Forum Battles from the Insurer's Perspective

by Robert D. Allen

With the high financial stakes involved in much of today's insurance coverage litigation, it is not surprising that some parties will go to incredible lengths to achieve a forum beneficial to their case.[1] The type of forum (state court, federal court or arbitration proceeding) and the forum situs (desired jurisdictions and venues therein) can be outcome determinative for a particular action.[2]

A party's desire to litigate in a particular forum might be motivated by an innocent attempt to obtain a beneficial choice of law ruling or by a blatant effort to utilize the party's and/or its attorneys' power and clout. Indeed, courts acknowledge that forum shopping is engaged in by defendants, as well as plaintiffs.[3] Obviously, the strategy to achieve a particular forum is not unique to insurance coverage litigation. The vast number of insurance coverage issues on which different schools of thought have developed and the susceptibility of insurers to be haled into courts all over the United States, however, has given rise to very expensive litigation battles over the forum.

Insurers' Ability to Guide Litigation to a Particular Forum

Insurance companies are vulnerable, but not completely powerless, when it comes to battling over a particular forum. Policy terms and litigation procedure rules and statutes are the fundamental mechanisms that insurers can use to protect themselves from being forced to litigate coverage and bad faith actions in unfavorable forums.

Policy Language

Obviously, if the language of a pertinent insurance policy compels a particular forum, then the parties involved and the courts presiding over a forum battle must deal with the relevant language. Common policy terms that greatly impact the forum determination include service-of-suit clauses, forum selection clauses and arbitration provisions.

Robert D. Allen is a partner with the Dallas law firm of Vial, Hamilton, Koch & Knox, where he serves as coordinator of the firm's insurance coverage and bad faith litigation practice group. Mr. Allen's practice is primarily focused on representing insurance companies in insurance coverage, bad faith, and fraud litigation. He is a member of the International Association of Defense Counsel and is Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization. The views expressed herein are his own, and do not necessarily represent the views of Vial, Hamilton, Koch & Knox or its clients.

Service-of-Suit Clause

It is not unusual for insurance policies to contain what is known as a service-of-suit clause. This is particularly true with respect to excess policies and policies issued by London market companies and other foreign insurers.

> *Service-of-suit clauses provide that the insurer will agree to submit to the jurisdiction of any court of competent jurisdiction within the United States.*

Recently, a good deal of case law has analyzed the effect of service-of-suit clauses in the context of ongoing forum battles. Typically, service-of-suit clauses provide that the insurer will agree to submit to the jurisdiction of any court of competent jurisdiction within the United States. For example, a common Service-of-Suit clause contained in a London Market Company policy provides:

> It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.

Removal of Policyholder's State Court Action. In 1991, the Fifth Circuit Court of Appeals confronted the situation of a policyholder bringing a state court action that was removed to federal court by the insurance company when the policy in issue contained a standard Service-of-Suit clause.[4] In *Rose City v. Nutmeg*, the Fifth Circuit held that: "[w]e are persuaded that this [service of suit] clause gives to the policyholder (or its assignee) the right to select the forum, foreclosing Nutmeg's right to remove this action to federal court."[5]

In the context of a reinsurance coverage dispute concerning asbestos claims arising out of reinsurance treaties including both service-of-suit clauses and ar-

bitration clauses, a federal district court for the Southern District of New York held that the service-of-suit clauses serve as a contractual waiver of removal rights, notwithstanding the presence of arbitration clauses in the treaties.[6] Accordingly, the U.S. District Court remanded the reinsurance dispute to New York state court.[7]

While the service-of-suit clause might not preclude declaratory judgment actions first filed by insurers, the case law appears to uniformly hold that such clauses amount to waivers of the right to remove to federal court coverage cases filed by policyholders.[8]

Insurer Initiated Declaratory Judgment Actions. In 1992 in *International Ins. Co. v. McDermott, Inc.*,[9] the Fifth Circuit analyzed the impact of a standard service-of-suit clause in connection with a policyholder's motion to dismiss a federal declaratory judgment suit first filed by the insurer. In this case, the Fifth Circuit narrowly construed its holding in *City of Rose City v. Nutmeg* opining that:

> In a strict sense, *Nutmeg* holds only that a Service of Suit Clause like the one at issue there prevents an insurer from removing an action that the insured files in state court. *Nutmeg* certainly does not hold that a Service of Suit Clause prevents the insurer from bringing an action of its own against the insured. Moreover, *Nutmeg* deals only with disputes raised (and complaints filed) by the insured. *Nutmeg* has nothing to say about complaints filed by the insurer. Indeed, the Service of Suit Clause itself speaks only to actions brought by the insured. Thus, when the action is first instituted by the insurer, the Service of Suit Clause simply has no application.[10]

It should be noted that although the Fifth Circuit did not dismiss the insurance company's first filed declaratory judgment action based on the policyholder's reliance on the service-of-suit clause, the court stated in a footnote that the insurance company still had to appear in the Texas state court action initiated by the policyholder and had to submit to the jurisdiction of that court.[11] Also, the insurance company cannot remove the competing Texas state court coverage action to federal court. The court conceded that its ruling "may in some cases lead to an unfortunate race to the court house."[12]

Recently, *McDermott* was followed to the benefit of a sister insurance company of International Insurance in *International Surplus Lines Insurance Ins. Co. v. University of Wyoming Research Corp.*[13] Similar to *McDermott*, the policyholder complained that its insurer violated the service of suit clause by instituting the coverage litigation through a declaratory judgment action.[14] The court noted that since coverage did not exist, the insurance company did not "fail" to pay an obligation. Thus, the "Service-of-Suit Clause *simply has no application.*"[15] As an aside, the court also acknowledged that "the purpose behind a Service-of-Suit Clause is to protect the insured from having to litigate in an inconvenient forum selected by the insurer."[16] Since the insurer selected the home-state of the policyholder, the court ruled that the policyholder was not "prejudiced by any alleged violation of [t]he Service-of-Suit Clause"[17]

> ***The case law appears to uniformly hold that service-of-suit clauses amount to waivers of the right to remove to federal court coverage cases filed by policyholders.***

Choice of Law. Also, courts hold that service-of-suit clauses do not amount to choice of law clauses. Thus, the court chosen by the policyholder must still engage in the procedure for determining the applicable law that is mandated in the particular jurisdiction. In *Chesapeake Utilities Corp. v. American Home Assur. Co.*,[18] the court stated:

> The Court has no doubt that the parties could have agreed in advance upon the law which would govern any subsequent contract dispute. However in this case the parties reached no such agreement. The above-quoted language is part of a service-of-suit clause. It is not a choice of law provision.[19]

Forum Non Conveniens. Furthermore, courts recognize that insurers can still utilize forum non conveniens procedures, notwithstanding the presence of a Service-of-Suit clause. In the context of a large complex asbestos coverage litigation, one court held:

> In our opinion, a Service-of-Suit clause does not lock an insurance company into the jurisdiction selected by its insured nor does such a provision bar a court in that jurisdiction from considering a plea of forum non conveniens. A "determination in accordance with the law and practice" of the court that the insured has selected refers to the old law of the jurisdiction, including principles of forum non conveniens and rules governing the choice of law. We do agree with [the policyholder], however, that the Service-of-Suit clause bars an insurance company from

relying on its own inconvenience to assert a claim of forum non conveniens.[20]

Forum Selection Clause

Although not commonplace, it is conceivable that an insurance policy, particularly a manuscript policy, would include a forum selection clause specifying a particular forum to preside over legal disputes arising from the policy.[21] Basically, forum selection clauses are prima facie valid, especially if it they result from an arm's -length negotiation.[22]

A general allegation of fraud is not sufficient to invalidate a forum selection clause.[23] Nonetheless, forum selection clauses will be disregarded for "compelling and countervailing reasons" and are unenforceable "if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[24]

Interestingly, in *Pearcy Marine Inc. v. Secor Marine, Inc.*,[25] the court considered a party's bankruptcy and the availability of attorneys working on a contingency basis as grounds to invalidate a forum selection clause specifying the London Court of Justice as the exclusive forum. In this regard, the court noted that:

> The Plaintiff's bankruptcy has left it totally bereft of the enormous funds necessary to pursue an action in England. In fact, the Plaintiff is only able to pursue the present action by means of a contingent fee relationship with its attorneys. Apparently, contingent fee relationships are illegal in England. [citation omitted] Consequently, there is a significant possibility that the enforcement of the Forum Selection Clause would deprive the Plaintiff of any opportunity to pursue its claims.[26]

Arbitration

Arbitration clauses are common provisions in reinsurance treaties and often exist in insurance policies issued to commercial entities and professionals. These clauses are intended to mandate alternative dispute resolution and foreclose the possibility of litigation in the courts. If the insurance policy in question contains an arbitration clause, then the defendant may have a right to have a lawsuit abated or dismissed in favor of an arbitration proceeding. Also, an action could be filed to compel a party to arbitrate a dispute.[27] Many cases acknowledge the public policy favoring alternative dispute resolution and enforce arbitration clauses in insurance policies and reinsurance treaties.[28]

Interplay with Service of Suit Clause. In *Continental Cas. Co. v. Certain Underwriters at Lloyd's*,[29] the federal court granted a reinsurer's motion to stay pending arbitration. The court rejected the ceding company's argument that the service-of-suit clause should supersede the arbitration clause and therefore negate the arbitration provision. The court ruled that the purpose of the service-of-suit clause was to allow the ceding company to file suit in the court of its choice to enforce an arbitration award, not to circumvent arbitration.[30]

> ***If the insurance policy in question contains an arbitration clause, then the defendant may have a right to have a lawsuit abated or dismissed in favor of an arbitration proceeding.***

