

No. 63358-9-I

WASHINGTON STATE COURT OF APPEALS  
DIVISION ONE

---

NATIONAL SURETY COMPANY, *Respondent*

v.

EQUITY RESIDENTIAL, et al., *Appellant*

---

**RESPONDENT'S BRIEF**

---

BARRETT & WORDEN, P.S.  
M. Colleen Barrett, WSBA # 12578  
Heather M. Jensen, WSBA # 29635  
John V. Hager, *pro hac vice*  
Attorneys for Respondent National Surety Company  
2101 Fourth Avenue, Suite 700  
Seattle, Washington 98121  
(206) 436-2020

COPIED FILED  
DIVISION ONE  
NOV 21 11:00 AM '07

ORIGINAL

TABLE OF CONTENTS

I. Introduction.....1

II. Issue Statements.....2

III. Statement of the Case.....3

**A. Equity Residential is a Multi-Billion Dollar Company,.....3  
Residing in Illinois**

**B. National Surety, An Illinois Corporation, Wrote Two.....4  
Commercial General Liability Policies in Effect in 1997 and  
1998, More Than Five Years Before Equity Residential  
Converted Apartments Located in Washington to  
Condominiums, and Became the Target of Construction-  
Defect Litigation**

**C. The Insurance Contract Disputes At Issue in This.....5  
Declaratory Judgment Action Have No Connection to  
Washington**

**D. National Surety Filed a Declaratory Judgment Action in...7  
Illinois, A More Convenient Forum For Resolving the  
Disputes At Issue**

**E. Equity Residential Previously Argued That Illinois is the...8  
Proper Forum For Litigating Its Insurance Contract  
Disputes**

**F. Exercising Reasonable Discretion, The Trial Court.....12  
Agreed That Illinois Was The Proper Forum For  
Resolution Of These Insurance Contract Disputes**

IV. Argument.....13

**A. Standard of Review.....13**

**B. The Trial Court Properly Exercised Discretion in.....13  
Dismissing This Case Because the Illinois Court Provides  
An Adequate Alternate Forum to Litigate The Essential  
Subject Matter Of this Dispute**

1.	<b>The COAs Are Not Necessary parties Because.....16 They Do Not Have An Interest in the Subject Matter of the Declaratory Action, Nor Will They be Materially Affected by its Outcome</b>
2.	<b>Joinder of the COAs is Not Necessary to Protect...20 the Interests of National Surety or Equity Residential</b>
3.	<b>Joinder of the COAs is Not Necessary to make a...21 Complete Determination of the Controversy at Issue</b>
C.	<b>The Trial Court Properly Exercised its Discretion in.....22 Dismissing the Case Because the Public and Private <i>Forum Non Conveniens</i> Factors Favor Illinois As the More Convenient Forum For This Controversy</b>
1.	<b>On Balance, the Private Factors Favor Illinois as...23 the More Convenient Forum</b>
2.	<b>On Balance, the Public Factors Favor Illinois as...24 the More Convenient Forum</b>
a.	<b>Illinois Has a Strong Interest in the.....24 Controversy</b>
b.	<b>Washington Has No Interest in.....25 Controversy</b>
3.	<b>The Location of Property Damage Should Not.....26 Be Given Weight in the <i>Forum Non Conveniens</i> Analysis When the Action Relates to the Interpretation and Application of an Insurance Contract</b>
V.	<b>Conclusion.....27</b>

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page No.</u>
<i>Allied American Ins. Co. v. Ayala</i> , 247 Il.App.3d 538, 616 N.E.2d 1349, 186 Ill.Dec. 717 (1993).....	17
<i>Bituminous Casualty Corp. v. Gust K. Newburg Construction Co.</i> 218 Ill.App.3d 956, 578 N.E.2d 1003, 161 Ill.Dec. 357 (1991).....	18
<i>Chandler v. Doherty</i> , 299 Ill.App.3d 797, 702 N.E.2d 634, 234 Ill.Dec. 294 (1998).....	17
<i>Consumer Construction Co. v. American Motorists Insurance Co.</i> , 118 Ill.App.2d 441, 254 N.E.2d 265 (1969).....	18
<i>Flashner Medical Partnership v. Marketing Mgmt., Inc.</i> , 189 Ill.App.3d 45, 545 N.E.2d 177, 136 Ill.Dec.653 (1989).....	17
<i>Georgia Pacific Corp. v. Sentry Select Ins. Co.</i> , 2006 WL 1525678 (S.D.Ill. May 26, 2006) .....	17
<i>Gulf Oil Corp. v. Gilbert</i> , 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947).....	23
<i>Harbor Insurance Co. v. Tishman Construction Co.</i> , 218 Ill.App.3d 936, 578 N.E.2d 1197, 161 Ill.Dec. 551 (1991).....	19
<i>Hill v. Jawanda Transport Ltd.</i> , 96 Wn. App. 537, 983 P.2d 666 (1999).....	14
<i>Holzer v. Motorola Lighting, Inc.</i> , 295 Ill.App.3d 963, 693 N.E.2d 446, 230 Ill.Dec. 317 (1998).....	15, 21, 22
<i>J.H. Baxter &amp; Co. v. Central National Insurance Co. of Omaha</i> , 105 Wn. App. 657, 20 P.3d 967 (2001).....	27
<i>Johnson v. Spider Staging Corp.</i> , 87 Wn.2d 577, 555 P.2d 997 (1976).....	13, 14
<i>Lain v. John Hancock Mutual Life Ins. Co.</i> , 79 Il.App.3d 264, 398 N.E.2d 278 ,34 Ill.Dec. 603, (1979).....	20

