

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TIG INSURANCE COMPANY,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
INSINGER MACHINE CO., INC.,	:	
	:	
Defendant.	:	NO. 97-3164

MEMORANDUM

Reed, J.

October 26, 1998

This case presents the interesting question of whether an insurance company seeking a declaratory judgment that it has no duty to defend or indemnify an insured under certain insurance policies presents a judicable case or controversy to the Court when the insured has not made a claim to the insurance company for coverage under those policies.

Before the Court is the motion of Insinger Machine Company, Inc. (“Insinger”) to dismiss¹ the amended complaint (“Am. Comp.”) and for sanctions under the inherent power of the Court. For the reasons that follow, the motion will be granted in part and the action

¹ Insinger labels its motion in part as one “to dismiss for lack of subject matter jurisdiction,” but in its supporting memorandum, it refers to the motion as one “to dismiss amended complaint for failure to state a claim.” Indeed, in the first paragraph of its motion, Insinger moves for dismissal of the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). However, the thrust of Insinger’s argument is that because there is no justiciable case or controversy before the Court, it lacks subject matter jurisdiction.

Plaintiff TIG Insurance Company (“TIG”) asserts that because Insinger includes the declaration of Jay McDaniel, Esq. for consideration in its motion to dismiss, the motion is transformed into one for summary judgment under Rule 12. Because a Court may consider matters outside the pleadings in determining its jurisdiction, see 5A Wright & Miller, Federal Practice and Procedure § 1364 (1990), I conclude that this motion is properly before the Court as a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

dismissed for lack of subject matter jurisdiction. The request for sanctions will be denied.

I. BACKGROUND AND POSITIONS OF THE PARTIES

The underlying litigation in this case, the Pennsauken Landfill litigation, involves a suit in the Superior Court of New Jersey by the Pennsauken Solid Waste Management Authority, its successor in interest, the Pollution Control Financing Authority of Camden County, and the Township of Pennsauken against various owners, operators, generators, and haulers of pollutants for the remediation of the Pennsauken Landfill. Quick-way, Inc. is a defendant in the Pennsauken Landfill litigation. On November 15, 1996,² Quick-way, Inc. filed a third party complaint seeking indemnification and contribution from its customers, naming Insinger as a defendant. (Am. Comp. ¶¶ 8-14).

In the case before this Court, TIG is seeking declaratory relief “as to the effect of the exclusion for pollution liability in commercial general liability policies issued by plaintiff and a declaration that these policies do not provide coverage for claim arising out of the environmental contamination at the Pennsauken Landfill.” (Am. Comp. ¶ 1). In addition, TIG seeks a declaration that any alleged bodily injury and/or property damage which did not occur during the policy periods is not covered any TIG insurance policy, that any alleged property damage was not an “occurrence” within the meaning of the insurance policies, that any liability of Insinger for fines, penalties, and exemplary damages is not covered under any TIG insurance policy, and that one or more additional conditions, terms, agreements, limitations, endorsements,

² TIG mistakenly stated the date of the filing of the third party complaint as November 15, 1997 in its amended complaint.

or exclusions contained in the subject insurance policies bar coverage.

Insinger notified TIG by letter dated February 4, 1997 that it was being sued in the Pennsauken Landfill litigation and seeking coverage under policies issued to it by TIG in 1979, 1980, and 1981. (McDaniel Decl. Ex A). Insinger believed that TIG was its insurance carrier for those years, and possibly for years before that period.

TIG responded in a letter dated February 5, 1997 that it could not make a coverage determination until it had retrieved a copy of the policies from those years. (McDaniel Decl. Ex. B). In a letter to TIG from Insinger dated March 31, 1997, Insinger requested copies of all policies issued to Insinger or, if the policies could not be located, secondary evidence of coverage. (McDaniel Decl. Ex. C).