Terms of Arbitration. Arbitration provisions come in a variety of forms. Often, the arbitration provisions detail the procedures of selecting the arbitrators, determining the location of the arbitration, the rules and law governing the arbitration and the apportionment of the costs. In *Universal Re Insurance Corp. v. Allstate Insurance Ins. Co.*,[31] the Seventh Circuit on rehearing reversed its own prior and the district court's decisions with respect to a ceding company's right to appoint an arbitrator for the reinsurer after the reinsurer's inadvertent mistake led to its tardy appointment of an arbitrator. The Seventh Circuit technically applied the Federal Arbitration Act and reversed the district court's holding that the parties' intent could be carried out without requiring precise compliance with the appointment process due to an inadvertent mistake.[32]

Arbitration Procedure and Judicial Review. The published case law concerning arbitration often analyzes arbitration procedure and whether and when it is possible to obtain judicial review. For example, in *Psarianos v. Standard Marine, Ltd., Inc.*,[33] the Fifth Circuit addressed a situation in which an insurer filed a declaratory judgment action to confirm an arbitration finding that there was no coverage for a loss. While the arbitration was pending, the policyholder delivered a DTPA demand letter to the insurance company indicating its intention to proceed against the insurance company in a Texas state court action. In response, the insurance company filed a declaratory judgment action seeking a declaration that the arbitration decision would be binding on the parties. Eventually, the case was appealed on to the Fifth Circuit, which upheld the arbitration finding of no coverage.

In *Eljer Manufacturing Co. Inc. v. Kowin Development Corp.*,[34] the Seventh Circuit discussed the situations in which a court can modify an arbitrator's decision. Here, the Seventh Circuit essentially approved a district court's reduction of damages awarded by an arbitrator. In so doing, the court recognized that

although its "scope of review of a commercial arbitration award is grudgingly narrow . . . [the court] will set aside an arbitrator's decision if in reaching his result, the arbitrator deliberately disregards what he knows to be the law."[35]

In *Louisiana Natural Gas Pipeline, Inc. v. Bludworth Bond Shipyard, Inc.*,[36] the Houston First District of Appeals considered an attempt by the party to avoid an arbitration award by the filing of a state court lawsuit. Here, the court strictly applied the Texas General Arbitration Act[37] and found that the plaintiff failed to comply with the limitations period for contesting the arbitration award. Accordingly, the Court of Appeals affirmed the trial court's dismissal of a lawsuit that sought relief falling within the scope of an arbitration agreement.

The insurance company's greatest weapons to guide coverage litigation to a particular forum are the federal and state declaratory judgment statutes.

In *Gathe v. Cigna Health Plan of Texas, Inc.*,[38] the court analyzed whether it had jurisdiction over an appeal of a trial court order compelling arbitration. In this case, the court held that a trial court order compelling arbitration under the Federal Arbitration Act is interlocutory and thus the court of appeals lacked jurisdiction over the matter. It should be noted, however, that under article 238-2 of the Texas General Arbitration Act,[39] a party may appeal from an order denying an Application to Compel arbitration, or an order granting an application to stay arbitration.[40]

In *Kline v. O'Quinn*,[41] the Houston Court of Appeals, over a dissent, held that an arbitrator had the right to award punitive damages against one of the parties to the arbitration.

The Federal Arbitration Act, 9 U.S.C.A. §§1-16, often applies to contracts involving interstate commerce transactions.[42] If the issue of the applicability of the Federal Arbitration Act arises in a state court, then state procedure governs the determination.[43] While the trial court normally decides whether to compel arbitration summarily on the basis of affidavits, pleadings, discovery and stipulations, an evidentiary hearing may be necessary if material facts necessary to decide whether a valid arbitration agreement applies are controverted. Thus, in connection with its motion to compel arbitration, a party will have to put on proof that the contract at issue touches interstate commerce.[44]

Declaratory Judgment Actions

Perhaps the insurance company's greatest offensive weapons to guide coverage litigation to a particular forum are the federal and state declaratory judgment statutes.[45] Cases such as *International Ins. Co. v. McDermott, Inc.*[46] demonstrate the importance of winning the race to the courthouse. From the insurer's perspective, utilizing declaratory judgment actions may be the only way that an insurance company can influence the forum over which a coverage dispute will be litigated. Traditionally, declaratory judgment actions have been recognized as particularly effective in the context of litigating coverage disputes. For example, the seminal United States Supreme Court case on the justiciability of issues raised by declaratory judgment actions was an insurance coverage dispute.[47]

Pertinent Statutes and Rules

Theoretically, a court's ability to provide declaratory relief arises out of statutes and rules. Practitioners in the federal court system have to deal with the Federal Declaratory Judgment Act.[48] The basic statutory provisions governing declaratory judgment actions is quite brief. Below is the text of the pertinent portions of the Federal Declaratory Judgment Act in connection with insurance disputes.

§2201. Creation of Remedy

> (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.

§2202. Further Relief

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Also, Fed. R. Civ. P. 57 specifically addresses declaratory judgment actions and it reads as follows:

Rule 57. Declaratory Judgments

> The procedure for obtaining a declaratory judgment pursuant to Title 28, U.S.C., §2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence

of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

In Texas, a version of the Uniform Declaratory Judgment Act has been enacted.[49] It is more specific than its federal counterpart, especially as it relates to proper subject matters for declaratory relief, necessary parties, a court's refusal to render a declaratory judgment and the recovery of costs and attorney's fees.

Justiciability

Fundamentally, there must be a justiciable controversy in order for a court to entertain a declaratory judgment action. Nonetheless, because the "metes and bounds are not clearly marked" and the words used to define a justiciable controversy in the context of declaratory judgments "are themselves elastic, inconstant and imprecise,"[50] not all courts have been consistent in determining when a justiciable controversy exists in the insurance context.

The analysis of what constitutes a justiciable controversy was explored by Judge Posner of the Seventh Circuit in *Bankers Trust Co. v. Old Republic Ins. Co.*[51] In this opinion, the Seventh Circuit analyzed the issue of when a judicial proceeding to determine an insurer's obligations to indemnify its insured is premature. In this regard, the court conceded that there are inconsistent decisions among the circuits.[52] As the court recognized, "[t]he conflict dissolves when one realizes that our cases state a general rule rather than an absolute one."[53]

Additionally, because the decision to grant or withhold a declaratory judgment in a particular case is discretionary, a party's right to a declaratory judgment is not established simply because an actual case or controversy is presented.[54] Nevertheless, issues such as duty to defend, coverage for a determined loss, waiver of conditions and other disputes between insurers and policyholders are normal subjects of declaratory judgment suits.[55]

Fifth Circuit Application. In light of the nebulous standards for determining justiciability of declaratory judgment actions, it is not surprising that a wide variety of apparently inconsistent results have been handed down by the federal courts in the Fifth Circuit. A key issue with respect to whether a declaratory judgment action is justiciable arises from the relief sought and the timing thereof in the declaratory judgment action. For example, insurers regularly file declaratory judgment actions to obtain a ruling on whether a defense is owed to a policyholder in a lawsuit filed against that policyholder.[56] In that instance, the court can compare the pleadings to the policy and determine whether a defense is owed.[57]

On the other hand, it is much more difficult to determine justiciability in an action involving the duty to indemnify or pay (as opposed to the duty to defend), especially when the request for declaratory relief is filed prior to the rendition of a judgment against the policyholder. For example, the Fifth Circuit has held that a dispute between two or more insurers as to which has the primary responsibility for a potential, but not yet rendered, tort judgment against an insured represents a "many sided Donnybrook" and an "academic theoretical," which in the court's discretion, should not be determined.[58]

Because the decision to grant or withhold a declaratory judgment in a particular case is discretionary, a party's right to a declaratory judgment is not established simply because an actual case or controversy is presented.

Notwithstanding *American Fidelity* and *Allstate v. Employers*, it is not altogether unusual for a coverage declaratory judgment action to be adjudicated by the federal courts in the Fifth Circuit prior to the rendition of a judgment in the underlying case. As a practical matter, such actions have been recognized as legitimate by the United States Supreme Court in *Maryland Cas. Co. v. Pacific Coal & Oil Co.*[59] Indeed, there are a host of declaratory judgment actions that have been considered by the Fifth Circuit in which an indemnity coverage issue was being determined prior to a judgment against the policy holder.[60]

From an academic level, it should be noted that justiciability is connected to a court's subject matter jurisdiction over a declaratory judgment action. Theoretically, federal courts are duty bound to raise jurisdictional defects, *sua sponte* if necessary. If a federal court is improperly adjudicating a premature declaratory judgment action, that would go to the court's jurisdiction over the matter. Since the federal courts have been routinely analyzing declaratory judgment action seeking rulings on indemnity before the pertinent judgment is taken against the policyholder, it can be inferred that the Fifth Circuit panels in the above cases saw no jurisdictional or justiciability flaws. At least, none are discussed in those opinions.

Texas Appellate Court Application. With respect to the recurring justiciability issues that are prominent in the Fifth Circuit, Texas state common law on declaratory judgment justiciability appears to be much

more straightforward. Under Texas law, a court has no power to render a declaratory judgment on indemnity coverage or noncoverage, as opposed to a duty to defend, until the injured party obtains a judgment against, or settles with, the insured.[61] The Texas Supreme Court's holding in *Burch* that such an action is premature and would require the court to render an advisory opinion, does not apply to a claim by the insurer seeking to determine whether it has a duty to defend.[62]

Discretion of a Court to Hear a Declaratory Judgment Action

As a practical matter, declaratory judgment lawsuits brought by insurers are easily administered and very likely to determine the forum when they involve a relatively small number of parties. That is not to say, however, that declaratory judgment actions are not possible in larger, more complex, multi-insurer litigation because declaratory judgment actions can be a very appropriate procedure in those situations as well. This is especially true in jurisdictions, like Texas and the federal court system, where compulsory counterclaim and liberal joinder of party rules apply.