<i>Monticello Insurance v. Wil-Freds Construction, Inc.</i> 277 Ill.App.3d 697, 661 N.E.2d 451, 214 Ill.Dec. 597 (1996).....	18
<i>Myers v. Boeing Co.</i> , 115 Wn.2d 123, 128, 794 P.2d 1272 (1990).....	14, 23
<i>Oglesby v. Springfield Marine Bank</i> , 385 Ill. 414, 52 N.E.2d 1000 (1944).....	16
<i>Safeco Ins. Co. v. Treinis</i> , 238 Ill.App.3d 541, 606 N.E.2d 379, 179 Ill.Dec. 547 (1992).....	16, 20
<i>Sales v. Weyerhaeuser Co.</i> , 163 Wn.2d 14, 177 P.3d 1122 (2008).....	13
<i>Skidmore v. Throgmorton</i> , 323 Ill.App.3d 417, 751 N.E.2d 637, 256 Ill.Dec. 247 (2001).....	17
<i>Trovillion v. U.S. Fidelity and Guaranty Co.</i> 130 Ill.App.3d 694, 474 N.E.2d 953, 86 Ill.Dec. 39 (1985).....	18
<i>Society of Mount Carmel v. National Ben Franklin Ins. Co. of Illinois</i> , 268 Ill.App.3d 655, 205 Ill.Dec. 673, 643 N.E.2d 1280 (1994).....	15, 16, 17
<i>Sullivan v. Merchants Property Insurance Co. of Indiana</i> , 68 Ill.App.3d 260, 385 N.E.2d 897, 24 Ill.Dec. 756 (1979).....	22
<i>Williams v. Madison County Mut. Auto. Ins. Co.</i> , 40 Ill.2d 404, 240 N.E.2d 602 (1968).....	17
<i>Zurich Insurance Co. v. Raymark Industries, Inc.</i> , 144 Ill.App.3d 943, 98 Ill.Dec. 508, 494 N.E.2d 630 (1986).....	15
<b><u>Statutes</u></b>	<b><u>Page No.</u></b>
735 Ill.Comp.Stat. 5/2-406.....	15
735 ILCS 5/2-408.....	19

## I. INTRODUCTION

Equity Residential, an Illinois real estate investment trust, initiated this insurance coverage action in Washington against National Surety Company, an Illinois corporation. The only connection to the insurance contract has to this state is that the properties in the underlying construction-defect lawsuits are located in King and Snohomish Counties. The Honorable Mary Yu properly exercised her discretion when she dismissed this case in favor of the pending action brought by National Surety Company to resolve the same controversies at issue in the more convenient forum of the Circuit Court of Cook County, Illinois.

Equity Residential challenges Judge Yu's exercise of discretion, arguing that the Illinois state court is not an adequate alternate forum because the court cannot establish personal jurisdiction over the plaintiffs in the underlying lawsuits. Equity Residential is a multi-billion dollar real estate investment trust that owns and manages well over 500 multifamily residential properties from its headquarters in Chicago, Illinois, and maintains reserves of fifty million dollars in available cash. There is no dispute that Equity Residential is capable of funding any judgment awarded in the underlying lawsuits, regardless of the outcome of the insurance contract dispute. Thus, the underlying plaintiffs are not necessary parties to the Illinois action because they have no legal or

beneficial interest in this dispute, nor will they be affected by the outcome. The Cook County, Illinois court is in fact an adequate alternate forum for this controversy.

Equity Residential also challenges Judge Yu's determination that the private and public *forum non conveniens* factors favor Illinois because, they argue, the alleged property damage occurred in Washington. This is not an environmental liability case where the local community has a legitimate interest in the declaratory judgment action because it may bear the expense of remediation if there is a finding of non-coverage. There is no danger that Washington will bear the cost of any judgment awarded in the underlying lawsuits given Equity Residential's corporate wealth, no matter how the insurance contract dispute is decided. By comparison, a finding that there is no duty to defend or indemnify Equity Residential under the National Surety policies will only impact the community in Illinois. Because Washington has no other interest in this controversy, the order of dismissal reflects Judge Yu's reasonable exercise of discretion and should be affirmed.

## II. ISSUE STATEMENTS

**Issue No. 1:** Is Illinois an adequate alternative forum for this insurance dispute when it allows the parties who have a legal or beneficial

interest in the subject matter of the litigation, and who will be affected by the action, to litigate their claims in that jurisdiction?

**Issue No. 2:** Where suit is brought to determine the rights and obligations of a liability carrier under a policy issued in Illinois to an Illinois company, should the trial court's discretionary ruling deferring to an Illinois court's jurisdiction be upheld?

### III. STATEMENT OF THE CASE

#### A. EQUITY RESIDENTIAL IS A MULTI-BILLION DOLLAR COMPANY, RESIDING IN ILLINOIS

Equity Residential is a real estate investment trust that owns and manages residential properties across the country, including properties in Illinois, with its principal place of business located in Chicago, Illinois.<sup>1</sup> Equity Residential also is the general partner and majority owner of the ERP Operating Limited Partnership, an Illinois LLC.<sup>2</sup> All business operations are conducted by the operating partnership and its 799 subsidiaries under the umbrella of the Equity Residential trust.<sup>3</sup>

The company boasts that it "is one of the largest publicly traded real estate companies and is the largest publicly traded owner of multifamily properties."<sup>4</sup> As of December 31, 2007, Equity Residential

---

<sup>1</sup> CP 479, 520.

<sup>2</sup> CP 520.

<sup>3</sup> CP 520, 523-34.

<sup>4</sup> CP 520.

