IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

ACE PROPERTY AND CASUALTY INSURANCE COMPANY, *Plaintiff,*	§	**CIVIL ACTION 4:11-CV-01458**
FIREMAN'S FUND INSURANCE COMPANY, INTERSTATE FIRE & CASUALTY INSURANCE COMPANY, AND LEXINGTON INSURANCE COMPANY, *Intervenors-Plaintiffs*	§	**JURY REQUESTED**
VS.	§	
PAR ELECTRICAL CONTRACTORS, INC. *Defendant.*	§	**HON. DAVID HITTNER**

PAR ELECTRICAL CONTRACTORS, INC.'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, STAY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

SUMMARY OF THE ARGUMENT

This declaratory-judgment action is governed by familiar abstention doctrines handed down by the United States Supreme Court in the *Brillhart* and *Wilton* cases. As this Court again follows the *Brillhart* and *Wilton* road, it should exercise its judicial discretion in favor of abstaining from federal-court interference in this insurance-coverage dispute. The dispute between PAR and its insurers is now pending in a parallel coverage lawsuit in California state court, and that controversy can better be settled in the state court. No federal question whatsoever is presented here, and the controversy is truly local—involving a huge fire cause-and-origin investigation, as well as newly-minted third-party claims brought against PAR by a California public utility based upon allegations arising from work done in California. There is no reason for a federal court to get involved.

In addition to following the Supreme Court's *Brillhart* and *Wilton* precedents, the Court also can look to the Fifth Circuit's guideposts, called the *Trejo* factors, which likewise encourage abstention. All the issues between PAR and its insurers—together with additional excess insurers and extra-contractual claims—are present in the California lawsuit. Rather than bringing their claims in California, where the underlying incident happened, the insurers raced to a federal forum in Texas, engaging in impermissible forum shopping. If permitted to proceed here, the insurers will argue that Texas favors denial of coverage—an

argument created solely by their choice of this forum. With the majority of records, witnesses, and other information about the underlying dispute located elsewhere, this federal forum in Texas is not a convenient one for the parties. Abstention will allow PAR, more properly a plaintiff here, to proceed in California, which is the forum with the greatest interests at stake in resolving the coverage dispute for damages occurring there. In short, retaining a declaratory-judgment lawsuit in Texas does not serve the interests of judicial economy. The Court should abstain from deciding this insurance-coverage case.

STATEMENT OF FACTS

The Parties. ACE Property & Casualty Insurance Company is the plaintiff. PAR Electrical Contractors, Inc. is the defendant. Besides ACE, some of PAR's other insurance companies have intervened to contest their obligations to provide coverage. However, not all of PAR's excess insurers have intervened, and two of the insurers, Liberty and RSUI, are present only in the related California state-court coverage lawsuit now on file. A469. [1]

PAR is a Missouri-based corporation that provides electric power infrastructure services for public utility companies and the electrical services industry. A463, 3. The vast majority of PAR's nationwide work is performed in California. A3. PAR's parent company, Quanta Services, is the Named Insured

[1] Factual references are to the Appendix. Thus, "A3" means "Appendix, page 3."

under the excess insurance policies at issue in this case. A549. As an affiliate of Quanta, PAR is also an Insured under those policies by virtue of PAR's wholly-owned subsidiary status. A3, 544. All the insurers have their principal offices in other states, and Fireman's Fund is a California corporation with its principal place of business in California. A668. Quanta is the only party with a connection to Texas; however, Quanta was dropped from this lawsuit, presumably to preserve federal-court diversity for all the insurers.

The Underlying Lawsuits and the San Diego Wildfires. In October 2007, three wildfires ravaged San Diego County, California. The fires burned hundreds of thousands of acres and reportedly caused over $1 billion in property damage. A157, 338. Beginning in November 2007, thousands of plaintiffs filed multiple lawsuits against San Diego Gas & Electric Company, Sempra Energy, and others. A669. The California courts consolidated those lawsuits into four cases: (1) individual plaintiffs; (2) insurer plaintiffs; (3) governmental entities; and (4) class litigation. A6-10. Not a single one of the consolidated lawsuits named PAR, and no demand has ever been submitted to PAR by the plaintiffs seeking any damages in any of the lawsuits. A25-26, 68-69, 91-92, 123, 464. The plaintiffs' reluctance to make monetary demands against PAR coincides with the lack of fault attributed to PAR by any of the investigative agencies that looked into the fires' cause and origin.

