IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

NORTHLAND INSURANCE CO.,	)	Civil Action No. 3:03CV00011
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM OPINION
	)	
BERKEBILE OIL CO.,	)	
DANIEL BUCK,	)	
and	)	
ANDREA BUCK,	)	
	)	
Defendants.	)	JUDGE JAMES H. MICHAEL, JR.

The plaintiff in this action seeks a declaratory judgment that its insurance agreement with a party not before this court does not cover the defendants in this case. In response to a motion for default judgment, one of the defendants in this case filed a motion to dismiss for failure to join a necessary party. The magistrate judge recommended that this court grant the defendant's motion and sua sponte dismiss the other parties to the action. After a thorough examination of the plaintiff's objections to the magistrate judge's report and recommendation, the supporting memoranda, the applicable law, and the report and recommendation, this court adopts in part the analysis and findings of the magistrate judge and accepts his recommendation to deny the defendant's motion to dismiss.

I. FACTS

On July 27, 2000, two of the defendants to this action, the Bucks, filed a product liability suit against Berkebile Oil Co. ("Berkebile") for exposure to products sold by that entity (the "West Virginia Litigation"). After Berkebile did not appear to defend against the

suit, the court in Marshall County, West Virginia, entered a default judgment. In a series of unrelated actions, Berkebile sued the product manufacturer, Hydrosol, Inc., for breach of an indemnity agreement to which the two were parties (the "Illinois Litigation"). More specifically, Berkebile alleged that Hydrosol had breached its duty to defend Berkebile from the Bucks' suit.

On February 10, 2003, Hydrosol's insurance company, Northland Insurance Co. ("Northland"), filed this action seeking a declaratory judgment against both Berkebile and the Bucks. Northland's complaint contains two counts. Both counts are predicated upon the insurance agreement between Northland and Hydrosol. Neither count seeks relief other than a declaration of the terms of coverage.

First, the plaintiff seeks a judgment that the insurance agreement between itself and Hydrosol does not obligate Northland to defend or to indemnify Berkebile with respect to the action initiated by the Bucks in West Virginia. The complaint alleges that the coverage of the agreement, a commercial general liability policy, does not extend to bodily injury claims against vendors who provide some "ingredient," "part," or "container" to Hydrosol for use in the products manufactured for that vendor. The second count alleges that Berkebile breached its duties to Northland by failing to notify it in a timely manner, again as allegedly provided by the insurance agreement between Northland and Hydrosol.

II. PROCEDURAL POSTURE

On February 10, 2003, the plaintiff instituted this action seeking a declaration that the defendants are not covered by an insurance agreement between the plaintiff and a third party

not before this court. In response, on June 25, 2003, the defendant filed a motion to dismiss for failure to join a necessary party. On July 10, 2003, the matter was referred to Magistrate Judge Crigler for his report and recommendation, which he filed on September 8, 2003 ("Report and Recommendation"). In the Report and Recommendation, he recommended that the defendant's motion to dismiss be granted. Furthermore, he recommended that the Bucks be dismissed from the suit altogether. The plaintiff has filed timely objections to the Report and Recommendation. According to § 636(b)(1)(C), this court "shall make a de novo determination of those portions of the report . . . to which the objection is made." 28 U.S.C. § 636(b)(1)(C) (2000).

III. DISCUSSION

The plaintiff objects to the magistrate judge's finding that Hydrosol is an indispensable party and his recommendation to grant the defendant's motion to dismiss for failure to join a necessary party. The substance of Northland's objection is that the magistrate judge both failed to recognize and to accept its characterization of the action. Northland also takes issue with the magistrate judge's recommendation to dismiss the Bucks from the suit. Finally, the plaintiff objects to several findings of fact, none of which are material to the outcome of this case in its current posture.

