

Defendant Connecticut Indemnity Company's Motion for Transfer of Venue ("Plaintiff's Opposition") (Docket No. 18) at 2; Amended Complaint, *Harter, et al. v. Auto Europe, L.L.C., et al.*, Docket No. 01 C 9509 ("Harter Complaint") (copy attached as Exh. 1 to Motion to Transfer Venue ("Defendant's Motion") (Docket No. 12)), and subsequently remanded to state court, Plaintiff's Opposition at 3, where it apparently remains pending. The plaintiff is a named insured under policies issued by the defendant. First Amended Complaint ¶¶ 11-13. The defendant has refused to defend the plaintiff in this action. *Id.* ¶¶ 2, 16. Other named defendants in the Harter suit are Kemwel Holiday Autos, L.L.C. and DER Travel Service, Inc. *Id.* ¶ 8. The Harter suit alleges that the defendants in that action violated the Illinois Consumer Fraud Act and obtained unjust enrichment, and that Auto Europe also violated the Maine Unfair Trade Practices Act. *Id.* ¶ 10 & Harter Complaint.

The plaintiff filed this action on November 15, 2001. Docket. The defendant has filed a counterclaim seeking a declaratory judgment that it has no duty to defend or indemnify the plaintiff in the Harter suit. Answer of Connecticut Indemnity Company to First Amended Complaint with Affirmative Defenses and Counterclaim (Docket No. 9) at 4-7.

The plaintiff was also a named insured on a policy of insurance issued by Commercial Union Insurance Company. Defendant's Motion at [2]. Commercial Union filed a declaratory judgment action against Auto Europe in the United States District Court for the Northern District of Illinois on or about September 10, 2001. *Id.* at [3] & Exh. 2 thereto. Auto Europe filed a motion to transfer that action to this court which was denied. *Id.* & Exh. 4 thereto. Summary judgment has been granted in favor of Commercial Union by the district court in the Northern District of Illinois on its claim that it has no duty to defend Auto Europe in the Harter suit. Reply Brief of Connecticut Indemnity Company in Support of its Motion to Transfer Venue ("Defendant's Reply") (Docket No. 21) at [2] & Exh. A thereto. On January 25, 2002 Connecticut Indemnity filed a declaratory judgment action against Auto

Europe, Kemwel and DER in the Northern District of Illinois. Defendant's Motion at [4] & Exh. 5 thereto.

II. Motion to Transfer Venue

The defendant's motion invokes 28 U.S.C. § 1404(a), which provides:

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.

Here, the plaintiff concedes that the action could have been brought in the Northern District of Illinois. Plaintiff's Opposition at 4.

Under section 1404(a) a plaintiff's choice of forum is entitled to great weight, *Forum Fin. Group v. President & Fellows of Harvard College*, 173 F.Supp.2d 72, 92 (D. Me. 2001), particularly where, as here, the plaintiff is a resident of the district in which the action was brought, *Demont & Assocs. v. Berry*, 77 F.Supp.2d 171, 173 (D. Me. 1999). The defendant "bear[s] a substantial burden" to demonstrate why there should be a change in venue; the evidence must weigh heavily in favor of transfer before the plaintiff's choice of forum will be disturbed. *Forum*, 173 F.Supp.2d at 92.

With respect to the convenience of the parties and witnesses, "[i]t is not enough without more that the defendant would prefer another forum, . . . [n]or will transfer be ordered if the result is merely to shift the inconvenience from one party to another." *Banjo Buddies, Inc. v. Renosky*, 156 F.Supp.2d 22, 26 (D. Me. 2001) (quoting 15 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3848, at 383-86 (2d ed. 1986)). Here, the defendant essentially concedes that the convenience of witnesses is not a factor, because "the existence of any duty . . . to defend . . . will almost certainly be determined through cross-motions for summary judgment on the basis of documents." Defendant's Motion at [5]. With respect to the convenience of the parties, the defendant contends that its own subsequently-filed declaratory judgment action in Illinois involves the same issues as this action and

that that action “is by far the more comprehensive case in that it will fully resolve all issues between Connecticut Indemnity and all three of its insureds in a single forum in which Auto Europe is already represented by counsel familiar with the issues involved.” Defendant’s Reply at [2]. This argument merely seeks the shifting of inconvenience from the defendant to the plaintiff. In addition,

[w]here identical actions are proceeding concurrently in two federal courts, entailing duplicative litigation and a waste of judicial resources, the first filed action is generally preferred in a choice-of-venue decision.

