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Jurisdictional and Venue Considerations in Insurance Coverage Litigation:
The "Colorado River" Runs Through It
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I. Introduction

a. Federal Courts have jurisdiction over insurance coverage disputes when (1) they have jurisdiction over the action and (2) venue is proper.

i. State courts are courts of general jurisdiction; federal courts are courts of limited jurisdiction, as defined by Article III, section 2 of the United States Constitution.

1. Federal courts have jurisdiction over disputes involving federal questions, disputes between states, and disputes between citizens of different states (diversity jurisdiction). A federal court exercising diversity jurisdiction will apply the law of the state in which it sits, including with respect to choice of law questions. *Erie v. Tompkins*, 304 U.S. 64 (1938); *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). States' local laws differ substantially with respect to the ways in which many important insurance policy provisions are interpreted and applied. They also differ with respect to choice of law – i.e., how to determine which state's law applies. Accordingly, the outcome of an insurance coverage dispute will sometimes turn on which court hears and decides it.
2. Insurance coverage disputes and policy interpretation are governed by state law. As a general matter, coverage disputes can be litigated in federal court only if there is diversity jurisdiction. To establish diversity jurisdiction, federal courts must have complete diversity of citizenship between all parties on one side and all parties on the other side, and the amount in controversy must

exceed $75,000. 28 U.S.C. § 1332; *see Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

3. A corporation's citizenship is based on state of incorporation and its principal place of business. *Louisville, Cincinnati & Charleston Railroad Co.* v. *Letson*, 43 U.S. (2 How.) 497 (1844) (holding that a corporation is to be deemed a citizen of the state where it is chartered for the purpose of suing and being sued.).

ii. Establishing citizenship for the purpose of demonstrating diversity jurisdiction in coverage disputes can be particularly difficult where LLCs and other entities or organizations that are not corporations are involved.

1. If an insured is a limited liability company or a partnership, as a general rule, the organization has the citizenship of each of its "members," and one must go "up the chain" and establish that all members at all levels are diverse. *See, e.g.*, *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990) (holding that a limited partnership has the citizenship of each of its partners, whether general or limited); *Americold Realty Trust v. ConAgra*, 136 S. Ct. 1012 (Mar. 7, 2016) (because *Americold* was organized under a statute enabling it to sue and be sued in its own name, the rule of *Carden* was applied, and the citizenship of every beneficial owner in the trust was attributed to it for purposes of diversity jurisdiction); *Mut. Assignment & Indem. Co. v. Lind-Waldock & Co.*, 364 F.3d 858, 861 (7th Cir. 2004) ("Lind-Waldock is a limited liability company, which means that it is a citizen of every state of which any member is a citizen; this may need to be traced through multiple levels if any of its members is itself a partnership or LLC."). *But see Americold*, 136 S. Ct. at 1016 (recognizing that the citizenship of a traditional trust that lacks the capacity to sue and be sued in its own name and can only bring suit through its trustee is determined

by the citizenship of the trustee, not the trust's members); *Navarro Savs. Assn. v. Lee*, 446 U.S. 458 (1980) (business trust could not sue or be sued in its own name so only citizenship of trustee mattered for diversity purposes).

2. Establishing diversity jurisdiction in coverage disputes that involve syndicates of Lloyd's of London is also made difficult by courts that require a showing that each member of the syndicate is diverse. *See Indiana Gas Co. v. Home Ins. Co.*, 141 F.3d 314 (7th Cir. 1998) (holding that a syndicate procures the citizenship of each of its subscribing members); *accord Underwriters at Lloyd's, London v. Osting-Schwinn*, 613 F.3d 1079 (11th Cir. 2010) *and E.R. Squibb & Sons, Inc. v. Acc. & Cas. Ins. Co.*, 160 F.3d 925 (2d Cir. 1998). *But see Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d 39 (6th Cir. 1994) (holding that a Lloyd's insurance syndicate acquires strictly the citizenship of the agent of the syndicate).

iii. In insurance coverage actions, the amount in controversy requirement is usually met if the amount potentially recoverable under the policy at issue exceeds $75,000. *First Mercury Ins. Co. v. Excellent Computing Distributors, Inc.*, 648 Fed App'x 861, 865 (11th Cir. April 20, 2016) (citing *Stonewall Ins. Co. v. Lopez*, 544 F.2d 198, 199 (5th Cir. 1976)) (concluding the amount in controversy included both the insurance company's potential indemnity liability and attendant costs associated with defending an underlying action against the insured).

iv. In addition to establishing jurisdiction, venue must be proper under 28 U.S.C. § 1391(b). Venue may be changed "for the convenience of the parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a).

b. Insurance coverage litigants often have multiple federal and state courts to choose from when filing a coverage suit. Many coverage disputes involve multiple

insurers, sometimes 20 or more. Even if only one insurer is involved, litigants may still have multiple possibilities among federal and state courts from which to choose. This is particularly true if the policy was issued in one state, the underlying loss or litigation occurred in another state, and the insured is incorporated and has its principal place of business in other states.

c. Federal courts have developed a body of case law that addresses how federal courts decide whether to exercise or decline to exercise jurisdiction, known as *Colorado River* and *Brillhart-Wilton* doctrines. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491-494-95 (1942); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). There is also a body of case law that has evolved to address venue disputes.

   i. Coverage disputes generally involve one or two core causes of action: one seeking a declaration of coverage (by the policyholder) or of no coverage (by an insurer); the other for breach of contract seeking damages by the policyholder. If an insurer files in federal court, it files under the Declaratory Judgment Act.

   ii. The issues addressed here arise in a few different contexts:

      1. An insurer files a federal court declaratory judgment action, and a policyholder files a state court declaratory judgment and breach of contract action.
      2. A policyholder files a federal court declaratory judgment and breach of contract action, and an insurer files a state court declaratory judgment action.
      3. An insurer files a federal court declaratory judgment action, and a policyholder files a federal court declaratory judgment and breach of contract action.

   iii. The federal case law governing the first context flows from the Supreme Court's decisions in *Brillhart* and *Wilton*. The case law governing the

second flows from the Supreme Court's decision in *Colorado River*. The case law governing the third context flows from the forum non conveniens provision of the Judicial Code, 28 U.S.C. § 1404(a). The factors considered under these lines of cases overlap.

