COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1422 **Cir. Ct. No. 2011CV137**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

SOO LINE RAILROAD COMPANY D/B/A CANADIAN PACIFIC RAILWAY,

PLAINTIFF-APPELLANT,

V.

ADMIRAL INSURANCE COMPANY, ALLIANZ UNDERWRITERS, INC., CENTURY INDEMNITY COMPANY, AS SUCCESSOR TO CIGNA SPECIALTY INSURANCE COMPANY F/K/A CALIFORNIA UNION INSURANCE COMPANY, CERTAIN UNDERWRITERS AT THE BELGIAN MARKET, CERTAIN UNDERWRITERS AT LLOYDS LONDON, COLUMBIA CASUALTY COMPANY, EMPLOYERS INSURANCE OF WAUSAU, EMPLOYERS MUTUAL CASUALTY COMPANY, EVANSTON INSURANCE COMPANY, EXCESS INSURANCE COMPANY LIMITED, GRANITE STATE INSURANCE COMPANY, CONTINENTAL INSURANCE COMPANY, AS SUCCESSOR-IN-INTEREST TO HARBOR INSURANCE COMPANY, CENTURY INDEMNITY COMPANY, AS SUCCESSOR TO CCI INSURANCE COMPANY, AS SUCCESSOR TO INSURANCE COMPANY OF NORTH AMERICA, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, TIG INSURANCE COMPANY, AS SUCCESSOR BY MERGERS TO INTERNATIONAL INSURANCE COMPANY AND INTERNATIONAL SURPLUS LINES INSURANCE COMPANY, LANDMARK INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, MEAD REINSURANCE CORP., MIDSTATES REINSURANCE CORP., NATIONAL CASUALTY COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, ALLSTATE INSURANCE COMPANY, AS SUCCESSOR-IN-INTEREST TO

NORTHBROOK EXCESS & SURPLUS INSURANCE COMPANY F/K/A NORTHBROOK INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, ST. PAUL FIRE & MARINE INSURANCE COMPANY, STONEWALL INSURANCE COMPANY, TRANSAMERICA PREMIER INSURANCE COMPANY/TIG PREMIER INSURANCE COMPANY, TRAVELERS INDEMNITY COMPANY, TWIN CITY FIRE INSURANCE COMPANY, ZURICH US AND 21ST CENTURY NORTH AMERICA INSURANCE COMPANY, AS SUCCESSOR-IN-INTEREST TO BELGIAN GENERAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

AMERICAN TRANSPORTATION INSURANCE COMPANY, SENTRY INSURANCE, AS ASSUMPTIVE REINSURER OF GREAT SOUTHWEST FIRE INSURANCE COMPANY, CHUBB CUSTOM MARKET, INC. AND FEDERAL INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Kloppenburg, JJ.

¶1 HIGGINBOTHAM, J. Soo Line Railroad Company d/b/a Canadian Pacific Railway (Soo Line) appeals an order of the circuit court dismissing its declaratory judgment action on the ground that the action was not ripe. The parties to this action are Soo Line and its liability insurers (collectively, the "insurers"). The Environmental Protection Agency (EPA) gave Soo Line notice in the form of a letter informing Soo Line that it was potentially responsible for the cleanup of a lakeshore site in Ashland. Soo Line filed a declaratory judgment action under the Uniform Declaratory Judgments Act (Act), WIS. STAT. § 806.04

(2011-12),[1] seeking a determination of its right to coverage under various insurance policies for all costs to Soo Line that might arise from the cleanup. Earlier on the same day that Soo Line filed the lawsuit in the circuit court, Soo Line placed in the mail notices of claim and tenders of defense (collectively referred to as "notices of claim" or "the notices") to its insurers.

¶2 We address three issues in this appeal. First, when is justiciability to be determined in an action brought under the Act; second, was Soo Line's declaratory judgment action ripe for judicial determination and thus justiciable; and, third, did the circuit court lack competency to exercise its subject matter jurisdiction because this action was not ripe for judicial determination.

