IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, Plaintiff, vs. METZELER AUTOMOTIVE PROFILE SYSTEMS IOWA, INC., f/k/a BTR Antivibration Systems, Inc. d/b/a/ BTR Sealing Systems Group, a foreign corporation, Defendant.	)	Civil No. 3-01-cv-10168 ORDER

Before the Court is a motion to dismiss brought by defendant, Metzeler Automotive Profile Systems Iowa, Inc. ("Metzeler"). The motion was filed on March 11, 2002. Plaintiff, Burlington Northern and Santa Fe Railway Company ("BNSF"), filed a memorandum of law opposing defendant's motion to dismiss on April 11, 2002. Defendant filed a reply brief on May 8, 2002. The matter is now considered fully submitted.

I. BACKGROUND

A. *The Underlying Tort Actions*

Kenneth Timbrook was killed on September 9, 2000, while performing his duties as a switch foreman for BNSF. Mr. Timbrook died when he allegedly became trapped under a railcar along a BNSF spur track situated on or near Metzeler's property in Keokuk, Iowa. Linda Timbrook, the

spouse and personal representative of the deceased, filed an action against BNSF in Missouri state court, claiming that BNSF's negligence was responsible for the death of her husband, in violation of the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (2002). *See* Plaintiff's Amended Complaint, Exhibit C ¶¶ 9-11. Ms. Timbrook has also filed a similar lawsuit against Metzeler in this Court, claiming that her husband's death was a result of Metzeler's negligence.[1] Ms. Timbrook alleges that Metzeler allowed a dangerous or hazardous condition to exist on its property and failed to provide adequate warning of that condition to Mr. Timbrook. Both of Ms. Timbrook's personal injury lawsuits are currently pending.[2]

B. *The Declaratory Judgment Action*

Plaintiff commenced the present action on November 30, 2001. It seeks a declaration that defendant is contractually obligated to assume plaintiff's defense in the Missouri Action and to indemnify it for any liability imposed in that action.[3] *See* Plaintiff's Amended and Restated Complaint ¶¶ 22-24. Now before the Court is defendant's motion to dismiss pursuant to Federal Rule of Civil

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[1] On August 15, 2002, Metzeler filed a Third-Party Complaint and Jury Demand adding BNSF as a third-party defendant in the Iowa Action.

[2] The Court will refer to the underlying tort suit, *Linda Timbrook v. The Burlington Northern and Santa Fe Ry. Co.*, Case No. 012-8618, which is currently pending in the Circuit Court for the City of St. Louis, Missouri, as the "Missouri Action." The term "Iowa Action" refers to the underlying tort suit, *Linda Timbrook v. Metzeler Auto. Profile Sys. Iowa, Inc.*, Case No. 3:01-CV-10122, which is currently pending before this Court. Collectively, these two cases are referred to as the "Underlying Actions."

[3] Plaintiff is a Delaware corporation with its principal place of business in Texas. Defendant is an Indiana corporation with its principal place of business in Indiana. This Court has jurisdiction under 28 U.S.C. § 1332(a), as this matter involves citizens of different states and the amount in controversy exceeds $75,000.

Procedure 12(b)(1) or, in the alternative, to stay proceedings.

C. *The Industrial Track Agreement.*

In this action plaintiff seeks a declaration that defendant is bound by the terms of an indemnification contract. It claims that on January 20, 1972, Burlington Northern Inc., plaintiff's predecessor, entered into a written Industrial Track Agreement with Sheller-Globe Corporation. *See* Plaintiff's Complaint (hereinafter Complaint) ¶ 6. Section 5 of the 1972 Agreement provides:

> Industry shall not place, or permit to be placed, or to remain, any material, structure, pole or other obstruction within 8-1/2 feet laterally of the center or within 23 feet vertically from the top of the rail of said track; provided that if by statute or order of competent public authority greater clearances shall be required than those provided for in this Section 5, then Industry shall strictly comply with such statute or order. Industry agrees to indemnify Railroad and save it harmless from and against any and all claims, demands, expenses, costs and judgments arising or growing out of loss of or damage to property or injury to or death of persons occurring directly or indirectly by reason of any breach of the foregoing or any covenant contained in this agreement.

See Plaintiff's Complaint, Exhibit A. Section 7 of the 1972 Agreement provides in pertinent part:

> Industry agrees to indemnify and hold harmless Railroad for loss, damage or injury from any act or omission of Industry, its employees, or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about said track, and if any claim or liability shall arise from the joint or concurring negligence of both parties hereto it shall be borne by them equally.

