

DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO 1777 6 th Street Boulder, CO 80302	FILED Document CO Boulder County District Court 20th JD Filing Date: Oct 7 2004 9:45AM MDT Filing ID: 4345703 Review Clerk: Cindy Farler
CHAD HICKS Plaintiff, v. AMERICAN FAMILY MUTUAL INSURANCE COMPANY Defendant.	COURT USE ONLY Case No.: 04 CV 879 Division 2
ORDER DENYING DEFENDANT'S MOTION TO DISMISS THE CLASS ACTION COMPLAINT	

This matter comes before the Court on Defendant's Motion to Dismiss the Class Action Complaint pursuant to C.R.C.P. 12(b)(5). Having considered the parties' briefs and the applicable law, the Court enters the following Ruling and Order:

I. Background

The allegations in this case stem from Defendant, American Family Insurance Company's alleged failure to offer extended Personal Injury Protection ("PIP") coverage to its Colorado insureds as required by C.R.S. § 10-4-710. Plaintiff Hicks, the putative class representative, on behalf of all similarly situated American Family insureds in Colorado, filed a class action complaint against Defendant alleging that it failed to offer extended PIP benefits to its insured. Plaintiff seeks declaratory and injunctive relief and requests that the Court reform policies of the putative class members to include extended PIP. Accordingly, Plaintiff moves to certify the class pursuant to C.R.C.P. 23(b)(2).

Before Plaintiff filed this case, several other parties have unsuccessfully attempted to certify and pursue class actions against American Family for failing to offer extended PIP coverage. See French v. Am. Family Mut. Ins. Co. et. al, 2000 CV 3162, El Paso County, Colorado ("French"); Marshall v. Am. Family Mut. Ins. Co. et. al, 2003 CV 1081, Adams County, Colorado ("Marshall"); Breaux v. Am. Family Mut. Ins. Co., Case No. 04-N-0191, D. Colo. To date, two of the three other courts to consider these cases have denied class certification.¹ By Motion to Dismiss, Defendant argues that the issue

¹ As of the time of this Ruling and Order, the Federal District Court has not ruled on Breaux's motion to amend the complaint to raise a class action. Thus, this Court does not address Magistrate Judge Watanabe's recommendations.

of certification has been litigated and decided and thus, collateral estoppel precludes Plaintiff from seeking a class certification in this Court.

II. Standard of Review

C.R.C.P. 12(b)(5) allows dismissal of a complaint for failure to state a claim. The purpose of a motion for dismissal under C.R.C.P. 12(b)(5) is to test the formal sufficiency of the complaint. Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911 (Colo. 1996); Dunlap v. Colo. Springs Cablevision, 829 P.2d 1286, 1290 (Colo. 1992). The rules of notice pleading only require “a short and plain statement of the claim showing that the pleader is entitled to relief.” C.R.C.P. 8(a)(2); Shapiro & Meinhold v. Zartman, 823 P.2d 120, 122 (Colo. 1992).

When ruling on a motion to dismiss pursuant to C.R.C.P. 12(b)(5), the court must consider only those matters stated within the four corners of the complaint. Dillinger v. N. Sterling Irrigation Dist., 308 P.2d 608, 609 (1957). All averments of material fact in the complaint must be accepted as true and viewed in a light most favorable to the plaintiff. Dorman, supra; Dunlap, supra; Shapiro, supra. “A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Davidson v. Dill, 180 Colo. 123, 131-132, 503 P.2d 157, 162 (1972) (citing Conley v. Gibson, 355 U.S. 41 (1957)).

III. Merits

Collateral estoppel, or issue preclusion, prevents a party to an earlier proceeding from re-litigating an issue that has already been finally determined in that prior proceeding even where the claims in the two cases differ. “Collateral estoppel precludes a subsequent claim if:

(1) the issue precluded is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding; (2) The party against whom estoppel was sought was a party to or was in privity with a party to the prior proceeding; (3) There was a final judgment on the merits in the prior proceeding; and (4) The party against whom the doctrine is asserted had a full and fair opportunity to litigate the issues in the prior proceeding. City and County of Denver v. Consol. Ditches Co., 807 P.2d 23, 32 (Colo. 1991).

Collateral estoppel does not bar re-litigation of an issue unless the party against whom preclusion is sought (1) raised that issue in the prior proceeding and (2) the issue was actually determined by the adjudicatory body. Bebo Const. Co. v. Mattox & O'Brien, P.C., 992 P.2d 78, 85 (Colo. 1999). In addition, even if another court has previously considered and determined the issue, collateral estoppel applies only if the other tribunal also necessarily adjudicated the issue. Bebo, 992 P.2d at 86. “An issue is necessarily adjudicated when a determination on that issue was necessary to the judgment.” Id.

Applying these elements to the Plaintiff's claims demonstrates that the first element of collateral estoppel is not met in this case. Collateral estoppel is not appropriate under these circumstances because, assuming *arguendo* that the French and Marshall courts actually considered and determined class certification under C.R.C.P. 23(b)(2), any such decision was not "necessary" to either courts' denial of class certification.

Unlike the case at bar, the French and Marshall plaintiffs both brought multiple claims for declaratory as well as monetary relief. Thus, neither court considered the issue of certification solely in a posture of declaratory or injunctive relief under C.R.C.P. 23(b)(2). As such, both courts denied the plaintiff's motion for class certification on two independent grounds. First, In French, Judge Gilbert found that Plaintiff's claim did not meet the requirements under C.R.C.P. 23(a) (e.g. numerosity, commonality, typicality, and adequate representation). After declining certification under C.R.C.P. 23(a), Judge Gilbert nonetheless briefly addressed certification issues under C.R.C.P. 23(b), finding certification inappropriate under C.R.C.P. 23(b)(2) because the plaintiff's claims were predominately for monetary rather than injunctive relief. Similarly, in Marshall, Judge Phelps concluded that class certification was inappropriate under both C.R.C.P. 23(a) and (b) again noting monetary claims predominated the plaintiff's requested relief.

In short, neither judge actually considered the merits of plaintiff's claim for injunctive relief but found only that neither French nor Marshall's claims met the C.R.C.P. 23(a) requirements or, alternatively, that neither plaintiff's claims fell within the ambit of C.R.C.P. 23(b)(2). As a result, any determination of certification under C.R.C.P. 23(b)(2) made by Judges Gilbert and Phelps was not necessary to the judgment to deny class certification. Thus, this Court finds that, to the extent the French and Marshall courts actually considered and decided similar issues relating to injunctive relief, the courts' determinations of those issues were not necessary to the judgments denying class certification. Accordingly, this Court finds that collateral estoppel does not preclude Plaintiff from moving to certify the putative class under C.R.C.P. 23(b)(2).

V. Conclusion

For the above reasons, Defendant's Motion to Dismiss the Class Complaint is DENIED.

Done this 6th day of Oct., 2004.

BY THE COURT:



Morris W. Sandstead, Jr.
District Court Judge

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CERTIFICATE OF SERVICE:
I certify that I electronically served the

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