In July 2008, the California Department of Forestry and Fire Protection, known as Cal Fire, issued an investigative report stating that two of the San Diego fires were SDG&E "power line caused." A169. The Cal Fire report did not attribute any fault to PAR or even mention PAR. In fact, the report identified the ignition source at issue as the span between pole 75 and pole 76. A174. PAR's work for SDG&E did not involve poles 75 or 76, and the work PAR did for SDG&E was at pole 74, down the line from the fire's ignition source. A464.

Cal Fire also reported that this span faulted four times on the day of the particular fire at issue, and that the fire started shortly after the third fault. A173-74. SDG&E reenergized the line after each electrical fault and did not de-energize the line until after the fourth fault. A173. The Cal Fire report traced all four faults back to the span between poles 75 and 76. A174. Again, PAR did not work on pole 75, pole 76, or the span of lines between those poles. A464. In September 2008, the California Public Utilities Commission issued a report reaching substantially the same conclusions as the Cal Fire report. A334.

Notwithstanding the government investigators' conclusions as to the cause of the fires, two things happened with respect to allegations about PAR and the San Diego wildfires. Neither one precludes coverage for the later-filed third-party claims brought against PAR by SDG&E in 2010.

First, Sempra Energy, SDG&E's parent company, sent PAR a letter dated November 19, 2007 stating that pole 74 was adjacent to the area of one of the fires and also stating, "This is to place PAR on notice of the potential for a claim against it." A463-65. However, neither Sempra nor SDG&E made any claim at that time; they made no demand for payment; they did not bring PAR into any of the four wildfire lawsuits; and they provided no factual basis for suggesting any "potential for a claim against" PAR arising from any of the fires. A464.

Second, in 2008, two homeowner insurers, Travelers and Mercury, filed two subrogation suits over a small percentage of the homeowner property-damage claims from one of the three fires. A363-405, 406-27. Travelers and Mercury made claims against a number of defendants, and PAR was initially included in that subrogation lawsuit. A365, 386, 409. However, the plaintiffs had indicated they did not intend to sue PAR, and before PAR ever appeared in the lawsuits, Travelers and Mercury adopted master complaints that did not name PAR—effectively dismissing PAR from the subrogation lawsuit. A430, 446, 71-72.

Even though none of the plaintiffs involved in the San Diego Wildfire lawsuits asserted claims against PAR, despite having been dropped from the subrogation lawsuits, and after a court-ordered joinder deadline, SDG&E filed third-party complaints against PAR in each of the four Wildfire Suits. A505. This third-party claim by SDG&E against PAR did not occur until June 2010. *Id.*

PAR Makes a Tender to Its Insurers. Once it was sued, PAR tendered the SDG&E Third-Party Complaints to its excess insurers for the 2009-2010 policy period during which the SDG&E claim was made, including ACE and the Intervenors here. A505. Even before it was sued, and in connection with its policy renewals, PAR and its parent company, Quanta, had disclosed the San Diego Wildfires to their 2009-10 insurers in the application process. A505, 519, 521-27. The insurers were provided information including spreadsheets that identified the "Witch Creek Fires" and "the San Diego Wild Fires of 2007, the Witch Creek Fire," as well as answers to questions posed by insurers. A522, 523-24, 526-27. Therefore, the insurers knew of this information prior to policy inception, yet none of them attempted to exclude claims-made coverage for the San Diego wildfires.