Id. On February 20, 1991, Burlington Northern Railroad Company, successor in interest to Burlington Northern Inc., entered into a written supplemental agreement with Schlegel Sealing Systems, Inc., Keokuk Division ("Schlegel"), successor in interest to Sheller-Globe Corporation. *Id.* ¶ 7. The supplemental agreement provided in part that "the terms, stipulations, conditions, and obligations, all

and singular, of [the 1972 Agreement] shall extend to and be binding upon the parties hereto, their successors or assigns, as if they were the original parties to said agreement." *Id.*

Plaintiff claims that BTR Antivibration systems, Inc., as a successor to or assign of Schlegel, became bound by the terms of the 1972 Agreement on September 9, 2000. *Id.* ¶ 8. Plaintiff alleges that sometime after September 9, 2000, Metzeler purchased the assets of BTR and assumed BTR's liability under the 1972 agreement and the supplemental agreement. *Id.* ¶ 9. Plaintiff also alleges that Metzeler is a successor to or assign of Schlegel and is bound by the terms, stipulations, conditions, and obligations of Schlegel under the agreements. *Id.* ¶ 10.

II. APPLICABLE LAW AND DISCUSSION

When considering a motion to dismiss, a court will accept as true all factual allegations in the complaint. McSherry v. Trans World Airlines, Inc., 81 F.3d 739, 740 (8th Cir. 1996) (citing Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 163-65 (1993)). A motion to dismiss will be granted "only if no set of facts would entitle the plaintiff to relief."' Id. (citing Conley v. Gibson, 355 U.S. 41, 45-47 (1957)).

I. Ripeness

In its motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), defendant argues that this dispute is not ripe for adjudication. The ripeness doctrine flows both from the Article III "cases" and "controversies" limitations and also from prudential considerations for refusing to exercise jurisdiction. *Reno v. Catholic Soc. Servs. Inc.*, 509 U.S. 43, 57 n. 18 (1993). Its "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Nebraska Public Power District v. MidAmerican Energy Co.*, 234 F.3d

1032, 1037 (8th Cir. 2001) (quoting *Abbot Labs. v. Gardner*, 387 U.S. 136, 148 (1967). It requires that "before a federal court may address itself to a question, there must exist 'a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" *Id.* at 1037-38 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). "The difference between an abstract question and a 'case or controversy' is one of degree . . . and is not discernible by any precise test." *Id.* at 1038 (quoting *Babbit*, 442 U.S. at 297).

The ripeness inquiry requires examination of: (1) the "fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." *Abott Labs.*, 387 U.S. at 149. "A party seeking judicial relief must necessarily satisfy both prongs to at least a minimal degree." *Nebraska Public Power District v. MidAmerican Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2001). The "fitness for judicial decision" inquiry goes to a court's ability to visit an issue. "[I]t safegaurds against judicial review of hypothetical or speculative disagreements." *Id.* at 1038 (citing *Babbit*, 442 U.S. at 297). "'Harm' includes both the traditional concept of actual damages–pecuniary or otherwise–and also the heightened uncertainty and resulting behavior modification that may result from delayed resolution." *Id.* (citing *Ohio Forestry Ass'n. Inc. v. Sierra Club*, 523 U.S. 726, 733-34 (1998). The court must consider the immediacy and the size of the threatened harm in conducting the ripeness analysis. *Id.* Both must be significant. *Id.*

In this action, plaintiff requests the Court to enter a judgment declaring that defendant is:

> liable for and must indemnify and hold Plaintiff harmless for the loss, damage, or injury and any and all claims, demands, expenses, costs, and judgments in the [Missouri] Action; award Plaintiff any such expenses, costs, or other items incurred by Plaintiff;

> award Plaintiff its costs including reasonable attorney's fees, and enter such other relief as is fair and just.

Plaintiff's Amended and Restated Complaint at 5 ¶ 24. Essentially, plaintiff seeks three separate declarations: (1) that defendant is bound by the 1972 Agreement; (2) that the 1972 Agreement requires the defendant to defend plaintiff in the Missouri Action; and (3) that the 1972 Agreement requires defendant to indemnify plaintiff for any liability it may incur in the Missouri Action. The court will first consider the "fitness" of these issues for judicial decision.