II. The *Brillhart-Wilton* Doctrine – Federal district courts have discretion to abstain from duplicative parallel declaratory judgment actions.

a. Introduction

i. Courts apply the *Brillhart-Wilton* doctrine when deciding whether to abstain from a parallel declaratory judgment action.

ii. The *Brillhart –Wilton* doctrine establishes that the district court has broad discretion to determine "whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject-matter jurisdictional prerequisites." *Wilton,* 515 U.S. at 288.

iii. The *Brillhart-Wilton* doctrine stands for the proposition that district courts are not compelled to entertain parallel actions seeking declaratory relief because the Declaratory Judgment Act grants them discretion in deciding whether to hear such claims. *Id.*

b. Substantial Discretion to abstain from parallel declaratory judgment actions – District courts are afforded "substantial discretion" to decline to exercise jurisdiction over parallel federal declaratory judgment actions because the Declaratory Judgment Act allows a court to decline jurisdiction on the basis of practicality and wise judicial administration. *Wilton*, 515 U.S. at 288.

i. The authority of the federal courts to issue declaratory judgments derives from the Declaratory Judgment Act. 28 U.S.C. § 2201 ("any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such

declaration, whether or not further relief is or could be sought ….") (emphasis added).

1. Under the Declaratory Judgment Act, a lawsuit seeking federal declaratory relief must present two things:
    a. An actual case or controversy within the meaning of Article III, section 2, of the United States Constitution. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937).
    b. Statutory jurisdictional prerequisites. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950).
2. Even if an action passes the statutory hurdle, the district court must also be satisfied that entertaining the action is appropriate. *Governmental Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1223 (9th Cir. 1998).
    a. "The normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Wilton*, 515 U.S. at 288.
3. Parallel Action – The existence of a parallel action in state court is a threshold factor for federal abstention.
    a. A state proceeding is parallel to a federal declaratory relief action when (1) the actions arise from the same factual circumstances; (2) there are overlapping factual questions in the actions; or (3) the same issues are addressed by both actions.
    b. Courts construe "parallel action" liberally. Underlying state actions need not involve the same parties or the same issues to be considered parallel: it is enough that the state proceedings arise from the same factual circumstances. *See, e.g.*, *N. Pac. Seafoods, Inc. v. Nat'l Union Fire Ins.*

Co., 2008 U.S. Dist. Lexis 1714 at *11 (W.D. Wash. Jan. 3, 2008).

i. The parallel action standard is generally satisfied when an insurer seeks a coverage determination in the federal court, and a policyholder seeks an opposite coverage determination in the state court. *State Auto. Mut. Ins. Co. v. Reed*, 2008 U.S. Dist. LEXIS 29712, at *2 (S.D. Ind. Mar. 28, 2008).

ii. Declaratory judgment suits by insurers have been held "parallel to the underlying state court action against the policyholder that gives rise to the coverage dispute" when fact issues overlap. *Emp'rs Reinsurance Corp. v. Karussos*, 65 F.3d 796 (9th Cir. 1995) (district court abused its discretion when it retained jurisdiction over an insurance coverage dispute because the resolution of coverage issues "turn[ed] on factual questions that overlap[ed] with those at issue in the underlying state court litigation," despite that fact questions were non-identical.)

c. Courts may exercise their discretion to dismiss a federal declaratory relief action in circumstances where state and federal actions involve different parties and legal theories. *See, e.g.*, *Am. Nat'l Fire Ins. Co. v. Hungerford*, 53 F.3d 1012, 1017 (9th Cir. 1995), overruled on other grounds.

i. In *Dizol*, the district court refrained from exercising jurisdiction even though the federal action did not "parallel a state court action arising from the same facts in the sense that different legal issues are

presented by the pleadings" because there was a sufficient "parallel" "in the sense that the ultimate legal determination in each depends upon the same facts." 133 F.3d at 1227.

ii. Thus, a federal court may decline to exercise jurisdiction over a parallel declaratory judgment even when the suit satisfies subject matter jurisdictional prerequisites because the Declaratory Judgment Act is "deliberately cast in terms of permissive, rather than mandatory, authority." *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 250 (1952) (Reed, J., concurring). *See also Public Affairs Ass'n v. Rickover*, 369 U.S. 111, 112 (1962) (the Act "gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so").

c. In *Brillhart*, the Supreme Court outlined considerations for deciding whether to hear or abstain from hearing a case. Recognizing that the Declaratory Judgment Act increased the potential for "uneconomical as well as vexatious" parallel actions in state and federal courts, the Court urged avoidance of "gratuitous interference with the orderly and comprehensive disposition of a state court litigation." 316 U.S. at 495. The Court found that the question for a district court presented with a suit under the Declaratory Judgment Act is "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." *Id.*

d. *Brillhart* did not set out an exclusive list of factors governing the district court's exercise of discretion in deciding whether and when to entertain an action under the Declaratory Judgment Act. *See Wilton*, 515 U.S. at 282-83. The circuits have developed their own multi-factor tests to guide the district courts. Each circuit's expression of the *Brillhart* factors, though stated differently, encompasses three main aspects: (1) "the proper allocation of decision-making between state and

federal courts"; (2) fairness; and (3) efficiency. *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 390 (5th Cir. 2003).

i. The proper allocation of decision-making between state and federal courts.

1. Many circuits have a presumption in favor of a pending parallel state lawsuit.

a. There is a presumption that an entire suit should be heard in state court when there are parallel state proceedings involving the same issues and parties pending at the time a federal declaratory action is filed. *Dizol*, 133 F.3d at 1225.

b. *See also Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1366 (9th Cir. 1991), overruled on other grounds by *Smith Mailer Mfg. v. Lib. Mut. Ins. Co.*, 1997 WL 407862 (9th Cir. July 21, 1997) (citing *Brillhart*). ("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. . . . [T]here exists a presumption that the entire suit should be heard in state court.").

c. *But see, e.g.*, *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1193 (5th Cir. 1988) (internal quotation marks and alterations omitted) ("The presence of a federal law issue must always be a major consideration weighing against surrender of jurisdiction, but the presence of state law issues weighs in favor of surrender only in rare circumstances.").

2. Whether or not such a presumption applies, the question of which court is better positioned to decide a particular declaratory judgment action is ultimately decided based on the facts and

circumstances of the case. For example, in *Great American Insurance Company v. ACE American Insurance Company*, the court declined to abstain from hearing the insurer's first-filed declaratory judgment action in deference to the insured's competing New Jersey lawsuit because, among other reasons, the court determined that Texas rather than New Jersey state law governed the construction of the relevant policies. 2018 WL 1916567, *3-5 (N.D. Tex. April 20, 2018); *see, also, e.g.*, *Crum & Forster Specialty Ins. Co. v. Explo Sys. Inc.*, 2013 WL 1869099, *5 (W.D. La. May 2, 2013) ("*Explo*") (declining to abstain in part because "federal courts frequently decide cases involving liability insurance coverage"); *Sherwin-Williams*, 343 F.3d at 396 (finding that the absence of novel questions of state law weighed in favor of retaining federal jurisdiction).

