

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

AXIS SPECIALTY INSURANCE : CIVIL ACTION  
COMPANY :  
 :  
v. :  
 :  
THE BRICKMAN GROUP LTD, LLC : NO. 09-3499

**MEMORANDUM**

**Padova, J.**

**January 28, 2010**

This dispute concerns an excess insurance policy that Plaintiff Axis Specialty Insurance Company (“Axis”) issued to Defendant Brickman Group LTD, LLC (“Brickman”). Brickman has filed a Motion to Dismiss the Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(7) or, in the alternative, to Transfer Venue to the District of New Jersey. For the following reasons, we dismiss Axis’s claim for equitable subrogation, but deny the Motion in all other respects.

**I. BACKGROUND**

The Amended Complaint alleges that, in 2006, a woman named Deborah Peisel commenced an action in the New Jersey state courts against Home Depot and Brickman (the “Peisel Action”), alleging that she sustained injuries in a fall in the Home Depot parking lot due to Brickman’s inadequate snow removal. (Am. Compl. ¶¶ 25-26.) On September 2, 2008, Peisel settled with Brickman for \$1,150,000 (the “Peisel Settlement”). (*Id.* ¶ 33.)

During the relevant time period, Brickman was self-insured for the first \$250,000 of its liability, and it maintained two excess insurance policies. (*Id.* ¶¶ 6-7.) The first was an ACE American Insurance Company (“ACE”) policy, which provided \$750,000 in excess coverage for the “‘ultimate net loss’ in excess of the ‘retained limit.’” (*Id.* ¶¶ 8-10.) The policy defined “retained

limit” to be the amount shown in the Declarations, which was \$250,000. (Id. ¶¶ 11- 12.) The policy further stated that the retained limit did not include “any expenses incurred by the Insured in the defense of any claim or ‘suit.’” (Id. ¶ 13.) Endorsement 10 of the policy further stated that ACE and Brickman would share defense costs on any claim in excess of the retained limit in proportion to each party’s share of any settlement or judgment. (Id. ¶ 14.) The endorsement finally provided that the policy “did not apply to defense, investigation, settlement, or legal expenses.” (Id. ¶ 15.)

Brickman’s second excess policy was an umbrella policy with Axis. (Id. ¶ 16.) The Axis policy provided \$5 million of coverage “in excess of the ‘retained limit’ which the insured becomes legally obligated to pay as damages . . . because of ‘bodily injury.’” (Id. ¶¶ 17-18.) The policy defined “retained limit” as the “limits of ‘underlying insurance’ scheduled in the Declarations,” which was \$1 million. (Id. ¶ 20.) Finally, the policy provided that Axis would only have a duty to defend suits covered by the policy, but not covered by the underlying insurance, and suits arising after the limits of the underlying insurance were exhausted by the payment of damages. (Id. ¶ 23.)

The \$1,150,000 settlement in the Peisel Action was funded with \$750,000 from ACE, and \$400,000 from Axis. (Id. ¶ 34.) Brickman did not contribute to the settlement, taking the position that its funding of defense costs excused its participation. (Id. ¶ 35.) Axis contends in the instant action that Brickman should have contributed its \$250,000 in self-insurance to the settlement, thereby reducing Axis’s required contribution by that amount.

The Amended Complaint contains four counts. The first is for Declaratory Relief and seeks a declaration that (1) the ACE policy did not include within its underlying limit or retained limit any amounts expended by Brickman for its defense; (2) Axis had no duty to defend or pay any defense costs incurred by or on behalf of Brickman; and (3) Brickman was required to fund the first \$250,000

of the Peisel settlement. Count II alleges that Brickman breached its contract with Axis by failing to fund the first \$250,000 of the Peisel Settlement. Count III asserts that Brickman was unjustly enriched by Axis's payment of \$400,000 to the settlement, because Axis's only obligation was \$150,000, i.e., Brickman should have paid \$250,000. Count IV asserts a claim for equitable subrogation and alleges that (1) Brickman was primarily liable for the first \$250,000 of the Peisel Settlement, (2) Axis ultimately paid that amount, and (3) equitable subrogation will correct that injustice.

## **II. DISCUSSION**

In its Motion to Dismiss or Transfer, Brickman first argues that each of the four claims should be dismissed because they fail to state claims upon which relief may be granted. It next argues, pursuant to Fed. R. Civ. P. 12(b)(7), that the entire Amended Complaint should be dismissed for failure to join ACE as a necessary party as required by Fed. R. Civ. P. 16. Finally, and in the alternative, Brickman argues that the case should be transferred to New Jersey pursuant to 28 U.S.C. § 1404.