The Insurers Take PAR for a Negotiation Ride. On August 16, 2010, ACE acknowledged receipt of the SDG&E complaints and requested more information. A508. In response, PAR asked for a conference to address ACE's questions. A501. However, ACE replied by asking PAR to "hold off on the request" and that ACE would follow up the next week. A500. ACE did not follow up. PAR again contacted ACE stating that PAR had not heard from ACE and that PAR remained available to discuss what ACE needed. *Id.* ACE replied again to "not respond to the request." A499.

Without receiving the additional information or the documents it had initially requested, and without any information on PAR's position, ACE denied coverage. A509-15. ACE contended in its denial that (1) the Sempra Letter and the Travelers and Mercury suits were prior "claims" under the 2009-2010 ACE Policy that precluded coverage for *all* property-damage claims; and (2) the "known loss" doctrine precluded coverage. A514. ACE took this position despite the 2009-2010 ACE Policy's express promise to cover "claims" made against the insured during the policy period, and further despite a policy endorsement stating that occurrences existing as of the policy's inception date are covered unless a non-disclosure of them is intentional. A603.

The Insurers Race to the Texas Courthouse Door. PAR wrote to ACE on January 4, 2011, explaining that ACE's denial of coverage was wrongful. A516-20. In response, ACE stated it would re-evaluate and requested some of the information it had previously told PAR not to send. A528-29. PAR submitted comprehensive information on February 14, 2011. A530-32. By that time, PAR was contemplating the need to file a lawsuit in California if ACE did not accept coverage. A506. However, on March 15, 2011, ACE then suggested its earlier denial was based upon incomplete information. A533-37. ACE asked for more information and sent a reservation of rights letter. *Id.*

Within a month, on April 8, 2011, ACE requested a meeting with PAR to discuss coverage. A506. Encouraged by the request for a face-to-face meeting, PAR promptly asked for convenient dates, and ACE offered available dates for a meeting. A506-07. However, while leading PAR to believe it was interested in a meeting to discuss coverage issues, ACE filed this pre-emptive lawsuit. A506, 543. In addition to filing this Texas federal-court action, ACE has refused to participate in mediation or in the SDG&E litigation. A497.

The Related California Coverage Lawsuit. The parties to this federal-court declaratory-judgment case include less than all of PAR's insurers. While the Texas case involves ACE, Lexington, Fireman's Fund, and Interstate, the California lawsuit also joins Liberty Insurance Underwriters and RSUI Indemnity Company, because the size of the claim is well beyond their upper-layer excess coverage. A668-69, 468-69. Moreover, although the Texas federal-court action involves coverage issues, the California state-court lawsuit makes additional extra-contractual and bad-faith claims not present in the Texas case. A485-88, 490-92.

In short, PAR's lawsuit in California is broader as to both parties and claims. PAR's claims in California ask for a declaration of its rights and "money damages and other relief for the harm caused by defendants' breaches of their contractual obligations . . . [plus] punitive or exemplary damages, and an award of attorneys fees and costs, for defendants' breaches of the covenant of good faith and fair

dealing implied in each of their insurance policies." A468. All parties to the California lawsuit have been served, and their answer dates are approaching. A677-82. In the Texas case, by contrast, there is no Texas-based defendant or plaintiff. Nor are any federal-law claims asserted here.

ARGUMENT AND AUTHORITIES

I. Under the *Brillhart – Wilton* Abstention Doctrine, this Court Should Refuse to Hear This Declaratory Judgment Proceeding.

Even when a federal court has jurisdiction to declare the rights of parties to an insurance-coverage dispute, it also has discretion to allow a parallel lawsuit to go forward in state court. Indeed, the court is "under no compulsion to exercise [its] jurisdiction." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995) (quoting *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494 (1942)). "Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties." *Brillhart*, 316 U.S. at 495. "[W]here another suit involving the same parties and presenting the same opportunity for ventilation of the same state law issues is pending in state court, a [federal] district court might be indulging in '[g]ratuitous interference' . . . if it permit[s] the federal declaratory action to proceed." *Wilton*, 515 U.S. at 283; Grace M. Giesel, *The Expanded Discretion of Lower Courts to Regulate Access to the Federal Courts After Wilton v. Seven Falls Co.: Declaratory Judgment Actions and*

Implications Far Beyond, 33 HOUS. L. REV. 393, 435 (1996). Abstention is warranted because "[g]ratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided." *Brillhart*, 316 U.S. at 495; *accord Wilton*, 515 U.S. at 283.