“owned all or a portion of 579 properties in 24 states and the District of Columbia consisting of 152,821 units.”<sup>5</sup> According to its 2007 Form 10-K filing with the Securities and Exchange Commission, Equity Residential did not believe that any pending or threatened litigation against it, individually or in the aggregate, would reasonably be expected to have a material adverse effect on the Company.<sup>6</sup> That same filing shows that as of December 31, 2007, Equity Residential had total assets exceeding 15 billion dollars, liabilities of 10 billion dollars, and 50 million dollars in available cash.<sup>7</sup>

**B. NATIONAL SURETY, AN ILLINOIS CORPORATION, WROTE TWO COMMERCIAL GENERAL LIABILITY POLICIES IN EFFECT IN 1997 AND 1998, MORE THAN FIVE YEARS BEFORE EQUITY RESIDENTIAL CONVERTED APARTMENTS LOCATED IN WASHINGTON TO CONDOMINIUMS, AND BECAME THE TARGET OF CONSTRUCTION-DEFECT LITIGATION**

National Surety, an Illinois corporation,<sup>8</sup> wrote two commercial general liability (“CGL”) policies at issue in this case.<sup>9</sup> During the time these policies were in effect, 1997 and 1998, Equity Residential did not exist in name. It was not until four years after the last National Surety policy expired that Equity Residential came into existence when Equity

---

<sup>5</sup> *Id.*

<sup>6</sup> CP 521.

<sup>7</sup> CP 522.

<sup>8</sup> CP 432.

<sup>9</sup> CP 587-733, 736-900.

Residential Properties Trust amended its documents to reflect the new identity.<sup>10</sup>

Between 2003 and 2005, more than five years after the National Surety policies expired, four subsidiary LLCs were formed under the Equity Residential umbrella for the purpose of converting apartments into condominiums.<sup>11</sup> These conversion projects were located in King and Snohomish County, Washington.<sup>12</sup> Beginning in 2005, allegations of construction defects at each of these locations were made by the respective condominium owners' associations ("COAs"). These complaints eventually gave rise to five lawsuits (the "underlying lawsuits") filed against Equity Residential, the associated LLCs, and other Equity entities in King and Snohomish County Superior Court.<sup>13</sup>

**C. THE INSURANCE CONTRACT DISPUTES AT ISSUE IN THIS DECLARATORY JUDGMENT ACTION HAVE NO CONNECTION TO WASHINGTON**

Equity Residential tendered the complaints in the underlying lawsuits to National Surety long after it had notice of the construction-defect claims, and in some cases, long after suit had been filed.<sup>14</sup> Before National Surety could reasonably investigate its obligations under the

---

<sup>10</sup> CP 433.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> CP 428-29, 434.

<sup>14</sup> CP 434.

CGL policies to determine whether it should accept or decline the duty to defend,<sup>15</sup> Equity Residential filed this lawsuit.<sup>16</sup> Originally, Equity Residential filed suit in its name only.<sup>17</sup> But in November 2008, Equity Residential added the LLCs as plaintiffs.<sup>18</sup> At no time has Equity Residential sought to include the COAs in this action, nor have they moved to intervene.

In its complaint, Equity Residential sought a declaration of indemnification for the underlying lawsuits under the National Surety policies, and a declaration that National Surety was estopped from denying coverage because it failed to defend in bad faith.<sup>19</sup> Equity Residential also sought treble damages under the Consumer Protection Act (“CPA”).<sup>20</sup>

In October 2008, National Surety accepted the defense of the underlying lawsuits under a reservation of rights.<sup>21</sup> Because the defense was accepted with reservation, and even though National Surety is contributing to Equity Residential defense costs in the underlying lawsuits, controversies involving the duty to defend still exist. Namely, whether

---

<sup>15</sup>CP 435.

<sup>16</sup>CP 1-10 (First Amended Complaint), 435-36 (Complaint).

<sup>17</sup>CP 1230.

<sup>18</sup>CP 1-10.

<sup>19</sup>Id.

<sup>20</sup>Id.

<sup>21</sup>CP 434.

National Surety actually owes a defense, and if so, whether it owes pre-tender attorney fees and costs.<sup>22</sup>

**D. NATIONAL SURETY FILED A DECLARATORY JUDGMENT ACTION IN ILLINOIS, A MORE CONVENIENT FORUM FOR RESOLVING THE DISPUTES AT ISSUE**

In February 2009, National Surety filed a declaratory judgment action against Equity Residential, the LLCs, and other Equity entities in the Circuit Court of Cook County, Illinois.<sup>23</sup> By that action, National Surety seeks to have the essential subject matter of this case adjudicated in a more convenient forum.<sup>24</sup> Specifically, National Surety seeks a declaration that it owes no duty to defend or indemnify Equity Residential in the underlying lawsuits.<sup>25</sup>

Equity Residential recently filed a motion to dismiss or stay the Illinois action.<sup>26</sup> Surprisingly, Equity Residential did not advance the argument in that motion, like it does here, that the case must be dismissed because the Illinois court cannot establish personal jurisdiction over all necessary parties (the COAs). Instead, Equity Residential argued only that

---

<sup>22</sup> CP 956-57.

<sup>23</sup> CP 466-521.

<sup>24</sup> Id.

<sup>25</sup> CP 466-521.

<sup>26</sup> See Appendix A to Appellant's Opening Brief.

the case should be dismissed because the Washington action constitutes another action pending between the same parties for the same cause.<sup>27</sup>

**E. EQUITY RESIDENTIAL PREVIOUSLY ARGUED THAT ILLINOIS IS THE PROPER FORUM FOR LITIGATING ITS INSURANCE CONTRACT DISPUTES**

Court records from other jurisdictions reveal that when litigating insurance contract disputes like the ones at issue in this case, Equity Residential consistently argues that Illinois is the most convenient forum, regardless of where the property in the underlying suit is located. For example, in 2005, Equity Residential filed a declaratory judgment action concerning an insurance-coverage dispute in the U.S. District Court for the Northern District of Illinois, and named several carriers, including Connecticut Specialty Insurance Company.<sup>28</sup> The underlying claim giving rise to the coverage dispute involved a class-action lawsuit by former tenants of Equity Residential properties located in Florida.<sup>29</sup> Opposing a defense motion to dismiss under the doctrine of *forum non conveniens*, Equity Residential argued that Illinois was the most convenient forum to litigate insurance contract disputes for the following reasons:

- All Plaintiffs were Illinois residents because they all maintained their principal places of business in Illinois;

---

<sup>27</sup> Id.