### **A. Fed. R. Civ. P. 12(b)(6) – Failure to State a Claim**

When considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), we look at the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). We take the factual allegations of the complaint as true and draw all reasonable inferences in favor of the plaintiff. Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008) (citing Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)). The “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell

Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

1. Declaratory Judgment Claim

Brickman first argues, without any citation to legal authority, that the declaratory judgment claim should be dismissed because Axis seeks a declaration of Brickman's obligations under the ACE policy, when it has no standing to seek such relief because it is neither a party nor a third-party beneficiary to that policy. The issue of standing under the Declaratory Judgment Act is determined by federal law. Fed. Kemper Ins. Co. v. Raucher, 807 F.2d 345, 352 (3d Cir. 1986). The Declaratory Judgment Act, 28 U.S.C. § 2201, provides:

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). “The ‘actual controversy’ requirement refers to the case or controversy requirement of Article III.” Maniscalco v. Brother Intern. Corp. (USA), 627 F. Supp. 2d 494, 504 (D.N.J. 2009) (citing Teva Pharms. USA, Inc. v. Novartis Pharms. Corp., 482 F.3d 1330, 1336 (Fed. Cir. 2007)). In the declaratory judgment context, an actual controversy is one in which the dispute is both “‘definite and concrete, touching the legal relations of the parties having adverse legal interests,’” and “‘real and substantial.’” Id. (quoting Teva Pharms., 482 F.3d at 1336). “Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” Id. (quoting Teva Pharms., 482 F.3d at 1336).

Here, the Amended Complaint makes plain that there is an actual controversy between Axis

and Brickman concerning the scope of coverage under the Axis policy, and the resolution of that controversy will determine the scope of Axis's liability to Brickman. While resolution of the coverage dispute may require some reference to, and interpretation of, the terms of the ACE policy, the declaratory judgment action will ultimately determine the rights and obligations of Axis and Brickman under the Axis policy. Accordingly, we reject Brickman's argument that the declaratory judgment claim fails under Fed. R. Civ. P. 12(b)(6) because the facts alleged do not suffice to establish Axis's standing to assert such a claim.

2. Breach of Contract Claim

Brickman next asserts that we should dismiss the breach of contract claim for failure to state a claim upon which relief may be granted because Axis has identified no provision in either the ACE or Axis policy that would require Brickman to pay Axis the self-insured retention. Indeed, Brickman points out that the Amended Complaint alleges that the ACE policy required Brickman to fund the first \$250,000 of any settlement, and then alleges in "a *non-sequitur*" that "by failing to pay the full underlying limits to settle the [Peisel] Action, Brickman has breached its contract with Axis." (Brickman Br. at 7; Am. Compl. ¶ 46.) Axis responds that Brickman misunderstands its claim, "confus[ing] how the rights of Brickman and Axis *inter se* depend upon the underlying insurance." (Axis Br. at 4.)

To state a claim for breach of contract, a plaintiff must allege "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract[,] and (3) resultant damages.'" Chemtech Int'l, Inc. v. Chemical Injection Techs., Inc., 247 Fed. App'x. 403, 405 (3d Cir. 2007) (quoting Ware v. Rodale Press, Inc., 322 F.3d 218, 225 (3d Cir. 2003)). Here, Axis alleges in the Amended Complaint that it and Brickman were parties to an insurance contract

that required Brickman to “have in place underlying limits of \$1 million before Axis’s liability would attach.” (Am Comp. ¶ 45.) It further alleges that Brickman, by failing to pay the full underlying limit towards settlement of the Peisel Action, breached its contract with Axis. (Id. ¶ 47.) Finally, it alleges that Axis sustained resulting damages of \$250,000. (Id. ¶ 48.) At this early stage of the litigation, these allegations, taken as true, are sufficient to state a claim upon which relief may be granted. We therefore deny Brickman’s Motion insofar as it seeks dismissal of the breach of contract claim pursuant to Rule 12(b)(6).

### 3. Unjust Enrichment Claim

Brickman next argues that Axis’s unjust enrichment claim should be dismissed because recovery in unjust enrichment is not available where a contract controls the relationship between the parties. “It is true that . . . a contract prevents a party from making a claim of unjust enrichment; recovery is limited to the measure provided for in the contract.” U.S. v. Kensington Hosp., 760 F. Supp. 1120, 1135 (E.D. Pa. 1991)) (citing Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 999 (3d Cir. 1987)). “However, [the] Federal rules allow pleading in the alternative. Courts have permitted plaintiffs to pursue alternative theories of recovery based both on breach of contract and unjust enrichment, even when the existence of a contract would preclude recovery under unjust enrichment.” Id. (citations omitted.) We therefore deny Brickman’s Motion insofar as it seeks dismissal of the unjust enrichment claim.

