the district court's discretion." 437 U.S. at 664.

Further confusion developed in the aftermath of the Supreme Court's next major evaluation of *Colorado River*-type abstention, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). In another plurality opinion, it discussed the tension between the restrictive *Colorado River* "exceptional circumstances" test for abstention and the more permissive *Brillhart* analysis, and held that in the context of a federal district court's stay order in a suit to compel arbitration in deference to a state court action over the same subject matter, the *Colorado River* test controlled. 460 U.S. at 17-19.

In insurance coverage declaratory judgment actions, this tension created a conflict among the federal circuits in which some were applying the restrictive *Colorado River/ Moses H. Cone* abstention principles. See, e.g., *Employers Insurance of Wausau v. Missouri Electric Works*, 23 F.3d 1372, 1374, n.3 (8th Cir. 1994); *Lumbermans Mutual Casualty Co. v. Connecticut Bank & Trust Co.*, 806 F.2d 411, 413 (2d Cir. 1986). Consequently, in these circuits, federal court coverage declaratory judgment actions were likely to proceed, notwithstanding the presence of a state court lawsuit adjudicating the same issues. See also, *Federated Rural Electric Insurance Co. v. International Insurance Co.*, 884 F. Supp. 439 (D.Kan. 1995) (declining to abstain under either *Colorado River* or *Brillhart*).

Other circuits rejected the restrictive *Colorado River/ Moses H. Cone* abstention theories and instead recognized a federal district court's broad discretion, as articulated in *Brillhart*, to decline to exercise subject matter jurisdiction. See, e.g., *Travelers Insurance Co. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774, 778, n.12 (5th Cir. 1993); *Mitcheson v. Harris*, 955 F.2d 235, 237-38 (4th Cir. 1992). Accordingly, federal courts in these circuits sometimes stayed declaratory judgment actions solely because of a parallel state court proceeding even in the absence of the "exceptional circumstances" required by *Colorado Water/ Moses H. Cone.*

Additionally, federal circuit courts of appeals decisions on whether to exercise subject matter jurisdiction over insurance coverage declaratory judgment actions were creating a split in the circuits on the appropriate appellate standard of review for the decisions. Some circuits held that the standard should be lenient and deferential, considering simply whether the district court abused its discretion. See, e.g., *Nationwide Insurance v. Zavalis*, 52 F.3d 689, 692, n.3 (7th Cir. 1995); *United States Fidelity & Guaranty Co. v. Murphy Oil USA, Inc.*, 21 F.3d 259, 263, n.5 (8th Cir. 1994); *Christopher P. v. Marcus*, 915 F.2d 794, 802 (2d Cir. 1990). Other circuits were reviewing a district court's decision on staying, dismissing, or abstaining from deciding federal coverage declaratory judgment actions *de novo*. See, e.g., *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 936 (Fed.Cir. 1993); *Cincinnati Insurance Co. v. Holbrook*, 867 F.2d 1330, 1333 (11th Cir. 1989). These splits among the circuits on procedural issues of the federal Declaratory Judgment Act and federalism abstention principles prompted the United States Supreme Court to decide a rare case involving insurance coverage litigation in *Wilton v. Seven Falls Co.*

THE *WILTON* OPINION

The confusion over whether *Brillhart* or *Colorado River/Moses H. Cone* provided the proper test for a district court's discretion to decline to exercise jurisdiction over a declaratory judgment action in the face of a pending parallel state court proceeding, as well as the review of such decisions, was put to rest in *Wilton v. Seven Falls Co.* The United States Supreme Court rejected the London Underwriters' arguments that the more recent *Colorado River/Moses H. Cone* line of cases had essentially overruled or transformed the broad discretion granted to federal district courts by *Brillhart* to stay, dismiss, or abstain from exercising jurisdiction in a declaratory judgment action in deference to a parallel state court proceeding. As the *Wilton* Court noted, the Declaratory Judgment Act itself provides that a court "*may* declare the rights and other legal relations of any interested party seeking such declaration." 115 S.Ct. at 2142. See generally, Borchard, "Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments," 26 Minn.L.Rev. 677 (1942). As stated by the Court, the federal Declaratory Judgment Act is "an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant" and that "the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power." 115 S.Ct. at 2143. See also, *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 241, 243 (1952).