For the reasons that follow, the court concludes that 1) Hydrosol is a necessary party, 2) the court does not have personal jurisdiction over Hydrosol given the posture of this case, and 3) Hydrosol is an indispensable party. Because the plaintiff has failed to join a necessary party, the court will grant Berkebile's 12(b)(7) motion to dismiss. Given the court's decision

concerning Berkebile's motion to dismiss, the court declines to address whether the Bucks are a proper party to this action.

Rule 19 provides a two-step process for determining whether persons must be joined for just adjudication of the case before it. "First, the district court must determine whether the party is 'necessary' to the action under Rule 19(a). If the court determines that the party is 'necessary,' it must then determine whether the party is 'indispensable' to the action under Rule 19(b)." *Nat'l Union Fire Ins. Co. v. Rite Aid of South Carolina, Inc.*, 210 F.3d 246, 249 (4th Cir. 2000). The court reaches the second step of the analysis if it finds that joinder of a necessary party is not feasible for jurisdictional reasons. The court proceeds with due reverence for the proposition that "[d]ismissal of a case is a drastic remedy [ ] which should be employed only sparingly." *Id.* at 250. "In determining whether to dismiss a complaint, a court must proceed pragmatically, 'examining the facts of the particular controversy to determine the potential for prejudice to all parties, including those not before it.' " *Id.*

A. Necessary Party

Because Hydrosol has an interest in the subject of this litigation, and because its ability to protect that interest may be compromised in its absence, Hydrosol is a necessary party.

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to

protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

FED. R. CIV. P. 19(a).

Despite Northland's contentions to the contrary, Hydrosol does have an interest in the subject of this litigation. Northland is the insurer of Hydrosol, a manufacturing concern. Hydrosol's products are distributed by Berkebile. Hydrosol and Berkebile entered an indemnity agreement, which represented a promise by Hydrosol to defend and to indemnify Berkebile from suits initiated by parties who were injured by the distributed products. One can visualize the relationship between the three parties as a right triangle, with the insurance agreement between Northland and Hydrosol forming the upright segment and the indemnity agreement between Hydrosol and Berkebile forming the lateral segment.

Northland's argument is that the sole issue in this case involves the hypotenuse. Claiming that the insurance agreement between itself and Hydrosol does not cover Berkebile as an insured, it argues that this line between Northland and Berkebile cannot be drawn. Defending against the motion to dismiss currently before this court, it further contends that the existence or nonexistence of the hypotenuse does not affect Hydrosol's interests.

Even if the court were to accept Northland's characterization of the issue before the court, Hydrosol's interests would be affected nonetheless. Northland is concerned that, should Berkebile not prevail in its indemnity suit against Hydrosol (a lateral action), it will turn its sights toward Northland to claim coverage under the insurance agreement. Attempting to justify the joinder of the Bucks in this action, Northland has also communicated to this court

a concern that the Bucks could somehow attach the insurance proceeds as assets of Berkebile in satisfaction of the default judgment awarded in the West Virginia litigation. However, another real possibility remains: Berkebile prevails in its indemnity suit against Hydrosol. At that point, Hydrosol would likely seek indemnity from its insurer, Northland. Alternatively, Berkebile could seek satisfaction of its judgment from both Hydrosol and Northland, either through Northland's obligations to Hydrosol (the upright segment) or against Northland independently (the hypotenuse). In either case, a determination that Berkebile's claim is not covered by the insurance agreement potentially forecloses the possibility that Hydrosol's obligation to Berkebile could be satisfied, either in part or in whole, by Northland.

Thus, although the interests of Northland and Hyrdosol coalesce in the sense that both companies desire to avoid indemnification of Berkebile, their interests diverge in some circumstances. Because Hydrosol has an interest in the outcome of this action and because that interest is not perfectly represented by those already parties, Hydrosol is a necessary party. *Nat'l Union Fire Ins. Co.*, 210 F.3d at 251 ("A court should hesitate to conclude [ ] that a litigant can serve as a proxy for an absent party unless the interests of the two are identical.").

