

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-CV-81205-RAR**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS
GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.

**RECEIVER’S SUR-REPLY TO DEFENDANT DEAN VAGNOZZI’S
REPLY TO RECEIVER’S RESPONSE IN OPPOSITION TO VAGNOZZI’S
MOTION FOR LEAVE TO FILE DECLARATORY JUDGMENT ACTION**

Ryan K. Stumphauzer, Court-Appointed Receiver of the Receivership Entities,¹ pursuant to Local Rule 7.1(c), files this Sur-Reply to Defendant Dean Vagnozzi’s (“Vagnozzi”) Reply to

¹ The “Receivership Entities” are Complete Business Solutions Group, Inc. d/b/a Par Funding; Full Spectrum Processing, Inc.; ABetterFinancialPlan.com LLC d/b/a A Better Financial Plan; ABFP Management Company, LLC f/k/a Pillar Life Settlement Management Company, LLC; ABFP Income Fund, LLC; ABFP Income Fund 2, L.P.; United Fidelis Group Corp.; Fidelis Financial Planning LLC; Retirement Evolution Group, LLC; RE Income Fund LLC; RE Income Fund 2 LLC; ABFP Income Fund 3, LLC; ABFP Income Fund 4, LLC; ABFP Income Fund 6, LLC; ABFP Income Fund Parallel LLC; ABFP Income Fund 2 Parallel; ABFP Income Fund 3 Parallel; ABFP Income Fund 4 Parallel; ABFP Income Fund 6 Parallel; ABFP Multi-Strategy Investment Fund LP; ABFP Multi-Strategy Investment Fund 2 LP; MK Corporate Debt Investment Company LLC; Fast Advance Funding LLC; Beta Abigail, LLC; New Field Ventures, LLC; Heritage Business Consulting, Inc.; Eagle Six Consultants, Inc.; 20 N. 3rd St. Ltd.; 118 Olive PA LLC; 135-137 N. 3rd St. LLC; 205 B Arch St Management LLC; 242 S. 21st St. LLC; 300 Market St. LLC; 627-629 E. Girard LLC; 715 Sansom St. LLC; 803 S. 4th St. LLC; 861 N. 3rd St. LLC; 915-917 S. 11th LLC; 1250 N. 25th St. LLC; 1427 Melon St. LLC; 1530 Christian St. LLC; 1635 East Passyunk LLC; 1932 Spruce St. LLC; 4633 Walnut St. LLC; 1223 N. 25th St. LLC; Liberty Eighth Avenue LLC; The LME 2017 Family Trust; Blue Valley Holdings, LLC; LWP North LLC; 500 Fairmount Avenue, LLC; Recruiting and Marketing Resources, Inc.; Contract Financing Solutions, Inc.; Stone Harbor Processing LLC; LM Property Management LLC; and ALB Management, Inc., and the Receivership also includes the properties located at 107 Quayside Dr., Jupiter, FL 33477; and 2413 Roma Drive, Philadelphia, PA 19145.

the Receiver's Response in Opposition [ECF No. 1665] ("Response") to Vagnozzi's Motion for Leave to File Declaratory Judgment Action [ECF No. 1654] ("Motion").

In the Motion, Vagnozzi seeks to determine how much insurance coverage may potentially be available for claims he has asserted against his former lawyer. The Receiver made clear in the Response that Vagnozzi lacks standing to pursue these claims. In his Reply, Vagnozzi argues that: (1) Florida's non-joinder statute does not apply in a federal court action; (2) federal common law permits an injured non-party to an insurance contract to seek a declaratory judgment regarding coverage issues; and (3) Pennsylvania law also permits him to pursue his proposed declaratory judgment action. As described below, these are not accurate statements of law.²

I. Florida's Non-Joinder Statute has been applied in federal courts numerous times to prohibit non-parties from pursuing a declaratory judgment against insurers.

Vagnozzi argues that "state law does not apply to the question of standing in the proposed federal declaratory judgment action." (Reply at 3). That is not a correct statement of law. Although the requirement of standing in federal court is governed generally by federal common law, courts in diversity actions must look to substantive state law to determine whether a plaintiff is the real party in interest with standing to pursue a particular claim in federal court. *See Live Entm't, Inc. v. Digex, Inc.*, 300 F. Supp. 2d 1273, 1278 (S.D. Fla. 2003). To that end, courts in the Eleventh Circuit routinely rely upon Florida's Non-Joinder Statute to prohibit an injured non-party from pursuing a declaratory judgment action against an insurer. *See Allstate Ins. Co. v. Stanley*, 282 F. Supp. 2d 1342, 1343–44 (M.D. Fla. 2003) ("Pursuant to section 627.4136(1), the defendants cannot sue Allstate for a declaratory judgment until the defendants have obtained a settlement or

² Vagnozzi also presents arguments regarding whether the litigation stay should be lifted to allow him to pursue this proposed declaratory judgment action. The Receiver rests on his arguments in the Response on this issue.