> ***Classic forum battles usually pit insurer-initiated declaratory judgment actions against indemnity actions filed by the policyholder.***

In light of the insurer's ability to file declaratory judgment actions, it is not at all surprising that classic forum battles usually pit insurer-initiated declaratory judgment actions against indemnity actions filed by the policyholder.

Federal Court Application. A perfect example of a federal appellate court analyzing a forum battle between an insurer initiated coverage declaratory judgment suit against a suit brought by the policyholder occurred in *Granite State Ins. Co. v. Tandy Corp.*[63] There, Granite State first filed a federal declaratory judgment action and its policyholder, Tandy Corp., filed an indemnity action in a Texas state court three weeks later. In this case, the federal court exercised its discretion to stay the insurer-initiated litigation in deference to the indemnity action filed by the policyholder. In so doing, it analyzed and applied the common test applied by courts to determine whether to stay, abate or dismiss a declaratory judgment action.[64]

It is remarkable that application of similar tests has resulted in such a wide divergence in the court decisions as to when a court should exercise its discretion to abate or dismiss an insurer initiated declaratory judgment action. For example, case law authority exists to support the proposition that it is an abuse of discretion for a federal court to decline to exercise jurisdiction over a declaratory judgment action in the face of a parallel state action.[65]

Important to insurers is the fundamental premise that although a district court may have discretion whether to decide a declaratory judgment action, that court may not dismiss a request for declaratory relief arbitrarily "on the basis of whim or personal disinclination."[66] Rather, courts should analyze various factors to determine whether to decide a declaratory judgment suit. As stated by the Fifth Circuit:

> [D]eclaratory judgment relief may be denied because of a pending state court proceeding in which the matters in controversy between the parties may be litigated, because the declaratory complaint was filed in anticipation of another suit and is being used for the purpose of forum shopping, because of possible inequities in permitting the plaintiff to gain precedence in time and forum, or because of inconvenience to the parties or the witness.[67]

In *Nautilus Insurance Ins. Co. v. Winchester Homes, Inc.*[68] the Fourth Circuit held that the decision to entertain or dismiss a declaratory judgment depends on (1) the interest of the state to decide the issues in a state court; (2) whether the state court forum is more efficient of the resolution of the issues; (3) whether an unnecessary entanglement between state and federal court would result; and (4) "procedural fending" whether the federal court is being asked to decide a case that would not otherwise be removable. After applying these factors, the Fourth Circuit held that the district court erred in abating the declaratory judgment action, notwithstanding the pendency of related litigation in state court.

The Second Circuit, in *Broadview Chem. Corp. v. Loctite Corp.*[69] and *Continental Cas. Co. v. Coastal Savings Bank*,[70] applied a two-prong test to determine whether a federal court should decline to exercise its discretion to hear a declaratory judgment action. In these cases, the Second Circuit held that if the declaratory judgment will (1) clarify and settle legal relations; and (2) terminate and afford relief from the uncertainty, insecurity and controversy, then the federal court should proceed to preside over the declaratory judgment action.[71]

A scholarly opinion on whether a federal district court should exercise its discretion to adjudicate an insurance declaratory judgment action was recently authored by retired United States Supreme Court Associate Justice Byron White, sitting by designation on

a panel of the Tenth Circuit, in *State Farm Fire & Cas. Co. v Mhoon.*[72] In *Mhoon*, the Tenth Circuit analyzed whether the presence of a pending state court action in which a critical factual issue would be determined required the federal court to stay and/or abate the federal declaratory judgment action. After applying the standard Tenth Circuit analysis of whether "a declaration of rights, under the circumstances, [will] serve to clarify or settle legal relations in issue [and whether the declaration of rights will] terminate or afford relief from the uncertainty giving rise to the proceeding," the Tenth Circuit affirmed the trial court's decision to adjudicate the declaratory judgment action.[73]

When coverage litigation is initiated by insurance companies through the use of declaratory judgment actions, care must be taken to avoid the use of deceptive tactics to gain an advantage in the selection of a forum. Otherwise, even a first-filed declaratory judgment suit is subject to a stay, abatement or dismissal order.[74]

A recent application of the *Puritan Fashions* rule was performed by a district court in the Northern District of Texas in *Fidelity Bank v. Mortgage Funding Corp. of America.*[75] In that case, the court considered arguments that the declaratory plaintiff filed an anticipatory action for the purpose of securing a more favorable forum. The court acknowledged that the rule of *Puritan Fashions* is that "[a]nticipatory suits are disfavored because they are an aspect of forum-shopping."[76] Nonetheless, a district court still possesses the "discretion to entertain the disfavored suit and that the convenience of the parties, or other equitable factors, can outweigh the forum-shopping aspect."[77]

On a theoretical level, it is interesting to note that the propriety of a federal district court's abstention from deciding an insurance coverage declaratory judgment action is governed by "one of two different tests."[78] On the one hand, the decision as to whether to abstain over a pure declaratory judgment action, the district court should apply the rule of *Brillhart v. Excess Ins. Co. of America.*[79] On the other hand, when declaratory judgment actions include requests for "coercive relief," the federal abstention standard set out in *Colorado River Water Conservation District v. United States*[80] is applicable. In this regard, the court's discretion to abstain "is narrowly circumscribed by . . . [the district court's] 'virtually unflagging obligation to exercise discretion given them.' " Consequently, a district court should abstain only in the "exceptional" case.[81]

Texas State Court Application. The Texas State Court appellate case law has addressed some issues of interest. For example, in *Texas Electric Utilities Co. v. Rocha,*[82] the defendant in a tort action filed a counterclaim for declaratory judgment absolving it of the same liability at issue in the plaintiff's case. After the plaintiff nonsuited its action, the trial court also dismissed, over the defendant's objections, the defendant's counterclaim for declaratory relief.

> ***Issues pertaining to whether certain parties are necessary and/or indispensable in declaratory judgment actions have caused considerable difficulty for the courts.***

In *Reynolds, Shannon, Miller, Blinn, White & Cook v. Flanary,*[83] the Dallas Court of Appeals considered the procedural issues raised from the filing of a declaratory judgment action seeking a finding of nonliability in a different state court from an action filed by the other party seeking damages over the same relationship. In this case, the plaintiffs to the initial action for damages sought the extraordinary remedy of mandamus and/or prohibition to prevent the trial judge in the declaratory judgment action from exercising jurisdiction over it. In so doing, the Court of Appeals held that:

> Mandamus relief will not lie, however, to determine dominant jurisdiction between two courts when both courts have jurisdiction to act and neither court is interfering with the other's exercise of jurisdiction [citation omitted]. In effect, a party possesses an adequate remedy by appeal, after a final judgment, from the second court's incidental ruling overruling the plea in abatement. . . . When two courts compete for jurisdiction over the same parties in the same subject matter, the party aggrieved by the second court's ascertain of jurisdiction, without more, has an adequate remedy on appeal despite its costs and delay.[84]

Necessary Parties

Issues pertaining to whether certain parties are necessary and/or indispensable in declaratory judgment actions have caused considerable difficulty for the courts. For example, some case law exists for the proposition that an injured party, seeking a judgment against the insured, is a necessary, and perhaps even an indispensable, party in an insurer initiated coverage declaratory judgment lawsuit.[85] For example, the Fifth Circuit in *Ranger v. United Housing of New Mexico* inferred that Fed. R. Civ. P. 24 might permit the claimant to intervene in a duty-to-defend declaratory judgment action because the claimant might

"have to contend with the *stare decisis* effect of such a judgment."[86]

As is typical in declaratory judgment law, a separate line of cases espousing a diametrically opposite rule has developed as well. For example, the federal district court in *Austin Fireworks, Inc. v. THE Ins. Co.*,[87] denied a motion to dismiss a declaratory judgment action on the basis that the injured party was absent from that suit. In this case, the federal court rejected as dicta Kansas Supreme Court case law authority that the injured third party is an indispensable party to that declaratory judgment action between liability insurer and the insured on the issue of coverage for the injured party's damages, and held that the injured party was not an "indispensable party" to the coverage action between the insured and its liability insurer.[88]

In Texas state court, where only issues relating to the duty to defend are cognizable in a declaratory judgment proceeding prior to the injured party's obtaining a judgment against the insured, the courts have held that the injured party has no standing to intervene and no right of action against the insurer until a judgment is rendered against the insured.[89] In fact, the Texas Supreme Court has held that an injured party is not bound by an agreed judgment of noncoverage rendered in an action between only the insurer and the insured.[90] The court held that the injured party and the insured were not in privity with one another for collateral estoppel purposes:

> In the present action, Childress could exercise no control over the declaratory judgment suit. Their interest were not represented by a party to the action nor were they successors in interest to a party. In fact the purpose of the suit was to work against their interest.[91]

Furthermore, the court noted that the Texas Uniform Declaratory Judgment Act requires "all persons shall be made parties who would have or claim any interest which would be effected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."[92]

Recovery of Attorneys' Fees

Although there is a Federal Declaratory Judgment Act,[93] and virtually every state has adopted some version of the Uniform Declaratory Judgment Act,[94] issues arise over whether federal courts exercising diversity jurisdiction should apply the federal or the pertinent state's statute.[95] This can become an issue with respect to the recovery of attorneys' fees because the Federal Declaratory Judgment Act is silent on attorneys' fees and the Texas Uniform Declaratory Judgment Act specifically provides that "the court may award costs and reasonable and necessary attorneys' fees as are equitable and just."[96]

The availability of attorney's fees in diversity cases depends upon state law,[97] and this is true in declaratory judgment actions.[98] Cases exploring *Erie* issues hold that a right to recover attorney's fees should be considered a substantive right and not a procedural detail.[99] Thus, it is possible for a federal court to award attorney's fees pursuant to the state declaratory judgment act, notwithstanding the absence of an attorney's fee provision in the Federal Declaratory Judgment Act.