Cianbro Corp. v. Curran-Lavoie, Inc., 814 F.2d 7, 11 (1st Cir. 1987); *see also Bayside Enters., Inc. v. Mattern’s Hatchery, Inc.*, 741 F. Supp. 21, 22 (D. Me. 1990). Nothing offered by the defendant on this point is particularly weighty or persuasive; accordingly, the defendant has failed to carry its burden on this element of the statutory test. *See generally Banjo Buddies*, 156 F.Supp.2d at 26.

The defendant’s argument concerning the interest-of-justice element of the statutory test is essentially the same: judicial resources will be conserved if its dispute with Auto Europe over coverage for the claims raised in the Harter suit can be resolved in the same action in which its coverage dispute with the other defendants in the underlying action is to be addressed. The “first-filed” rule applies here as well. The fact that the Commercial Union case has been resolved by the court in Illinois, by a judge other than the judge assigned to Connecticut Indemnity’s action, *compare* Memorandum Opinion and Order, *Commercial Union Ins. Co. v. Auto Europe, L.L.C.*, Docket No. 01 C 6961, United States District Court, Northern District of Illinois (Exh. A to Defendant’s Reply) *with* Complaint, *Connecticut Indem. Co. v. Auto Europe, L.L.C., et al.*, Docket No. 02 C 0637, United States District Court, Northern District of Illinois (Exh. 5 to Defendant’s Motion), does not provide much support for the defendant’s argument here, particularly in the absence of any argument or demonstration that the relevant language in the insurance policies at issue is the same. The defendant has not shown that the overlap between the two cases outweighs the strong presumption in favor of the

plaintiff's choice of forum. *Banjo Buddies*, 156 F.Supp.2d at 25. There has also been no showing that resolution of this action in this court will result in any delay in the Illinois action or that transfer would result in faster resolution of the coverage issue.

The defendant's motion to transfer venue should be denied.

III. Motion for Judgment on the Pleadings

The plaintiff moves for judgment on the pleadings on its claims for declaratory judgment on the duty to defend and for breach of contract. Plaintiff Auto Europe, L.L.C.'s Motion for Judgment on the Pleadings, etc. ("Plaintiff's Motion") (Docket No. 14) at 1. A motion for judgment on the pleadings is governed by Fed. R. Civ. P. 12(c). The First Circuit has articulated the applicable standard for evaluating such a motion as follows:

[B]ecause rendition of judgment in such an abrupt fashion represents an extremely early assessment of the merits of the case, the trial court must accept all of the nonmovant's well-pleaded factual averments as true and draw all reasonable inferences in [its] favor. . . . [T]he court may not grant a defendant's Rule 12(c) motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief."

Rivera-Gomez v. de Castro, 843 F.2d 631, 635 (1st Cir. 1988) (citations omitted). *See also Lovell v. One Bancorp*, 690 F. Supp. 1090, 1096 (D. Me. 1988) (on motion for judgment on pleadings, factual allegations in complaint must be taken as true and legal claims assessed in light most favorable to plaintiff; judgment warranted only if there are no genuine issues of material fact and moving party establishes that it is entitled to judgment as matter of law).

When a party seeking judgment on the pleadings submits materials in addition to the pleadings, it is within the court's discretion whether to consider those materials, thereby transforming the motion into one for summary judgment by operation of Fed. R. Civ. P. 12(c). *Snyder v. Talbot*, 836 F. Supp. 19, 21 n.3 (D. Me. 1993) (motion to dismiss under Rule 12(b)(6); language in rule concerning

conversion to summary judgment identical); *see also Collier v. City of Chicopee*, 158 F.3d 601, 602-03 (1st Cir. 1998). The court may choose to ignore the supplementary materials and determine the motion under Rule 12. *Garita Hotel Ltd. Partnership v. Ponce Fed. Bank, F.S.B.*, 958 F.2d 15, 18-19 (1st Cir. 1992).