judgment in the underlying state court actions against Allstate's insureds.”); *Villas at Meadow Lakes Condo. v. U.S. Liab. Ins. Co.*, 12-61469-CIV, 2013 WL 424361, at *3 (S.D. Fla. Feb. 1, 2013) (“Further, because Villas is not an insured, its claims against U.S. Liability come too soon and run afoul of Florida’s Non-Joinder Statute, section 627.4136. As a non-insured, such claims must be brought, if at all, after a judgment or verdict is obtained from the insureds.”); *Colony Ins. Co. v. Total Contracting & Roofing, Inc.*, 10-23091-CIV, 2010 WL 5093663, at *2 (S.D. Fla. Dec. 8, 2010) (“While third-party claimants such as the Smiths can defend a declaratory judgment action against an insured, or intervene in a declaratory judgment initiated by an insurer, the Smiths have not brought any authority to this Court’s attention suggesting that they may raise their own claim against Colony at this time.”) (internal citations omitted); *Penn-Am. Ins. Co. v. Deslin Hotels, Inc.*, CV-90-ORL22TBS, 2013 WL 12158115, at *2 (M.D. Fla. Feb. 22, 2013) (“Under Section 627.4136, a third party beneficiary cannot bring or maintain a cause of action against a liability insurer under the terms of the insurance policy at issue unless the third party beneficiary first obtains a settlement or verdict against an insured for a cause of action which is covered by the insurance policy.”). Thus, contrary to the argument in Vagnozzi’s Reply, federal district courts regularly apply Section 627.4136, Florida Statutes to prohibit a third party, like Vagnozzi, from attempting to pursue a declaratory judgment action involving potential insurance coverage issues.

II. A third-party may not pursue a declaratory judgment claim against an insurer prior to a settlement with or judgment against the insured.

Contrary to Vagnozzi’s suggestion, an injured third party does not have standing to pursue a declaratory judgment action against an insurer, absent a settlement with or judgment against the insured. Vagnozzi suggests that *Fed. Kemper Ins. Co. v. Rauscher*, 807 F.2d 345 (3d Cir. 1986), supports his argument that an “injured third-party like Vagnozzi” has standing to obtain a

declaratory judgment action. (Reply at 6). But the injured third-party in *Rauscher* was *not* like Vagnozzi, and that case does not support Vagnozzi's position. In that case, the insurer (not the injured third party) brought a declaratory judgment action against its insured and injured third parties to determine the extent of its obligations under an insurance policy. The court held that the injured third parties could defend against the insurer's declaratory judgment action after a default judgment was entered against the insured. *Id.* at 352-53. That opinion did not, however, support the opposite: permitting a third-party to initiate a declaratory judgment action against the insurer without having first obtained a settlement with or judgment against the insured.

Vagnozzi also suggests that the Eleventh Circuit has held that an injured party has standing to obtain a declaratory judgment against a tortfeasors' insurers, even at a pre-judgment stage, citing *Edwards v. Sharkey*, 747 F.2d 684, 685 (11th Cir. 1984). That case is also distinguishable from the circumstances here. In *Edwards*, the court held that a "case or controversy" existed, even in the absence of a judgment against the insured, because there was a settlement between the third party and the insured:

Finally, even if there was no "case or controversy" before the district court because of the lack of a judgment against the insured, the settlement of the tort actions provides the necessary establishment of the insured's liability.

Id. at 687. Here, Vagnozzi has not obtained a settlement with or a judgment against Eckert Seamans or Pauciulo and, therefore, the cases he cites in his Reply are inapplicable.

III. Even if Pennsylvania Law applies, Vagnozzi could not establish standing.

Finally, Vagnozzi suggests that, under Pennsylvania law, he would be permitted to pursue his proposed declaratory judgment action. (Reply at 3 n.2 (citing to *Rauscher*, 807 F.2d at 353)). But the caselaw Vagnozzi is relying upon arises in the context of an insurance company filing a declaratory judgment action against its insured and the injured third-parties and, therefore, does

not support his argument. Rather, Pennsylvania law is no different than Florida law in holding that a third-party lacks standing to seek a declaratory judgment involving potential coverage issues under an insurance contract. The *Carrasquillo* case clearly explains this distinction:

However, on two occasions, the Third Circuit has held that an injured third party has standing *to defend* itself in a declaratory judgment action brought by an insurer against its insured and the injured third party. . . . Here, unlike the plaintiffs in *Rauscher* . . ., [the injured third party], rather than the insurance company, initiated this declaratory judgment action and seeks to dictate the terms of the contractual relationship between [the insurer] and [the insured]. Under these circumstances, this Court finds that [the injured third party] lacks standing to do so because she seeks a declaration about third parties' legal interests rather than her own.

Carrasquillo v. Kelly, CV 17-4887, 2018 WL 1806871, at *4 (E.D. Pa. Apr. 17, 2018); *see also Joseph Oliver Constr., LLC v. Utica First Ins. Co.*, CV 19-4352-KSM, 2020 WL 3791564, at *5 (E.D. Pa. July 7, 2020) (“[A]n injured third party affirmatively seeking a declaratory judgment against an insurer lacks standing to do so.”); *All. of Nonprofit for Ins. Risk Retention Group v. Transdev, Inc.*, 2:16-CV-01896-MJH, 2019 WL 452492, at *4 (W.D. Pa. Feb. 5, 2019) (same). Accordingly, regardless of whether this Court were to apply the substantive law of Florida or Pennsylvania, Vagnozzi lacks standing to pursue his proposed declaratory judgment action.