In Texas, the considerable discretion in the awarding of attorney's fees in declaratory judgment actions enjoyed by state courts can lead to interesting results. Pursuant to Tex. Civ. Prac. & Rem. Code ann. §37.009: "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." The award of attorney's fees is not limited to the plaintiff or to the party affirmatively seeking declaratory relief.[100] In fact, case law authority exists in Texas state court to award fees to the non-prevailing party under the declaratory judgment statute.[101]

On the one hand, the possibility of recovering fees is another valid reason motivating an insurance company to initiate coverage litigation by filing its own declaratory judgment action. On the other hand, case law authority exists to support the proposition that a defendant who successfully defends a declaratory judgment can recover its attorneys' fees from the declaratory plaintiff.[102]

Defensive Measures Possessed by Insurers to Combat an Undesired Forum Selected by the Policyholder

While the filing of a declaratory judgment suit by an insurer before the insured initiates its own action certainly is helpful in influencing the forum, it is not necessarily conclusive on the forum determination. For example, federal courts can, only in unique circumstances, enjoin common parties from litigating the same matter in a state court. Also, similar limitations on comity might allow parallel actions to proceed in different state court systems. Thus, it is not only possible to have a race to the courthouse, there may be a race to judgment as well, which in turn gives rise to issues of full faith and credit.[103]

In many situations, the policyholder wins the race to the courthouse. Also, in some instances insurers decide not to file competing proceedings. Accordingly, insurers must be aware of the procedures they can employ defensively to attempt to achieve a more favorable forum. The article will analyze many of these procedures by looking at this issue separately from the standpoint of one or more proceedings filed to determine a particular coverage issue and single

coverage actions filed by policyholders. Naturally, some of these procedures can apply to either situation.

Defensive Forum Battle Measures When the Coverage Issue Is Joined in One or More Proceeding

Removal

It is quite unusual for an insurance coverage action to be such that the forum is limited to federal courts only. Conceivably, an insurance coverage question could be a supplemental claim to a federal antitrust or a RICO action that must be litigated in the federal courts. Much more likely, however, the federal court jurisdiction over an insurance coverage matter, if it exists at all, will not be exclusive. This means that state courts will normally possess concurrent subject matter jurisdiction over the matter, along with the federal court. Accordingly, insurers must pay particular attention to the procedural requirements of removal if they desire to exercise their prerogative, when available, to have a federal court decide their case, instead of a state court forum selected by the policyholder.

Timing of Removal. Normally, the Notice of Removal must be filed within 30 days after the defendant receives, by service or otherwise, a copy of the plaintiff's petition.[104] If the case is not initially removable, the notice must be filed within 30 days after receipt, by service or otherwise, of the paper that first demonstrates that the case is removable.[105]

Problems are created in the situation with multiple defendants. For example, case law authority exists for the proposition that the time for removal for all defendants runs from the service on the first defendant to be served. If the first-served defendant fails to remove the action within the specified period, later-served defendants cannot remove the case.[106]

Not surprisingly, there is case law to support a diametrically opposite rule. For example, in *Faulk v. Superior Industries Int'l, Inc.*,[107] the court, while acknowledging the validity of the "single-date-of-removal rule," held that "exceptional circumstances existed to negate the applicability of the single-date-of-removal rule in the case of a staggered service on the various defendants to the action."[108]

An example of the technical aspects of removal that can serve as a trap to unwary insurance carriers and other defendants arises from the time for removal requirement under 28 U.S.C.A. §1446(b). The basic language provides that "within thirty days after receipt by defendant, through service or otherwise, of a copy of the initial pleading," a notice of removal must be filed. A split in the federal courts has developed as to whether the thirty day removal period begins upon receipt of service of the pleading or whether receipt of a courtesy copy of the pleading prior to service triggers the running of the thirty-day time period.[109]

Very recently, a Texas federal court considered whether receipt of a copy of a petition "through service or otherwise," gave rise to the waiver of the right to remove the case to federal court when the defendant sought removal more than 30 days after receiving a courtesy copy of the pleading but within 30 days of receiving formal service of the pleading.[110] In this case, the court, while recognizing the split of authority, adopted the "receipt" rule and held that the defendant's attempted removal was untimely and accordingly remanded the case to state court.[111]

Accordingly, defendant insurance carriers in federal jurisdictions that have adopted the "receipt rule" or have not decided this issue or have inconsistent decisions (*i.e.*, the Ninth Circuit) are well advised not to take any chances and remove the case to federal court within thirty days upon receipt of the initial pleading. This could lead to the bizarre practice of a defendant removing a case to federal court, even prior to it being properly served with the initial pleading.

Diversity Jurisdiction. Although it is said that the historical justification for federal diversity jurisdiction is obscure—and this is undoubtedly true—the consensus is that diversity has existed and exists to provide a neutral forum for out-of-staters against perceived local bias by state courts.[112]

This principle is as important today as it was 200 years ago and holds true with respect to certain state court actions filed by policyholders against insurance carriers.

Diversity jurisdiction is often available in insurance coverage litigation matters. This is especially true in situations involving a small number of insurance companies because it is not unusual that the insurance company defendants' principal places of business and states of incorporation are different than the citizenship of the policyholder plaintiff. The removal requirements are set out in 28 U.S.C.A. §1441(b). They are very technical and considerable care must be used to make sure compliance with the requirements are satisfied.

An interesting case analyzing the issue of what state or states are implicated for determining whether diversity jurisdiction exists when a defendant is an unincorporated association of a group of underwriters is *Royal Ins. Co. of America v. Quinn-L Capital Corp.*,[113] in which the Fifth Circuit held that diversity jurisdiction existed even though the attorney-in-fact for the unincorporated underwriters' association, himself, was non-diverse. Since all of the underwriters were citizens of diverse states, the Fifth Circuit held that diversity jurisdiction existed.[114]

Federal Question Jurisdiction. Removal to federal court on the basis of federal question jurisdiction under 28 U.S.C.A. §1441(b) frequently occurs in

health insurance coverage litigation involving policies governed by the Employee Retirement Income Act of 1974,[115] (ERISA). In essence, ERISA recharacterizes state law claims into federal claims and thus the corresponding actions can be removed to federal court.[116]

Fraudulent Joinder. It used to be next to impossible for an insurance company to remove a case, filed in state court on the grounds that one of the parties to the suit was fraudulently joined to destroy diversity jurisdiction. In 1990, however, the Fifth Circuit in *Carriare v. Sears, Roebuck & Co.*[117] made it a little easier for insurance carriers and other defendants to remove state court lawsuits to federal courts in the Fifth Circuit on the grounds that a party was added for the sole purpose of destroying federal court jurisdiction. As it now stands, the insurance company does not have to prove that the policyholder possessed actual fraudulent intent in adding the non-diverse straw party to the lawsuit.[118] Rather, if the insurance carrier can show that it is legally impossible for the plaintiff to prevail against the straw party, in other words no legal basis for having that party in the lawsuit, then the federal courts are now permitting the insurance company to remove the case to federal court on a fraudulent joinder theory.[119]

For insurers in Texas litigation, a new trend is developing whereby federal courts are allowing removal of state court insurance litigation to federal court on the grounds that a party, often an agent or adjuster, was fraudulently joined to destroy diversity jurisdiction.[120]

Foreign Sovereign Jurisdiction. Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA) to provide access to the federal courts for the resolution of ordinary legal disputes involving foreign sovereigns.[121] Prior to enactment of the FSIA, the United States granted virtually absolute immunity to foreign sovereigns for any liability suits in this country.[122] The intent of Congress in passing the FSIA "was to allow for a uniform body of law concerning foreign states to emerge in the federal courts."[123] The FSIA generally grants foreign states immunity from jurisdiction of United States courts, but delineates certain exceptions to prevent a foreign state from invoking foreign sovereignty as an absolute defense.[124]

The Removal Statute. The removal statute provides for the removal of any civil action brought in state court against any entity qualifying as a "foreign state" under the FSIA:

> Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.[125]

The FSIA defines a "foreign state" as follows:

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.[126]

Foreign Sovereign Jurisdiction as Grounds for Removal of Insurance Coverage Lawsuits. With the recent explosion of massive coverage litigation involving insurers, reinsurers and retrocessionaires located in other countries, many insurers are seeking to invoke foreign sovereign jurisdiction as a vehicle to remove the coverage lawsuit to a more favorable federal forum.[127]

In *Moore*, the court noted that one of the foreign carriers failed to provide sufficient evidence to establish its status as a "foreign state" under the FSIA.[128] Therefore, it is important to remember that removals based on foreign sovereign jurisdiction should be accompanied by proper affidavits from appropriate personnel within the foreign entity that adequately establishes the entity's status as a "foreign state" under §1603.

