Flying Blind: The Ramifications of *Hamilton v. USAA*

by: Paul A. Slager and Amanda R. Whitman

Introduction

It is a recurrent, and frustrating, scenario: the plaintiff has a strong case against an insured defendant, but the carrier disclaims coverage, asserting that the conduct alleged in the complaint is not covered. The two obvious options are unpalatable: one is to abandon the claim; the other is to pursue the case to judgment and only then hope to establish coverage by bringing an entirely new action, this time against the insurance company for subrogation under General Statutes § 38a-321. In *Hamilton v. USAA*, 115 Conn. App. 774, cert. denied, 293 Conn 924 (2009), we tried a third, more sensible approach, only to see the Appellate Court elevate form over substance in a decision that requires plaintiffs to take the long way around to justice.

A Different Approach

Our client was the conservator for a mentally disturbed woman whose counselor had taken advantage of her trust in him by sexually exploiting her, in violation of the code of professional ethics and Connecticut criminal law. In fact, the counselor pled guilty to sexual assault in the second degree (General Statutes § 53a-71) and served more that three years in prison. On learning that the two insurance companies involved both disclaimed coverage, we filed declaratory judgment actions, asking that determinations about coverage be made before the underlying case was fully litigated. We also simultaneously sought a stay of the underlying case until after the declaratory judgment actions were resolved. Our commonsense argument: in order for the plaintiff to make an informed decision about whether to make the emotional investment required to pursue a particularly painful and intrusive lawsuit, she should know whether insurance proceeds would be available if she obtained a significant judgment against defendant.

This notion is sensible and consistent with Connecticut's longstanding public policy in favor of disclosing insurance information to plaintiffs. It was particularly compelling in our case: the defendant had taken advantage of our client's emotional vulnerability to inflict devastating emotional injuries. Given these disturbing facts, we urged that the plaintiff should have the right to know whether there existed insurance coverage before having her life, including the specifics of her experiences being victimized by defendant, opened and explored in painful detail by opposing counsel.

The Lower Court: Motions to Dismiss the Declaratory Judgment Complaints

Both insurance companies predictably moved to dismiss the declaratory judgment actions for lack of subject matter jurisdiction, arguing that (1) the plaintiff did not have standing to bring the action because she was not a party to the contract or a third party beneficiary; (2) the matter was not ripe because the plaintiff had not yet obtained a judgment against the insured; and (3) the availability of a remedy under General Statutes § 38a-321 (a subrogation action following a judgment in the underlying case) precluded the use of declaratory judgment. The Superior Court (Shaban, J.) granted defendant's motion.

At the time of the Superior Court's decision, there was no appellate authority on the issue of whether a tort plaintiff may bring a declaratory judgment action against the defendant tortfeasor's insurer for a determination on insurance coverage prior to obtaining a judgment against the insured. However, a number of other Superior Courts which had addressed the issue, had held that a personal injury plaintiff may bring a declaratory judgment action to determine the existence of insurance coverage for her claims prior to obtaining a judgment against the underlying tortfeasor. See *American State Ins. Corp. v. Peci*, 15 Conn. L. Rptr. 97, 1995 WL 416269 (Conn. Super. Jul. 7, 1995) (Stodolink, J.); *Brown v. United Services Auto. Ass'n*, No. CV 04-4004645-S, 2005 WL 3623845 (Conn. Super. Dec. 6, 2005) (Licari, J.); *Wynn v. Commercial Union Ins. Co.*, 12 Conn. L. Rptr. 51, 1994 WL 271824 (Conn. Super. June 13, 1994) (Lewis, J.).

Plaintiff Seeks Reversal

We appealed, arguing that the trial court had gotten it wrong in at least three different ways: contrary to the trial court's decision, (1) our plaintiff was not required to be a party to the contract or a third party beneficiary in order to have standing; rather the requirement for standing to bring a declaratory judgment action is set forth at Practice Book § 17-55(1); (2)the case was ripe for adjudication because there was an actual and substantial issue in dispute which requires settlement between the parties, as required by Practice Book § 17-55(2); and, (3) the trial court had ignored Connecticut law providing that the availability of alternative remedies does not deprive the court of subject matter jurisdiction over a declaratory judgment action.

Regarding *standing*, Practice Book § 17-55(1) requires that "[t]he party seeking the declaratory judgment has an *interest*, legal or equitable, by reason of danger of loss or of uncertainty as to the party's rights or other jural relations." Id. (emphasis added). We argued that the plaintiff readily met this standard because under Connecticut law, "[i]t is generally held that an injured person having a claim against an insured tortfeasor has a *legal interest* in a coverage dispute with the insurer and must be either notified or joined as a party in a declaratory judgment action to decide the coverage question." *Connecticut Ins. Guar. Ass'n v. Raymark Corp.*, 215 Conn. 224, 228 (1990) (emphasis added). The insurance companies argued in response that the plaintiff's legal interest for purposes of standing must be based on either a contract or personal right, and the plaintiff did not have a personal right until she had obtained a judgment against the defendants' insured.