¶3 We conclude that justiciability is determined at the time of the filing of the summons and complaint in the circuit court; that under the facts of this case, this action was not ripe when Soo Line filed it; and that the circuit court did not have competency to exercise its jurisdiction over this action because the action was not ripe at the time of filing. We therefore affirm.

BACKGROUND

¶4 In 2011, Soo Line received a letter from the EPA, informing Soo Line that the EPA considered Soo Loo potentially responsible under the federal Comprehensive Environmental Response, Compensation, and Liability Act for the cleanup of a lakeshore site in Ashland.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶5 Shortly thereafter, Soo Line placed in the mail notices of claim to its insurers. In these notices, Soo Line intended to alert the insurers that it was seeking coverage under "certain policies of liability insurance to Soo Line." Soo Line requested the insurers to "indemnify" Soo Line "for all costs," including defense costs incurred in responding to the EPA letter, and "for all sums" that Soo Line "may incur by reason of liability arising from property damage, bodily injury, or personal injury at the Site."

¶6 Later on the same day that Soo Line placed the notices of claim in the mail, Soo Line filed a declaratory judgment action in the Ashland County Circuit Court. Soo Line served the summons and complaint on the insurers after they had received the notices. Some of the insurers subsequently filed a declaratory judgment action in Minnesota state court. The Minnesota court ultimately stayed that action in favor of the Wisconsin action.

¶7 Numerous insurers moved for summary judgment in this action. The insurers argued in relevant part that the undisputed facts established that this action was not ripe for a judicial determination at the time Soo Line filed it and thus did not present a justiciable controversy. The insurers argued that a matter is ripe only when "there is *some indicia of a controversy*," and here the insurers had no knowledge at the time the action was filed that "even a potential dispute over coverage existed or was in the offing." The insurers argued that, because the action was not ripe for judicial determination, the circuit court lacked competency to exercise its subject matter jurisdiction over this action.

¶8 Soo Line responded that the question is whether a justiciable controversy existed when it served the summons and complaint on the insurers, not when it filed the summons and complaint, and that, under the facts of this case,

there is no dispute that a justiciable controversy existed when service was made. Soo Line further argued that, even if a justiciable controversy was required to have existed at the time the lawsuit was filed, a justiciable controversy existed before Soo Line filed the action because it had placed the notices of claim in the mail earlier that day.

¶9 The circuit court granted the insurers' motion for summary judgment and dismissed this action without prejudice. The court concluded that this case is ripe only if a justiciable controversy existed at the time that Soo Line filed this action, and this action was not ripe for judicial determination and thus not justiciable at the time of filing. The circuit court reasoned that, even though Soo Line had placed the notices in the mail, the insurers "not only had no chance to respond to [Soo Line's] notice [of claim] before the [action] was filed, they had no knowledge" of the notice, and, therefore, the insurers had no opportunity to take an adverse position as to coverage. Soo Line appeals.

DISCUSSION

¶10 A court's authority to grant declaratory relief under the Act is statutory. *See* ***Sipl v. Sentry Indem. Co.***, 146 Wis. 2d 459, 463, 431 N.W.2d 685 (Ct. App. 1988). The Act empowers courts "to declare rights, status, and other legal relations whether or not further relief is or could be claimed." WIS. STAT. § 806.04(1). Specifically, the Act provides:

> Any person interested under a … written contract … or whose rights, status or other legal relations are affected by a … contract … may have determined any question of construction or validity arising under the … contract … and obtain a declaration of rights, status or other legal relations thereunder.

§ 806.04(2). Under the Act, "[a] contract may be construed either before or after there has been a breach thereof." § 806.04(3). The purpose of the Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." § 806.04(12). The Act is to be read liberally to effectuate its remedial purpose. ***Id.***

¶11 A court's authority to grant declaratory relief under the Act is broad. *See* ***Sipl***, 146 Wis. 2d at 464. However, a court's broad authority to grant declaratory relief is limited by the requirement that the issue presented to the court must be justiciable. ***Id.***; ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶28, 309 Wis. 2d 365, 749 N.W.2d 211. A controversy is justiciable when four factors are present:

> (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
>
> (2) The controversy must be between persons whose interests are adverse.
>
> (3) The party seeking declaratory relief must have a legal interest in the controversy-that is to say, a legally protectible interest.
>
> (4) The issue involved in the controversy must be ripe for judicial determination.