IV. Conclusion

WHEREFORE, the Receiver respectfully submits that Vagnozzi lacks standing to pursue his proposed declaratory judgment action against Eckert Seamans and Pauciulo's insurers and, therefore, his Motion should be denied. A proposed Order denying the Motion is attached as Exhibit 1.

Dated: August 28, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 28, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Timothy A. Kolaya
TIMOTHY A. KOLAYA

Exhibit “1”

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS
GROUP, INC. d/b/a PAR FUNDING, et al.,

Defendants.

**[PROPOSED] ORDER DENYING DEAN VAGNOZZI LEAVE TO FILE A
DECLARATORY JUDGMENT COMPLAINT TO DETERMINE INSURANCE
COVERAGE CONCERNING CLAIMS AGAINST ECKERT SEAMANS AND PAUCIULO**

THIS CAUSE comes before the Court upon Defendant Dean Vagnozzi’s Motion for Leave to file a Declaratory Judgment Action Against Insurers of Eckert Seamans and John W. Pauciulo, Esquire [ECF No. 1654] (“Motion”). The Court has reviewed the Motion, the Receiver’s Response to the Motion [ECF No. 1665], Vagnozzi’s Reply in Support of the Motion [ECF No. 1672], the Receiver’s Sur-Reply [ECF No. _____], and the record in this matter.

It is hereby **ORDERED AND ADJUDGED** that:

The Motion is **DENIED**. In the Motion, Defendant Dean Vagnozzi seeks relief from this Court’s stay of litigation provided for in the Amended Order Appointing Receiver [ECF No. 141, ¶¶ 32-34] to permit him to pursue a declaratory judgment action (“Declaratory Judgment Action”) against the insurance companies of the law firm of Eckert Seamans Cherin & Mellott, LLC (“Eckert Seamans”) and its former law partner, John W. Pauciulo (“Pauciulo”). In his proposed Declaratory Judgment Action, Vagnozzi would like this Court to determine the amount of insurance proceeds that may potentially be available to satisfy the claims in his pending lawsuit against Eckert Seamans and

Pauciulo in a Philadelphia state court action, *Vagnozzi v. Eckert Seamans Cherin & Mellott, LLC and John Pauciulo*, Philadelphia Court of Common Pleas Docket No. 2021002115.

Vagnozzi's reliance on *Edwards v. Sharkey*, 747 F. 2d 684 (11th Cir. 1984) and *Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345 (3d Cir. 1986) is misplaced. In *Edwards*, the injured third party who was seeking to pursue a declaratory judgment action—unlike Vagnozzi here—had obtained a settlement with the insured. *See Edwards*, 747 F. 2d at 687. In *Rauscher*, the insurance company—and not the injured third party—was the party seeking a determination of the extent of its obligations under the insurance policy it issued to its insured. *See Rauscher*, 807 F. 2d at 347.

Here, Vagnozzi cannot establish the Article III standing requirements necessary for him to pursue his proposed Declaratory Judgment Action in federal court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Vagnozzi is a third-party to the insurance contracts between Eckert Seamans and its insurers, and has not entered into a settlement with or obtained a judgment against Eckert Seamans and Pauciulo. Accordingly, because he is seeking to litigate declaratory judgment claims over potential losses that have not yet accrued and for which Eckert Seamans and Pauciulo might ultimately bear no liability, this Court declines to permit Vagnozzi to proceed with his Declaratory Judgment Action.

Moreover, the determination of what insurance coverage may potentially be available to satisfy an injured third-parties' claims against an insured is a matter of state law. *See, e.g., Miree v. DeKalb County*, 433 U.S. 25, 29–33 (1977). Regardless of whether Florida or Pennsylvania (or some other state's) law applies to the interpretation of the subject insurance policies, this Court finds that Vagnozzi may not raise the claims in his proposed Declaratory Judgment Action at this time. *See, e.g., Colony Ins. Co. v. Total Contracting & Roofing, Inc.*, 10-23091-CIV, 2010 WL 5093663, at *2 (S.D. Fla. Dec. 8, 2010) (“While third-party claimants such as the Smiths can defend a declaratory judgment action against an insured, or intervene in a declaratory judgment initiated by an insurer, the

Smiths have not brought any authority to this Court’s attention suggesting that they may raise their own claim against Colony at this time.”); *Joseph Oliver Constr., LLC v. Utica First Ins. Co.*, CV 19-4352-KSM, 2020 WL 3791564, at *5 (E.D. Pa. July 7, 2020) (“[A]n injured third party affirmatively seeking a declaratory judgment against an insurer lacks standing to do so.”).

DONE AND ORDERED in Miami, Florida, this _____ day of August, 2023.

RODOLFO A. RUIZ II
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record