The defendant argues that this case is not fit for adjudication. It claims that the declaration sought by plaintiff is analogous to the declaration sought in *State ex rel. Missouri Hwy. & Transp. Comm'n v. Cuffley*, 112 F.3d 1332, 1337 (1997). *See* Defendant's Brief in Support of Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1) or to Stay Proceedings at 8-9. In *Cuffley*, a leader of the Missouri Klu Klux Klan (the Klan) had filed an application with the State for the Klan to participate in the Adopt-A-Highway program. *Id.* at 1333. Rather than denying the application, the State filed an action in federal district court seeking a declaration that it was not required to approve the Klan's application. *Id.* The district court sided with the Klan and declared that any decision on the part of the State to exclude the Klan from the program would be a violation of the Klan's First Amendment rights. *Id.* On appeal, the Eighth Circuit noted that the State had not yet denied the Klan's application, and emphasized that the court could not determine in advance what reasons the State might choose to support its denial. Consequently, the Circuit Court remanded with instructions to dismiss, holding that the action was not ripe.

Unlike *Cuffley*, the issues that must be resolved in this case in order to determine whether the

defendant is bound by the 1972 Agreement are not contingent upon future events. Plaintiff alleges that its predecessor entered into the 1972 Agreement with Sheller Globe; that Sheller Globe's obligations passed to its successor in interest, Schlegel; that Schlegel's obligations were then assumed by BTR Antivibration Systems; that defendant purchased the assets of BTR and assumed BTR's liability under the agreements; and that defendant is a successor to or assign of Schlegel and is bound by any of Schlegel's obligations under the agreements. Whether these transactions took place as plaintiff alleges and legally bind defendant to the 1972 Agreement is yet to be determined. However, such a determination does not require the court to engage in speculation and conjecture. *See Aetna*, 300 U.S. at 242 ("That the [contract] dispute turns upon questions of fact does not withdraw it . . . from judicial cognizance.) The events giving rise to the "binding effect" dispute have already occurred, and resolution of this matter would not require the Court to issue an advisory opinion based on hypothetical future occurrences. *See id. at* 242 (recognizing a dispute relating to legal rights and obligations arising from a contract "is manifestly susceptible of judicial determination"). Thus, the Court finds that the "binding effect" issue is "fit" for judicial decision.

The same can be said about the "duty to defend" issue. On July 6, 2001, Linda Timbrook filed suit against the plaintiff in the Circuit Court for the City of St. Louis, Missouri. *See* Plaintiff's Amended and Restated Complaint at ¶ 12. Plaintiff tendered the defense of that action to defendant, and defendant has refused to assume plaintiff's defense. Thus, there is no question that plaintiff and defendant have a definite and concrete dispute regarding defendant's duty to defend plaintiff in the Missouri Action. It is "a real, substantial controversy between parties having adverse legal interests." *Babbitt*, 442 U.S. at 298. Furthermore, the facts needed to determine whether defendant's "duty to

defend" has been triggered have already allegedly occurred.[4] Whether defendant breached the 1972 Agreement and thereby caused injury to Mr. Timbrook is yet to be established, but resolution of these issues does not hinge upon unknown future events. Thus, the Court finds that the "duty to defend" issue is also "fit" for adjudication.

The Court acknowledges that the "duty to indemnify" declaration is somewhat less "fit" for judicial review. No judgment has been entered against plaintiff in the Missouri Action, nor has plaintiff reached a settlement agreement with Mrs. Timbrook in that action. As of today, the parties do not know what amount, if any, plaintiff will be required to pay Mrs. Timbrook. With this in mind, the Court will next consider the second prong of the ripeness analysis, "hardship to the parties."

The Court finds that withholding judicial review would create a substantial hardship for plaintiff. Defendant's refusal to assume BNSF's defense has placed BNSF in the position of defending itself in the Missouri Action. The financial burden of defending the lawsuit is significant, and BNSF will continue to incur those costs so long as defendant refuses to perform its alleged obligations under the 1972 Agreement. In addition, plaintiff's ability to plan its litigation strategy in that action is hindered by the uncertainty associated with the 1972 Agreement, including the enforceability of the indemnification provisions. These harms are sufficiently immediate and substantial under the "significant harm" prong of the ripeness analysis. *See Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*, 339 F.2d 673,

[4] The plain language of § 5 of the 1972 Agreement prohibits defendant from placing objects within 8.5 feet laterally, and 23 feet vertically, from the railroad tracks. The agreement provides that "Industry agrees to indemnify Railroad and save it harmless from and against any and all claims, demands, expenses, costs and judgments arising or growing out of loss of or damage to property or injury to or death of persons occurring directly or indirectly *by reason of any breach"* of this agreement. *See* Plaintiff's Complaint, Exhibit A (emphasis added).