A determination that Berkebile is an entity insured by the agreement between Northland and Hydrosol might also affect a determination of Hydrosol's notice obligations (and compliance with those obligations) under its agreement with Northland. If the court were to accept Northland's argument and to hold that the agreement did encompass Berkebile as an insured, then arguably Berkebile's alleged failure to comply with its notice obligations could imply in turn that Hydrosol did not comply with its notice obligations. *See Nat'l Union Fire*

Ins. Co., 210 F.3d at 251 (concluding that interpretation of notice provisions of agreements between absent parent corporation and insurance company in litigation between the subsidiary corporation and insurance company required presence of parent to protect its interest adequately). The agreement has three primary obligations bearing upon notice. First, Hydrosol has an obligation "to see to it that [Northland] is notified" in the event that the potential for a claim is created. Second, Hydrosol must notify Northland if a claim is received by any insured. Third, Hydrosol "and any other involved insured" must, *inter alia*, "send [Northland] copies of demands, notices, summonses or legal papers received in connection with [a] claim." Conceivably, another court examining the third clause could conclude that both Hydrosol and Berkebile would have to meet independent notice obligations to permit Hydrosol to recover under the agreement. A determination that Berkebile failed to provide Northland with notice could affect Hydrosol's ability to receive indemnity for Berkbile's claim against it, regardless of whether Berkebile could recover against Northland independently.

B. Personal Jurisdiction

Uncontested by the objections to the Report and Recommendation, the magistrate judge represents that the parties have stipulated to the lack of personal jurisdiction of this court over Hydrosol.[1] In the West Virginia Litigation, the Bucks alleged that the injuries resulted from contacts with Berkebile's products, products manufactured by Hydrosol, through Mr. Buck's

[1] To avoid any question related to the implicit nature of this concession and its apparent waiver and for the sake of thoroughness, the court proceeds to address the question of personal jurisdiction. It is not clear that such discussion is necessary and therefore will be abbreviated somewhat.

employment in various gas stations in Elkton and in Charlottesville, Virginia. If the subject of this litigation was the underlying tort action *simpliciter*, these contacts arguably would support personal jurisdiction over Hydrosol. However, Northland's suit was brought as a declaratory judgment action to determine the scope of coverage of an insurance contract. The court concludes that the sale of Hydrosol's product in Virginia does not support specific jurisdiction over the absent party given the nature of the action brought by Northland.

The Fourth Circuit Court of Appeals has held that the assertion of specific jurisdiction comports with due process when three criteria are met. *Christian Sci. Bd. of Dirs. of the First Church of Christ, Scientist v. Nolan*, 259 F.3d 209, 215-16 (4th Cir. 2001) (citing *Helicopteros Nacionales de Colombia., S.A. v. Hall*, 466 U.S. 408, 414-16 (1984) and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 476-77 (1985)). First, the party must have purposefully availed itself of the benefits of the forum. *Id.* Second, the cause of action must arise from the forum contacts. *Id.* Third, the exercise of jurisdiction must be reasonable. *Id.* It is not clear from the evidence presented to the court whether Hydrosol has purposefully availed itself of the benefits of the forum by manufacturing products that are distributed to Virginia. Assuming *arguendo* that the distribution of Hydrosol's products constitutes purposeful availment, the court concludes that the second prong of the analysis is not satisfied.

The instant declaratory judgment action does not arise from the sale of products manufactured by Hydrosol. " 'In order for a cause of action to arise from business transacted in Virginia . . . , the activities that support the jurisdictional claim must coincide with those that