A. The questions in controversy in this insurance-coverage dispute can better be settled in the pending California lawsuit between the same parties.

When confronted with a claim such as this one, involving state-law insurance-coverage questions in a declaratory-judgment setting, a district court should consider the inquiry that has been asked—and answered in favor of abstention—in two landmark Supreme Court cases. Namely, the court "should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court." *Wilton*, 515 U.S. at 282. In this well-rehearsed performance of insurance coverage litigation, the issues are better left to the state court in California. The federal court should abstain.

1. The insurance issues here can be addressed by a state court applying state law, and they present no federal question whatsoever.

In its amended complaint, ACE cites only two federal statutes, asserting diversity of citizenship and invoking federal declaratory relief. *See* 28 U.S.C. §§ 1332, 2201. Despite these allegations made to bring a lawsuit in federal court, there is no claim that federal law controls.

Nor could the insurers assert a federal-law claim. State law governs the indemnity obligations of an insurer under an insurance policy. *E.g., RSR Corp. v. Int'l Ins. Co.*, 612 F.3d 851, 857 (5th Cir. 2010).[2] Likewise, the insurers make no allegation that, "under applicable local law, the claims sought to be adjudicated . . . [have] either been foreclosed by [state] law or could [not] adequately be tested . . . in the [state] court." *Brillhart*, 316 U.S. at 495-96. "The states have primary responsibility for regulating the insurance industry." *See Barnhardt Marine Ins., Inc., v. New England Int'l Sur. of Am., Inc.*, 961 F.2d 529, 531 (5th Cir. 1992). While the parties may disagree as to which state's law (Texas or California) will apply here, "it is clear that state law, not federal law, will govern resolution of the underlying claims in this insurance coverage action. The absence of federal issues weights heavily in favor of abstention." *Travelers Indem. Co. v. Philips Electronics of N. Am. Corp.*, No. 02 Civ. 9800, 2004 WL 193564 *3 (S.D.N.Y. Feb. 3, 2004). Because no issue of federal law is presented, and a state court can address all the claims, this Court should abstain from deciding the dispute.

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[2] In addition to longstanding Fifth Circuit law to the same effect, *see Bituminous Cas. Corp. v. Vacuum Tanks, Inc.*, 75 F.3d 1048, 1056 (5th Cir. 1996), other circuits agree that the states should tackle insurance-coverage disputes, some involving the same insurers who are not ashamed to file cookie-cutter coverage actions all over the country. *Bituminous Cas. Corp. v. J&L Lumber Co., Inc.*, 373 F.3d 807, 815 (6th Cir. 2004); *Allstate Ins. Co. v. Mercier,* 913 F.2d 272, 279 (6th Cir. 1990) ("states regulated insurance companies for the protection of their residents, and state courts are best situated to identify and enforce the public policies that form the foundation of such regulation."). In particular, the Sixth Circuit has "held on a number of occasions that a district court should stay or dismiss complaints filed by insurance companies seeking a declaratory judgment as to their underlying state court lawsuits." *Travelers Indem. Co. v. Bowling Green Prof. Assocs., PLC*, 495 F.3d 266, 273 (6th Cir.2007) (citing numerous cases).

2. The controversy between PAR and its insurers implicates more than just coverage issues.

The claims among PAR and its insurers involve much more than just an interpretation of insurance contracts and coverage. Only the declaratory-judgment claims are presented here. A668-75, 543-47. However, in the California lawsuit, there are also claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, and California statutory claims. A485-88, 490-92. By abstaining from this narrower case in federal court, all claims between the parties can proceed in California and be decided where the underlying fire and property-damage claims, as well as the coverage and bad-faith claims, are pending.