Federal courts utilize a strict approach in analyzing removal of insurance coverage lawsuits based on foreign sovereign jurisdiction. In *Fabe v. Aneco Reinsurance Underwriting, Ltd.*,[129] a Bermuda liquidator sought to remove an action against various reinsurance companies on the grounds that the liquidator qualified as an agency or instrumentality of a "foreign state" under §1603. The plaintiff sought to remand the lawsuit to state court contending that the insolvent Bermuda reinsurer did not qualify as an agency or instrumentality of Bermuda. The court held that the liquidator, charged with vindicating the interests and public policy of Bermuda, qualified as an agency or instrumentality of the country and denied the plaintiff's motion.[130]

A recent example of a successful invocation of foreign sovereign jurisdiction as grounds for removal is *Missouri Pacific Railroad Co., v. Aetna Casualty & Surety Co., et al.*[131] (*MOPAC*). In the *MOPAC* lawsuit, the policyholder filed suit in Texas state court for, among other things, a declaration that the general liability carriers of its predecessor-in-interest owed coverage for certain environmental liabilities. Three entities, subscribing to one or more policies that the policyholder placed in issue, removed the case to federal court on the grounds that they each qualified as a "foreign state" under §1603. This was so even though the policyholder did not specifically name these foreign sovereign entities as defendants in the lawsuit. Rather, the removing foreign sovereigns qualified as "Doe" defendants. The policyholder subsequently filed a motion to remand on the principal contention that the remaining foreign sovereign entities could not remove the lawsuit to federal court because these parties were not expressly named as defendants in the lawsuit; therefore, they technically were not parties to the action. Initially noting that three entities qualified as "foreign states" within the meaning of §§1603(a) and 1441(d), Dallas federal judge Sidney Fitzwater held that the removing entities were real parties sued by descriptive or fictitious names; therefore, they could remove the action pursuant to §1441(d). Accordingly, the policyholder's motion to remand was denied.

Alienage Jurisdiction. When a state court coverage litigation involves a foreign insurance company, removal based on alienage jurisdiction[132] should be considered by the insurance carriers. This type of federal court jurisdiction should always exist if a foreign insurer is the only party to the coverage litigation.[133] Nonetheless, it is also possible for insurance carriers to invoke 28 U.S.C.A. §1332(a)(3) granting federal courts jurisdiction in suits between "citizens of different States and in which citizens or subjects of a foreign state are additional parties" in cases involving multiple insurance company defendants.[134]

Transferring Venue

The federal court system has a very useful procedure that allows actions to be transferred if another federal court is a more appropriate venue. Two federal statutes are relevant. First, under 28 U.S.C.A. §1404(a):

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Also, under 28 U.S.C.A. §1406(a):

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Although some state court systems likewise have convenience based venue transfer statutes, Texas does not. The Texas method of transferring venue exists pursuant to Tex. R. Civ. P. 86-88 and it is a due order pleading, so it must be filed at or before the Answer. Otherwise, the Motion to Transfer Venue will be void and venue will be set in the county where the suit was filed. For this reason, insurance carriers as defendants in Texas coverage litigation should always be prepared to coordinate with other defendants to collectively file Motions to Transfer Venue, if there is not a legitimate basis for the policyholder's choice of venue at the filing of the suit. Accordingly, great care must go into the Motion to Transfer Venue practice in Texas state court system, especially in multi-defendant cases like so many of the larger coverage actions.[135]

Forum Non Conveniens

A typical motion filed by insurers in insurance coverage litigation to obtain an abatement or dismissal is based on the doctrine of forum non conveniens. Indeed, a motion to dismiss or stay based on forum non conveniens can be filed regardless of whether a competing lawsuit is also on file. Under federal practice, there is great interplay between the doctrine of forum non conveniens and the federal venue transfer statute.[136] The seminal United States Supreme Court case on the forum non conveniens doctrine is *Gulf Oil Co. v. Gilbert.*[137] The factors to be considered serve both private and public interests and they include:

> That an alternative forum be available in which the defendant is amenable to service of process; however, this requirement can be satisfied by a defendant's agreement to the jurisdiction of the alternative forum[138];

- Where the parties and witnesses reside;
- Ability to compel witnesses' attendance;
- Comparative costs of the available venues;
- Discovery and access to evidence;
- Ability to enforce a judgment;
- Relative burdens on the subject courts;
- Policy factors in determining the matter;
- Avoiding unnecessary choice of law decisions; and
- "All other practical problems that make trial of a case easy, expeditious and inexpensive."[139]

The moving party bears the burden with respect to a forum non conveniens motion. As the Fifth Circuit has said:

> Where the action has been filed by a U.S. citizen, defendant has a very heavy burden to satisfy ... because granting the motion denies the citizen access to courts in his or her own country. But even a citizen's choice of forum may be disturbed in an appropriate case.[140]

Most states also recognize a forum non conveniens practice. In *Sarieddine v. Moussak*,[141] the court held that the *Gulf Oil Co. v. Gilbert* factors should be addressed and applied in determining whether a particular action should be stayed or dismissed on the basis that the Texas forum is not convenient.

Defensive Forum Battle Measures While Other Coverage Suits Are Pending

Injunctions

Perhaps one of the most problematic features of a federal declaratory judgment insurance coverage suit is encountered when one of the litigants files a competing action on the same coverage issue in state court. Sometimes, the policyholder may be able to proceed at a more rapid pace in the state action, much to the chagrin of the insurer/federal plaintiff.

Anti-Injunction Act. The insurer/federal plaintiff's impulse to seek an injunction of the state action may or may not prove successful. The federal anti-injunction statute provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.[142]

A recent federal case analyzing the issue of whether a federal court can enjoin parties from litigating a parallel and competing case in a state court is *Royal Ins. Co. of America v. Quinn-L Capital Corp.*[143] One of the procedural issues addressed by the Fifth Circuit was whether the federal anti-injunction act prohibits a federal district court from enjoining ongoing litigation of the same coverage issue in a state court. Importantly, in *Royal v. Quinn-L*, the insurer filed a declaratory judgment action seeking an anti-suit injunction before any state court proceedings began.

Overall, there is a split between the circuits, wherein three circuits have adopted the rule that the Anti-Injunction Act does not apply if the federal suit is filed before the state suit.[144] On the other hand, two circuits take the position that the Anti-Injunction Act applies, regardless of whether the federal action was first filed.[145]

In *Royal v. Quinn-L*, the insurer had already obtained a declaratory judgment from a federal district court that it did not owe either a duty to defend or indemnify its policyholder in what was essentially a suit by group of investors against the manager of their money. After some interesting procedural maneuvering, the investors obtained a $741 million default judgment against the policyholder in a Texas state court. Next, the policyholder assigned its rights against the insurer to the judgment creditor investors. Immediately thereafter, the investors filed suit against the insurer in a Cameron County state court seeking coverage and bad faith damages with respect to the $741 million default judgment.[146] As the Fifth Circuit:

> The Cameron County litigation proceeded at an accelerated pace. The day after suit was filed—before Royal had even been served—the trial court set a trial date of December 10 [*i.e.*, 90 days thereafter].[147]

The insurer responded by seeking a preliminary injunction, which the federal district court granted, against the Cameron County litigation. The Fifth Circuit affirmed the district court's injunction of the investor's contractual claims against the insurer based on the "relitigation exception" to the Anti-Injunction Act.[148] Nonetheless, the Fifth Circuit reversed the district court's injunction preventing the investor's claims against the insurer based on the insurer's post-declaratory judgment conduct. The Fifth Circuit ruled that the "aid of jurisdiction" exception to the Anti-Injunction Act did not apply in these circumstances.[149]

Civil Justice Reform Act Implications. Significantly, the Civil Justice Reform Act (CJRA)[150] is aimed at reducing expense and delay in the civil justice system. Accordingly, there may be tension between the new CJRA and the anti-injunction statute that would appear to indicate that federal court injunctions of parallel state court proceedings will be easier to come by than before. Basically, the CJRA requires certain United States District Courts to implement "a civil justice expense and delay reduction plan" to "facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions to civil disputes." The relationship between the CJRA and the anti-injunction statute is analogous to the CJRA's preemptive relationship to the Federal Rules of Civil Procedure. At least one district court has noted:

> The academic community is virtually unanimous in its opinion that the Civil Justice Reform Act of 1990 supersedes the Rules Enabling Act. In other words, whatever we provide here trumps the Federal Rules of Civil Procedure.[151]

Like the Federal Rules, the anti-injunction statute is procedural in nature and has the potential to conflict

with the policies underlying the CJRA. District courts which hold that the CJRA preempts the Federal Rules to the extent the rules are inconsistent with Congressional intent to reduce litigation costs, may be forced to preempt other procedural statutes, including the anti-injunction statute, under this same rationale.

Prior to the enactment of the CJRA, cost and delay concerns *could not* be considered by judges in decisions concerning the procedure of a case. However, these factors are the very foundation of the CJRA. By analogy, some courts are especially sensitive to the cost and delay involved when determining whether to grant nonsuits. In *Jordan v. State Farm Mutual Auto. Ins. Co.*,[152] the court denied the plaintiff's motion to dismiss without prejudice on the basis that granting such a motion would expose the defendant to actions for indemnity or contribution and defending against other defendants. The court noted that the defendant would suffer legal prejudice, as well as much additional expense and delay in the resolution of the dispute, if the plaintiff were permitted to dismiss her cause of action at such a late date.

The court also considered cost and delay when it refused to grant a nonsuit in *Wood v. Borden, Inc.*[153] The *Wood* court specifically found that the plaintiffs were aware of the existence of a non-diverse defendant several months prior to filing their motion to dismiss, forsaking an opportunity to join this defendant when the court granted a 30-day period of leave to join additional parties. The court found that permitting dismissal at such a late stage in the litigation would unduly prejudice the defendant and result in unnecessary duplication of expense and delay in contravention of the Eastern District of Texas's Civil Justice Expense and Delay Reduction Plan.