form the basis of the plaintiff's substantive claim.' " *Verosol v. Hunter-Douglas, Inc.*, 806 F. Supp. 582, 589 (E.D. Va. 1992) (quoting *City of Virginia Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484, 489 (4th Cir. 1985)). Northland's cause of action concerns the interpretation of its insurance agreement with Hyrdosol, not the underlying tort action. Simply put, while the distribution of Hydrosol's products might have subjected the company to suit in Virginia for a product liability action, those same contacts would not permit this court to hale Hydrosol into Virginia to adjudicate a contract dispute. *Cf. Chiaphua Components Ltd. v. West Bend Co.*, 95 F. Supp. 2d 505, 510 (E.D. Va. 2000) (holding that declaratory judgment action against Wisconsin manufacturer to declare components incorporated into final product were not defective was independent of sales of the product in Virginia); *Coastal Video Communications Corp. v. Staywell Corp.*, 59 F. Supp. 2d 562, 568 (E.D. Va. 1999) (concluding that sale of copyrighted material did not support specific jurisdiction in plaintiff's declaratory judgment action to determine whether publication infringed the plaintiff's copyright). The issue of contract interpretation arises from the contacts relevant to the formation of the insurance agreement. Given the nature of the issue before the court, the sales of Hydrosol's products in Virginia do not subject it to personal jurisdiction in this forum.

C. Indispensability

The court has determined that Hydrosol is a necessary party over which the court does not have personal jurisdiction. Because joinder of a necessary party is not feasible, the court must "determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as

indispensable." FED. R. CIV. P. 19(b). To determine whether Hydrosol is indispensable, the court analyzes several factors:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to [Hydrosol] or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id.

1. Prejudice to the Absent Party

As noted above, even accepting the plaintiff's characterization of its claim, Hydrosol has an interest in the subject of the suit because excluding Northland closes a potential avenue of relief for Berkebile, leaving a suit against Hydrosol as the only path to indemnification. Also, Hydrosol's compliance with its notice obligations could be affected by a determination that an insured did not comply with its independent notice obligations. *See Nat'l Union Fire Ins. Co.*, 210 F.3d at 252 (noting that " 'precedent supports the proposition that a contracting party is the paradigm of an indispensable party' "). Therefore, the acceptance of Northland's own characterization of the issue involved leads to the conclusion that a decision here could work to the prejudice of Hydrosol.

Moreover, an examination of the complaint and the insurance agreement reveals that the core issue before the court is the coverage of Berkebile's *claim*. This subtle distinction undermines further Northland's argument that Hydrosol would not be prejudiced by this

litigation and convinces the court that the potential preclusive effects of any judgment erode the court's ability to avoid such prejudice.

The definition of "insured" in the agreement, as amended, encompasses all vendors in the definition of an insured person or organization.[2] An exclusion then limits, or excepts, a particular type of *claim*, i.e., the vendor is only covered with respect to bodily injury or property damage arising from the aerosol products distributed in the normal course of the vendor's business. The succeeding clause then proceeds to list "additional" exclusions, which

---

[2] The insurance agreement promises that "[Northland] will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which [the] insurance applies." It then defines "insured" as "any person or organization qualifying as such under [Section II]." The definition of "insured" was later broadened to include vendors selling Hydrosol's products in the ordinary course of business. Specifically, the endorsement provides that:

> Section II is amended to include as an insured any person or organization (referred to below as vendor) shown in the Schedule [All Vendors] but only with respect to "bodily injury" or "property damage" arising out of "your products" shown in the Schedule [Aerosol Products] which are distributed or sold in the regular course of the vendor's business, subject to the following additional exclusions:
>
> 1. The insurance afforded the vendor does not apply to . . . [certain types of claims not at issue here].
>
> 2. This insurance does not apply to any insured person or organization, from whom you have acquired such products, or any ingredient, part or container, entering into, accompanying or containing such product.

would imply that the exclusions are additional to the preceding claim limitation. Thus, the clause Northland seeks to employ to exclude Berkebile is an exception to claims against vendors as additional insured and not an exclusion of particular vendors.

Because the issue here is coverage of a claim against Berkebile, a determination by this court that insurance coverage was not available likely would compel a similar conclusion if Hydrosol were to seek indemnification for Berkebile's claim. In addition, it is fairly clear to the court that a decision here that notice obligations were not met with respect to Berkebile's claim would operate to preclude an argument by Hydrosol in the future that its obligations were satisfied. In either case, it is difficult for the court to shape relief in a manner that can avoid the prejudicial effects of a judgment.