B. The insurance companies have no absolute right to a declaratory judgment action in a Texas federal court.

"The declaratory judgment act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Public Affairs Assocs., Inc. v. Rickover*, 369 U.S. 111 (1962). The federal Declaratory Judgment Act's "textual commitment to discretion, and the breadth of leeway we have always understood it to suggest, distinguish the declaratory judgment context from other areas of the law in which concepts of discretion surface." *Wilton*, 515 U.S. at 287. Thus, "[i]n the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial

administration." *Id.* at 289; *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 389 (5th Cir. 2003). This Court has the ability, both under the declaratory-judgment statute as well as Supreme Court precedent, to defer to a state court.

II. Applying the Fifth Circuit's Controlling *Trejo* Analysis, This Court Should Exercise Its Discretion to Dismiss or Abstain.

In *St. Paul Insurance Company v. Trejo*, 39 F.3d 585, 590-91 (5th Cir.1994), the Fifth Circuit considered seven nonexclusive factors in deciding whether to dismiss a declaratory-judgment action. The relevant factors are familiar to the Court and are discussed in subparts A through E below. Later interpretations of *Trejo* have conflated the seven-part list into three areas of analysis: (1) "the proper allocation of decision-making between the state and federal courts;" (2) "fairness;" and (3) "efficiency." *Sherwin-Williams*, 343 F.3d at 390-92. Based on the *Trejo* analysis, the insurers cannot prevail in their attempts to keep this insurance-coverage case in a federal court.

A. All the matters in controversy can be fully litigated in the California declaratory-judgment action.

Every circuit to consider *Brillhart–Wilton* abstention emphasizes "that if the federal declaratory judgment action raises only issues of state law and a state case involving the same state law issues is pending, generally the state court should decide the case and the federal court should exercise its discretion to dismiss the federal suit." *Sherwin-Williams*, 343 F.3d at 390-91; *see also United Capitol Ins.*

Co. v. Kapiloff, 155 F.3d 488, 494 (4th Cir.1998). All the coverage issues are presented in the California lawsuit. A482-85, 488-89. However, there are many additional claims pending there, including breach of contract and the covenant of good faith and fair dealing, fraud, and statutory claims. A485-88, 90-92.

It does not matter that the California lawsuit was filed later. Even the "lack of a pending parallel state proceeding should not automatically require a district court to decide a declaratory judgment action." *Sherwin-Williams*, 343 F.3d at 394. The chronological order of filing is not dispositive in evaluating discretionary abstention. *Travelers Ins. Co. v. Louisiana Farm Bureau Fed'n*, 996 F.2d 774, 779 n.15 (5th Cir. 1993). This Court is entitled to consider circumstances existing at the time abstention is raised, rather than merely checking into the lawsuits on file when ACE's declaratory-judgment lawsuit was filed. *Am. Cas. Co. of Reading, Penn. v. Krieger*, 181 F.3d 1113, 1119 (9th Cir. 1999). Abstention is not limited to cases in which the parallel state-court case is filed first; the potential for such a proceeding is enough, as when an insurer anticipates a lawsuit by its insured in state court and "rushes" to file a federal case in hopes of "pre-empting" the state court action. The federal case is still deemed reactive to the state case, and abstention is appropriate. *Maryland Cas. Co. v. Knight*, 96 F.3d 1284, 1289 (9th Cir. 1996).

B. By filing this federal-court coverage suit in Texas in anticipation of a California state-court coverage lawsuit, the insurers engaged in impermissible forum shopping.

Under the ruse of a coverage meeting, and after replacing its original outright denial with a less categorical reservation of rights, ACE hauled off and filed suit, hastily seeking a favorable forum in which to assert its position in federal court instead of at the negotiating table. Given the tenor of the negotiations, PAR was contemplating filing its California lawsuit over coverage, but it was encouraged by ACE's apparent change of heart on denial, as well as requests for an in-person meeting. A506. However, these events were just a ruse to buy time so that ACE could file suit in Texas, which ACE did the same day it offered meeting dates. At the meeting, ACE's lawyers simply urged PAR not to pursue coverage under the ACE policy. A507.