Olson, 309 Wis. 2d 365, ¶29; *see also* ***Loy v. Bunderson***, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982). The insurers' argument rests entirely on the fourth factor, ripeness.

¶12 Whether a case is ripe for purposes of resolution under the Act presents a question of law subject to de novo review. ***Olson***, 309 Wis. 2d 365, ¶¶37, 39.

¶13 A party seeking declaratory relief under the statute need not suffer an actual injury or threatened wrong before seeking relief under the Act. ***Id.***, ¶¶28, 43. Nonetheless, "[w]hat is required is that the facts be sufficiently developed to allow a conclusive adjudication." ***Id.***, ¶43. The facts must be developed to a point so as to "avoid courts entangling themselves in abstract disagreements." ***Id.*** (quoting another source). "The facts on which the court is asked to make a judgment should not be contingent or uncertain, but not all adjudicatory facts must be resolved as a prerequisite to a declaratory judgment." ***Id.*** With these principles in mind, we turn to the issues at hand.

¶14 In this appeal, we address the following issues: (1) when is justiciability determined in the course of a dispute or litigation; (2) was Soo Line's declaratory judgment action ripe for judicial determination and thus justiciable; and (3) did the circuit court lack competency to exercise its subject matter jurisdiction because Soo Line's action was not ripe. We address each issue in turn.

A. When is justiciability determined?

¶15 Soo Line contends that justiciability is determined on the date of service of the summons and complaint, citing WIS. STAT. § 801.02(1) and ***State v. One 1997 Ford F-150***, 2003 WI App 128, ¶14, 265 Wis. 2d 264, 665 N.W.2d 411. We disagree.

¶16 WISCONSIN STAT. § 801.02(1) states:

> Except as provided in [a statute not relevant here], a civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the

> summons and of the complaint is made upon the defendant under this chapter within 90 days after filing.

¶17 By its clear terms, WIS. STAT. § 801.02(1) establishes that a civil action "is commenced" upon the filing of a summons and complaint, directly undermining Soo Line's argument. And, we have applied this rule in this context. "Generally, a court's jurisdiction over a declaratory judgment action is determined as of the time the suit is filed, and matters occurring after such time are not considered." ***J.F. Ahern Co. v. Wisconsin State Bldg. Comm'n***, 114 Wis. 2d 69, 80, 336 N.W.2d 679 (Ct. App. 1983); *see also* 7 Wisconsin Pleading & Practice Forms § 64:4 (5th ed. 2013) ("The controversy between the parties must exist at the time the declaratory judgment complaint is filed.").

¶18 Soo Line's reliance on ***One 1997 Ford F-150*** is also misplaced. There, we concluded that *personal* jurisdiction attaches where "service was properly and timely made." ***One 1997 Ford F-150***, 265 Wis. 2d 264, ¶14. However, the issue here is not when personal jurisdiction attaches, but rather at what point a justiciable controversy must exist.

B. Ripeness

¶19 For an action to be ripe for judicial determination, the facts on which the court is to render a declaratory judgment must be "sufficiently developed to avoid courts entangling themselves in abstract disagreements," and not "contingent or uncertain." ***Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship***, 2002 WI 108, ¶44, 255 Wis. 2d 447, 649 N.W.2d 626 (quoting another source). In ***Loy***, the supreme court quoted Borchard's explanation of what is meant by "contingent and uncertain" with approval:

> "When are the facts contingent? ….

> [Facts are not contingent when the court is] satisfied that an actual controversy, or the ripening seeds of one, exists between parties, all of whom are *sui juris* and before the court, and that the declaration sought will be a practical help in ending the controversy.
>
> By ripening seeds the court meant, not that sufficient accrued facts may be dispensed with, but that a dispute may be tried at its inception before it has accumulated the asperity, distemper, animosity, passion, and violence of the full-blown battle which looms ahead. It describes a state of facts indicating imminent and inevitable litigation, provided the issued [sic] is not settled and stabilized by a tranquilizing declaration. The dispute may be determined before the *status quo* has been altered or disturbed by physical acts of either party. Borchard, *Declaratory Judgments* (2d ed.), p. 57."