A. Choice of Law

This court must apply the choice-of-law principles of Maine in order to determine what law governs the issues raised by the plaintiff. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Under Maine law, when an insurance contract does not specify the jurisdiction whose law is to be applied to related disputes, “the rights and duties of the parties . . . are to be determined . . . by the local law of the state which, with respect to that particular issue, has the most significant relationship to the transaction and the parties.” *Baybutt Constr. Corp. v. Commercial Union Ins. Co.*, 455 A.2d 914, 918 (Me. 1983). “Specifically, in a casualty insurance contract . . . the rights and duties created thereby, are to be determined . . . by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue involved, some state has a more significant relationship to the transaction and the parties.” *Id.*

The plaintiff asserts that Maine law is applicable. The defendant responds that the pending motion “is premature, or procedurally inappropriate in the sense that the facts relevant to any choice of law determination are not apparent from the pleadings and exhibits.” Memorandum of Law of Connecticut Indemnity Company to Auto Europe’s Motion for Judgment on the Pleadings (“Defendant’s Opposition”) (Docket No. 20) at 2. Because the insurance policy at issue was actually purchased by the plaintiff’s corporate parent, located in Florida, and included 20 or more named insureds in addition to the plaintiff; the plaintiff’s business was conducted nationwide and only a

minimal percentage of that business involved Maine residents; and the policy was applied for and delivered in Florida, the defendant contends that it is entitled to discovery on these issues before the motion for judgment may be addressed. *Id.* at 5-8. The defendant suggests that either the law of Illinois or the law of Florida is applicable to the plaintiff's claims. *Id.* at 3.

The discovery sought by the defendant is unnecessary. The rights and duties of the only parties involved in this action are to be determined, under Maine choice-of-law principles, by the law of the state which those parties understood to be the principal location of the insured risk with respect to the only insured involved in this action. It matters not whether there were other named insureds that might be located elsewhere or that the policy was delivered elsewhere. The first amended complaint alleges, and the defendant admits, that the plaintiff has "its principal place of business in Portland, Maine." First Amended Complaint ¶ 4; Answer of Connecticut Indemnity Company to First Amended Complaint, etc. (Docket No. 9) ¶ 4. Contrary to the defendant's argument, Defendant's Opposition at 5, the fact that the plaintiff is incorporated in Delaware has no bearing on the principal location of the insured risk. Nor does the fact that the two named plaintiffs in the Harter suit who are alleged to have used the services of Auto Europe are residents of Illinois mean that the principal location of the insured risk cannot be Maine, as the defendant contends. *Id.* The underlying action purports to assert the claims of a nationwide class against Auto Europe. Harter Complaint ¶¶ 68-75. The action for all plaintiffs residing outside Illinois is brought against Auto Europe under the Maine Unfair Trade Practices Act. *Id.* ¶ 81. By the terms of the complaint, Auto Europe could only have acted in Maine, since no other place of business is alleged. The defendant offers no authority in support of its contention, Defendant's Opposition at 7-8, that the principal location of the insured risk varies when the named insured conducts business by telephone, mail or the internet, and my research has located none. Such a view of Maine's choice-of-law principles would, in any event, result in a lack of

uniformity and predictability for insurers and insureds that has no apparent public policy value to recommend it.

The insurance policy at issue, Exhibit 3 to the First Amended Complaint (“Policy”), lists Auto Europe as a named insured, *id.* at [8], includes “all of the named insured’s travel agency and/or tour operator locations,” *id.* at [9], and promises to pay on behalf of the named insured all sums which the insured becomes legally obligated to pay because of “any negligent act, error or omission of the ‘insured’ . . . in the conduct of ‘travel agency operations’ by the ‘named insured,’” *id.* at [2]. “Travel agency operations” is defined as “all operations necessary or incidental to the conduct of a travel agency business.” *Id.* at [3]. Auto Europe, with its principal place of business in Maine, conducts its business in Maine. Consideration of which state has the most significant relationship to the insurance contract, urged by the defendant, Defendant’s Opposition at 8, is not appropriate under the Maine choice-of-law test, and consideration of the individual transactions involved, also urged by the defendant, *id.*, is not relevant to consideration of the principal location of the insured risk, particularly where, as here, an unknown number of plaintiffs in an unknown number of locations may have claims that fit within the purported class. Maine law directs that the principal location of the insured risk be the primary consideration when an insurance contract is at issue; here, that location could only be Maine. *See also Gates Formed Fibre Prods., Inc. v. Plasti-Vac, Inc.*, 687 F. Supp. 688, 690-91 (D. Me. 1988) (where insurer and insured could reasonably foresee and expect law suits in any of fifty state, insured’s place of business was in Maine, and forum was in Maine, Maine law should determine extent of insurer’s obligations under policy). Maine law will apply to the plaintiff’s claims in this case.