857 (3rd Cir. 1965) (finding that "since [plaintiff] instituted this [indemnification action] after it had made necessary out of pocket expenses and incurred obligations in defending [a non-party's] suit against it, [plaintiff] is presently entitled to some recovery if it can prove the allegations of its [complaint]"). *But see A/S J. Ludwig Mowinckles Rederi v. Tidewater Constr. Corp.*, 559 F.2d 928, 932-33 (4th Cir. 1977) (finding that a contractual indemnification action was not ripe where issues depended upon whether parties were found liable in the underlying personal injury or wrongful death actions pending in other courts, and where there had been neither a determination of liability nor a settlement in those cases).

Recognizing that the two prongs of the ripeness analysis "must play off each other," the Court holds that, as a jurisdictional matter, plaintiff's declaratory judgment action presents a ripe "case and controversy" within the meaning of Article III of the Constitution. *See MidAmerican Energy Co.*, 234 F.3d at 1039 (acknowledging that the two ripeness branches must operate "on a sliding scale").

B. *Discretion to Dismiss or Stay*

Although the Court finds that it has the jurisdictional power to enter a declaratory judgment in this case, it must also determine whether prudential considerations justify the exercise of that power. The Supreme Court has stated that "district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995). *See Gopher Oil Co. v. Bunker*, 84 F.3d 1047, 1051 (8th Cir. 1996) (holding that the declaratory judgment plaintiff's claim was ripe, but that the district court had discretion to determine whether or not the subject matter of the declaratory judgment action should be resolved in conjunction with the

Underlying Actions in order to avoid piecemeal litigation); and *Reichhold Chems, Inc. v. Travelers Ins. Co.*, 544 F. Supp. 645, 651 (E.D. Mich. 1982) ("Even where a justiciable controversy has been shown to exist, Federal Courts have discretion to decline to exercise their jurisdiction."). In proceeding, this Court is mindful that the Supreme Court has "repeatedly characterized the Declaratory Judgment Act as an enabling act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Wilton*, 515 U.S. at 287.

In deciding whether to enter a stay, a district court may consider: (1) whether the declaratory action would clarify the legal relations among all interested parties and thus settle the controversy, or rather would result in piecemeal litigation; (2) the extent of harm, if any, to the party seeking declaratory relief if the court declines to entertain the action; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata;" (4) whether the use of a declaratory action would increase friction between federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective. *See, e.g., Wilton*, 515 U.S. at 283 ("[I]n deciding whether to enter a stay, a district court should examine 'the scope of the pending state court proceeding and the nature of defenses open there.'") (quoting *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 495 (1942)); (*Vigilant Ins. Co. v. Behrenhausen*, 889 F. Supp. 1130, 1133 (W.D. Mo. 1995); and *Grand Trunk Western R.R. Co. v. Consol. Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984). *See generally,* Wright, Miller, and Kane, *Federal Practice and Procedure* § 2759 (2002).

Other federal courts have dealt with issues similar to the one presented in the case at bar. In *Allstate v. Philip Leasing Co.*, 214 F. Supp. 273, 274 (D.S.D. 1963), Allstate sought a declaration

that it was neither obligated to defend nor to pay any judgment against Philip Leasing in an underlying tort action brought by a third party. Allstate's position turned on the issue of whether the injured party was employed by Philip Leasing at the time of the injury. *Id.* The district court observed that "[e]mployment, as well as negligence, are questions of fact to be determined by a jury in the [underlying] case." *Id*. at 275. The court expressed its concern that any relief that it gave would not settle the issues pending in the underlying personal injury case, may "result in two trials instead of one," and may create confusion if the two courts reached conflicting factual determinations. *Id.* at 274. Accordingly, the district court exercised its discretion and refused to entertain *Allstate's* declaratory judgment action. *Id.*

A case from the Western District of Missouri also illustrates why entertaining plaintiff's request for declaratory relief at this time would be imprudent. In *Vigilant Ins. Co. v. Behrenhausen*, 889 F. Supp. 1130, 1132 (W.D. Mo. 1995), the plaintiff insurer sought a declaration that it was not obligated under its policy to provide a defense for or pay any judgment against its insured, because the acts leading to the decedent's death were intentional. The court noted that rendering such a declaration would require it to decide substantially the same issues as were present in the underlying wrongful death action brought against the insured–whether the insured acted intentionally or negligently to cause the decedent's death. *Id.* at 1133. The district court found that discretionary considerations "strongly favor[ed] a decision to dismiss or stay." *Id.* at 1133-34. The district court concluded that "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 . . . " *Id*. at 1133.