On May 1, 1997, TIG filed this declaratory judgment action against Insinger seeking a declaration that it had no duty to defend or indemnify Insinger because the Pennsauken Landfill litigation did not involve a “sudden and accidental” discharge into the environment. Around October 1997, TIG located policies issued to Insinger and found that they included an absolute exclusion, not a temporal exclusion. Insinger wrote a letter to TIG dated November 10, 1997 noting that it was clear that TIG did not issue policies to Insinger before 1987 and that all policies issued to Insinger contained an absolute pollution exclusion. Insinger demanded that TIG withdraw the complaint and reimburse it for attorney’s fees. (McDaniel Decl. Ex. D). In a letter dated December 16, 1997, TIG replied that the filing of the declaratory action was necessary and done in good faith, but that it was willing to settle the case if Insinger would sign a release of coverage under all policies for all claims arising from the Pennsauken Landfill litigation (McDaniel Decl. Ex. E). Insinger rejected this offer. (McDaniel Decl. Ex. F).

TIG filed an amended complaint on April 6, 1998. In its amended complaint, TIG denies that it insured Insinger at any time prior to April 1, 1987. (Am. Comp. ¶ 6). TIG alleges that policies issued to Insinger effective April 1, 1987 through April 1, 1988, and April 1, 1988 through April 1, 1991 include absolute pollution exclusion clauses. (Am. Comp. ¶¶ 7-9). TIG alleges that Insinger is not covered under these policies for its liability for injury or damages in connection with the Pennsauken Landfill litigation. (Am. Comp. ¶¶ 19, 23, 30, 33). TIG claims that Insinger “has asserted coverage under the aforesaid policies.” (Am. Comp. ¶ 10).

In the declaration of counsel for Insinger submitted with the motion to dismiss, Insinger admits that it “is satisfied that TIG did not issue any liability policies to Insinger before 1987” and that it “does not have a claim for coverage with TIG.” (Declaration of Jay McDaniel ¶¶ 16 and 17). Therefore, Insinger argues that there is no justiciable controversy before the Court because Insinger made claims against policies issued for years up to and including 1984, but it has not made any claims for coverage under policies issued after 1987. Insinger asserts that TIG is seeking an advisory opinion in its amended complaint, and that the complaint should be dismissed for lack of subject matter jurisdiction.

TIG argues that there is a justiciable controversy before the Court because Insinger has not withdrawn its claim for coverage.

II. ANALYSIS

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

The Declaratory Judgment Act provides, in relevant part, that “(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.” 28 U.S.C. § 2201(a). Under Article III of the United States Constitution, the presence of a case or controversy is a condition precedent to the exercise of jurisdiction under this Act. See Travelers Insurance Company v. Obusek, 72 F.3d 1148, 1153 (3d Cir. 1995). To determine whether there is a justiciable case or controversy, the relevant facts presented to the court must be real, not hypothetical. See Riehl v. Travelers Insurance Co., 772 F.2d 19, 22 (3d Cir. 1985). A case is justiciable if the “essential facts establishing a right to relief, including declaratory relief, have already occurred.” Id. In general, an action must present “(1) a legal controversy that is real and not hypothetical, (2) a legal controversy that affects an individual in a concrete manner so as to provide the factual predicate for reasoned adjudication, and (3) a legal controversy so as to sharpen the issues for judicial resolution.” Obusek, 72 F.3d at 1154 (quoting Armstrong World Industries, Inc. v. Adams, 961 F.2d 405, 411 (3d Cir. 1992)).

Federal jurisdiction over claims under the Declaratory Judgment Act is also restricted by the doctrine of ripeness. Article III of the Constitution, which prohibits federal courts from issuing advisory opinions, is the source of the ripeness doctrine. See Hurley v. Columbia Casualty Co., 976 F. Supp. 268, 272 (D. Del. 1997) (citing Armstrong, 961 F.2d at 410). Thus, if a case is not ripe, a federal court lacks subject matter jurisdiction to adjudicate the claim. Id. Determining the ripeness of a claim for declaratory relief, in which a court may properly render judgment “before an ‘accomplished’ injury has been suffered,” is particularly difficult. Obusek, 72 F.3d at 1154 (quoting Step-Saver Data Systems, Inc. v. Wyse Tech., 912 F.2d 643, 647 (3d Cir. 1990)). Generally, a court should focus on the timing of the plaintiff’s

claim in order “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” Armstrong, 961 F.2d at 410 (citing Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967) (abrogated on other grounds)). The Third Circuit Court of Appeals has utilized two tests to determine the ripeness of a claim for declaratory relief. See Hurley v. Columbia Casualty Co., 976 F. Supp. 268, 273 (D. Del. 1997). In Artway v. Attorney General, the Court of Appeals followed the example set forth in Abbott Labs., 387 U.S. at 148, by weighing “the hardship to the parties of withholding court consideration; and (2) the fitness of the issues for judicial review.” Similarly, in Armstrong, 961 F.2d at 411, the Court of Appeals considered whether there is (1) adversity of interest between the parties, (2) the conclusivity that a declaratory judgment would obtain, and (3) the practical help or utility of a declaratory judgment.