Loy, 107 Wis. 2d at 412 (internal quotation marks omitted). Thus, the facts on which a court is to render a declaratory judgment are not contingent and uncertain where there are the "ripening seeds" of a dispute, meaning a set of facts "indicating imminent and inevitable litigation." ***Id.*** In other words, the facts are not contingent and uncertain where a "bona fide controversy" exists, such that the court in issuing a declaratory judgment "will not be acting in a merely advisory capacity." ***Tooley v. O'Connell***, 77 Wis. 2d 422, 434, 253 N.W.2d 335 (1977) (quoting another source).

¶20 Soo Line contends that the circuit court erred in concluding that this case was not ripe for three reasons. First, the court erred in concluding that ripeness required that the insurers provide an adverse response to Soo Line's notice of claim. Second, this action became ripe when Soo Line placed its notices of claim in the mail. Third, even if one were to assume that the insurers would have decided upon receiving the notices not to dispute general liability for coverage, the action was ripe for judicial determination because the insurers

inevitably would have disputed aspects of the sequence of obligations under the insurance policies. We address and reject these arguments.

¶21 Soo Line first argues that the circuit court erred because its ripeness decision rested on the premise that ripeness requires, on these facts, that the insurers had notice of and provided an adverse response to Soo Line's notices of claim. The court concluded that, at the time the action was filed, no controversy existed because the insurers were "completely unaware of [Soo Line's] assertion of rights ... they [didn't] have knowledge of [Soo Line's] claim" and therefore had no opportunity to "assert[] anything controverting [Soo Line's] claim."

¶22 Whether the circuit court erred in its reasoning is beside the point. We may affirm a circuit court's decision on a legal issue using reasoning that the circuit court did not employ. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987) ("If the holding is correct, it should be sustained, and this court may do so on a theory or on reasoning not presented to the trial court."). We need not, and do not, decide by precisely how much Soo Line effectively jumped the gun here, because it filed suit before there was even the *potential* for a ripe action. Even if it could be said that there were "seeds" for controversy, such as in the form of the EPA letter and the insurance policies, here, in order for these seeds to ripen, Soo Line, at a bare minimum, needed to show that there were potential coverage issues. Because Soo Line fails to point to any facts that meet its minimum burden here, we conclude that Soo Line's lawsuit was not ripe when this action was filed.

¶23 Second, Soo Line argues that, contrary to what the circuit court concluded, it is irrelevant that the insurers had no knowledge of Soo Line's notice of claim and that the insurers were not afforded an opportunity to take a position

on coverage before this action was filed. What matters, according to Soo Line, is the legal effect of placing the notices of claim in the mail. In its brief on appeal, Soo Line contends that, under WIS. STAT. § 631.81(2),[2] the "act of providing the Insurers with a notice and tender letter by first-class U.S. mail is sufficient … to provide the Insurers with notice of Soo Line's claim." However, Soo Line does not provide any legal authority demonstrating that this statute applies in determining whether a declaratory judgment action is ripe for judicial determination. We therefore reject this argument as unsupported.

¶24 In a refinement of this argument made at oral argument, Soo Line argues that this action became ripe when it placed the notices of claim in the mail because that created a claim under the insurance policies, which, in turn, created rights and obligations that Soo Line could seek to adjudicate under the Act. However, while placing the notices in the mail may have satisfied the statutory service requirement, it is not apparent how complying with notice provisions of an insurance policy indicates the existence of potential coverage issues and Soo Line has not provided a persuasive argument on this point. There is nothing that is readily inherent in mailing a notice of a claim that suggests the potential that issues may arise regarding coverage under the various insurance policies at issue here.

[2] WISCONSIN STAT. § 631.81(2) provides:

> It is a sufficient service of notice or proof of loss if a 1st class postage prepaid envelope addressed to the insurer and containing the proper notice or proof is deposited in any U.S. post office within the time prescribed. The commissioner may expressly approve clauses requiring more expeditious methods of notice where that is reasonable.