"[T]hese negotiations indicate[] that the plaintiffs expected [the insured] to file suit, which implies an improper motive in the [insurers'] filing of their own declaratory action." *See Penn. Gen. Ins. Co. v. Caremark-PCS*, No. 3:05-DV-0844-G, 2005 WL 2041969, at *6 (N.D. Tex. Aug. 24, 2005). "Lengthy negotiations and the tenor of the party's relationship will serve as evidence that suit was expected to be filed." *Id.* In considering this factor, it is not necessary that the evidence establish conclusively that forum shopping has occurred; it is enough that the evidence suggests such behavior. *E.g., Great Lakes Dredge and Dock Co. v.*

Eubanks, 870 F. Supp. 1112, 1118 (S.D. Ga. 1994); *Gen. Star Indem. Co. v. Puckit, L.C.*, 818 F. Supp. 1526, 1533 (M.D. Fla. 1993). At a minimum, that suggestion is present here, where ACE and one of the Intervenors first sued Quanta to manufacture a Texas connection, then dismissed Quanta presumably to preserve diversity. ACE's evident forum shopping should not be rewarded, and this Court should dismiss or stay the lawsuit procured through procedural fencing.

C. By filing in Texas, the insurers are attempting to create inequities in their favor.

Forum-shopping is more likely when the declaratory-judgment plaintiff seeks to gain a procedural or substantive advantage in the federal court, which the insurers' conduct here suggests. The procedural fencing here revolves around choice-of-law issues. California law and Texas law differ regarding their approach to the fortuity doctrine or "known loss" rule. *Compare Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal.4th 645, 42 Cal Rptr.2d 324, 913 P.2d 878, 906 (1995) (holding coverage defense of known loss requires that the insured actually had a legal obligation to pay damages to a third party) and CAL. INS. CODE §§ 22, 250 *with Two Pesos, Inc. v. Gulf Ins. Co.*, 901 S.W.2d 495, 501 (Tex. App.—Houston [14th Dist.] 1995, no writ).

In California, ACE would be required to prove that a "legal obligation to pay damages" actually had occurred before PAR's recovery under the policy would be defeated. In Texas, ACE no doubt will argue (erroneously) that a different

interpretation of the known loss rule precludes coverage for these losses. What the insurers have ignored in planning their Texas two-step is that the 2009-2010 policies all are subject to Endorsement 18 of the ACE policy, which provides:

> Your failure to disclose all hazards or prior "occurrences" existing as of the inception date of this policy shall not prejudice the coverage afforded by this policy provided such failure to disclose . . . is not intentional.

A603. Together with a retroactive date of August 1, 2002, Endorsement 18 specifically confirms the intent of the parties that the 2009-2010 policies cover occurrences existing as of the inception of the policies, so long as there was not intentional non-disclosure of those occurrences. *Id.*

This is not the first time the differences between California and Texas choice-of-law rules have been at issue in an abstention case. Academics have noted that one reason for "reactive" lawsuits like this one is "to obtain the application of favorable substantive law by taking advantage of . . . choice-of-law rules." Linda Mullenix, *Abstention Doctrines*, in 17A MOORE'S FEDERAL PRAC. §120.20[1][b] at 120-41(3d ed. 2004) (citing *PPG Indus., Inc. v. Cont'l Oil Co.*, 478 F.2d 674, 676 (5th Cir. 1973)). For example, in *Mission Insurance Company v. Puritan Fashions Corporation*, 706 F.2d 599 (5th Cir.1983), the Fifth Circuit pointed out that California and Texas had different choice-of-law rules, and the difference in forum presented the insurers with an opportunity to argue for a change in the law that applied. *Id.* at 602 n. 3. The court saw indications that the insurer used the federal

declaratory judgment statute and the lack of an earlier-filed state court suit for the sole purpose of controlling the state law that would apply to the dispute. This was characterized as improper "procedural fencing" undermining "the wholesome purposes" of declaratory actions. *Id.*; *Sherwin-Williams*, 343 F.3d at 397. This Court should not allow the insurers to accomplish here what was prohibited in *Mission*—a race to federal court to gain a perceived advantage.