The rationales of *Allstate* and Vigilant apply to the case at bar, and considering the above set

of factors, this Court finds that plaintiff's declaratory judgment action should be stayed. The declaratory judgment sought by plaintiff would require a determination of many of the same questions that must be resolved in the Underlying Actions–namely, whether defendant breached the minimum clearance provisions in the Track Agreement, whether the alleged breach caused or contributed to cause Mr. Timbrook's death, and whether BNSF, Metzeler, or both were negligent. By proceeding with the declaratory judgment action in the present case, the Court would be creating unnecessary friction with the Missouri Action and would cause wasteful duplication of efforts for both counsel, parties, witnesses, and the courts in the Underlying Actions, including this Court's efforts in the Iowa Action.

The plaintiff contends that negligence is the primary issue in the Underlying Actions, and that the enforceability of the 1972 Agreement is not directly at issue in those cases. It suggests that the 1972 Agreement requires the defendant to assume plaintiff's defense in the Missouri Action upon a showing of breach of contract, not negligence. Thus, plaintiff argues that this Court should not wait for the Underlying Actions to be resolved before declaring the rights and obligations of the parties under the 1972 Agreement. This Court disagrees. The plain language of the 1972 Agreement provides that "if any claim or liability shall arise from the joint or concurring negligence of both parties hereto it shall be borne by them equally." *See* Plaintiff's Amended and Restated Complaint at 4, ¶ 15. Thus, until the negligence, or lack thereof, of plaintiff and defendant is determined, the parties will not know what their obligations are, if any, under the 1972 Agreement. Because those very issues are being resolved in the Underlying Actions, issuing plaintiff's declaration at this time would be "unnecessarily duplicative and uneconomical." *Capital Indemnity Corp.*, 218 F. 3d at 875.

Plaintiff argues that withholding review today will create a substantial hardship for the plaintiff. As previously discussed, if the Court refuses to entertain this declaratory judgment at this time, plaintiff will have to continue defending itself in the Missouri Action. Although this burden is sufficient to render this a ripe case and controversy, the Court finds that the previously mentioned prudential considerations for withholding judicial review at this time far outweigh any harm to the plaintiff.

Finally, in light of the Court's present unwillingness to declare that defendant has a "duty to defend" and a "duty to indemnify," the plaintiff may urge the Court to declare only that the defendant is bound by the 1972 Agreement. The Court is unwilling to enter such a limited declaration at this time. Doing so would not settle the present controversy and would result in piecemeal litigation. *See Allstate v. Philip Leasing Co.*, 214 F. Supp. 273, 275 (D.S.D. 1963) (holding that discretion to decline to hear action is properly exercised in cases where declaration would have the effect of trying a controversy in piecemeal fashion).

In light of the foregoing, the Court finds that it would be imprudent to entertain plaintiff's request for declaratory relief at this time.

III. Conclusion

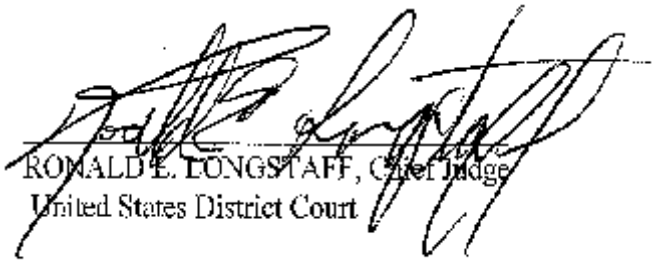
The Court holds that plaintiff has presented a ripe "case and controversy" under Article III of the Constitution. Therefore, defendant's 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is denied. However, exercising its discretion to hear declaratory judgment actions, the Court grants defendant's motion to stay[5] plaintiff's declaratory judgment action pending resolution of

[5]The *Wilton* court noted that "where the basis for declining to proceed is the pendency of a state proceeding, a stay will often be the preferable course, because it assures that the federal action

the personal injury actions previously filed in Missouri state court and before this Court. Counsel for defendant is required to submit a joint status report with the Court no later than July 1, 2003 regarding the progress of the related litigation.

IT IS ORDERED.

Dated this 30th day of September, 2002.



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can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy." *Wilton* at 288 n.2.