Moreover, the CJRA's policy does not permanently replace the concerns of the anti-injunction act. Instead, the legislative history articulates Congress's position that this cost and delay reduction plan is experimental. Because the CJRA is an experiment, it temporarily gives courts the power to implement expense and delay reduction programs that override other federal procedural rules and statutes. Thus, the temporary nature of the CJRA is a justification for allowing the preemption of the anti-injunction statute.

The CJRA may also qualify as an exception to the anti-injunction statute. The criteria for exceptions to 28 U.S.C.A. §2283 was outlined by the Supreme Court in *Mitchum v. Foster*:

> In the first place, it is evident that, in order to qualify under the "expressly authorized" exception of the anti-injunction statute, a federal law need not contain an express reference to that statute. . . . Secondly, a federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception. . . . Thirdly, it is clear that, . . . an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin in a state court proceeding.[154]

Thus, it is insignificant that the CJRA neither refers to the anti-injunction statute nor expressly authorizes injunctions of state court proceedings. Instead, the focus of the CJRA is on the third criterion. These principles were applied in *Martinez v. Deaf Smith County Grain Processors.*[155] The Court held that the Fair Labor Standards Act (FLSA), which created a cause of action for employees who are retaliated against for filing a complaint,[156] could only be enforced by enjoining a state court proceeding.[157] Although the decision was also based on the fact that federal law preempted state law in the area of labor, it is important because of its policy against retaliatory actions in state court. This policy also may be applicable in cases where a coverage action filed by policyholders in state court is in retaliation to the insurer's federal court declaratory judgment coverage action.

The CJRA creates a unique federal right in districts that have enacted expense and delay reduction plans—that guarantees litigants sincere efforts by those courts to reduce litigation costs. In many cases, this federal right will be frustrated if the state court coverage action filed by the policyholder is not enjoined. Litigants in cases with reduced discovery may be prejudiced by increased discovery costs, while congressional intent to reduce litigation costs is mocked if the state court proceeding is permitted to continue.

Texas State Court Applications. In *Admiral Ins. Co. v. Atchison, Topeka & Santa Fe Railway Co.*,[158] Santa Fe filed a coverage lawsuit seeking, among other things, indemnity from its several insurance carriers for a $350 million settlement that Santa Fe paid in the *ETSI Pipeline Project and Energy Transportation Systems, Inc. v. Burlington-Northern, Inc.* lawsuit. Within three weeks of that suit filing, one of the insurers filed a declaratory judgment lawsuit in Illinois state court on the coverage issues. After the Texas trial court enjoined all of the insurers from litigating the Illinois suit, or from commencing any other action on the same claim, several of the insurers took recourse in the Texas state court appellate system. In response, the Fort Worth Court of Appeals upheld the trial court's injunction, which precluded the parties from litigating the Illinois declaratory judgment suit. The court held:

> We believe the number of parties to the action underlying this appeal is a legitimate basis for granting the injunction. The Texas trial court faced the very real possibility that suit involving mirror image claims between Santa Fe and its insurers could spring up in an unde-

termined number of forums if no anti-suit injunction was issued. . . . While there are no precise guidelines for determining the appropriateness of an anti-suit injunction or for deciding when comity should be invoked, we find the totality of the circumstances shown in the record compelled the issuance of an injunction in this case to prevent an irreparable miscarriage of justice and otherwise inevitable havoc within the judicial system.[159]

International Situations. In light of the international aspects to insurance, it is possible for forum battles to arise in which courts of different countries clash with one another over the power to adjudicate a dispute. For example, in *Allendale Mut. Ins. Co. v. Bull Data Systems, Inc.*,[160] the Seventh Circuit upheld a preliminary injunction that enjoined an American subsidiary of a French corporation from litigating a coverage action in French courts. Similarly, the Privy Council of the English House of Lords considered the issues raised by simultaneous proceedings over the same product liability dispute in Texas state court and in the courts of Brunei.[161] Here, the Privy Council granted an injunction that prevented the parties involved in the litigation arising from the helicopter crash from simultaneously litigating the case in Texas state courts.

Motions to Stay, Abate or Dismiss

Perhaps the most fundamental motions in almost every forum battle seek stay, abatement or dismissal orders. Indeed many of the procedures explored above are pursued to obtain a stay, abatement or dismissal of a competing lawsuit, so that the action in the desired forum can proceed without the irritation and interference of another suit on the same issue being litigated simultaneously. Basically, motions to stay, abate or dismiss attempt to convince a trial court to exercise its discretion and defer the resolution of the coverage issues to another court.

While many esoteric areas are argued (*i.e.*, abstention, comity and full faith and credit) in advancing or defending motions to stay, abate or dismiss, the factor of which party first filed a lawsuit is always considered by the trial court. However, the issue of which party won the race to the courthouse is often not outcome determinative by itself.

For example, in forum battles involving different Texas state courts litigating the same issue, the second court should abate its case pending the outcome of the first filed action and the first filed action should decide any claims of defendant as compulsory counterclaims.[162] A problem arises because a court's decision on whether to abate a case is not immediately reviewable by an appellate court through the writ of mandamus procedure.[163] Consequently, a Texas state court trial judge's decision to stay, abate or dismiss a case, even if erroneous, will not in most cases be reviewable until the entire case is resolved. By that time, the issues will already have been decided in the other case.

Conclusion

From the insurers' perspective, great care must go into the manner in which the insurer tries to influence the forum. There is no question that filing the first lawsuit that joins the coverage issues is very significant. However, there are other important factors as well. As a practical matter, the insurance company that can demonstrate more logical reasons why its desired forum should proceed will be in the best position to prevail in the forum battle.

NOTES

1. See, e.g., Royal Ins. Co. of America v. Quinn-L Capital Corp., 960 F.2d 1286, 1290 (5th Cir. 1992) affirmed after remand, 3 F.3d 897 (5th Cir. 1993).

2. See, Kalis and Reiter, Examining Choice-of-Law and Choice-of-Forum Issues before Litigating Environmental Insurance Coverage, 2 Environmental Claims Journal, No. 2 at 165 (Winter 1989/90).

3. See, Carey Canada, Inc. v. California Union Ins. Co., 1984 C.C.H. Fire & Cas. Cases 65, 67 (D.D.C. 1984).

4. City of Rose City v. Nutmeg Ins. Co., 931 F.2d 13 (5th Cir. 1991).

5. Id. at 16. See also Regents of University of Minnesota v. Evanston Ins. Co., No. 4-92-182 D. Minn. (opinion available in Mealey's Litigation Reports—Insurance 9/11/92) (service of suit clause is interchangeable with a forum selection clause and thus insurers waive their right of removal). Tennessee Gas Pipeline Co. v. Continental Cas. Co., No. 91-1024-B, M.D. La. (opinion available in Mealey's Litigation Reports—Insurance 2/23/93), but see In Re: Delta American Re Ins. Co., 900 F.2d 890 (6th Cir. 1990).

6. The Travelers Ins. Co. v. Keeling, No. 91 CIV. 7753 [JFK], S.D.N.Y. (opinion available in Mealey's Litigation Reports—Insurance 2/16/93 at Op.H.).

7. Id.; See also General Phoenix Corp. v. Maylon, 88 F. Supp. 502, 503 (S.D.N.Y. 1949) and Welborn v. Classic Syndicate, Inc., 807 F. Supp. 388, 389-90 (W.D.N.C. 1992).

8. See, e.g., Foster v. Chesapeake Ins. Co., 933 F.2d 1207, 1216-18 (3rd Cir. 1991); Capital Bank and Trust Co. v. Associated Int'l. Ins. Co., 576 F. Supp. 522, 524-25 (M.D.La. 1984); Perini Corp. v. Orion Ins. Co., 331 F. Supp 453, 455 (E.D.Cal. 1971); Euzzino v. London & Edinburgh Ins. Co., 288 F. Supp. 431, 433 (N.D. Ill. 1964).

9. 956 F.2d 93 (5th Cir. 1992) cert. denied, 113 S. Ct. 82 (1992).

10. Id. at 95-96.

11. Id. at 96 n.1.

12. Id.at 96.

13. 850 F. Supp. 1509 (D.Wyo. 1994).

14. Id. at 1527-28.

15. Id. at 1528 (emphasis in opinion).

16. Id.

17. Id.

18. 704 F. Supp. 551 (D.Del. 1989).

19. Id. at 577. See also, Singer v. Lexington Ins. Co., 658 F. Supp. 341, 344 (N.D. Tex. 1986); cf. Edinburgh Assurance Co. v. R.L. Burns Corp., 479 F. Supp. 138, 148 (C.D.Cal. 1979) ("parties engaged in the London insurance market" did not consider the clause to be "a contractual agreement for choice of United States law") aff'd in part and rev'd in part on other grounds, 669 F.2d 1259 (9th Cir. 1982).

20. W.R. Grace & Co. v. Hartford Accident and Indem. Co., 407 Mass. 572, 555 N.E.2d 214, 218-19 (1990). See also, Appalachian Ins. Co. v. Superior Court of Los Angeles County, 162 Cal. App. 3d 427, 438, 208 Cal. Rptr. 627 (1984), Turner & Newell Plcv. Canadian Universal Ins. Co., 652 F. Supp. 1308, 1311 (D.D.C. 1987) but see Rokeby-Johnson v. Kentucky Agricultural Energy Corp., 108 A.D.2d 336, 339, 489 N.Y.S.2d 69 (N.Y. 1985).