Regarding *ripeness*, Practice Book § 17-55(2) requires that "[t]here is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement between the parties." Id. This provision "means no more than that there must appear a sufficient practical need for the determination of the matter." *Bombero v.*

(Continued on page 18)

(Continued from page 17)

Planning and Zoning Comm'n of the Town of Trumbull, 40 Conn. App. 75, 79 (1996). We argued that the plaintiff had a practical need to resolve a substantial uncertainty over the defendants' obligations under the insurance policy, in advance of litigating the underlying action to judgment, in order to: (1) properly assess the benefits of continuing to litigate the underlying action; (2) have an opportunity to settle the underlying action; and (3) request properly tailored jury interrogatories in the underlying action to avoid the need to re-litigate factual issues in a subrogation action. These interests would be lost if the plaintiff were required to complete discovery and a full trial on the merits before even seeking a declaration on the coverage issues. In response, the insurance companies pointed to the possibility — which in this case was entirely theoretical in view of the glaring, criminal fault of the defendant — that the plaintiff might somehow lose the case against the tortfeasor, in which case there would be no basis for a declaratory judgment.

Regarding the availability of alternative remedies, Connecticut law leaves no question that "the Superior Court has subject matter jurisdiction over suits for declaratory relief despite the adequacy of other legal remedies." *England v. Coventry*, 183 Conn. 362, 364 (1981); accord *Coscina v. Coscina*, 24 Conn. App. 190, 192 (1991); *Leoni v. Water Pollution Control Authority*, 21 Conn. App. 77, 82 (1990). The defendants nevertheless argued that a court may, in its discretion, decline to allow a declaratory judgment action when there is an alternative remedy.

Decision Affirmed

The Appellate Court affirmed the trial court's dismissal of the action. In doing so, the Court only addressed the ripeness issue, holding that claims were not ripe because they were contingent on the outcome of the underlying negligence action. The court reasoned: "until there has been a judicial determination that Thorson [the tortfeasor] is liable to the plaintiff, the question of whether the defendant is obligated to provide insurance coverage in this declaratory judgment action is a hypothetical one." 115 Conn. App. at 780. The court further declared:

> the allegations in the *Thorson* action are known, but the evidence that the plaintiff will present in her effort to prove [her] allegations and the jury's findings are not. Until the evidence is known, as well as the jury's verdict with respect to those allegations, it is not possible to determine whether the defendant is obligated to indemnify Thorson. The action therefore seeks the answer to a hypothetical question, which is not the purpose of a declaratory judgment action.

Id. at 782.[1] We filed a petition for certification for review by the Supreme Court, which was denied. *See Hamilton v. USAA*, 293 Conn. 924 (2009).

Consequences for Plaintiffs

The Appellate Court's decision in *Hamilton* was not only deeply disappointing to us and our client but has troubling broader implications. The apparent import of the Appellate Court's decision in *Hamilton v. USAA* is that a negligence victim may never bring a declaratory judgment action against the tortfeasor's insurer to resolve uncertainties over insurance coverage prior to obtaining a judgment against the insured. As a result, in cases where a tortfeasor's insurance company has disclaimed coverage, negligence victims will be required to go through the emotional and financial expense of litigating their claim to obtain a judgment which may be worthless if it is ultimately determined that there is no insurance coverage in a subsequent subrogation action. This rule would seem to make disclaiming coverage an appealing first option for an insurance company seeking to deter a vulnerable plaintiff from seeking recovery against an insured party.

To us, this result is contrary to Connecticut public policy, which overwhelmingly favors giving negligence victims accurate information about the availability of insurance for their claims in advance of obtaining a judgment against a tortfeasor, a policy most recently enacted into law as General Statutes § 52-200a. We urge our colleagues not only to be wary of the dangers that *Hamilton* has created but to look for an opportunity to undo its damage by bringing an appropriate case to the Supreme Court or seeking correction from the legislature.

Paul A. Slager and Amanda R. Whitman are attorneys who focus their practice on civil cases involving catastrophic events, including sexual abuse and professional negligence. Both practice with the Stamford firm, Silver Golub & Teitell LLP.

[1] Although plaintiff sought a declaration on USAA's duty to defend, which is based on plaintiff's allegations alone, in addition to a declaration on USAA's duty to indemnify, the court declined to address whether the issue of USAA's duty to defend was ripe noting that the parties did not analyze the duty to defend issue in their papers.