3. A needless determination of state law may involve an ongoing parallel state proceeding or an area of law expressly reserved to the states. *Continental Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1370 (9th Cir. 1991).
    a. "[A] district court's discretion to grant relief under the Declaratory Judgments Act ordinarily should not be exercised where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties." *Id.*
    b. In *Robsac*, the insured (Robsac) brought a state court action against its insurer, Continental Casualty, and certain other non-diverse parties, for breach of contract related to Continental's denial of coverage. Because Robsac's action lacked diversity, and thus, could not be removed to federal court, Continental filed its own action in federal court,

seeking a declaration that it had no coverage obligation under its policy. Applying the *Brillhart* factors, the Court found that three facts created a likelihood that the parallel federal action would result in a needless determination of state law issues:

i. "[T]he precise state law issues at stake [in the federal action] are the subject of a parallel proceeding in state court." *Id.*

ii. "In the federal case, a diversity action, California law provides the rule of decision for all the substantive questions. Moreover, this case involves insurance law, an area that Congress has expressly left to the states through the McCarran-Ferguson Act." *Id.*; and

iii. "[W]here, as in the case before us, the sole basis of jurisdiction is diversity of citizenship, the federal interest is at its nadir. Thus, the *Brillhart* policy of avoiding unnecessary declarations of state law is especially strong here." *Id.*

4. Area of state law

a. Abstention is more appropriate where state law is unclear and there is no strong federal interest in the matter. *Mitcheson v. Harris*, 955 F.2d 235, 238 (4th Cir. 1992).

i. Absent a strong countervailing federal interest, federal court should not attempt to render what may be an "uncertain and ephemeral" interpretation of state law. *Allstate Ins. Co. v. Davis*, 230 F. Supp. 2d, 1112, 1120 (D. Haw. 2006).

b. Conversely, abstention is less appropriate where "the issues involved are standard ones" and "[a] federal court [applying state law] would be unlikely to break new ground or be faced with novel issues of state interest." *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494 (4th Cir. 1998).

c. Because the McCarran-Ferguson Act leaves the substantive law of insurance to the states, there is no compelling federal interest in resolving disputes concerning insurance coverage.

    i. States have a free hand in regulating the dealings between insurers and their policyholders. *Karussos*, 65 F.3d at 799

    ii. Federal interest in coverage disputes is minimal because the insurance industry is wholly state regulated. *Dizol*, 133 F.3d at 1232

    iii. Where the sole basis of federal subject matter jurisdiction is diversity, the federal interest is "at its nadir." *Robsac*, 947 F.2d at 1371.

d. However, courts have rejected assertions that questions of liability insurance coverage—which are frequently decided by federal courts—necessarily present the sort novel questions of state law that weigh in favor of abstention. *See Explo*, 2013 WL 1869099 at *5; *see also Dizol*, 133 F.3d at 1225 ("[T]here is no presumption in favor of abstention in declaratory actions generally, nor in insurance coverage cases specifically. We know of no authority for the proposition that an insurer is barred from invoking

diversity jurisdiction to bring a declaratory judgment action against an insured on an issue of coverage.").

ii. Fairness: The district court should discourage litigants from filing declaratory actions as a means of improper forum shopping.

1. "Although many federal courts use terms such as 'forum selection' and 'anticipatory filing' to describe reasons for dismissing a federal declaratory judgment action in favor of related state court litigation, these terms are shorthand for more complex inquiries. The filing of every lawsuit requires forum selection. . . . The courts use pejorative terms such as 'forum shopping' or 'procedural fencing' to identify a narrower category of federal declaratory lawsuits filed for reasons found improper and abusive, other than selecting a forum or anticipating related litigation." *Sherwin-Williams*, 343 F.3d at 391.
2. Federal courts generally decline to entertain declaratory actions that appear to have been brought to gain an unfair advantage. Courts apply a variety of different tests in determining whether a plaintiff's choice of forum is improper or abusive.
3. Courts "generally decline to entertain reactive declaratory actions." *Dizol*, 133 F.3d at 1225.
4. A number of courts have characterized an insurer's declaratory relief action filed during the pendency of parallel underlying proceedings as reactive and found abstention proper in order to discourage forum shopping.
    a. "A declaratory judgment action by an insurance company against its insured during the pendency of a non-removable state court action presenting the same issues of state law is an archetype of what we have termed 'reactive'…." *Robsac*, 947 F.2d at 1372-73.

5. Courts have reached different results in analyzing whether a first-filed federal court action should be considered "reactive" or otherwise improper.
    a. In *Robsac*, the court took the view that a federal court action is improperly "reactive" when an insurer "anticipate[s] that its insured intends to file a non-removable state court action, and rush[es] to file" a declaratory judgment action in federal court in hopes of "preempt[ing] any state court proceeding." *Id.* The court concluded that "[w]hether the federal declaratory judgment action regarding insurance coverage is filed first or second, it is reactive, and permitting it to go forward when there is a pending state court case presenting the identical issue would encourage forum shopping in violation of the second *Brillhart* principle." *Robsac*, 947 F.2d at 1372-73. *See also Chamberlain*, 931 F.2d at 1367 ("[T]here is a concern that parties could attempt to avoid state court proceedings by filing declaratory relief actions in federal court. This kind of forum shopping could be avoided by requiring district courts to inquire into the availability of state court proceedings to resolve all issues without federal intervention."); *Federated Servs. Ins. Co. v. Les Schwab Warehouse Ctr., Inc.*, 2004 U.S. Dist. Lexis 9252, at *11-14 (D. Or. Feb. 9, 2004); *Great Am. Assur. Co. v. Bartell*, 2008 U.S. Dist. Lexis 38720, at *11-12 (D. Ariz. Apr. 28, 2008); *AMCO Ins. Co. v. AMK Enters*., 2006 U.S. Dist. LEXIS 50806, at *12 (N.D. Cal. July 13, 2006) (exercising jurisdiction would encourage forum shopping because

insurer could have brought action in state court where underlying action was pending.).

b. However, in *Sherwin-Williams*, the court emphasized that "[d]eclaratory judgment actions often involve the permissible selection of a federal forum over an available state forum, based on the anticipation that a state court suit will be filed." *Sherwin-Williams*, 343 F.3d at 398. *See also, e.g.*, *Kapiloff*, 155 F.3d 488 at 495 (finding that although the plaintiff-insurer may have predicted that the insured would file suit in state court, thus making the federal suit "anticipatory," "without more, we cannot say that [the insurer's] action is an instance of forum-shopping instead of a reasonable assertion of its rights under the declaratory judgment statute and diversity jurisdiction"); *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 195 N.J. 231, 242 (2008) ("The case law has overwhelmingly rejected the notion that an insured has the right to choose the forum in all instances and to avoid participation in a first-filed action by the insured.").

iii. Efficiency: The district court should "avoid duplicative litigation" where possible.