21. See e.g., M.S. Bremen v. Zapata Off Shore Co., 407 U.S. 1 92 S.Ct. 1907, 32 L. Ed. 2d 513 (1972).

22. M.S. Bremen, 407 U.S. at 12, 92 S.Ct. at 1914.

23. See Carnival Cruise Lines v. Shute, 499 U.S. 585, 594 11 S.Ct. 1522, 1528, 113 L.Ed. 2d 622 (1991) and Moses v. Business Card Exp., Inc., 929 F.2d 1131 (6th Cir. 1991).

24. M.S. Bremen, 407 U.S. at 15, 92 S.Ct. at 1916.

25. 847 F. Supp. 57 (S.D. Tex. 1993).

26. Id. at 60.

27. See Sphere Drake Ins. PLC v. Marine Towing, Inc. 16 F.3d 666 (5th Cir. 1994).

28. E.g., Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1984).

29. No. C-92-4094-DLJ, N.D. Calf.

30. Id.; See also NECA Ins. Ltd. v. National Union Fire Ins. Co., 595 F. Supp. 955, 958 (S.D.N.Y. 1984); Hart v. Orion Ins. Co., 453 F.2d 1358, 1361 (10th Cir. 1971).

31. 16 F.3d 125 (7th Cir. 1994).

32. Id.

33. 12 F.3d 461 (5th Cir. 1994).

34. 14 F.3d 1250 (7th Cir. 1994)

35. Id. at 1253-54. See also, Yasuda Fire & Marine Insurance Co. v. Continental Casualty Co., 840 F. Supp. 578 (N.D. Ill. 1993) (analyzing federal jurisdiction in connection with actions to seek confirmation of arbitration awards under the Federal Arbitration Act).

36. 875 S.W.2d 458 (Tex. App.—Houston [1st Dist.] 1994, writ pending).

37. Tex. Rev. Civ. Stat. & Ann. Art. 237 (Vernon 1973).

38. 879 S.W.2d 360 (Tex. App.—Houston [14th Dist.] 1994, writ pending).

39. Tex. Rev. Civ. Stat. & Ann. Art. 238-2 (Vernon 1973),

40. Id.; Gathe v. Cigna Health Care Plan, 879 S.W.2d at 362.

41. 874 S.W.2d 776 (Tex. App.—Houston [14th Dist.] 1994, writ pending).

42. Universal Re Insurance Corp. v. Allstate Ins. Co., 16 F.3d 125 (7th Cir. 1994).

43. See, e.g., Perry v. Thomas, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525, 96 L. Ed. 2d 426 (1987).

44. Jack Anglin Co. v. Tipps, 482 S.W.2d 266, 268 (Tex. 1992).

45. Good articles, with much greater analysis of Declaratory Judgment actions include: D. Howard, Declaratory Judgment Actions Involving Insurance Coverage: A Multistate Survey and Analysis, Mealey's Litigation Reports-Insurance, May 10, 1994 at 16; D. Ericsson, Declaratory Judgment: Is it a Real or Illusory Solution 23 Tort & Insurance Law J. 162 (Fall 1987); J. Kirkland and J. Berkeley Declaratory Judgment Suits: Use in Insurance Coverage Litigation, FIC Quarterly 243 (1983).

46. 956 F.2d 93 (5th Cir. 1992) cert. denied, 113 S. Ct. 82 (1992).

47. See Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 61 S. Ct. 510 (1941).

48. 28. U.S.C.A. §2201 et. seq.

49. Tex. Civ. Prac. & Rem. Code §37.001 et. seq.

50. Public Service Comm'n v. Wycoff, 344 U.S. 237, 242, 73 S. Ct. 236, 240 (1952).

51. 959 F.2d 677 (7th Cir. 1992).

52. Id. at 680.

53. Id.

54. See, e.g., Byers v. Byers, 254 F.2d 205, 209-10 (5th Cir. 1958).

55. See generally M. Hayes, The Justiciability Controversy Requirements in Environmental Coverage Actions, Mealey's Litigation Reports — Insurance March 3, 1993 at 23.

56. E.g., Rhodes v. Chicago Ins. Co., 719 F.2d 116 (5th Cir. 1983).

57. Id. at 119; Mary Kay Cosmetics, Inc. v. North River Ins. Co., 729 S.W.2d 608 (Tex. App.—Dallas 1987, no writ).

58. See, e.g., American Fidelity & Cas. Co. v. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co., 280 F.2d 453 (5th Cir. 1960); Allstate Ins. Co. v. Employers Liability Assur. Corp., 445 F.2d 1278, 1280-81 (5th Cir. 1971).

59. 312 U.S. 270, 61 S. Ct. 510, 512 (1941).

60. See, e.g., Sentry Ins. v. R.J. Weber Co., Inc., 2 F.3d 554 (5th Cir. 1993); Continental Cas. Co. v. McAllen I.S.D., 850 F.2d 1044 (5th Cir. 1988); Evanston Ins. Co. v. Jimco, Inc., 844 F.2d 1185 (5th Cir. 1988); Atlantic Mut. Fire Ins. Co. v. Cook, 619 F.2d 553 (5th Cir. 1980); Dairyland Ins. Co. v. Makover, 654 F.2d 1120, 1123 (5th Cir. 1981); Standard Accident Ins. Co. v. Meadows, 125 F.2d 422 (5th Cir. 1942); Central Sur. & Ins. Corp. v. Caswell, 91 F.2d 607 (5th Cir. 1937).

61. Fireman's Ins. Co. v. Burch, 442 S.W.2d 331 (Tex. 1968).

62. Id. at 332.

63. 986 F.2d 94 (5th Cir. 1992).

64. Id.

65. See Sandefer Oil & Gas, Inc. v. Duhon, 871 F.2d 526 (5th Cir. 1989) and Travelers Ins. Co. v. Louisiana Farm Bureau, 996 F.2d 774 (5th Cir. 1993).

66. Hollis v. Itawamba County Loans, 657 F.2d 746, 750 (5th Cir. 1981).

67. Rowan Companies., Inc. v. Griffin, 876 F.2d 26, 28 (5th Cir. 1989). As the Rowan court concedes, this list is neither exhaustive, nor is it exclusive or mandatory. Id. at 28-29.

68. 15 F.3d 371 (4th Cir. 1994).

69. 417 F.2d 998, 1000 (2d Cir. 1969).

70. 977 F.2d 734 (2d Cir. 1992).

71. But see Aetna Cas. & Surety Co. v. Jefferson Trust and Savings Bank of Peoria, 993 F.2d 1364 (8th Cir. 1993) (upholding dismissal of a federal court declaratory judgment action even though party seeking dismissal was the party who removed case to federal court and even though parallel state court action not initiated until after the removal); DeFeo v. Proctor & Gamble Co., 831 F. Supp. 776 (N.D. Cal. 1993) and Sphere Drake Ins. Co. v. Tiger Tennis Camp, 839 F. Supp. 403 (M.D. La. 1993).

72. 31 F.3d 979 (10th Cir. 1994).

73. Id.

74. See Mission Ins. Co. v. Puritan Fashions Corp., 706 F.2d 599 (1983).

75. 855 F.Supp. 901 (N.D.Tex. 1994).

76. 706 F.2d at 602 n.3.

77. Fidelity Bank v. Mortgage Funding Corp. of America, 855 F.Supp. at 903.

78. Southland Aviation, Inc. v. Burgon Aviation, Inc., 23 F.3d 948 (5th Cir. 1994).

79. 316 U.S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942).

80. 424 U.S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976).

81. Southland Aviation, Inc. v. Burgon Aviation, Inc. 23 F.3d 948 (5th Cir. 1994). See Home Ins. Co. v. Townsend, 22 F.3d 91 (5th Cir. 1994) (recision relief requested). Granite State Ins. Co. v. Tandy Corp., 986 F.2d 94, 95 (5th Cir. 1992); but see Evanston Ins. Co. v. Jimco, Inc., 844 F.2d 1185 (5th Cir. 1988).

82. 762 S.W.2d 275 (Tex. App.—El Paso 1988, writ denied).

83. 872 S.W.2d 248 (Tex. App.—Dallas 1993, no writ).

84. Reynolds, Shannon v. Flanary, 872 S.W.2d at 250-51.

85. See 6A J. Moore, Moore's Federal Practice ¶ 57.25 (2d e.d. 1987); Ranger Ins. Co. v. United Housing of New Mexico, Inc., 488 F.2d 682 (5th Cir. 1974); Federal Kemper Ins. Co. v. Rauscher, 807 F.2d 345 (3d Cir. 1986).

86. 488 F.2d at 683. See also, New Hampshire Ins. Co. v. Greaves, 110 F.R.D. 549 (D.R.I. 1986) (court permitted wrongful death claimants to intervene in declaratory judgment action between an insurer and its insured even though the claimant's interest was not "vested," because of possible inadequate remedy if claimants ultimately obtained a judgment against insured).

87. 809 F.Supp. 829 (D. Kan. 1992).

88. Id. at 830-31. See also Liberty Mut. Ins. Co. v. Pacific Indem. Co., 76 F.R.D. 767 (W.D.Pa. 1977) (intervention denied where claimant had not yet obtained a judgment against the insured); Independent Petro Chem. Corp. v. Aetna Cas. & Sur. Co., 105 F.R.D. 106 (D.D.C. 1985) (intervention denied because claimant's interest was too contingent); Great American Ins. Co. v. Dunn Corp., 580 F.Supp. 1287, 1288 (W.D. Mich. 1984) (court questions claimant's right to intervene, but permitted intervention based on parties' stipulation).