<sup>28</sup> CP 461-516.

<sup>29</sup> CP 483-501.

- Connecticut Specialty did business in Illinois because it sold an insurance policy to Equity Residential in Illinois;
- All parties had ties to and availed themselves of Illinois law.
- Equity Residential reviewed the policies, made decisions regarding the policy's terms and paid the policy's premiums from its office in Illinois; and,
- The harm caused by a lack of insurance coverage would be felt directly by Equity Residential in Illinois.<sup>30</sup>

That same Florida class action gave rise to another declaratory judgment action on an insurance-coverage claim brought by Genesis Indemnity Insurance Company against Equity Residential Properties Trust in a Florida state court.<sup>31</sup> Relying on the doctrine of *forum non conveniens*, Equity Residential moved to dismiss the Florida action for similar reasons:

- The parties were not Florida corporations or residents (Genesis Insurance is a North Dakota corporation with its principal place of business in Connecticut);
- No evidence or witnesses were located in Florida;
- Illinois and its citizens had a stronger interest in the outcome of the litigation than did Florida;
- A judgment regarding the scope of the subject insurance policy would be enforceable in Florida under the Full Faith and Credit Clause of the Constitution;

---

<sup>30</sup> CP 474.

<sup>31</sup> CP 536-553.

- Because Equity Residential has its principal place of business in Illinois, it would save money and resources by avoiding substantial transportation costs associated with litigating the case in Florida;
- Genesis would not be any more inconvenienced by litigating the case in Illinois; Chicago is a major airline hub, and costs of traveling to Florida would not be outweighed by costs of traveling to Illinois;
- Illinois had a strong public interest in the outcome of the litigation; because Equity Residential resided in Illinois, the harm of a determination of non-coverage would be felt in Illinois, not Florida;
- An Illinois jury that might be called upon to decide the case would not be burdened with a matter unrelated to Illinois; and,
- Florida residents would not be directly impacted by the litigation because the court's decision on insurance coverage would have no bearing on Equity Residential's liability in the underlying suit.<sup>32</sup>

In 2004, Equity Residential filed a declaratory judgment action in Cook County, Illinois, to resolve yet another insurance-coverage dispute arising out of the Florida class action.<sup>33</sup> In opposition to a motion by the carrier to dismiss for *forum non conveniens*, Equity Residential argued that the Cook County suit was “an insurance coverage action that merely calls for the Court to interpret the language of an insurance policy and determine whether that language covers the allegations in an underlying complaint.”<sup>34</sup> Equity Residential once again argued that:

---

<sup>32</sup> CP 544-551.

<sup>33</sup> CP 555-568.

<sup>34</sup> CP 556, 564.

- Equity Residential was a resident of Illinois and maintained its principal place of business there, which, they argued, was a key factor for the Court to consider, and weighed heavily in favor of keeping the case in Illinois;
- The primary pieces of evidence in these simple contract-interpretation cases were easily accessible in Illinois;
- Equity Residential reviewed the policies, made the decision to enter into the contracts and paid premiums to the carrier from its home office in Illinois;
- The only connection to the alternate forum was that it was the location of the underlying lawsuit;
- All Equity Residential witnesses were in Illinois; and again,
- Illinois had a strong interest in litigating this case at home, where Equity Residential resides and where the harm to the company would be felt.<sup>35</sup>

That same declaratory judgment action gave rise to yet another motion to dismiss brought by a different carrier. Equity Residential again opposed, reiterating that all public and private *forum non conveniens* factors weighed in favor of keeping the insurance contract dispute in the most convenient forum - Illinois.<sup>36</sup>

Thus, on at least four occasions, Equity Residential has argued that Illinois is the most convenient forum to resolve insurance contract disputes, regardless of the location of the property that is the subject of the underlying lawsuit. National Surety presented this information to Judge

---

<sup>35</sup> CP 562-567.

<sup>36</sup> CP 579-584.

Yu in support of its motion to dismiss.<sup>37</sup> Only here does Equity Residential take the position that its insurance contract disputes should be resolved in a forum other than Illinois.

**F. EXERCISING REASONABLE DISCRETION, THE TRIAL COURT AGREED THAT ILLINOIS WAS THE PROPER FORUM FOR RESOLUTION OF THESE INSURANCE CONTRACT DISPUTES**

On April 10, 2009, Judge Yu heard argument on National Surety's motion to dismiss. By her remarks preceding the arguments of counsel, Judge Yu made clear that she understood the *forum non conveniens* analysis. Specifically, Judge Yu advised counsel that her questions surrounded "the issue of whether or not Illinois is genuinely an adequate alternate forum," and "whether or not the [underlying] claimants are necessary parties."<sup>38</sup> After hearing argument, Judge Yu granted National Surety's motion, holding that:

After reviewing all of the materials that have been submitted, and taking notice of the underlying complaint as well as the underlying lawsuits that are not part of this particular case, it's my determination that the homeowners are not a necessary party to this litigation. This really is an issue of contract interpretation; it's a question of looking at an insurance policy and interpreting the terms.<sup>39</sup>

---

<sup>37</sup> CP 460-516, 536-553, 555-568, and 570-585.

<sup>38</sup> RP 3.