1. Resolving the coverage dispute in the context of the more comprehensive action may promote judicial economy and conservation of judicial resources—results that may not be achieved through piecemeal litigation.

a. In *Robsac*, the court determined that the insurers' federal declaratory relief action was sufficiently "duplicative" of the insureds' state court action: "The federal declaratory suit is virtually the mirror image of the state suit. All of the

issues presented by the declaratory judgment action could be resolved by the state court. [Indeed, the state court can also resolve the additional claims involving the non-diverse defendants.] Hence, permitting the present action to go forward would waste judicial resources in violation of the third *Brillhart* factor." 947 F.2d at 1373.

b. However, where either suit would fully resolve the parties' dispute, this factor does not support disregarding the first-filing plaintiff's choice of forum. *See Great Am. Ins. Co.*, 2018 WL 1916567 at *5.

2. A stay may be indicated where state and federal claims are "inherently intertwined[.]" *Burlington Ins. Co. v. Panacorp, Inc.*, 758 F. Supp. 2d 1121, 1142 (D. Haw. 2010); *see also Phoenix Assur. PLC v. Marimed Found. for Island Health Care Training*, 125 F. Supp. 2d 1214, 1222 (D. Haw. 2000) (avoidance of duplicative litigation favored stay where district court would have to decide many of the same issues pending in state court litigation).
3. Where duplicative litigation runs the risk of providing inconsistent factual findings and judgments, a stay or dismissal of proceedings is particularly appropriate. *See One Beacon Ins. Co. v. Parker, Kern, Nard & Wenzel*, 2009 U.S. Dist. LEXIS 88043 *15 (E.D. Cal. Sept. 9, 2009).
    a. There is the clear potential that allowing this action to continue will lead to state and federal appellate courts reviewing claims and rulings, perhaps inconsistent rulings, arising from the same set of facts." *Hungerford*, 53 F.3d at 1018.
4. Courts also recognize that it may be inefficient to litigate in a forum that is inconvenient to the parties and witnesses. Depending

on the facts presented, it may be more appropriate to address concerns of duplicative litigation and inconsistent factual findings and judgments through a stay of the later-filed state court action, rather than the first-filed federal court action. *See Great Am. Ins. Co.*, 2018 WL 1916567, at *5.

e. Additional Factors – Circuit courts have articulated additional considerations that a district court should address in considering whether to abstain.

   i. Ninth Circuit – The *Dizol* Factors

      1. whether the declaratory action will settle all aspects of the controversy in a single proceeding;
      2. whether it will serve a useful purpose in clarifying the legal relations at issue;
      3. whether it is being sought merely for the purposes of procedural fencing or to obtain a res judicata advantage at the expense of the other party;
      4. whether the use of a declaratory action will result in the entanglement between federal and state court systems; and
      5. convenience of the parties and the availability and relative convenience of other remedies.

   ii. Fifth Circuit – The *Trejo* Factors – *St Paul. Ins. Co. v. Trejo*, 39 F.3d 585, 590-91 (5th Cir. 1994).

      1. whether there is a pending state action in which all of the matters in controversy may be fully litigated;
      2. whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant;
      3. whether the plaintiff engaged in forum shopping in bringing the suit;
      4. whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist;

5. whether the federal court is a convenient forum for the parties and witnesses;
6. whether retaining the lawsuit would serve the purposes of judicial economy; and
7. whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.

f. Utility

i. The Court will only apply the "substantial discretion" standard when the action is for declaratory judgment; the inclusion of claims for damages or injunctive relief may render the *Brillhart-Wilton* doctrine inapplicable. There is a circuit split as to whether the discretionary *Brillhart-Wilton* standard, or the exceptional circumstances *Colorado River* standard, applies when the federal case presents mixed claims for relief. *See State Farm Mut. Auto. Ins. Co. v. Physicians Grp. of Sarasota, L.L.C.*, 9 F. Supp. 3d 1303, 1308 (M.D. Fla. 2014) (summarizing circuit split).

1. Second, Fourth, Fifth, and Tenth – The *Brillhart/Wilton* standard does not apply where non-declaratory claims are joined with declaratory ones; any abstention decision must be reached by reference to the exceptional cases standard of *Colorado River*. *New England v. Barnett*, 561 F.3d 392, 395 (5th Cir. 2009); *United States v. City of Las Cruces*, 289 F.3d 1170, 1181-82 (10th Cir. 2002); *Vill. of Westfield v. Wlech's*, 170 F.3d 116, 125 n. 5 (2d Cir. 1999).

a. The Fourth Circuit has held that when a complaint states claims for both non-declaratory and declaratory relief, the *Colorado River* "exceptional circumstances" standard, rather than the *Brillhart/Wilton* "discretionary" standard,

always applies to determine whether abstention is appropriate. *VonRosenberg v. Lawrence*, 781 F.3d 731 (4th Cir. 2015), *as amended* (Apr. 17, 2015).

i. The *Colorado River* standard applies to all mixed claims—even when the "claims for coercive relief are merely 'ancillary' to [a party's] request for declaratory relief." *Id.*

ii. Indeed, "the only potential exception to this general rule arises when a party's request for injunctive relief is either frivolous or is made solely to avoid application of the *Brillhart* standard." *Id.*

b. Claims for declaratory and injunctive relief "are so closely intertwined that judicial economy counsels against dismissing the claims for declaratory judgment relief while adjudicating the claims for injunctive relief." *Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 463, 466-67 (4th Cir. 2005).