89. Morris v. Allstate Ins. Co., 523 S.W.2d 299 (Tex. Civ. App.—Texarkana 1975, no writ).

90. Dairyland County Mut. Ins. Co. v. Childress, 650 S.W.2d 770, 773-74 (Tex. 1983).

91. Id. at 774.

92. Tex. Civ. Prac. & Rem. Code § 37.006; See also, Caldwell v. Calendar Lake Property Owners Improvement Assc., ___ S.W. 2d ___, 1994 WL 521645 (Tex. App.—Texarkana 1994).

93. See 28 U.S.C.A. §2201 et. seq.

94. E.g. Tex. Civ. Prac. & Rem. Code §37.001 et. seq.

95. See Town of Peterborough v. Hartford Fire Ins. Co., 824 F.Supp. 1102 (D.N.H. 1993).

96. Tex. R. Civ. Prac. & Rem. Code § 37.009.

97. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 259 n. 31, 95 S. Ct. 1612, 1622 n. 31, 44 L. Ed. 2d 141 (1975).

98. Mercantile Nat'l. Bank at Dallas v. Bradford Trucking Co., 850 F.2d 215, 218 (5th Cir. 1988). Tex. Civ. Prac. & Rem. Code §37.009.

99. See, e.g., Titon Holding Syndicate, Inc. v. City of Keene, N.H., 898 F.2d 265, 273-74 (1st Cir. 1990) (recovery of fees allowed in federal declaratory suit under state statute granting fees in actions to determine coverage of insurance policy).

100. See Hartford Casualty Ins. Co. v. Budget Rent-a-Car Systems, Inc., 796, S.W.2d 763, 771 (Tex. App.—Dallas 1990).

101. See District Judges v.Commissioner's Court, 677 S.W.2d 743, 746 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

102. Estopar Holdings, Inc. v. Advanced Metallurgical, Inc., 876 S.W.2d 205 (Tex. App.—Fort Worth 1994, n.w.h.).

103. See Moses H. Cone Hospital v. Mercury Construction Corp., 460 U.S. 1, 15, 103 S.Ct. 927, 936, 74 L.Ed.2d 765 (1983) (approving of parallel proceedings in all but exceptional circumstances); PPG Industries, Inc. v. Continental Oil Co., 478 F.2d 674, 677 (5th Cir. 1973).

104. 28 U.S.C. § 1446(b).

105. Id.

106. See Getty Oil Corp. v. Insurance Co. of North Am., 841 F.2d 1254, 1263 (5th Cir. 1988).

107. 851 F.Supp. 457 (M.D.Fla. 1994).

108. Id. at 459.

109. CompareApache Nitrogen Products, Inc. v. Harbor Ins. Co., 145 F.R.D. 674, 676-77 (D. Ariz. 1993); Thomason v. Republic Ins. Co., 630 F. Supp. 331 (E.D.Cal. 1986), Conticommodity Services, Inc. v. Pearl, 663 F. Supp. 27 (N.D.Ill. 1987) and Hunter v. American Express Travel Related Services, 643 F. Supp. 168 (S.D.Miss. 1986) (holding that the thirty day removal period is triggered upon proper service of the pleading) with Tyler v. Prudential Ins. Co., 524 F. Supp. 1211, 1213 (W.D.Pa. 1981) and Uhles v. F.W. Woolworth Co., 715 F. Supp. 297 (C.D.Cal. 1989) (holding that the time for removal runs from when a defendant receives a copy of the complaint, even if the complaint is not properly served on that defendant at that time).

110. Burr v. Choice Hotels, Int'l Inc., 848 F.Supp. 93 (S.D. Tex. 1994).

111: Id. at 94-95.

112. P. Borchers, The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon, 72 Tex. L. Rev. 78 (Nov. 1993).

113. 960 F.2d 1286 (5th Cir. 1992) affirmed after remand, 3 F.3d 987 (5th Cir. 1993).

114. 3 F.3d at 883; See also Certain Interested Underwriters at Lloyd's London v. Layne, 26 F.3d 39 (6th Cir. 1994).

115. 29 U.S.C.A. §1001 et. seq.

116. See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987); Brandon v. Interfirst Corp., 858 F.2d 266 (5th Cir. 1988); Metroplex Infusion Care v. Lone Star Container Corp., 855 F.Supp. 897 (N.D. Tex. 1994).

117. 893 F.2d 98 (5th Cir.), cert. denied, 498 U.S. 817, 111 S. Ct. 60, 112 L. Ed. 2d 35 (1990).

118. Id. at 101-02.

119. See also Laughlin v. Prudential Ins. Co., 882 F.2d 187, 190 (5th Cir. 1989); Gasnik v. State Farm Ins. Co., 825 F. Supp. 245 (E.D. Cal. 1992).

120. See Haines v. National Union Fire Ins. Co., 812 F.Supp. 93 (S.D. Tex. 1993); French v. State Farm Ins. Co., 156 F.R.D. 159 (S.D. Tex. 1994); but see Tolbert v. United Ins. Co. of American, 853 F.Supp. 1374 (M.D. Ala. 1994).

121. See FSIA, 28 U.S.C. §§ 1602-1611 (Supp. 1993).

122. See generally, Note, Nelson v. Saudi Arabia — Subject Matter Jurisdiction Under the Foreign Sovereign Immunities Act of 1976, 1 J. Transnat'l L & Pol'y 273 (1992).

123. Refco, Inc. v. Galadari, 755 F. Supp. 79, 83 (S.D.N.Y. 1991).

124. 28 U.S.C. §§ 1604-1607 (Supp. 1993).

125. 28 U.S.C. § 1441(d) (Supp. 1993).

126. 28 U.S.C. §§ 1603(a)-(b) (Supp. 1993).

127. In Re Texas Eastern Transmission Corp., 15 F.3d 1230, 1241-42 (3rd Cir. 1993); In Re: Delta American Re Ins. Co., 900 F.2d 890 (6th Cir. 1990); Moore v. National Distillers and Chem. Corp., 143 F.R.D. 526 (S.D.N.Y. 1992).

128. Moore, 143 F.R.D. at 532, n.6.

129. 784 F. Supp. 448 (S.D. Ohio 1991).

130. Id.

131. Civil Action No. 93-3-CV-1898-D, on file in the United States District Court for the Northern District of Texas, Dallas Division.

132. 28 U.S.C.A. §1332(a)(2) and (3).

133. 28 U.S.C.A. §1332(a)(2).

134. See generally Chick Kam Choo v. Exxon Corp., 764 F.2d 1148, 1149 (5th Cir. 1985); Zaini v. Shell Oil Corp., 853 F.Supp. 960 (S.D. Tex. 1994).

135. See generally, Ruiz v. Conoco, Inc., 868 S.W.2d 752 (Tex. 1993).

136. 28 U.S.C.A. §1404(a).

137. 330 U.S. 501 (1947).

138. See Veba-Chemie A.G. v. M/V Getafix, 711 F.2d 1243, 1245 (5th Cir. 1983);

139. See Gulf Oil Co. v. Gilbert, 330 U.S. 501, 508-09 (1947).

140. Baris v. Sulpicio Lines, Inc., 932 F.2d 1540 (5th Cir. 1991); see also Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981).

141. 820 S.W.2d 837 (Tex. Civ. App.—Dallas 1991).

142. 28 U.S.C. § 2283.

143. 960 F.2d 1286 aff'd on remand 3 F.3d 877 (5th Cir. 1993).

144. See Baransick v. Investors Funding Corp., 489 F.2d 933, 937 (7th Cir. 1973); National City Lines v. LLC Corp., 687 F.2d 1122, 1127 (8th Cir. 1982); Hydepark Partners, LP v. Connolly, 839 F.2d 837, 842 n.6 (1st Cir. 1988) (holding anti-injunction act does not preclude federal court from enjoining state court proceedings if the federal suit is filed before the state court proceeding).

145. See Roth v. Bank of the Commonwealth, 583 F.2d 527, 533 (6th Cir. 1978) cert. dism'd, 442 U.S. 925, 99 S. Ct. 2852, 61 L. Ed. 2d 292 (1979); Standard Microsistems Corp. v. Texas Instruments, 916 F.2d 58, 61-62 (2d Cir. 1990) (holding that anti-injunction act prevents federal court from enjoining a state court proceeding, regardless of when the individual suits were filed).

146. Id. at 1291.

147. Id.

148. Id. at 1297.

149. Id. at 1298-99.

150. 28 U.S.C. § 471, et seq.

151. Workshop on the Civil Justice Expense and Delay Reduction Plan Pursuant to the Civil Justice Reform Act of 1990 at 8 (Course No. 269700001, Sherman, Texas, Jan. 27, 1992).

152. No. 3:91-CV-40 (E.D. Tex. March 10, 1992).

153. No. 2-92-CV078 (E.D. Tex., Sept. 23, 1993).

154. 92 S. Ct. 2151, 2159 (1972).

155. 583 F. Supp. 1200 (N.D. Tex. 1984).

156. Id. at 1209.

157. Id. at 1212.

158. 848 S.W.2d 251 (Tex. App. —Ft. Worth 1993, writ den'd).

159. Id. at 257. Citing Gannon v. Payne, 706 S.W.2d 304, 306 (Tex. 1986).

160. 10 F.3d 425 (7th Cir. 1993).

161. SNI Aerospatiale v. Lee Qui Jak, 3 All England Law Reports, 510 (1987).

162. See Wyatt v. Shaw Plumbing, 760 S.W.2d 245 (Tex. 1988).

163. Hooks v. Fourth Court of Appeals, 808 S.W.2d 56, 59-60 (Tex. 1991) (absent extra-ordinary circumstances, a denial of a motion to dismiss or a plea in abatement is not reviewable by mandamus).