### 4. Equitable Subrogation Claim

Brickman next argues that Axis’s equitable subrogation claim should be dismissed for failure to state a claim upon which relief may be granted because an insurer cannot assert a subrogation claim against its own insured. (Brickman Br. at 8-9.) Indeed, “[i]t is well settled that an insurer

may not assert a subrogation claim against one of its insureds.” Fidelity & Guar. Ins. Underwriters, Inc. v. American Bldgs. Co., Inc., 14 F. Supp. 2d 704, 706 (M.D. Pa. 1998) (citations omitted). This is because “[n]o right of subrogation can arise in favor of the insurer against its own insured, since by definition subrogation arises only with respect to rights of the insured against third persons . . . .” Employers of Wausau v. Pulex Corp., 476 F. Supp. 140, 142-43 (E.D. Pa. 1979) (quoting 16 Couch on Insurance 2d, § 61:133 (1966 & Supp. 1978)).

Axis concedes that this is “the general rule,” but argues that it is only applicable when an insurer provides coverage for damage to the insured’s property and then seeks to recover from its insured based on a theory that the insured is partially responsible for the damage. However, Axis has cited no authority that supports this distinction and, more importantly, has cited no case in which a court has permitted an insurer to assert a subrogation claim against its own insured. Accordingly, we conclude that the general rule applies and dismiss Axis’s equitable subrogation claim.

**B. Rule 12(b)(7) – Failure to Join a Necessary Party**

Brickman next argues, very briefly, that dismissal under Fed. R. Civ. P. 12(b)(7) is appropriate because Axis has failed to join ACE, which is a necessary party under Federal Rule of Civil Procedure 19. Rule 19(a), provides in pertinent part as follows:

- (1) A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
  - (A) in that person’s absence, the court cannot accord complete relief among existing parties; or
  - (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person’s absence may:

- (i) as a practical matter impair or impede the person's ability to protect the interest; or
- (ii) leave an existing party subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 16(a). Rule 19 therefore “creates a two-tiered mode of analysis. First, the Court must determine whether joinder of a person is necessary. If the person is necessary, then the Court must determine whether joinder is feasible.” Matlack Leasing, LLC v. Morison Cogen, LLP, Civ. A. No. 09-1570, 2010 WL 114883, at \* 12 (E.D. Pa. Jan. 13, 2010) (citing Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 844 F.2d 1050, 1053-54 (3d Cir. 1988)). It is the moving party's burden to establish that joinder is necessary. Id. (citing United States v. Payment Processing Ctr., LLC, No. 06-0725, 2006 WL 2990392, at \*2 (E.D. Pa. Oct. 18, 2006)).

Here, Brickman appears to argue that ACE is a necessary party to this action pursuant to subdivision 19(a)(1)(B)(ii), which “requires a court to decide whether determination of the rights of the parties before it would impair or impede an absent party's ability to protect its interest in the subject matter of the litigation.” Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 406 (3d Cir. 1993). This subdivision “recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence.” Fed. R. Civ. P. 19, Advisory Committee Notes, 1966 Amendment.

Brickman asserts that ACE will be prejudiced if this action is decided in its absence, because the action seeks a declaration of rights and responsibilities under an ACE Policy. However, as explained above, Axis's declaratory judgment count ultimately seeks a declaration as to Brickman's and Axis's respective rights under the Axis policy, not the ACE policy. Brickman nevertheless

argues that resolution of this case will have a “direct impact” on ACE’s obligations to Brickman if, incidental to our declaration of rights under the Axis policy, we determine both that defense costs do not count towards the retention under the ACE policy and that such costs must be borne pro rata by ACE. We are not persuaded by this argument as Axis is not asking us to determine ACE’s liability for defense costs; it is only asking us to determine whether Brickman’s payment of defense costs satisfies the “retained limit” referenced in both the ACE and Axis policies. In any event, we will not speculate as to how a hypothetical resolution of the instant case might impact an also-hypothetical, future legal dispute between Brickman and ACE concerning ACE’s liability for defense costs, which is simply not the subject matter of the instant action.<sup>1</sup> See Matlack Leasing, 2010 WL 114883, at \*12 (stating that “[s]peculation about what may happen in a hypothetical future legal action . . . does not demonstrate necessity under Rule 19.”)

Accordingly, we find that Brickman has failed to satisfy its burden of establishing that ACE is a necessary party under Fed. R. Civ. P. 19 and, therefore, deny Brickman’s request that we dismiss this action pursuant to Fed. R. Civ. P. 12(b)(7).