Since the above-described discretion is so broad, the London Underwriters in *Wilton v. Seven Falls Co.* argued that "district courts *must* hear declaratory judgment cases absent exceptional circumstances; district courts *may* decline to enter the requested relief following a full trial on the merits, if no beneficial purpose is thereby served or if equity otherwise counsels." 115 S.Ct. at 2143. The United States Supreme Court rejected that argument, stating it would be a "futile exercise" for a district court to hear a case on the merits before exercising its discretion to decline declaratory relief, characterizing it as a "wasteful expenditure of judicial resources." As further elaborated by the Court (*id.*):

> By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants. Consistent with the non-obligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close. In 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.

The Court then declared that, consistent with the discretionary nature of the Declaratory Judgment Act, the appellate review of a district court's stay, dismissal, or abstention orders will be conducted by determining whether the district court abused its discretion as opposed to analyzing its decision on a *de novo* basis.

A "USEFUL PURPOSE" FOR A DECLARATORY JUDGMENT?

The Supreme Court's opinion in *Wilton* holds that *Brillhart* provides the proper standard with respect to a federal district court's discretion over whether to grant declaratory relief. Even so, *Brillhart* and its progeny make clear that there is nothing unusual about an insurer seeking declaratory relief on coverage issues in federal court and that it is usually proper for the district court to grant declaratory relief. Indeed, federal courts have recognized that insurance disputes are particularly appropriate for declaratory judgment actions. *Nautilus Insurance Co. v. Winchester Homes, Inc.*, 15 F.3d 371, 375-76 (4th Cir. 1994); *AC and S, Inc. v. Aetna Casualty & Surety Co.*, 666 F.2d 819, 823 (3d Cir. 1981).

The suit for declaratory relief is *sui generis*. Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. See Borchard, *Declaratory Judgments* 107-09 (1934). In the insurance context, a declaratory judgment action affords insurers threatened with liability an early adjudication of rights and a means of settling a controversy before it ripens into a breach of a contractual duty. See *Rowan Cos. v. Griffin*, supra. The primary question the district court should ask in deciding to proceed is whether a declaration would serve a useful purpose. See *Nationwide Insurance v. Zavalis*, supra; Borchard, "Discretion to Refuse Jurisdiction of Actions for Declaratory Judgments," *supra*.

The pendency of a state court lawsuit involving issues similar to those presented by an insurer's federal declaratory judgment action will always be taken into account in analyzing whether a federal court declaration will serve a useful purpose. If the federal action serves only to duplicate litigation or to advance illegitimate purposes, such as harassment, then a federal court may well rule that its action serves no useful purpose. See, e.g., *Mission Insurance Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602-03 (5th Cir. 1983) (declaratory suit dismissed as anticipatory filing); *Johnson Bros. Corp. v. International Brotherhood of Painters*, 861 F.Supp. 28, 29-30 (M.D.La. 1994) (action dismissed because it was a preemptive strike and because convenience of parties dictated dismissal); but see, *Fidelity Bank v. Mortgage Funding Corp. of America*, 855 F.Supp. 901, 904-05 (N.D. Tex. 1994) (declaratory judgment action allowed to proceed, even though court found declaratory plaintiff guilty of forum shopping).

In determining whether to proceed with a request for declaratory relief, the federal court must consider the propriety of proceeding not only in light of any state court lawsuit filed by the insured on coverage issues, but also in light of the issues presented by and the status of the underlying litigation against the insured. In either case, the factors considered by the federal court are the same, *i.e.*, whether the requested grant of declaratory relief by the federal court will serve a useful purpose.

In this connection, the United States Supreme Court, in *Brillhart v. Excess Insurance Co.*, recognized that the pendency of a state court lawsuit presenting similar or identical issues is, by itself, an insufficient reason to deny declara-

tory relief. 316 U.S. at 494-95 (stating that pendency of state court suit should be considered along with other factors); see also, *Sears, Roebuck & Co. v. Zurich Insurance Co.*, 422 F.2d 587, 590 (7th Cir. 1970). Rather, the declaratory judgment statute's grant of discretion implies that the federal court should examine the entire situation presented by the request for relief, including any pending state court actions, and determine whether justice and expediency would be promoted by proceeding with the federal action. Accordingly, "[i]n examining the question whether a concurrent state action should bar federal declaratory relief, the inquiry should not be directed primarily to the question whether the state relief fulfills a useful or adequate purpose, but whether the federal declaratory action subserves such a purpose." Borchard, *supra*, 26 Minn.L.Rev. at 695.

The primary question the district court should ask in deciding to proceed is whether a declaration would serve a useful purpose.