<sup>39</sup> RP 40.

When asked if her ruling included a finding as to whether the COAs were necessary parties to the Illinois lawsuit, Judge Yu indicated that she was not making a finding on that issue:

So I'm not making a ruling that they are necessary or not for purposes of whether or not they should be joined in Illinois. I want to be very clear that I'm not saying that. What I'm simply indicating is that I do not believe that this issue or the questions in this case are connected to the underlying litigation in a way that we would connect them legally for purposes of keeping the case here in the State of Washington to decide an insurance contract issue. I really believe that Illinois has the most significant relationship to what has to be interpreted and that is the contract.<sup>40</sup>

An order of dismissal was entered<sup>41</sup> and Equity Residential timely appealed to this Court.

#### IV. ARGUMENT

##### A. STANDARD OF REVIEW

This Court reviews a trial court's order of dismissal under the doctrine of *forum non conveniens* for abuse of discretion.<sup>42</sup> A trial court abuses its discretion only if the court's decision to dismiss is "manifestly unfair, unreasonable, or untenable."<sup>43</sup>

---

<sup>40</sup> RP 42.

<sup>41</sup> CP 1216-1219.

<sup>42</sup> *Sales v. Weyerhaeuser*, 163 Wn.2d 14, 19, 177 P.3d 1122 (2008).

<sup>43</sup> *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 579, 555 P.2d 997 (1976).

**B. THE TRIAL COURT PROPERLY EXERCISED DISCRETION IN DISMISSING THIS CASE BECAUSE THE ILLINOIS STATE COURT PROVIDES AN ADEQUATE ALTERNATE FORUM TO LITIGATE THE ESSENTIAL SUBJECT MATTER OF THIS DISPUTE**

While a plaintiff exercises the original choice of forum when filing suit, the doctrine of *forum non conveniens* authorizes a trial court to decline jurisdiction if another forum would better serve the convenience of the parties and the ends of justice.<sup>44</sup> This doctrine limits a plaintiff's choice of forum by preventing it from inflicting expense and trouble on the defendant that are not necessary to the plaintiff's right to pursue its remedy.<sup>45</sup>

A defendant seeking such a dismissal bears the burden of showing that an adequate alternate forum exists – a burden that can be overcome.<sup>46</sup> Once a defendant demonstrates the existence of an adequate alternate forum, the trial court then looks to certain private and public interests to determine whether on balance, dismissal is appropriate.<sup>47</sup>

An alternate forum is adequate if it allows the plaintiff to litigate “the essential subject matter of the dispute.”<sup>48</sup> Equity Residential

---

<sup>44</sup> Spider Staging Corp., 87 Wn.2d at 579; Hill v. Jawanda Transport Ltd., 96 Wn. App. 537, 540, 983 P.2d 666 (1999).

<sup>45</sup> Myers v. Boeing, 115 Wn.2d 123, 128, 794 P.2d 1272 (1990).

<sup>46</sup> Hill, 96 Wn. App. at 541.

<sup>47</sup> Id. at 543.

<sup>48</sup> Id. at 542 (citing Capital Currency Exch. N.V. v. National Westminster Bank PLC, 155 F.3d 603, 611 (2<sup>nd</sup> Cir. 1998)).

challenges the adequacy of Illinois court as a proper forum for the declaratory action, arguing that the COAs are necessary parties to the action under Illinois law, but not subject to the personal jurisdiction of that court. A careful review of Illinois case law reveals, however, that the COAs are not necessary parties, and that both Equity Residential and National Surety can litigate the essential subject matter of the dispute in their absence.

Illinois law defines a necessary party as “one who has a legal or beneficial interest in the subject matter of the litigation and will be affected by the action of the court.”<sup>49</sup> In making the determination of whether a party is necessary, Illinois courts look to whether the absent party’s participation is necessary to: 1) protect an interest that the absent party has in the subject matter of the controversy that would be materially affected by a judgment entered in that party’s absence; 2) protect the interests of those already before the court; or 3) enable the court to make a complete determination of the controversy.<sup>50</sup> If these concerns are not at issue, such as the case here, joinder of the absentee party is not required.<sup>51</sup>

---

<sup>49</sup> Society of Mount Carmel v. National Ben Franklin Ins. Co. of Illinois, 268 Ill.App.3d 655, 660, 205 Ill.Dec. 673, 643 N.E.2d 1280 (1994) (quoting Zurich Insurance Co. v. Raymark Industries, Inc., 144 Ill.App.3d 943, 946, 98 Ill.Dec. 508, 494 N.E.2d 630 (1986)). See also, 735 Ill.Comp.Stat. 5/2-406.

<sup>50</sup> Society of Mount Carmel, 268 Ill.App.3d at 660-61; Holzer v. Motorola Lighting, Inc., 295 Ill.App.3d 963, 970, 693 N.E.2d 446, 230 Ill.Dec. 317 (1998).

<sup>51</sup> See generally, Holzer, 295 Ill.App.3d 963.

**1. The COAs Are Not Necessary Parties Because They do Not Have an Interest in the Subject Matter of the Declaratory Action, Nor Will They be Materially Affected by its Outcome**

The COAs have no real interest in the subject matter of the declaratory action that would be materially affected by a judgment entered in their absence because there is no danger that any judgment in their favor not will be satisfied - if Equity Residential prevails, they will be paid through insurance proceeds, and if National Surety prevails, payment will come from Equity Residential's own ample assets. Typically, this concern arises in cases where a party may suffer prejudice if a limited fund may be depleted in that party's absence.<sup>52</sup> This concern may also be present when a declaratory action is brought to determine insurance coverage for an underlying tort claim.<sup>53</sup> In that situation, the tort claimant effectively becomes the real party in interest to the liability policy, and a declaration of non-coverage would eliminate a source, if not all sources, of funds available to cover a judgment in favor of the claimant.<sup>54</sup>

This is not a limited-fund case, nor is it a case where a finding of non-coverage will eliminate the only source of funds available to cover judgments in favor of the COAs. There is no question that Equity

---

<sup>52</sup> Safeco Ins. Co. v. Treinis, 238 Ill.App.3d 541, 546-47, 606 N.E.2d 379, 179 Ill.Dec. 547 (1992) (citing Oglesby v. Springfield Marine Bank, 385 Ill. 414, 52 N.E.2d 1000 (1944)).