2. Ninth and Seventh Circuits – declined to apply *Brillhart* where the coercive claims are "independent of any claim for purely declaratory relief." *Dizol*, 133 F.3d at 1225 ("Because claims of bad faith, breach of contract, breach of the fiduciary duty and rescission provide an independent basis for federal diversity jurisdiction, the district court is without discretion to remand or decline to entertain these causes of action"); *R.R. St. & Co. v. Vulcan Materials Co.*, 569 F.3d 711,716-17 (7th Cir. 2009).

a. The Ninth Circuit has held "when [monetary] claims are joined with an action for declaratory relief . . . the district court should not, as a general rule, remand or decline to entertain the claim for declaratory relief." *United Nat'l Ins.*

Co. v. R&D Latex Corp., 242 F.3d 1002, 1009 (9th Cir. 2001)

i. But subsequent cases interpreting *R&D* have held that "the presence of claims for monetary relief does not require the district court to accept jurisdiction where the action is primarily declaratory in nature." *Keown v. Tudor Ins. Co*., 621 F. Supp. 2d 1025, 1030 (D. Hawaii 2008) (citing *R&D* and remanding action to state court).

3. Eighth Circuit and certain district courts look to the "essence" of the lawsuit: if the essence of the lawsuit is a declaratory judgment action, *Brillhart* applies. *See Royal Indem. Co. v. Apex Oil Co.*, 511 F.3d 788, 793-94 (8th Cir. 2008); *see also Nissan N. Am., Inc. v. Andrew Chevrolet, Inc.*, 589 F. Supp. 2d 1036, 1040 (E.D. Wis. 2008).

a. "If the outcome of the coercive claim hinges on the outcome of the declaratory ones, *Wilton's* standard governs; conversely, if the opposite applies, *Colorado River's* standard controls." *Coltex Indus., Inc. v. Continental Ins. Co*., 2005 WL 1126951, *2 (E.D. Pa. May 11, 2005).

III. The *Colorado River* Doctrine - Abstention from duplicative parallel action seeking legal, equitable, and coercive relief.

a. Introduction

i. Courts apply the *Colorado River* doctrine when deciding whether to abstain from a parallel action for damages or equitable relief.

ii. The *Colorado River* doctrine stands for the proposition that federal courts should abstain because of pending parallel and duplicative state court litigation in a limited number of cases. *Colorado River*, 424 U.S. at 817 (1976).

iii. The *Colorado River* doctrine's "exceptional circumstances" standard is more narrowly applied than the *Brillhart* doctrine's "substantial discretion" standard.

b. Exceptional Circumstances Standard

i. The pendency of a parallel state proceeding should not generally bar federal court proceedings. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25- 26 (1983). In light of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," notably "[o]nly the clearest of justifications will warrant dismissal." *Colorado River*, 424 U.S. at 817-18.

ii. A federal court may decline jurisdiction in deference to a contemporaneous parallel proceeding pending in state court "only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." *Id.* (citing *Cty of Allegheny v. Frank Mashuda Co*., 360 U.S. 185, 188-189 (1959)).

iii. Courts have rejected the argument that "a liability insurance coverage question is [necessarily] a 'rare circumstance warranting abstention." *Explo*, 2013 WL 1869099, at *5.

c. *Colorado River* Factors

i. Four Factor Test – The Supreme Court examined four factors to determine whether staying proceedings was appropriate under the Exceptional Circumstances standard:

1. whether either court has assumed jurisdiction over a res;

2. the relative convenience of the forums;
3. the desirability of avoiding piecemeal litigation; and
4. the order in which the forums obtained jurisdiction. *Colorado River*, 424 U.S. at 818.

ii. Additional Factors – In *Moses H. Cone*, the Supreme Court articulated two more considerations:

5. whether state or federal law controls; and
    a. "[T]he presence of federal-law issues must always be a major consideration" for a federal court in deciding whether to surrender jurisdiction.
    b. "[I]n some rare circumstances the presence of state-law issues may weigh in favor of that surrender . . . ."
6. whether the state proceeding is adequate to protect the parties' rights.

460 U.S. at 25- 26 (1983).

ii. "These factors are to be applied in a pragmatic and flexible way, as part of a balancing process rather than as a 'mechanical checklist.'" *Am. Int'l Underwriters, (Philippines), Inc. v. Continental Ins. Co.*, 843 F.2d 1253, 1257 (9th Cir. 1988) (quoting *Moses H. Cone*, 460 U.S. at 16).

b. Utility

i. *Colorado River* abstention is only applicable to situations of parallel litigation. Circuits differ as to whether the involvement of different parties is enough to preclude abstention.

1. The Seventh Circuit requires parallel suits, not identical suits.
    a. In *Interstate Material Corporation v. City of Chicago*, the Court held a suit was parallel when "substantially the same parties are contemporaneously litigating substantially the same issue in another forum." 847 F.2d 1285, 1288 (7th Cir. 1988).

2. The Second Circuit may require identical parties.
    a. In *Zemsky v. City of New York*, the court refused to apply Colorado River when the parties were not identical because the stay of federal action would not necessarily avoid piecemeal litigation. 821 F.2d 148 (2d Cir.), *cert. denied*, 484 U.S. 965 (1987)
3. The Eighth Circuit has held a suit is parallel when it is substantially similar such that disposition of the state proceeding will dispose of the claims presented in a federal court. *Fru-Con* Constr. Corp. *v. Controlled Air, Inc.*, 574 F.3d 527, 535 (8th Cir. 2009).
    a. "The pendency of a state claim based on the same general facts or subject matter as a federal claim and involving the same parties is not alone sufficient. Rather, a substantial similarity must exist between the state and federal proceedings."
    b. A substantial similarity "occurs when there is a substantial likelihood that the state proceeding will fully dispose of the claims presented in the federal court…. Moreover, in keeping with the Supreme Court's charge to abstain in limited instances only, jurisdiction must be exercised if there is any doubt as to the parallel nature of the state and federal proceedings."

ii. The *Colorado River* doctrine is only relevant when "a federal case duplicates *contemporaneous* state proceedings." *Haak Motors LLC v. Arangio*, 670 F. Supp. 2d 430, 434 (D. Md. 2009) (*quoting Vulcan Chem. Techs., Inc. v. Barker*, 297 F.3d 332, 341 (4th Cir. 2002)). If a parallel state court action is removed to federal court such that both parallel actions are in federal court,

neither the *Colorado River* doctrine nor the *Brillhart-Wilton* doctrine applies to determine the appropriate forum.