FACTORS TO CONSIDER

The factors to be considered by the federal district court in deciding to grant declaratory relief include: (1) whether the state and federal suits present the same issues; (2) whether the state court is better able to settle the controversy, including the existence of novel state law issues; (3) the adequacy and reach of the state court proceedings; (4) the obligation to discourage duplicative and piecemeal litigation; and (5) how far each proceeding has advanced. Cf., *Brillhart*, 316 U.S. at 495. In applying the foregoing factors, the federal court should also consider judicial economy, comity, and fairness to litigants. *Mission Insurance Co. v. Puritan Fashions Corp.*, supra, 706 F.2d at 601, n.2 (court considered those factors under *Brillhart*); *Rowan Cos.*, supra, 876 F.2d at 28-29 (court considered those factors under *Brillhart*); *Evanston Insurance Co. v. Jimco, Inc.*, 844 F.2d 1185, 1191-93 (5th Cir. 1988) (court considered those factors under *Moses Cone*).

It should be remembered, however, that the *Brillhart* test is inappropriate for cases involving coercive relief. Where damages or other coercive relief are sought, the *Colorado River/Moses Cone* test controls. See, e.g., *Southwind Aviation, Inc. v. Bergen Aviation, Inc.*, 23 F.3d 948, 951 (5th Cir. 1994) (declaratory judgment action also seeking damages for breach of contract, attorneys' fees, and injunctive relief removed suit from ambit of *Brillhart* test). In this regard, it is not uncommon for insurers to seek reimbursement of costs incurred in providing a defense to an insured along with an adjudication of the coverage issues in a declaratory judgment action. See, e.g., *Sentry Insurance v. R. J. Weber Co.*, 2 F.3d 554, 556 (5th Cir. 1993). But see, *Employers Reinsurance Corp. v. Karussos*, 65 F.3d 796, 801 (9th Cir. 1995) (insurer's request for share of defense costs from another insurer did not remove case from *Brillhart* analysis).

In a declaratory judgment action, the federal court should analyze the circumstances under which it was filed. If it happened before the filing of a competing state court action the court will probably favor the exercise of federal discretion to grant declaratory relief. *Travelers Insurance Co. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774, 776-77, 779 (5th Cir. 1993) (federal court should have reached the merits of the insurer's request); *Sandefer Oil & Gas, Inc. v. Duhon*, 871 F.2d 527, 529 (5th Cir. 1989). In these instances, the insurer's first-filed federal declaratory action is apt to be seen as a genuine attempt to determine the parties' legal relations and to obtain guidance from the federal court. In contrast, when the insured has already filed a parallel state court lawsuit the federal action may be viewed as an attempt by the insurer to forum shop. *Texas Employers' Insurance Association v. Jackson*, 862 F.2d 491, 506 (5th Cir. 1988) (federal suit dismissed where court found that its purpose was to defeat a previously filed state court lawsuit); *Dresser Industries Inc. v. Insurance Co. of North America*, 358 F.Supp. 327, 331 (N.D.Tex. 1973), *aff'd*, 475 F.2d 1404 (5th Cir. 1973) (same). If the federal court believes that the insurer is not simply attempting to gain a forum advantage by filing a federal lawsuit, it may properly take this into account in determining whether to proceed with the case before it.

The federal court should also look at how far an insurer's lawsuit for declaratory relief has proceeded and compare it to the status of the state court lawsuit. Where the insured files a parallel state court lawsuit but does not vigorously pursue it, the federal court may determine that considerations of judicial economy dictate proceeding with the federal action. For example, in *Louisiana Farm Bureau Federation*, supra, the Fifth Circuit held that the district court abused its discretion by dismissing a federal declaratory judgment action that was ripe for summary judgment in deference to a state court lawsuit that was still in the pleading stage at the time of the dismissal. Conversely, the district court in *Lady Deborah, Inc. v. Ware*, 855 F.Supp. 871, 876-77 (E.D.Va. 1994), stayed the declaratory judgment action before it in light of pending related state court litigation, mentioning that the state court would be able to resolve the case more quickly.

Even if the insured is prosecuting a parallel state court lawsuit, a federal court may conclude that, based on the issues to be addressed in each action, the speed with which the two actions can be concluded, and the case load of the respective courts, justice would be served by proceeding with the federal action. Cf., *American Casualty Co. of Reading, Pennsylvania v. Continisio*, 819 F.Supp. 385, 393-94 (D.N.J. 1993), *aff'd*, 17 F.3d 62 (3d Cir. 1994) (federal court proceeded with declaratory judgment action where it had progressed further than, and would likely be resolved before, the parallel state action).