There is great overlap in the factors to determine the justiciability and ripeness of a declaratory action. Whether a controversy is based on real and concrete facts, whether the parties are adverse, and the potential conclusivity of the declaratory action go to the fitness of the issues for judicial review. “Parties’ interests are adverse where harm will result if the declaratory judgment is not entered.” Obusek, 72 F.3d at 1154. Thus, a declaratory action may be entered if harm is threatened in the future, so long as the threat remains real and immediate throughout the litigation. Id. In order for a declaratory judgment to be conclusive, it must change or clarify the legal status of the parties, not merely issue an advisory opinion on a hypothetical state of facts. Obusek at 1155.

In cases in which a declaratory action to determine coverage under an insurance policy have been permitted to proceed, the insured made a claim for coverage under the policy in

question. See, e.g., AC and S, Inc. v. Aetna Casualty and Surety, Co., 666 F.2d 819, 823 (3d Cir. 1981) (“The obligation to defend is a current one as to which the parties are in conflict.”); Hurley, 976 F. Supp. at 274 (noting that plaintiff insureds claimed that the insurer was required under the policy in question to advance defense costs to the plaintiffs and that the insured disclaimed that obligation in determining that the parties had presented a ripe controversy).

I conclude that no immediate harm to TIG is threatened here as Insinger has made no claim for coverage under the policies issued on and after 1987 which are the subject of TIG’s amended complaint, and Insinger has admitted through its attorney’s declaration that it does not have a claim for coverage against TIG. The lack of adversity between the parties and lack of harm to TIG if its claim is not heard suggest that this case is not fit for judicial review at this time. Further, without a claim for coverage by Insinger, the controversy is currently only hypothetical. Because I conclude that this case is not ripe for consideration and that TIG has not presented a judicable case or controversy to this Court, this Court lacks subject matter jurisdiction to hear the claim.

Based on the foregoing analysis, the motion to dismiss for lack of subject matter jurisdiction will be granted.

B. Motion for Sanctions

Insinger claims that TIG raced to the courthouse to establish jurisdiction to file a declaratory action against its policy holders without first investigating the terms and conditions of the insurance policies and their application to Insinger. Insinger requests that this Court award attorney fees to Insinger against TIG for its actions under the Court’s inherent authority to

impose sanctions for bad faith, oppressive, and vexatious litigation. This Court granted TIG's motion for leave to file an amended complaint on April 3, 1998. Insinger never contested the motion. TIG filed its original complaint at least in part in reliance on erroneous information provided to it by Insinger regarding policies that did not exist. TIG moved to amend its complaint as soon as it realized that the original complaint referenced the wrong policies. I conclude that Insinger has not persuaded this Court that TIG acted vexatiously or in bad faith such that sanctions should be levied against them.

III. CONCLUSION

For the foregoing reasons, I conclude that there is no ripe, justiciable case or controversy before this Court, and the motion to dismiss will be granted. The motion for sanctions will be denied.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TIG INSURANCE COMPANY,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
INSINGER MACHINE CO., INC.,	:	
	:	
Defendant.	:	NO. 97-3164

AND NOW, this 26th day of October, 1998, upon consideration of the motion of defendant Insinger Machine Co., Inc. (“Insinger”) to dismiss for lack of subject matter jurisdiction and for sanctions pursuant to the inherent authority of the court (Document No. 13), the response of plaintiff TIG Insurance Co. (“TIG”) (Document No. 14), and the reply of Insinger (Document No. 15), and for the reasons set forth in the accompanying memorandum, it is hereby **ORDERED** that the motion is **GRANTED** in part and **DENIED** in part. This action is **DISMISSED** pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. The request for sanctions pursuant to the inherent power of the Court is **DENIED**.

This is a final Order.

LOWELL A. REED, JR., J.