

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

CAROLYN KAHHAN	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 01-1128
	:	
v.	:	
	:	
MASSACHUSETTS CASUALTY	:	
	:	
INSURANCE COMPANY	:	
	:	
Defendant.	:	

**MEMORANDUM AND ORDER**

YOHN NOVEMBER ,2001

On February 7, 2001, plaintiff, Carolyn Kahhan (“Kahhan”), brought this action against defendant, Massachusetts Casualty Insurance Company (“MCIC”) in the Court of Common Pleas of Philadelphia County. Defendant removed this action on March 8, 2001 to the United States District Court for the Eastern District of Pennsylvania on the basis of diversity. Plaintiff subsequently amended her complaint and on May 25, 2001 defendant filed an answer, asserting 23 affirmative defenses and a counterclaim against plaintiff for fraudulent misrepresentation, violation of Pennsylvania Insurance Law 18 Pa C.S.A. §4117(a)-(g), and breach of contract.

Presently before the court is plaintiff’s supplemental motion for leave to amend her complaint to join Benjamin Skversky (“Skversky”) as an additional defendant and to remand the

case to the Court of Common pleas of Philadelphia County.<sup>1</sup> Because the equities favor allowing plaintiff to join Skversky to this action, I will permit plaintiff to amend her complaint and I will remand this case to state court.

## **BACKGROUND**

On or about August 14, 1993, plaintiff, Kahhan, met with Benjamin Skversky (“Skversky”), a representative of defendant, MCIC, for the purposes of applying for an MCIC disability income protection insurance policy. Doc. No. 14 ¶ 15. On October 14, 1993, MCIC issued a policy to Kahhan, which provided that if Kahhan incurred a disability that prevented her from working, she would receive a monthly benefit of approximately \$825. Am. Compl. ¶ 5. This policy was in effect on December 22, 1993, when Kahhan was involved in an automobile accident during which she sustained severe injuries that prevented her from being able to work. Am. Compl. ¶ 8. As a result, Kahhan submitted a claim for benefits under her MCIC insurance policy. Am. Compl. ¶ 9. MCIC approved the claim and paid benefits to Kahhan until November 1997. Am. Compl. ¶ 11. However, on December 8, 1997, MCIC issued a retroactive denial of Kahhan’s claim and ceased making payments. Am. Compl. ¶ 13. MCIC’s reason for stopping payment on Kahhan’s claim was the omission of relevant medical history from her insurance application. In light of this medical history, which had been uncovered during MCIC’s investigation of Kahhan’s claim, Kahhan was no longer eligible to receive benefits under the plan. Am. Compl. ¶ 15.

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<sup>1</sup> This court denied plaintiff’s initial motion to amend without prejudice. At the time of that decision, the evidence presented did not allow this court to make an informed decision as to the appropriateness of joining Skversky.

On February 7, 2001, Kahhan commenced this action in the Court of Common Pleas of Philadelphia County. This case was removed on March 8, 2001 to the United States District Court for the Eastern District of Pennsylvania. Plaintiff brings four counts against MCIC: breach of contract, violation of the Pennsylvania Trade Practices and Consumer Protection Law 73 P.S. 201-1, bad faith, and deceit. On May 25, 2001, MCIC filed a counterclaim against Kahhan, alleging fraudulent misrepresentation, violations of Pennsylvania Insurance Law 18 Pa. C.S.A. 4117 (a)-(g), and breach of contract.

Kahhan contends that Skversky is liable for any omissions or misrepresentations contained in her insurance application. Kahhan maintains that when she signed her insurance application, she did not place the answers to the questions directly on the form. Rather, Kahhan claims that she told the relevant information to Skversky, who later completed the application, ostensibly using the information that Kahhan had provided to him.

Kahhan contends in her amended complaint that MCIC is liable for the actions taken by its agent, Skversky. Doc. 9 ¶¶ 3,4. Although MCIC has “admitted generally that Benjamin Skversky is the agent named on the application of disability insurance for the plaintiff,” MCIC has denied that Skversky was acting as its agent at the time that Kahhan signed her insurance application. Doc. 11 ¶ 4. MCIC claims that it is without sufficient information to form a belief about Skversky’s agency status. *Id.* As a result, Kahhan now seeks to amend her complaint to join Skversky as a defendant, alleging fraud, fraudulent misrepresentation and negligence against Skversky in his individual capacity.

## **DISCUSSION**

28 U.S.C. § 1447(e) confers substantial discretion on the courts in deciding whether to permit joinder of a diversity-destroying defendant.<sup>2</sup> *Morze v. Southland Corp.*, 816 F.Supp. 369, 370 (E.D. Pa. 1993); *Carter v. Dover Corp. Rotary Lift Div.*, 753 F.Supp. 577, 579 (E.D. Pa. 1991). This flexible approach is in sharp contrast to the strict Rule 19 analysis, which provides for joinder only when the party is necessary and indispensable. *Carter*, 753 F.Supp. at 579.

The Third Circuit has not yet needed to announce the appropriate discretionary standard to be used by a court when applying section 1447(e). Thus, the courts within this circuit have adopted the approach developed by the Fifth Circuit in *Hensgens*. *Guldner v. Brush Wellman Inc.*, 2001 WL 856699 at \*2 (E.D. Pa. July 25, 2001). *See Carter*, 753 F. Supp at 579 (indicating that the enactment of § 1447(e) was a codification of the discretionary approach prescribed in *Hensgens*). Under *Hensgens*, a district court must weigh “the danger of parallel federal/state proceedings” against the diverse defendant’s “interest in retaining the federal forum.” *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1181 (5th Cir. 1987). In balancing these two competing interests, the court should consider: (1) the extent to which the purpose of the amendment is to defeat federal jurisdiction; (2) whether the plaintiff has been “dilatatory” in asking for amendment; (3) whether plaintiff will be injured if amendment is not allowed; and, (4) any other factor bearing on the equities. *Id.* These factors will instruct this court’s decision of whether to allow joinder in this case.