<sup>53</sup> Society of Mount Carmel, 268 Ill.App.3d at 661.

<sup>54</sup> Id. (internal citations omitted).

Residential can satisfy any judgment awarded in the underlying lawsuits given its resources, which include assets in excess of 15 billion dollars and 50 million dollars in available cash.<sup>55</sup> By its own admission, Equity Residential does not believe that any pending litigation, individually or in the aggregate, will have a material adverse effect on the company.<sup>56</sup>

Even though the COAs are in no danger of being affected by the outcome of the declaratory action, Equity Residential argues that they are necessary parties because Illinois law mandates joinder. In support of this assertion, Equity Residential cites several cases where Illinois courts found that the underlying tort claimants were necessary parties to the insurance contract dispute.<sup>57</sup> None of these cases govern the circumstances here. First, none of these cases involve underlying claims of defective construction. Rather, the majority of cases involve personal-

---

<sup>55</sup> CP 522.

<sup>56</sup> CP 521.

<sup>57</sup> Allied American Ins. Co. v. Ayala, 247 Ill.App.3d 538, 616 N.E.2d 1349, 186 Ill.Dec. 717 (1993) (finding that the plaintiff in the underlying suit who was injured in a motor-vehicle accident was a necessary party to the declaratory action because she had a substantial interest in the viability of the policyholder's liability insurance); Williams v. Madison County Mut. Auto. Ins. Co., 40 Ill.2d 404, 240 N.E.2d 602 (1968) (same holding); Skidmore v. Throgmorton, 323 Ill.App.3d 417, 751 N.E.2d 637, 256 Ill.Dec. 247 (2001) (same holding); Chandler v. Doherty, 299 Ill.App.3d 797, 702 N.E.2d 634, 234 Ill.Dec.294 (1998) (same holding); Society of Mount Carmel, 268 Ill.App.3d 655 (same holding where the underlying action involved a wrongful-termination claim); and Flashner Medical P'ship v. Marketing Mgmt., Inc., 189 Ill.App.3d 45, 545 N.E.2d 177, 136 Ill.Dec.653 (1989) (same holding where the underlying action involved a medical-malpractice claim). Equity Residential also relies on an unpublished case, Georgia Pacific Corp. v. Sentry Select Ins. Co., 2006 WL 1525678 (S.D.Ill. May 26, 2006) (finding that a plaintiff injured at work was not a necessary party for purposes of establishing diversity jurisdiction on a case removed to federal court to determine whether the policyholder's carrier owed a duty to defend).

injury claims arising out of auto accidents. Second, all of the cases involve tort claimants who may have no ability to recover against the defendant if there was a finding of non-coverage in the declaratory action. As discussed above, the COAs are in no such danger here.

By comparison, several cases applying Illinois law implicitly show that the underlying claimants in construction-defect lawsuits are not necessary parties to declaratory actions between the policyholders and the CGL carriers. For example, the Illinois Court of Appeals addressed insurance disputes arising out of construction-defect claims without joining the underlying claimant in Monticello Insurance v. Wil-Freds Construction, Inc.,<sup>58</sup> Trovillion v. U.S. Fidelity and Guaranty Co.,<sup>59</sup> Consumer Construction Co. v. American Motorists Insurance Co.,<sup>60</sup> and Bituminous Casualty Corp. v. Gust K. Newburg Construction Co.<sup>61</sup>

The conclusion that the COAs are not necessary parties is further supported by the fact that in its own motion to dismiss the Illinois case, Equity Residential never argued that the COAs were necessary parties. Instead, Equity Residential argued only that the Illinois case should be dismissed because this case is pending in Washington.<sup>62</sup>

---

<sup>58</sup> 277 Ill.App.3d 697, 661 N.E.2d 451, 214 Ill.Dec. 597 (1996).

<sup>59</sup> 130 Ill.App.3d 694, 474 N.E.2d 953, 86 Ill.Dec. 39 (1985).

<sup>60</sup> 85 Ill.App.2d 441, 254 N.E.2d 265 (1969).

<sup>61</sup> 218 Ill.App.3d 956, 578 N.E.2d 1003, 161 Ill.Dec. 357 (1991).

<sup>62</sup> See Appendix A to Appellant's Opening Brief.

That Illinois courts allow insurance disputes to be resolved between the policyholders and carriers without joining the claimants in the underlying construction-defect suits does not mean that those claimants are prohibited from participating in the declaratory action. For example, in Harbor Insurance Co. v. Tishman Construction Co., the CGL carrier named the claimant in the underlying construction-defect lawsuit as a defendant in the insurance-coverage dispute.<sup>63</sup> Should the COAs determine that their interests are not being adequately represented in the Illinois case, they could waive personal jurisdiction and move to intervene.<sup>64</sup> It is unlikely that the COAs would take this step, however, given that they never sought to intervene in this case.

Aside from ensuring that Equity Residential will be able to satisfy a judgment, the COAs have no other interest in the subject matter of this controversy. As stated in the declaratory actions filed in both Washington and Illinois, and as acknowledged by Judge Yu in her oral ruling, the subject matter of this controversy is limited to the rights and obligations of Equity Residential and National Surety under the CGL policies (i.e., the duties to defend and indemnify, the applicability of policy exclusions, and

---

<sup>63</sup>218 Ill.App.3d 936, 578 N.E.2d 1197, 161 Ill.Dec. 551 (1991).