1. Federal abstention does not apply in a dispute between two federal court forums. *Allstate Ins. Co. v. Longwell*, 735 F. Supp. 1187, 1191–92 (S.D.N.Y. 1990) ("[Defendant's] arguments were premised on the principles set forth in *Colorado River* …. These doctrines of abstention, however, are predicated on the existence of pending state litigation on parallel issues, and, thus, are inapposite since there is no longer anything pending in the state courts—both lawsuits are now [in federal court]." (citations omitted)).
2. To determine a dispute between federal court forums, district courts consider the first-filed rule and factors of forum convenience.

IV. Forum Non Conveniens

a. Introduction

i. The forum non conveniens provision of the Judicial Code provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

ii. Through transfer after removal, a movant may obtain its preferred forum, a more convenient federal court, or a federal court that already has before it one or related matters.

iii. Courts typically apply the first-filed rule to determine which federal court is the appropriate forum for a duplicative action, however, the rule is not to be applied mechanically. *Orthmann v. Apple River Campground Inc.,* 765 F.2d 119, 121 (8th Cir. 1985). Importantly, there are exceptions under which a court will defer to a second-filed action over the first filed suit.

1. In the insurance coverage context, special circumstances such as forum shopping, procedural fencing and fundamental unfairness will often lead a court to defer to the second-filed suit.
2. Additionally, courts may be persuaded to defer to a second-filed suit or transfer the action to a more appropriate venue based on factors of convenience.

iv. When parallel federal actions exist, the court where the first-filed lawsuit is pending decides which court should hear the case.

1. *Congregation Shearith Israel v. Congregation Jeshuat Israel*, 983 F. Supp. 2d 420, 422 (S.D.N.Y. 2014) ("*Shearith*") (citing *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 218 (2d Cir.1978)) ("The Southern District of New York has laid down a bright-line rule for situations such as this: The court before which the first-filed action was brought determines which forum will hear the case.") (citations omitted)); *accord Nutrition & Fitness, Inc. v. Blue Stuff, Inc.*, 264 F. Supp. 2d 357, 360 (W.D.N.C. 2003) ("[W]here parallel federal litigation has been filed, the court in which the litigation was first filed must decide the question of where the case should be heard.").

b. First-filed rule

i. The first-filed rule provides that, as between parallel actions in federal courts with concurrent jurisdiction, the "first suit should have priority, absent the showing of balance of convenience in favor of the second action." *Volvo Const. Equip. N. Am., Inc. v. CLM Equip. Co.,* 386 F.3d 581, 595 (4th Cir. 2004) (quoting *Ellicott Mach. Corp. v. Modern Welding Co., Inc.*, 502 F.2d 178, 180 n. 2 (4th Cir. 1974)); *see, e.g.*, *First City Nat'l Bank and Trust Co. v. Simmons*, 878 F.2d 76, 79 (2d Cir. 1989); *Orthmann v. Apple River Campground Inc.,* 765 F.2d 119, 121 (8th Cir. 1985); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu,* 675 F.2d 1169, 1174

(11th Cir. 1982). Insurance carriers typically rely on the first-filed rule to argue that the court with the second-filed action should defer to the previously filed suit.

1. The standard for determining whether lawsuits are parallel for purposes of the first-filed rule is relevantly consistent with the standard for abstention motions, as both are based on the shared nexus of facts and do not require exact identity of parties. *See, e.g.*, *Harleysville Mut. Ins. Co. v. Hartford Cas. Ins. Co.*, 2012 WL 1825331, at *4 (E.D.N.C. May 18, 2012) (applying first-filed rule to defeat insurance company's second-filed suit where "the parties to the two suits are *nearly* identical) (emphasis added); *see also Allied-Gen. Nuclear Servs. v. Commonwealth Edison Co.*, 675 F.2d 610, 611 (4th Cir. 1982) ("Ordinarily, when multiple suits are filed in different Federal courts upon the *same factual issues*, the first or prior action is permitted to proceed to the exclusion of another subsequently filed.") (emphasis added).

ii. However, the first-filed rule "is not intended to be rigid, mechanical, or inflexible[.]" *Orthmann*, 765 F.2d at 121. Instead, the first-filed rule is discretionary, and only to be applied in a manner best serving the interests of justice. *Affinity Memory & Micro, Inc. v. K&Q Enters*., 20 F. Supp. 2d 948, 954 (E.D. Va. 1998) (citing *Brierwood Shoe Corp. v. Sears, Roebuck & Co.*, 479 F. Supp. 563, 567 (S.D.N.Y. 1979)). Thus, deference may be given to the court where the second-filed action is pending when there are "special circumstances," or where a "balance of conveniences" favors the second-filed action. *See Ill. Union Ins. Co. v. NRG Energy, Inc.*, 2010 WL 5187749, at *1 (S.D.N.Y. Dec. 6, 2010) ("It is within the sound discretion of the Court "to determine whether substantive factors, including the balance of convenience, weigh against proceeding in the forum of the first

filed action"); *Adam v. Jacobs*, 950 F.2d 89, 92 (2d Cir. 1991); *Oleg Cassini, Inc. v. Serta, Inc.*, 2012 LEXIS 33875, *5-*6 (S.D.N.Y. 2012).

c. Special Circumstances – Anticipatory Filing and Forum Shopping

i. Special circumstances may overcome the first filed rule. *See, e.g.*, *Affinity Memory*, 20 F. Supp. 2d at 954 (noting that district courts have always retained discretion to depart from the first-filed rule given appropriate circumstances); *Carbide & Carbon Chems. Corp. v. U.S. Indus. Chems.*, 140 F.2d 47, 49 (4th Cir. 1944). Exceptions to the "first-filed" rule are sometimes granted when "justice or expediency requires." *Samsung Elecs. Co. v. Rambus, Inc.,* 386 F. Supp. 2d 708, 724 (E.D. Va. 2005). *But see Learning Network, Inc. v. Discovery Commc'ns*, Fed. Appx. 297 at 301 n. 2 (4th Cir. 2001) ("The Fourth Circuit has not stated explicitly that special circumstances may warrant an exception to the first-filed rule.").

ii. This is especially true in some jurisdictions where "the filing date difference between [the] parallel actions is de minim[i]s." *NRG*, 2010 WL 5187749, at *1. In those cases, the first-filed rule is often not determinative. *Id.* (holding the first-filed rule not determinative where an insurance carrier filed for declaratory relief eleven days before Defendants filed their competing complaint). *But see, e.g.*, *Bass v. DeVink*, 336 N.J. Super 450, 457 (App. Div. 2001) (holding one-day priority sufficient to invoke the first-filed rule, and rejecting "a nebulous 'meaningfully first-filed' test" that "would needlessly complicate a straightforward principle of sound judicial administration").