¶25 Third, Soo Line contends that placing the notices of claim in the mail created a controversy for purposes of determining ripeness because, even if none of the insurers disputed coverage, the court nonetheless would have to determine "the *sequence* of obligations among the various [p]olicies at issue." In other words, Soo Line argues that once it placed the notices of claim in the mail, a dispute was an imminent and practical certainty because a dispute would arise, at the least, regarding the sequence of recovery from the insurers. However, at oral argument, the insurers contended that, the court does not reach the sequencing issue until coverage is determined, and Soo Line did not seriously argue otherwise. At the time of the filing of the action, Soo Line did not know whether any of the insurers would dispute coverage, let alone whether they would dispute the sequencing of coverage. We are not persuaded that this case was ripe based on the uncertain and contingent fact that at some point during the proceedings the court may have to determine the sequencing of coverage under the various insurance policies.

C. Competency

¶26 Soo Line argues that the circuit court erred in concluding that it lacked competency to exercise its subject matter jurisdiction over this action. We understand Soo Line to be arguing that, even if this case was not ripe, the court was competent to exercise its subject matter jurisdiction. Soo Line contends that a court's competency is limited only by statute and that the Act does not purport to limit the court's competency. Thus, according to Soo Line, the court is competent to proceed with this case. In response, the insurers argue that the circuit court correctly determined that it lacked competency to exercise its jurisdiction over this action because no justiciable controversy existed when Soo Line filed this action. We agree with the insurers.

¶27 The accepted definition of competency in Wisconsin "is the power of a court to exercise its subject matter jurisdiction." ***Kohler Co. v. Wixen***, 204 Wis. 2d 327, 337, 555 N.W.2d 640 (Ct. App. 1996). "Circuit courts in Wisconsin are constitutional courts with general original subject matter jurisdiction over 'all matters civil and criminal.'" ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶1, 273 Wis. 2d 76, 681 N.W.2d 190 (quoting WIS. CONST. art. VII, § 8). Thus, a circuit court always has subject matter jurisdiction. ***Id.*** However, a circuit court's power to exercise its subject matter jurisdiction in certain cases may be limited by statute. ***Id.***, ¶2. Where there is a failure to comply with the statutory requirements pertaining to the invocation of the court's subject matter jurisdiction, a court may lack competency to proceed in a particular case. ***Id.***

¶28 In Wisconsin, it is well established that a claim brought under the Act must be justiciable and that justiciability, as a threshold matter, is a jurisdictional question: "[a] court must be presented with a justiciable controversy before it may exercise its jurisdiction over a claim for declaratory judgment." ***Olson***, 309 Wis. 2d 365, ¶28. "Ripeness, as a component of justiciability, is a threshold jurisdictional question." ***Id.***, ¶32; ***Dieck v. Unified Sch. Dist.***, 157 Wis. 2d 134, 138, 458 N.W.2d 565 (Ct. App. 1990) (test for determining whether a justiciable controversy exists "is jurisdictional and, if not met, strips the court of the power to hear the case as a matter of law"); ***Sipl***, 146 Wis. 2d at 465 (four factor test to determine justiciability is jurisdictional).

¶29 We pause to clarify that, although courts have stated that whether a controversy is justiciable is a "jurisdictional" question, we understand courts to be saying that a court lacks the competency to exercise its subject matter jurisdiction where there is not a justiciable controversy. *See* ***Village of Trempealeau***, 273 Wis. 2d 76, ¶¶8-9, 14. Because we conclude that this action was not ripe, and

therefore not justiciable, we conclude that the circuit court lacked competency over the action and therefore properly dismissed Soo Line's complaint.

CONCLUSION

¶30 We conclude that justiciability under the Act is determined at the time that the summons and complaint are filed in the circuit court; that Soo Line's declaratory judgment action was not ripe for judicial determination at the time of filing; and that the circuit court lacked competency to exercise its subject matter jurisdiction because the action was not ripe. We therefore affirm.

By the Court.—Order affirmed.

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