**C. Transfer under 28 U.S.C. § 1404**

In the alternative to dismissal, Brickman argues that the action should be transferred to New Jersey pursuant to 28 U.S.C. § 1404(a). Section 1404(a) provides that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any

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<sup>1</sup>We also note that, by its terms, Rule 19(a)(1)(B) requires that the absent party “claim[] an interest relating to the subject matter of the action . . . .” Fed. R. Civ. P. 19(a)(1)(B); see also Payment Processing, 2006 WL 2990392, at \*4. Accordingly, where, as here, there has been no showing that ACE itself has claimed an interest relating to the subject of the action, we could deny Brickman’s request for dismissal on that basis alone. Payment Processing, 2006 WL 2990392, at \*4 (“[T]o the extent that Defendants’ motion relies on Rule 19(a)(2), it is denied, as there has been no showing that the absent [parties] have claimed an interest relating to the subject of the action.”).

other district or division where it might have been brought.”

The United States Court of Appeals for the Third Circuit has set forth a number of private and public factors that a court may consider in evaluating a motion to transfer. See Jumara v. State Farm Ins. Co., 55 F.3d 873, 879-80 (3d Cir. 1995). The private factors include: (1) the plaintiff’s choice of venue; (2) the defendant’s preference; (3) where the claim arose; (4) the relative physical and financial condition of the parties; (5) the extent to which witnesses may be unavailable for trial in one of the forums; and (6) the extent to which books and records could not be produced in one of the forums. Id. at 879. The public factors include: (1) the enforceability of the judgment; (2) practical considerations that could make the trial easy, expeditious, or inexpensive; (3) the relative administrative difficulty resulting from court congestion; (4) the local interest in deciding the controversy; and (5) the public policies of the forums. Id. at 879-80. The burden of establishing the need for transfer rests with the movant. Id. at 880. In the end, whether to transfer an action pursuant to § 1404(a) lies within the court’s sound discretion. See Lony v. E.I. DuPont de Nemours & Co., 886 F.2d 628, 631 (3d Cir. 1989).

Here, Brickman argues we should transfer the case to New Jersey for the convenience of the parties, and in the interests of justice, because the Peisel Action proceeded in the New Jersey courts, Axis paid the Peisel settlement in New Jersey, the settlement agreement states that it is to be governed by New Jersey law, and the “most relevant witnesses” to the settlement agreement reside in New Jersey. However, as Axis points out, this case is not about the settlement agreement in the Peisel action; it is about the Axis insurance policy that provided excess insurance coverage to fund a portion of the settlement. Thus, Brickman has not satisfied its burden of establishing the need for transfer. Moreover, the Eastern District of Pennsylvania is the Plaintiff’s choice of forum; resolution

of the dispute will primarily turn on the terms of the insurance contracts, which can be produced and reviewed anywhere; and it appears that Pennsylvania law will apply.<sup>2</sup> We therefore exercise our discretion to deny Brickman’s request to transfer the case to the District of New Jersey.

### III. CONCLUSION

For the foregoing reasons, we grant Brickman’s Motion insofar as it seeks dismissal of the Axis’s equitable subrogation claim, but deny it in all other respects. An appropriate Order follows.

BY THE COURT:

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John R. Padova, J.

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<sup>2</sup>“Where federal jurisdiction is based on diversity of citizenship, as it is here, we apply the choice of law rules of the state in which the District Court [sits].” J.C. Penney Life Ins. Co. v. Piloni, 393 F.3d 356, 360 (3d Cir. 2004). “[U]nder Pennsylvania choice-of-law rules, an insurance contract is governed by the law of the state in which the contract was made.” Id. at 361. “An insurance contract is “made” in the state in which the last act legally necessary to bring the contract into force takes place.” Id. (quoting Crawford v. Manhattan Life Ins. Co., 221 A.2d 877, 880 (Pa. Super. Ct. 1969)). Generally, the “last act is delivery of the policy to the insured and the payment of the first premium by him.” Id. (citations omitted). Here, the insurance policy was delivered to Brickman in Langhorne, Pennsylvania. (See Ex. 3 to Axis Br.) Accordingly, it appears that Pennsylvania law will apply.

IN THE UNITED STATES DISTRICT COURT  
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AXIS SPECIALTY INSURANCE	:	CIVIL ACTION
COMPANY	:	
	:	
v.	:	
	:	
THE BRICKMAN GROUP LTD, LLC	:	NO. 09-3499

**ORDER**

**AND NOW**, this 28th day of January, 2010, upon consideration of Defendant's Motion to Dismiss the Amended Complaint or, in the Alternative, to Transfer Venue (Docket No. 13) and Plaintiff's response thereto, and for the reasons stated in the accompanying Memorandum Opinion, **IT IS HEREBY ORDERED** that the Motion is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. Defendant's Motion is **GRANTED** insofar as it seeks dismissal of Count IV, the equitable subrogation claim.
2. The Motion is **DENIED** in all other respects.

BY THE COURT:

/s/ John R. Padova, J.

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John R. Padova, J.