The first three factors weigh in favor of allowing plaintiff to amend her complaint to join Skversky as an additional defendant. First, there is no evidence that plaintiff’s motive in adding

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<sup>2</sup> Section 1447(e) provides that “[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.”

Skversky to the present action is anything other than a desire to promote an efficient resolution of her dispute, by joining all defendants in one lawsuit regardless of the forum. Defendant's contention, that plaintiff's true motive for joining Skversky is to defeat federal jurisdiction, is unsupported. Doc. No. 16 at 5. Second, plaintiff has not been dilatory in asking for leave to amend her complaint. Dilatory, in this context, means that the purpose of plaintiff's delay in seeking an amendment was to prolong the litigation. *See In Re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997). Plaintiff first filed a motion for leave to amend her complaint on June 22, 2001, less than one month after MCIC asserted its affirmative defenses and counterclaim against plaintiff. Moreover, plaintiff's motion to amend was filed less than five months after this action was commenced, a period of time which this court does not find to amount to an unnecessary delay of litigation.<sup>3</sup> Third, plaintiff will be injured if the Court does not allow Skversky to be joined as a defendant. If Skversky is not added as a defendant to the present action plaintiff will be forced to litigate two lawsuits at the same time, increasing her litigation costs tremendously. *Lehigh Mechanical, Inc. v. Bell Atlantic Tricon Leasing*, 1993 WL 298439 (E.D. Pa. 1993) (an increase in litigation costs is evidence of injury to a plaintiff).

Finally, other equitable considerations favor allowing amendment of plaintiff's

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<sup>3</sup> In December 1997, plaintiff was informed that her insurance coverage was being terminated because certain medical history was omitted from her application. Defendant contends that the fact that plaintiff was made aware of the application's omissions in 1997 indicates that plaintiff was dilatory in not seeking amendment at an earlier time. However, this litigation did not commence until February 2001, and it was not until MCIC answered plaintiff's complaint in May 2001 that the personal liability of Skversky became an issue in the lawsuit. At the time plaintiff initiated her action against MCIC, she believed that Skversky was an agent of MCIC, and that MCIC would be responsible for the liability of its agent. Am. Compl. ¶¶ 3, 4. It was not until MCIC denied Skversky's agent status that the need to sue Skversky individually for his personal liability arose. Answer ¶ 4; Doc. No. 32 at 4.

complaint. Judicial economy would be hampered by allowing concurrent federal and state proceedings. Both lawsuits arise from a common nucleus of facts, and raise similar issues, such as the manner in which the insurance application was completed, the alleged misstatements and omissions of the application, plaintiff's knowledge and responsibility for the nondisclosures, and the principal/ agent relationship between MCIC and Skversky. It would be a great waste of judicial resources to explore these issues in two separate proceedings. Skversky will be able to prepare his defense in the present action, as the period for discovery has not yet expired. In addition, because a federal court sitting in diversity is required to apply state law, MCIC will not be prejudiced by a decision to remand. In fact, when there is a lack of a significant federal interest in deciding the state law issues, federal courts prefer to have state courts interpret their own laws. *Carter v. Dover Corp. Rotary Lift Div.*, 753 F.Supp. 577, 579 (E.D. Pa. 1991) (joinder allowed in a case involving exclusively state law issues); *Stipa v. Rodenhicher*, 1995 WL 384616 at \*2 (E.D. Pa June 23, 1995).<sup>4</sup>

Efficiency, economy and equity demand that the rights and liabilities of Kahhan, MCIC and Skversky are decided in a single proceeding. Therefore, I will allow Kahhan to amend the complaint in this action to join Skversky as a defendant. Since the addition of Skversky destroys the diversity upon which this court has subject matter jurisdiction, I will remand this action to the state court.

An appropriate order follows.

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<sup>4</sup> While it is not clear that inconsistent outcomes may result from separate federal and state court proceedings, under section 1447(e) the possibility of conflicting results is not a prerequisite for allowing joinder of a nondiverse party; it is merely a factor for the court to consider. In this case, the numerous equitable factors that favor allowing plaintiff to join Skversky outweigh the fact that there may not be a risk of inconsistent judgments.

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CAROLYN KAHHAN,	:	
	:	
Plaintiff,	:	CIVIL ACTION
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	:	NO. 01-1128
MASSACHUSETTS CASUALTY INSURANCE	:	
COMPANY	:	
	:	
Defendant.	:	

**Order**

And now, this                    day of November, 2001, upon consideration of the plaintiff's supplemental motion for leave to file a second amended complaint to join Benjamin Skversky as an additional defendant and remand the case to the Court of Common Pleas of Philadelphia County (Doc. 31), and defendant's response (Doc. 32); it is hereby ORDERED that the motion is GRANTED and plaintiff may file the second amended complaint within 20 days of this date thereof. It is further ORDERED that upon filing of the second amended complaint this case is REMANDED to the Court of Common Pleas of Philadelphia County.

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William H. Yohn, Jr., Judge