Obviously, the federal court must also determine if the issues presented by related state and federal lawsuits are identical. Quite often, the federal declaratory judgment

action presents issues that will not be resolved in a state court lawsuit. For example, where a federal action will resolve uncertainty among various insurers as to coverage for one or more lawsuits against a mutual insured, it may be appropriate for the federal court to proceed. *Nautilus Insurance Co. v. Winchester Homes, Inc.*, supra. Also, where an insurer attempts to disclaim liability based on a policy defense, such as late notice, or on other grounds that will not require the federal court to litigate the same issues that will be decided in an underlying or parallel state court action, the federal court is more likely to entertain the declaratory action.

A federal court should be concerned with whether the case before it is merely duplicative of a pending state court lawsuit.

A federal court may decline to exercise jurisdiction when it chooses not to become entangled with issues in the state court action. *Mitcheson v. Harris*, 955 F.2d 235, 237-38 (4th Cir. 1992); *Allstate Insurance Co. v. Mercier*, 913 F.2d 273, 278-79 (6th Cir. 1990). On the other hand, it may decide to proceed when resolution of the issues presented, including the insurer's duty to defend, would not interfere with the underlying state court tort action against the insured. *State Farm Fire & Casualty Co. v. Mhoon*, 31 F.3d 979, 983-84 (10th Cir. 1994). In *Nationwide Insurance v. Zavalis*, supra, the district court did not abuse its discretion in declining to rule on an insurer's duty to indemnify, but it did abuse its discretion in refusing to decide whether there was a duty to defend where resolution of the latter issue would not interfere with the state court action. 52 F.3d at 693-94. See also, *Aetna Casualty & Surety Co. v. Kelly*, 889 F.Supp. 535, 540-43 (D.R.I. 1995) (district court stayed determination of coverage questions that would interfere with underlying litigation, but proceeded to decide the coverage issues that would not).

One of the strongest cases for granting federal declaratory relief in the face of a competing state court lawsuit is made where limited insurance proceeds are available to satisfy an anticipated multiplicity of lawsuits against the insured. In that instance, declaratory relief by the federal court will serve to relieve the insurer of substantial uncertainty and may save a tremendous amount of future expense in defending multiple lawsuits. See, e.g., *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034, 1040 (D.C.Cir. 1981).

The opinion in *Wilton v. Seven Falls Co.* makes clear that a federal court should be concerned with whether the case before it is merely duplicative of a pending state court lawsuit. Accordingly, one of the most important factors to be examined by a federal court in deciding to proceed with a declaratory judgment action is whether the state court action will afford complete relief to all parties concerned. In *Granite State Insurance Co. v. Tandy Corp.*, 986 F.2d 94, 96 n.4 (5th Cir. 1992), for instance, the court dismissed the federal action in deference to a state court proceeding affording more complete relief to the parties. See also, *Nationwide Mutual Fire Insurance Co. v. Ott*, 1995 Westlaw 649324 (E.D.Pa. 1995). Similarly, in *Magnolia Marine Transport Co. v. LaPlace Towing Corp.*, 964 F.2d 1571, 1582 (5th Cir. 1992), the district court abused its discretion by not dismissing the declaratory suit in light of an adequate pending state court lawsuit. On the other hand, when the federal court has jurisdiction over all the necessary parties and will resolve more of the issues presented, the alternative remedy obtainable in state court may be deemed less adequate and the federal court action is more likely to proceed.

The federal court should also consider comity in deciding whether to proceed with the action before it. If a declaratory judgment action raises novel questions of state law, then a federal court may defer to a parallel state court action. See *Mitcheson v. Harris*, supra, 955 F.2d at 239-40; *State Farm Fire & Casualty Co. v. Meridian Industries Corp.*, 1995 Westlaw 648423 (N.D.Cal. 1995). If the questions raised have already been settled by state law, however, the federal court is more likely to proceed with the case before it because undue interference with state law proceedings is of less concern. *Nautilus Insurance Co. v. Winchester Homes, Inc.*, supra, 15 F.3d at 378. Similarly, where a declaratory judgment action will be affected by questions of federal law, a federal court is likely to proceed. *American Casualty Co. v. Continisio*, supra; *Youell v. Exxon Corp.*, 48 F.3d 105 (2d Cir. 1995) (federal district court refused to dismiss insurer's declaratory judgment action because federal maritime law governed insurance issues), *cert. granted, judgment vacated, case remanded*, 116 S.Ct. 43 (1995).

