

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

**HEALTH CARE ACCOUNTING AND)
CONSULTING SERVICES, LLC,)**

Plaintiff)

v.)

Docket No. 01-103-P-C

**EXECUTIVE RISK INDEMNITY, INC.,)
et al.,)**

Defendants)

RECOMMENDED DECISION ON DEFENDANTS' MOTIONS TO DISMISS

The defendants, Executive Risk Indemnity, Inc. (“Executive”) and Royal Indemnity Company (“Royal”), move to dismiss the complaint in this declaratory judgment action. I recommend that the court grant the motions.

I. Applicable Legal Standard

The motions to dismiss invoke Fed. R. Civ. P. 12(b)(6). Defendant Royal Indemnity Company’s Motion to Dismiss Pursuant to Fed. R. Civ. Proc. 12(b)(6), etc. (“Royal Motion”) (Docket No. 2) at 1; Executive Risk Indemnity, Inc.’s Motion to Dismiss, etc. (“Executive Motion”) (Docket No. 4) at 1. “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [its] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would

be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Tobin v. University of Maine Sys.*, 59 F.Supp.2d 87, 89 (D. Me. 1999).

II. Factual Background

The complaint includes the following relevant factual allegations. The plaintiff, Healthcare Accounting and Consulting Services, LLC, is a Maine limited liability corporation serving as the trustee of the JBI Creditor’s [sic] Trust and the Viburnum Creditors’ Trust, which were created in connection with two cases pending in the United States Bankruptcy Court for the District of Maine. Complaint (Docket No. 1) ¶¶ 1-2. The defendants are insurance companies incorporated in Delaware. *Id.* ¶¶ 3-4.

Certain officers and directors of Jackson Brook Institute (“JBI”) have been named as defendants in an adversary proceeding brought by the plaintiff and pending in the bankruptcy court in the pending bankruptcy cases. *Id.* ¶ 6. The defendants issued policies of liability insurance to the parent organization of JBI in 1997. *Id.* ¶¶ 13-15. The policies cover the directors and officers of JBI. *Id.* ¶¶ 14-15. Timely notice of the claims raised in the adversary proceeding was furnished to the defendant insurers. *Id.* ¶ 16. For itself and on behalf of Royal, Executive has declined to acknowledge that the officers and directors of JBI who are defendants in the adversary proceeding are covered under the policies for those claims. *Id.* ¶¶ 17-18. The debtor in possession, not otherwise identified in the complaint, paid premiums which caused the policies at issue to be reinstated. *Id.* ¶ 10. The plaintiff contends that it is the “owner” of the policies and that it has a contingent interest in the proceeds of the policies. *Id.* ¶¶ 9, 11.

The plaintiff seeks judgment declaring that the defendants “must defend and indemnify the former officers and directors against one or more [of] the claims asserted against them in the Adversary Proceeding” and for its attorney fees. *Id.* ¶ 20 & demand for relief.

III. Discussion

Both defendants contend that this action is barred by Maine's "reach and apply" statute, 24-A M.R.S.A. § 2904. The plaintiff agrees that it cannot bring a reach and apply action against the defendants under this statute or under Massachusetts law, which it suggests may apply. Plaintiff Health Care¹ Accounting and Consulting Services, LLC's Opposition to Defendant Royal Indemnity Company's Motion to Dismiss ("Opposition to Royal Motion") (Docket No. 9) at 7; Plaintiff Health Care Accounting and Consulting Services, LLC's Opposition to Defendant Executive Risk, Inc.'s Motion to Dismiss ("Opposition to Executive Motion") (Docket No. 11) at 6. However, the plaintiff argues that this action cannot be characterized as a reach-and-apply action because it does not seek directly the proceeds of the policies at issue but rather "merely seeks equitable relief in the form of a declaratory judgment" regarding coverage. Opposition to Royal Motion at 7; Opposition to Executive Motion at 6.

The Maine Law Court has addressed this question. In *Smith v. Allstate Ins. Co.*, 483 A.2d 344, 346 (Me. 1984), the plaintiff sought a declaratory judgment to the effect that the defendant insurer was obligated to defend and indemnify its insured, the other named defendant. The Law Court held that the plaintiff lacked standing to seek such declaratory relief because she had no right of action against the insurer unless and until the liability of its insured had been determined. *Id.* at 347. The plaintiff in this action is in the same position.² To the extent that the plaintiff's arguments concerning the applicability of the federal Declaratory Judgments Act, 28 U.S.C. § 2201(a), and case law from other jurisdictions may be construed as an argument that state law does not apply to this claim, that contention lacks merit as well. The First Circuit has held that state substantive law must be applied in state-law-based declaratory judgment actions brought in federal court. *Commercial Union Ins. Co. v.*

¹ So in motion and caption; one word in complaint.

Walbrook Ins. Co., 41 F.3d 764,773-774 (1st Cir. 1994). Litigants may not use federal declaratory judgment jurisdiction to avoid the effect of substantive and otherwise applicable state law. *See Allstate Ins. Co. v. Charneski*, 286 F.2d 238, 243-44 (7th Cir. 1960).³ *See also 118 East 60th Owners, Inc. v. Bonner Props., Inc.*, 677 F.2d 200, 203 (2d Cir. 1982); *Berger v. State Farm Mut. Automobile Ins. Co.*, 291 F.2d 666, 668 (10th Cir. 1961).

Because Maine law on this point is dispositive, it is not necessary to address the parties' other arguments.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motions to dismiss be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 11th day of July, 2001.

² None of the parties cites Massachusetts case law on this point, and my research has located none.

³ In *Indemnity Ins. Co. of N. Am. v. Kellas*, 173 F.2d 120 (1st Cir. 1949), cited by the plaintiff, the First Circuit did state that "it has been held that a federal court may entertain a complaint by the insurer for a declaratory judgment, naming the insured and the tort-claimant as defendants" under certain circumstances, *id.* at 124, the reverse of the situation in the instant case, but the court specifically declined to decide the jurisdictional question raised, *id.* at 126, and so the cited dictum is of no value in support of the plaintiff's position. Even if that were not the case, the question of state law on the point was not raised in *Kellas*.

David M. Cohen
United States Magistrate Judge

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