2. Adequate Remedy

The plaintiff has an adequate remedy if this action is dismissed for nonjoinder. Northland could reinitiate suit in a court with jurisdiction over the three corporate entities. For example, the plaintiff could reinitiate suit in Illinois, where litigation is currently pending between Hydrosol and Berkebile concerning the indemnity agreement. *See Nat'l Union Fire Ins. Co.*, 210 F.3d at 253 (reasoning that the plaintiff had an adequate remedy because the action could be brought in state court). Northland's claim that it would have to litigate twice is specious because if this suit were to proceed, it theoretically would have to defend against Hydrosol or Hydrosol and Berkebile in a separate suit. In other words, to gain jurisdiction over the Bucks here, Northland has forgone the inclusion of Hydrosol; either way, it opens itself to the possibility of two suits. As the magistrate judge noted, it is not clear that the

Bucks would or could sue anyone beyond Berkebile to recover, whereas it seems likely that a victory for Berkebile in the Illinois Litigation would almost certainly result in a suit (or a claim) by Hydrosol against Northland for indemnification.

In reaching these conclusions, the court observes that it has been compelled to indulge in a prediction of an outcome that is by no means certain. With proper regard for this uncertainty and with attention to considerations both factual and legal, the court has drawn proper observations of the likely effect of one action or another.

Overall, however, the balance of the factors provided by Rule 19(b) weigh in favor of the conclusion that the court cannot in "equity and good conscience" permit this action to proceed with Hydrosol *in absentia*. The court overrules Northland's objection to the Report and Recommendation and grants Berkebile's motion to dismiss for failure to join a necessary party. This disposition renders the plaintiff's objection to the magistrate judge's decision to dismiss the Bucks as party to this suit, as well as the underlying recommendation, moot.

The Clerk of the Court hereby is directed to send a certified copy of this Order to all counsel of record and to Magistrate Judge Crigler.

ENTERED: _____
Senior United States District Judge

_____
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

NORTHLAND INSURANCE CO.,	)	Civil Action No. 3:03CV00011
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
BERKEBILE OIL CO.,	)	
DANIEL BUCK,	)	
and	)	
ANDREA BUCK,	)	
	)	
Defendants.	)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The defendant's objections to the Report and Recommendation, filed September, 22, 2003, shall be, and they hereby are, OVERRULED, or, as appropriate, OVERRULED AS MOOT.

2. The magistrate judge's Report and Recommendation, filed September 8, 2003, shall be, and it hereby is, ADOPTED IN PART AND MODIFIED IN PART.

3. Berkebile's Motion to Dismiss, filed June 25, 2003, shall be, and it hereby is, GRANTED.

4. The above-captioned civil action shall be STRICKEN from the active docket of the court.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler and to all counsel of record.

ENTERED:

_____

Senior United States District Judge

_____

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

NORTHLAND INSURANCE CO.,	)	Civil Action No. 3:03CV00011
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
BERKEBILE OIL CO.,	)	
DANIEL BUCK,	)	
and	)	
ANDREA BUCK,	)	
	)	
Defendants.	)	JUDGE JAMES H. MICHAEL, JR.

Having become aware of a clerical error in the Memorandum Opinion and accompanying Order, both dated December 12, 2003, which error does not affect the substance, reasoning, or conclusion of the opinion, it is this day

ADJUDGED, ORDERED, AND DECREED

that the Memorandum Opinion dated December 12, 2003 be, and it hereby is, AMENDED as follows:

1. On page 1 of the Memorandum Opinion, first full paragraph, lines 8-9: The sentence is corrected to end "to grant the defendant's motion to dismiss."

2. The first numbered item of the accompanying Order: The sentence is corrected to begin "The plaintiff's objections . . . ."

The Clerk of the Court hereby is directed to send a certified copy of this Order to all counsel of record.

ENTERED: _____

Senior United States District Judge

_____

Date