B. Duty to Defend

Under Maine law, the duty to defend is determined by the so-called comparison test, under which the court compares the allegations of the

underlying complaint with the provisions of the insurance policy. The question of whether an insurer has a duty to defend an insured is a question of law. Under the comparison test, the insured is entitled to a defense if there exists any legal or factual basis, which could be developed at trial, which would obligate the insurers to pay under the policy. The correct test is whether a *potential* for liability within the coverage appears from whatever allegations are made.

Anderson v. Virginia Sur. Co., 985 F. Supp. 182, 187 (D. Me. 1998) (internal punctuation and citations omitted; emphasis in original); *see also Burns v. Middlesex Ins. Co.*, 558 A.2d 701, 702 (Me. 1989).

The defendant contends that the Harter Complaint alleges only “intentionally fraudulent, duplicitous, conspiratorial and criminal actions” which do not constitute negligent acts, errors or omissions, for which coverage is provided under the policy, and also that the allegations fall within a policy exclusion for liability arising from willfully dishonest, fraudulent, malicious or criminal acts.¹ Defendant’s Opposition at 14-15. The plaintiff responds that the causes of action alleged in the Harter suit “permit recovery for negligent and innocent misrepresentation,” and that is enough to trigger the duty to defend. Plaintiff’s Reply at 5-6.

The Harter Complaint cannot be reasonably construed to allege criminal acts or omissions by Auto Europe. More to the point, the Harter Complaint does allege that Auto Europe engaged in “a fraudulent and deceptive scheme” by “deceptively conceal[ing] from plaintiffs and [its] other customers a non-tax ‘add-on’ to the base price of the car rental.” Harter Complaint ¶ 1. “This ‘add-on’ is falsely presented . . . under the guise of a foreign sales or value-added tax (“VAT”), when, in fact, the add-on is an increase in the fee that plaintiffs and others are paying to the broker[] directly.” *Id.* After describing the process by which the defendant and other automobile rental brokers obtain

¹ The policy provides that it “does not apply: . . . under Coverages C and D, to liability arising out of any act, error or omission which is wilfully dishonest, fraudulent or malicious, or in wilful violation of any penal or criminal statute or ordinance, and is committed (or omitted) by or with the knowledge or consent of the ‘insured.’” Policy at [2]-[3].

discounts for rentals in other countries and in turn provide rental arrangements to American customers, the underlying complaint also alleges that

In every rental . . . the customer pays an add-on which is not for tax or insurance but is simply an extra feed to the broker, i.e., or [sic] a disguised increase in the base price.

This is done by the mechanism of the broker calculating the foreign sales tax as a percentage of the base price.

The base price includes the broker's booking fee, on which no foreign sales tax is due, because the booking by the broker occurs entirely in the United States.

Nonetheless, this spurious extra charge shows up on the booking acknowledgment, either broken out separately as tax, or simply put into the final or total base price, with a statement on the booking acknowledgment that this total base price "includes tax."

While it is technically true that the total base price on the booking acknowledgment "includes tax," the statement and the very presentation of this price information are designed to mislead and conceal from the customer that there is an add-on which is going directly to the broker as a disguised increase in the base price, and not for any tax or legitimate add-ons for insurance or other benefits.

* * *

The scheme or device described here is inherently deceptive and is intended to deceive and mislead customers such as plaintiffs who would object to payment of any add-on presented falsely as a sales tax when in fact the amount is going to the broker.

* * *

Auto Europe intended to deceive Harter . . . and deceptively conceal under the guise of a tax that Harter was simply paying an increase in the fee that Auto Europe would receive directly.

* * *

Auto Europe's failure to inform Harter that in the guise of a tax, it was simply increasing its own fee deprived Harter of a material fact which should have been disclosed to him.

* * *

Auto Europe intended to deceive Grogan . . . and deceptively conceal under the guise of a tax that Grogan was simply paying an increase in the booking fee that Auto Europe would receive directly.

* * *

Auto Europe's failure to inform Grogan that in the guise of a tax it was simply increasing its own fee deprived Grogan of a material fact which should have been disclosed to him.

* * *

At all times, the defendant brokers have conducted the deceptive scheme described above . . . in the course of conduct involving trade or commerce.