A federal court's decision on whether to proceed with a request for a coverage declaration is largely one of common sense. In spite of the limited jurisdiction of federal courts, insurers are no different than any other party who is a diverse citizen. Certainly, there is nothing wrong with an insurer availing itself of the opportunity to litigate in federal court granted by the statutes conferring diversity jurisdiction. The Declaratory Judgment Act allows a federal court to relieve uncertainty and declare rights and obligations under an insurance contract. The pendency of state court litigation involving similar or identical issues to an insurer's federal declaratory judgment action is simply a factor to be considered by the federal court in making a common sense decision whether to proceed with the case before it. In conducting its analysis, the federal court must, even in its exercise of the broad discretion conferred by *Brillhart* and *Wilton*, have a good reason for declining to grant the insurer's request for declaratory relief. *Hollis v. Itawamba County Loans*, 657 F.2d 746, 750 (5th Cir. 1981) (district court cannot decline on basis of whim or personal disinclination).

PRACTICAL CONSIDERATIONS

From the foregoing discussion, it is possible to give practical advice to insurers seeking declaratory relief. They should first determine whether the remedy to be sought

vis-a-vis the insured is only for declaratory relief. If an insurer contemplates an action seeking damages or other monetary or coercive relief against the insured, then the insurer may be able to limit the federal court's discretion to dismiss its case under the more lenient *Brillhart* test and force the court to analyze its decision to proceed under *Colorado River/Moses Cone*. For example, an insurer's claim for reimbursement of attorneys' fees spent defending an insured in underlying litigation or a claim seeking damages on account of the insured's own conduct, such as under a reverse bad faith theory, may suffice to remove an insurer's lawsuit from the *Brillhart* analysis and render it more likely to proceed.

A federal court's decision on whether to proceed with a request for a coverage declaration is largely one of common sense.

Insurers considering whether to file a declaratory judgment action should place themselves in the position of a federal district judge; accordingly, try to create a favorable record to maintain the suit in federal court as far in advance as possible. If an insurer believes that it will be necessary at some point for a court to decide issues regarding its duty to defend or ultimately cover a judgment that has been or may be obtained against an insured, declaratory relief in federal court should be sought quickly and should be vigorously pursued. The further the federal action has progressed before the insured files in state court, the more likely the federal court is to retain jurisdiction and proceed to resolve the dispute.

The insurer should select a venue for its action that is as convenient as possible for all parties concerned, especially if individuals are to be parties. Forcing an insured to litigate coverage issues in an inconvenient federal forum increases the likelihood that the court will defer to a parallel state court action sited in a more convenient location. Make sure that all necessary parties are joined in the federal action, so that the lawsuit will afford complete relief to all concerned and will not leave unresolved important issues for the state court lawsuit filed by the insured. If a declaratory judgment rendered by a federal court will not resolve the coverage dispute, a federal district court will be hesitant to proceed when more complete relief can be obtained in state court.

Most importantly, insurers should resist the temptation to assume that *Wilton v. Seven Falls* means that the pendency of a parallel state court lawsuit is an automatic death sentence for a federal declaratory judgment action. It is critical to remember that because a federal court's decision to exercise jurisdiction and proceed with a declaratory judgment action is discretionary and dependent upon various equitable factors, each case must be evaluated on its own merits under its own particular circumstances. Consequently, it is not surprising for individual judges to reach opposite results in cases presenting similar facts. The federal district court should be encouraged to examine the entirety of the situation involving insurer and insured, to weigh the considerations that determine whether federal declaratory relief will serve a useful purpose, and to gear its ultimate decision whether to proceed toward a quick and equitable resolution of the issues presented. Meanwhile, insurers should file appropriate motions in the competing state court action to persuade that court to abstain or stay its action as the parties litigate the coverage issues in federal court. After all, the claims pursued by the insured will be compulsory counterclaims to the insurer's federal court declaratory judgment action.

CONCLUSION

The United States Supreme Court's opinion in *Wilton v. Seven Falls Co.* brings to mind the oft-cited saying "the more things change, the more they stay the same." On the one hand, federal judges who are looking to reduce their dockets may be able in some instances to jettison requests for coverage declarations when a parallel state court action is pending. On the other hand, the mere presence of a parallel state court coverage action does not compel a federal judge to dismiss, stay or abstain from a declaration. As a practical matter, the insurer who favors a federal court with logical reasons as to why its declaratory judgment action should proceed will be in the best position to prevail in a forum battle. Δ