D. With the records, witnesses, and other information about the underlying dispute located in California, this federal-court action is not a convenient forum.

"Declining jurisdiction is always a sensible option to consider in declaratory judgment actions seeking an opinion on insurance coverage impacting litigation pending in another court, for although there is no *per se* rule prohibiting such actions in federal court, *see Allstate Ins. Co. v. Green,* 825 F.2d 1061, 1066 (6th Cir. 1987), '[s]uch actions . . . should normally be filed, if at all, in the court that has jurisdiction over the litigation giving rise to the indemnity problem.'" *Westfield Ins. Corp. v. Mainstream Capital Corp.*, 366 F.Supp.2d 519, 521 (E.D. Mich. 2005) (citing *Bituminous Cas. Corp.*, 373 F.3d at 812) (quoting *Manley, Bennett, McDonald & Co. v. St. Paul Fire & Marine Ins. Co.*, 791 F.2d 460, 463 (6th Cir.1986)).

None of the parties in the Texas lawsuit are from Texas, and one insurer—Fireman's Fund—is a California company. A668. Obviously, if any losses occurred, they happened in California, and the state fire investigators looked into

the fire's cause and origin in that state. Individuals who performed, inspected, approved, and have knowledge of PAR's work are in California. A464. Representatives of the four categories of plaintiffs are in California. The workers involved in SDG&E's decisions on the power lines at issue are presumably California residents. It is undisputed that the relevant conduct of Sempra, Travelers, and Mercury occurred in California. A465, 445.

Moreover, with respect to insurance coverage, the insurance policies at issue in the SDG&E third-party complaints provide that the insurers will "pay on behalf of the insured" as opposed to "indemnify the insured." A553. Therefore, if payments are made, they will occur in California, and the insurers will issue checks made payable to the third-party claimants like SDG&E; they will not simply reimburse their insured by making a payment to PAR in Missouri. The insurance underwriters, claims handlers, and agents are located in a number of states including Pennsylvania, Colorado, Massachusetts, and New Jersey. A507-08, 509, 668. Importantly, as their complaints judicially admit, the insurance companies themselves are not from Texas. A668, 543. Although some of the brokers for these out-of-state insurers are located in Texas, ACE itself is a Pennsylvania corporation; Interstate is from Illinois; Lexington is a Delaware corporation that operates from Massachusetts; Firemans' Fund is a California corporation; and even Quanta, PAR's parent company, although maintaining offices in Houston, is incorporated

in Delaware. A668-69, 543. For these reasons, California is a more convenient forum for the parties and witnesses related to both the underlying claim and the insurance-coverage issues. This Court should permit the dispute to go forward in the California state-court lawsuit.

E. Retaining the federal-court lawsuit in Texas would not serve the purposes of judicial economy.

Judicial economy will not be advanced if the federal and state-court actions proceed simultaneously. Both lawsuits involve those coverage issues and policy defenses, so allowing both cases to go forward will not promote any savings of time or resources. However, the California case is broader and involves more parties and claims than this federal-court action. A468-69, 482-92. Even if the federal case takes on the coverage questions, the California lawsuit must continue, because additional parties and other claims are pending there. Only the California case with both insurance-coverage claims and extra-contractual claims, and all the necessary parties, will be able to resolve both coverage and the extra-contractual issues. A California court *should* decide coverage issues involving a 198,000-acre fire loss in that state. Last, this federal-court action has only just started, and abating it will not waste any discovery, deposition, or investigative time. This Court should abstain from hearing the dispute.

PRAYER

The Court should either dismiss this claim in favor of the state court action in California, or it should stay the federal-court declaratory action until the California underlying claims and the related state court action are determined. PAR prays for all relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2011, the foregoing Defendant Par Electrical Contractors, Inc.'s Abstention Motion was electronically filed with the Clerk of Court using the CM/ECF system. A copy is being served on the following by e-filing notification:

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