iii. The "special circumstances" exception may apply where the first-filed case was an "anticipatory filing" or the result of forum shopping. *E.g.*, *Cassini*, *2012* LEXIS 33875 at *5-*6; *Aetna Cas. & Sur. Co. v. Quarles,* 92 F.2d 321, 324 (4th Cir.1937) (Courts should decline jurisdiction over declaratory judgment actions filed "for the purpose of anticipating the trial of an issue in a court of coordinate jurisdiction."); *Remington Arms Co., Inc. v. Alliant*

Techsystems, Inc., 2004 WL 444574, at *3 (M.D.N.C. Feb. 25, 2004) ("Other courts that have considered exceptions to the first-filed rule have, for example, refused to apply the first-filed rule when the party that files first does so with notice that the other party is about to file ... This court agrees that an improper anticipatory filing is one of the 'special circumstances' that may indicate a departure from the first-filed rule is appropriate.").

iv. The question of whether a first-filed suit is anticipatory often arises when an insurance carrier, which has a dispute with its policyholder, files a declaratory judgment action seeking a declaration that it has no coverage obligations. In response, the policyholder will often argue that the court should not give deference to the insurer's first-filed suit because the insurer (i) knew about or should have anticipated a lawsuit by the policyholder and (ii) engaged in improper forum shopping by filing suit somewhere outside of the policyholder's preferred state.

v. It may be improper for one party to file an anticipatory suit if on notice of the opposing party's intention to do the same. *See, e.g.*, *Family Dollar Stores, Inc. v. Overseas Direct Imp. Co.*, 2011 WL 148264, at *3 (W.D.N.C. Jan. 18, 2011). However, courts also note that the other party's anticipated suit must be "imminent," and that "[a] suit is 'anticipatory' for the purposes of being an exception to the first-to-file rule if the plaintiff in the first-filed action filed suit on receipt of specific, concrete indications that a suit by the defendant was imminent." *EEOC v. Univ. of Pa.*, 850 F.2d 969, 976 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 182 (1990); *see, e.g.*, *Pittsburgh Logistics Sys. v. C.R. Eng., Inc.*, 669 F.Supp.2d 613, 623 (W.D. Pa. 2009) (recognizing that a filing may also be anticipatory if one party has set a deadline after which it will file suit, and the other files preemptively in advance of the deadline); *Sinclair Cattle Co. v. Ward*, 80 F.Supp.3d 553, 561 (M.D. Pa. 2015); *Salaman v. United Capital Funding*

Corp., 2017 WL 616549, at *3 (E.D. Pa. Feb. 14, 2017); *Mitek Sys., Inc. v. United Servs. Auto. Ass'n*, 2012 WL 3777423, at *3 (D. Del. Aug. 30, 2012).

vi. What constitutes an anticipatory filing is a highly fact-dependent inquiry. *See Schnabel v. Ramsey Quantitative Sys.,* 322 F. Supp. 2d 505, 511-512 (S.D.N.Y. 2004).

1. An improper anticipatory filing is "one made under the apparent threat of a presumed adversary filing the mirror image of that suit is in another court." *Citigroup Inc. v. City Holding Co.*, 97 F.Supp.2d 549, 557 (S.D.N.Y.2000). As noted above, some courts hold that a filing is only anticipatory for purposes of disregarding the first-filed rule where it follows specific, concrete indications of an imminent suit by the other party. *See, e.g.*, *EEOC v. Univ. of Pa.*, 850 F.2d 969, 976 (requiring specific, concrete indications of an imminent suit); *Koresko v. Nationwide Life Ins. Co.*, 403 F. Supp. 2d 394, 403 (E.D. Pa. 2005) ("[T]he party at the receiving end of a financial ultimatum is not required to unilaterally disarm and allow the party asserting the demand to control the choice of forum. This is particularly so, given that [the plaintiff insurer's] choice of forum is reasonable and will not unduly vex or burden plaintiffs' ability to litigate this matter.").

2. Some courts have found that where a declaratory judgment was "triggered by a notice letter, this equitable consideration may be a factor in the decision to allow the later-filed action to proceed to judgment in the plaintiff's chosen forum." *Emplrs. Ins. v. Fox Entm't Grp., Inc*., 522 F.3d 271, 276 (2d Cir. N.Y. 2008); *see also Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1007 (8th Cir. 1993).

3. Courts have also found that a departure from the first-filed rule may be warranted where an action was filed in the midst of settlement negotiations. *Family Dollar Stores, Inc. v. Overseas Direct Imp. Co.*, 2011 WL 148264, at *3 (W.D.N.C. Jan. 18, 2011) (citing *Remington,* 2004 WL 444574 at *2; *EMC Corp. v. Norand Corp.*, 89 F.3d 807, 814 (Fed. Cir. 1996)). *But see, e.g.*, *Zelenofske Axelrod Consulting, L.L.C. v. Stevenson*, 1999 WL 592399, at *3 (E.D. Pa. Aug. 5, 1999) ("A party by virtue of engaging in settlement discussions is not obligated to provide notice to his adversary that he has decided to sue to allow the adversary to commence suit first.").

d. The Balance of Conveniences
   i. A balance of the conveniences may overcome the first-filed rule. *See, e.g.*, *Ellicott Machine Corp. v. Modern Welding Co., Inc.*, 502 F.2d 178, 180 (4th Cir. 1974) ("A departure from application of the 'first-filed' rule is warranted where convenience weighs in favor of the second action."); *see also Carbide*, 140 F.2d at 49 ("[O]rdinarily, the court first acquiring jurisdiction of a controversy should be allowed to proceed with it without interference from other courts under suits subsequently instituted" unless convenience weighs in favor of the second-filed action.); *Allied-Gen.*, 675 F.2d at 611.
   ii. Convenience Factors: Federal courts have articulated a variety of factors that are derived from, and in some cases, identical to, those considered on a motion to transfer venue under 28 U.S.C. § 1404(a). For example, the Eleventh Circuit balances the following private and public factors: "(1) the convenience of the witnesses; (2) the location of relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the

parties; (7) a forum's familiarity with the governing law; (8) the weight accorded a plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances." *Manuel v. Convergys Corp*., 430 F.3d 1132, 1135 n. 1 (11th Cir. 2005). Of these factors, considerations that are particularly relevant to the insurance coverage context include the following:

1. Plaintiff's choice of forum.
    a. There is a presumption in favor of the plaintiff's choice of forum. *See, e.g.*, *Collins v. Straight, Inc.*, 748 F.2d 916, 921 (4th Cir. 1984) ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.") (quoting *Gulf Oil v. Gilbert*, 330 U.S. 501, 508 (1946)); *Prod. Grp. Int'l, Inc. v. Goldman*, 337 F. Supp. 2d 788, 799 (E.D. Va. 2004). Courts have held that "[t]he plaintiff's choice of forum should not be disturbed unless it is clearly outweighed by other considerations." *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 260 (11th Cir. 1996) (quoting *Howell v. Tanner*, 650 F.2d 610, 616 (5th Cir. 1981)); *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1100 (11th Cir. 2004) (there is a "strong presumption against disturbing plaintiffs' initial forum choice.").
    b. Policyholders often argue that the presumption in favor of the plaintiff's chosen forum only applies to a "natural plaintiff." A natural plaintiff is an aggrieved party with a claim for damages, such as a policyholder that sues its insurer for breach of contract. *Cf. Andritz Hydro Corp. v. PPL Montana, LLC*, 2014 WL 868750, at *7 (W.D.N.C.

Mar. 5, 2014) ("[Plaintiff] was a natural plaintiff insofar as they filed a suit for contract damages in their home district and promptly served Defendants."); *see also Hipage Co. v. Access2Go, Inc.*, 589 F. Supp. 2d 602, 616 (E.D. Va. 2008) (holding the forum presumption is in favor of the aggrieved party with a claim for damages).

i. Many policyholders argue that requests for declaratory judgment cannot be used to allow a traditional defendant, such as an insurer, to choose the time and place of litigation. *Klingspor Abrasives, Inc. v. Woolsey*, 2009 WL 2397088, at *4 (W.D.N.C. July 31, 2009).

ii. The presumption in favor of the natural plaintiff can overcome the first filed rule. *See Hipage*, 589 F. Supp 2d at 616 ("[Plaintiff] filed for declaratory judgment in Virginia after [Defendant] filed suit for breach of contract in Illinois. Thus, [Plaintiff] attempted to 'wrest [ ] the choice of forum from the 'natural' plaintiff,' which runs directly contrary to the prevailing view, which is 'not to give the alleged wrongdoer a choice of forum.'") (citations omitted) (open brackets in original)).

c. In response, insurers often point to cases holding that the concepts of "natural plaintiff" and "natural defendant" have no meaning in insurance coverage disputes and do not impact operation of the first-filed rule. *See, e.g.*, *Biotronik, Inc. v. Lamorak Ins. Co.*, 2015 WL 3522362, *10 (D. N.M. June 3, 2015) (collecting cases).

2. The intent of resolving localized controversies at home and the appropriateness of having the trial of a diversity case in a forum that is at home with state law.
3. The avoidance of conflict of laws.
    a. Forum Selection Clause – When the parties express a preference for a particular venue in an insurance policy, that forum is determinative of the convenience to the parties. *See Priz Credit Alliance, Inc. v. Mid-South Materials Corp.*, 816 F. Supp. 230, 234 (S.D.N.Y. 1993). 28 U.S.C. 1404(a) may be used to transfer a case to the forum identified in an insurance policy's forum selection clause. *Union Elec. Co. v. Energy Ins. Mutual Ltd.*, 2014 WL 4450467, at 82 (E.D. Mo. Sept. 10, 2014); *Atlantic Marine Constr. Co. v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568 (2013) (a proper application of 1404(a) requires that a forum selection clause be "given controlling weight in all but the most exceptional cases.").
    b. However, an insurer that files a declaratory judgment action against its policyholder in a forum other than the forum specified in policy may be deemed to have waived its choice of forum. *See NRG*, 2010 WL 5187749, at *1 (holding that an insurance carrier abandoned its arguments on the basis of a forum selection clause when it filed its suit in a forum (the Southern District of New York) other than the one provided for in the policy (the "State of New York")).
    c. Absent a valid forum selection clause, conflicts of law analyses may be unavoidable absent agreement of the

parties regarding the governing law; the issue of what law applies may therefore exist in either action, albeit that it may be decided under different standards depending on which forum is ultimately chosen.

e. Utility
    i. The first-filed party can move to dismiss or stay a second-filed action based on the first-filed rule.
    ii. The movant may also ask for injunction of the second filed case to give effect to the first-filed rule. *See Learning Network*, 11 F. App'x at 298 (affirming injunction issued by trial court after determining that the pending action had priority over a later-filed New York action); *accord City of New York v. Exxon Corp.*, 932 F.2d 1020, 1025 (2d Cir. 1991) (holding that courts hearing a first-filed action have the authority to enjoin "a later action embracing the same issue").

V. Conclusion – Summary and Practical Tips
a. Forum battles are fairly common in insurance coverage disputes.
    i. Federal versus state court preference.
        1. Insurers typically favor federal court actions.
            a. Insurers wish to avoid "home-cooking" in policyholder's backyard.
            b. Federal courts generally offer a more conservative bench, more resources and quicker resolution.
        2. Policyholders typically favor state court actions.
            a. Many policyholders believe they will receive a better shake in own backyard, where state court judges (and often a less conservative bench) are better able to construe their own state law.
            b. Policyholders filing in state court must consider strategies to avoid removal to federal court. For example, they can

add the insurers as third-parties in the underlying litigation, or add non-diverse defendants to defeat diversity jurisdiction.

ii. Applicable law

1. The law applicable to a coverage dispute may include the law of any jurisdiction that has a colorable connection to the parties or dispute.
2. Because insurance law is an area left to the states, applicable law can vary greatly between states and parties have an incentive to ensure that they are not litigating in a forum that will apply unfavorable law.

b. Practical Tips

i. Parties to insurance coverage disputes should research all potentially applicable laws on key issues of the case and determine which jurisdiction has the most favorable law.

ii. Parties should also assess the possibility that their adversary will "jump" them by filing first in an unfavorable jurisdiction. If that possibility is real, parties should prioritize filing first in their preferred jurisdiction so that they may take advantage of the first-filed rule.

iii. Parties should maximize their chances of remaining in their preferred jurisdiction by filing the broadest action possible.

1. Bring suit against all relevant parties, including all insurers.
2. Allege more or different facts and issues than competing action.
3. Present mixed claims for relief: legal, equitable and coercive (certainly more than a declaratory judgment action).
4. Attempt to conduct discovery as soon as possible after the initiation of an action.