<sup>64</sup> 735 ILCS 5/2-408.

Equity Residential's compliance with coverage conditions), and to whether National Surety engaged in bad faith.<sup>65</sup>

## **2. Joinder of the COAs is Not Necessary to Protect the Interests of National Surety or Equity Residential**

Joinder of the COAs in the Illinois action is not necessary to protect the interests of National Surety and Equity Residential. Typically, this concern arises “where the existing parties may later be subject to multiple liability because of the absence of the party.”<sup>66</sup> Because the subject of this controversy centers around a contract dispute, and because the COAs are not a party to that contract, neither Equity Residential nor National Surety will be liable to the COAs on the contract. Of course, Equity Residential may be liable to the COAs in the underlying suits, but that is a separate matter, not at issue in the declaratory judgment action.

By way of comparison, National Surety would be exposed to multiple additional lawsuits if the case remained in Washington because there are Equity entities named in the underlying lawsuits that did not join as plaintiffs in this case, but are seeking coverage under the National Surety policies.<sup>67</sup> The suit brought by National Surety in Illinois names all related Equity entities, thereby protecting National Surety from exposure

---

<sup>65</sup> CP 384, CP 902, RP 40.

<sup>66</sup> *Treinis*, 238 Ill.App.3d at 546-47 (citing *Lain v. John Hancock Mutual Life Ins. Co.*, 79 Ill.App.3d 264, 268-69, 34 Ill.Dec. 603, 398 N.E.2d 278 (1979)).

<sup>67</sup> The COAs, and individual condominium-unit-owner plaintiffs all named Equity entities ERPMC and ERP Operating Limited Partnership as defendants. See CP 428-29.

to multiple liabilities.<sup>68</sup>

### **3. Joinder of the COAs is Not Necessary to Make a Complete Determination of the Controversy at Issue**

As previously noted, the controversies at issue in this case are the rights and obligations of Equity Residential and National Surety under the insurance contracts that were negotiated, entered into, and expired years before the conversion of the condominiums or formation of the COAs. A complete determination of these issues can be had without their participation. Indeed, regardless of how the Illinois court rules on the duties to defend and indemnify, that court's decisions will bring a complete resolution to the controversy - either National Surety will owe a duty to defend and/or indemnify, or it will not. That the COAs have little, if anything, to add to the resolution of this controversy is made further evident by the fact that the COAs never sought to intervene in this case.

Assuming *arguendo* that the COAs were necessary to achieve a complete determination of the controversy at issue, the court's determination of whether joinder is required (i.e., whether the COAs are indispensable) for this reason is discretionary, not mandatory, under Illinois law.<sup>69</sup> In other words, even if the COAs were found to be necessary to achieve a complete determination of the case, the Illinois

---

<sup>68</sup> CP 902.

<sup>69</sup> Holzer, 295 Ill.App.3d at 978-79.

court could allow the case to proceed in their absence because Illinois law recognizes that “the rules requiring joinder may ‘bend’ when it is ‘next to impossible to join all the parties indispensable to the litigation.’”<sup>70</sup>

**C. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DISMISSING THIS CASE BECAUSE THE PUBLIC AND PRIVATE *FORUM NON CONVENIENS* FACTORS FAVOR ILLINOIS AS THE MORE CONVENIENT FORUM FOR THIS CONTROVERSY**

Equity Residential also challenges the order of dismissal on grounds that National Surety failed to show that the private and public factors applicable to the *forum non conveniens* analysis weigh in favor of Illinois state court as a more convenient forum when the property damage in the underlying lawsuits occurred in Washington. Regardless of the location of the property damage, there is no evidence that Judge Yu abused her discretion in balancing the several private and public factors that must be considered in the *forum non conveniens* analysis.

Under Washington law, the private factors to be considered include: 1) the relative ease of access to evidence; 2) availability of compulsory process for attendance of unwilling witnesses; 3) costs of obtaining the attendance of witnesses, 4) the possibility of viewing the

---

<sup>70</sup> Holzer, 295 Ill.App.3d at 979 (quoting Sullivan v. Merchants Property Insurance Co. of Indiana, 68 Ill.App.3d 260, 263, 385 N.E.2d 897, 24 Ill.Dec. 756 (1979)).

premises if appropriate to the action; and 5) all other practical problems that make trying a case easy, expeditious and inexpensive.<sup>71</sup>

Public factors take into consideration the greater impact of litigation on the community as a whole. They require the consideration of: 1) administrative difficulties and court congestion; 2) whether jury duty ought to be imposed upon the people of a community that has no relation to the litigation; 3) the need to hold the trial in their view of people who will be affected by it; 4) the interest in having localized controversies decided at home; and 5) difficulties associated with the application of foreign law.<sup>72</sup>

**1. On Balance, the Private Factors Favor Illinois as the More Convenient Forum**

Application of the private interest factors reveals that this case has a minimal relationship to Washington. For example, there are no witnesses with knowledge of the National Surety policies in Washington. Similarly, there is no evidence relating to the interpretation or application of those policies in Washington. The relevant physical evidence is limited to documents generated in Illinois and other states excluding Washington, making the possibility of a view of the premises irrelevant.

---

<sup>71</sup> Myers, 115 Wn.2d at 128 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)).

<sup>72</sup> Id.

Other private factors similarly weigh in favor of Illinois. National Surety is incorporated in Illinois. Equity Residential maintains its principal place of business in Illinois. And the necessity of travel to Washington for purposes of deposition, trial testimony and other litigation-related purposes poses a practical and financial inconvenience to all parties.