* * *

Plaintiffs sue Auto Europe under the Illinois Consumer Fraud Act, 815 ILCS 505/2

* * *

The actions of the [sic] Auto Europe were intentionally and wilfully effected in disregard of plaintiffs' rights under law.

. . . Harter and Grogan as class representatives further sue Auto Europe for damages under the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 203 et seq. ("UTPA").

The non-Illinois members of the class are entitled to sue under the Maine UTPA because the deceptive pricing and other deceptive acts took place at the [sic] Auto Europe's principal place of business which is in Maine

By the acts set forth above, Auto Europe has engaged in deceptive or unfair pricing . . . because the application of a foreign sales tax to the booking fee of Auto Europe has been done with the intent of willfully deceiving plaintiff and every other consumer dealing with Auto Europe and inducing them to believe that the add on to the listed base price is to pay a tax and not to increase the fee to Auto Europe.

Harter Complaint ¶¶ 18-22, 25, 35, 37, 45, 47, 67, 77, 80-83.

The duty to defend exists under Maine law "where the general allegations [in the underlying complaint] may invoke coverage and no specifics exclude the possibility;" that is, "where the allegations of the complaint are 'general' and the 'possibility' remains of specifics being furnished that would bring the complaint within the ambit of the policy." *United Bank v. Chicago Title Ins. Co.*, 168 F.3d 37, 39 (1st Cir. 1999). The Harter Complaint cannot be construed to allege damages that were "an accidental unintended consequence of an act allegedly committed intentionally," which could result in liability under the policy language. *See Gibson v. Farm Family Mut. Ins. Co.*, 673 A.2d 1350, 1353 (Me. 1996). However, if the intentional acts alleged in a complaint do not require the subjective desire for the damage alleged or the subjective foreseeing of the damage as a result of the conduct as an element of proof, a duty to defend will be found. *Burns*, 558 A.2d at 702-03 (policy excluded "bodily injury . . . which is expected or intended by the insured" and complaint alleged

damages resulting from slander, invasion of privacy and intentional infliction of emotional distress; duty to defend found because neither slander nor invasion of privacy required tortfeasor to subjectively want or foresee bodily injury as “practically certain” result of conduct).

Maine law provides that “an act may be deceptive pursuant to [5 M.R.S.A.] section 207 [the Maine UTPA] even though the defendant had no purpose to deceive and acted in good faith.” *Binette v. Dyer Library Ass’n*, 688 A.2d 898, 906 (Me. 1996). “A failure to disclose, when there is a statutory or regulatory duty to disclose, constitutes evidence of an unfair or deceptive act even when one in actual fact may be unaware of information the statute requires be disclosed.” *Id.* at 907. This standard, when compared with the language of the underlying complaint, Harter Complaint ¶¶ 81-83, leads to the only possible conclusion that there is a potential for recovery under the policy at issue, which excludes coverage only for intentional acts. The underlying complaint certainly alleges bad faith and intentional conduct, but it also alleges, in general terms, deceptive conduct under the Maine UTPA, for which proof of intent is not required, and for which proof of negligence would thus be sufficient. This is precisely the kind of general allegation that presents the possibility of “specifics being furnished that would bring the complaint within the ambit of the policy.” *United Bank*, 168 F.3d at 39. *See generally York Ins. Group of Maine v. Lambert*, 740 A.2d 984, 985-86 (Me. 1999). Accordingly, the plaintiff is entitled to judgment on the pleadings on Count I of its amended complaint, which seeks a declaration that the defendant has a duty to defend it in the Harter suit.

The plaintiff provides no argument concerning its motion for judgment on Count II, which alleges breach of the contract of insurance, but it necessarily follows that, if a duty to defend exists and the insurer has refused to provide a defense, the contract has been breached. The defendant does not argue otherwise. The plaintiff is entitled to judgment in its favor on Count II of its amended complaint as well.

The plaintiff has also requested an award of attorney fees and costs. Plaintiff's Motion at 13-15. That issue will more appropriately be addressed when this action, in which the defendant's counterclaims remain pending, is finally resolved. *See* this court's Local Rule 54.2.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to transfer venue be **DENIED** and that the plaintiff's motion for judgment on the pleadings as to Counts I and II of the amended complaint 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 28th day of March, 2002.

David M. Cohen
United States Magistrate Judge

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