**2. On Balance, the Public Factors Favor Illinois as the More Convenient Forum**

Application of the public interest factors also favors Illinois as the most convenient forum because that community has a strong interest in the outcome of this matter.

**a. Illinois Has a Strong Interest in the Controversy**

Illinois has an interest in providing a forum for businesses residing in the state, including in particular, the multi-billion-dollar company, Equity Residential. Illinois certainly has an interest in the application of its state law (an issue that was separately briefed and argued before Judge Yu, but not ruled on because the case was dismissed<sup>73</sup>).

Should this matter proceed to trial, a jury of Illinois residents will have an interest in rendering a verdict concerning its own corporate resident because any harm or benefit resulting from the ultimate

---

<sup>73</sup> CP 1714-1733.

determination as to coverage and extra-contractual obligations will manifest in Illinois. In other words, should there be a determination that there is no coverage under the National Surety policies, that harm will befall Equity Residential at its principal place of business in Illinois. Similarly, a finding of coverage will benefit Equity Residential at its principal place of business in Illinois.

**b. Washington Has No Interest in the Controversy**

By comparison, Washington has no apparent interest in this dispute. No party to this lawsuit resides in Washington. Should this matter proceed to trial, a jury of Washington residents will be burdened with a matter unrelated to their state. Any harm or benefit resulting from the ultimate determination as to coverage and extra-contractual obligations will not impact Washington in light of Equity Residential's stated wealth and undisputed ability to cover any judgment awarded the COAs in the underlying lawsuits.

With respect to administrative difficulties in the local forum, King County Superior Court is experiencing a massive budget shortfall. Consequently, the practice of forum shopping by litigants who chose not to file suit in the jurisdiction with the direct ties to the insurance contract needs be closely scrutinized.

**3. The Location of Property Damage Should Not be Given Weight in the *Forum non Conveniens* Analysis When the Action Relates to the Interpretation and Application of an Insurance Contract**

Equity Residential acknowledges that the issue of whether National Surety owes a duty to defend is a limited question of contract interpretation. Equity Residential goes on to argue, however, that the issue of indemnification is one that turns on actual liability, and that Washington is the more convenient forum because it is the location of the evidence of property damage in the underlying lawsuits.

This argument is misplaced because it presumes that Washington law applies and that the parties will have to litigate facts related to the underlying construction-defect claims to determine whether policy exclusions apply. Equity Residential puts the cart before the horse; such evidence is irrelevant under Illinois law because construction defects are not covered “occurrences” under general liability policies.<sup>74</sup> Application of Illinois law ends the coverage dispute. Equity Residential also fails to acknowledge the coverage issues that involve documentary evidence located outside of Washington, including evidence relating to whether Equity Residential is entitled to benefits even though it is not a named insured, and evidence that it failed to comply with policy notice

---

<sup>74</sup> CP 1714-1733 (National Surety’s Motion for Partial Summary Judgment Declaring the Illinois Law Applies).

requirements. This argument also contradicts positions Equity Residential has taken in similar declaratory judgment actions where it argued that these disputes are simple contract-interpretation cases – not cases requiring full-blown litigation of the underlying claims.

Equity Residential relies on J.H. Baxter & Co. v. Central National Insurance Co. of Omaha, an environmental-liability case, to argue that the underlying loss location dictates the most convenient forum.<sup>75</sup> The case does not establish such a rule. In Baxter, the trial court found that California’s public interest weighed most heavily in the *forum non conveniens* analysis because the insured was headquartered in California, and because that state was the location of the largest loss, therefore its residents would be most affected by the insurance-coverage litigation. Division One recognized that the *forum non conveniens* factors are flexible and case specific, noting that another court might have exercised proper discretion to reach a different outcome when presented with the same facts.<sup>76</sup>

#### IV. CONCLUSION

The subject of the litigation between Equity Residential, an Illinois real estate development trust, and National Surety, an Illinois corporation,

---

<sup>75</sup>105 Wn. App. 657, 20 P.3d 967 (2001). Equity Residential also cites Vulcan Materials Co. v. Alabama Ins. Guaranty Assoc., 985 So.2d 376 (Ala. 2007), an Alabama state court case that is not persuasive authority here.

<sup>76</sup>105 Wn. App. at 665.

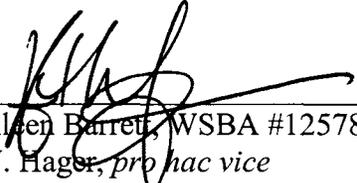
involves the rights and obligations of those parties under CGL policies. The only connection these policies have to Washington is that Equity Residential was sued in King and Snohomish Counties after converting some of its apartment buildings to condominiums years after the National Surety policies expired.

Judge Yu properly exercised her discretion under the *forum non conveniens* analysis. First, Illinois is an adequate alternate forum because all necessary parties can litigate the essential subject matter of this insurance contract dispute to achieve a complete determination of the controversy. The participation of the COAs is not required because they have no legal or beneficial interest in the dispute, nor will they be affected by the outcome, regardless of which party prevails.

Second, the private and public *forum non conveniens* factors favor Illinois. Unlike an environmental liability case where the local community may feel the impact of a finding against the policyholder, a finding of non-coverage will not impact Washington residents because Equity Residential is capable of funding any judgment awarded to the COAs. By comparison, a finding of non-coverage will impact Illinois residents. Judge Yu's order of dismissal should be affirmed.

Respectfully submitted this 19<sup>th</sup> day of August, 2009.

**BARRETT & WORDEN, P.S.**



---

M. Colleen Barrett, WSBA #12578  
John V. Hager, *pro hac vice*  
Heather M. Jensen, WSBA #29635  
Attorneys for Respondent National Surety  
Company