

## **INCLINATIONS**

It is Judge Mollway's practice, whenever possible, to notify attorneys and pro se parties scheduled to argue motions before her of her inclinations on the motions and the reasons for the inclinations. This is part of Judge Mollway's normal practice, rather than a procedure unique to a particular case, and is designed to help the advocates prepare for oral argument. It is the judge's hope that the advance notice of her inclination and the accompanying reasons will focus the oral argument and permit the advocates to use the hearing to show the judge why she is mistaken or why she is correct. The judge is not bound by the inclination and sometimes departs from the inclination in light of oral argument.

Judge Mollway attempts to communicate her inclinations no later than one working day before a hearing. If your case is not mentioned on the webpage when you check it, please check again later to see whether the webpage has been updated to include the inclination in your case.

The inclination is intended to be only a summary of the court's thinking before the hearing and not a complete legal discussion. The court will issue a written order with a detailed analysis after the hearing.

The parties are reminded that, under Local Rule 7.4, they may not submit supplemental briefs (such as briefs addressing the inclination) unless authorized by the court. The parties are also reminded that they must comply with Local Rule 7.8.

Occasionally, Judge Mollway does not announce an inclination, especially if materials are submitted to her right before the hearing. Because briefing on criminal motions closes just a few days before the hearing, it is not uncommon for her to be unable to announce an inclination on a criminal motion until the start of the hearing itself. Certainly if an evidentiary hearing is scheduled on matters necessary to a decision on either a civil or criminal motion, no inclination will be announced.

Judge Mollway's inclinations may not be cited as authority for any proposition. However, the inclinations will be included with case-related correspondence in the applicable case files for the convenience of the parties.

Judge Mollway announces the following inclinations:

**Mandalay Properties v. County of Kauai, CIV. NO. 04-00446  
SOM/LEK, Motion to Dismiss. (Posted: October 22, 2004)**

Plaintiff Mandalay Properties owns Papa`a Ranch, which includes the "Widemann Reservation." The property, on the island of Kauai, sits next to Papa`a Beach. On June 10, 2004, Kauai Mayor Bryan Baptiste issued a press release stating, "Our research found there is a public road leading to Papa`a Beach across the property called the Widemann Reservation." Mandalay claims that no such road exists, and that Baptiste's statements reduced the value of the Papa`a Bay Ranch by more than \$100,000. Mandalay further argues that the statements made it difficult to market the property and reduced Mandalay's use and enjoyment of it. Accordingly, Mandalay seeks a declaratory judgment in this court stating that there are no government or public roads crossing its property and leading to the beach.

The County of Kauai moves to dismiss the case on three grounds: (1) that this court lacks subject matter jurisdiction because of Haw. Rev. Stat. § 669-1; (2) that this case is not ripe for adjudication; and (3) that this court should exercise its discretion to abstain from ruling. The court is inclined to grant the motion.

The court is inclined to find that it has subject matter jurisdiction over this case. Kauai does not challenge this court's diversity jurisdiction, and the court is not persuaded by Kauai's claims that Haw. Rev. Stat. § 669-1 should affect the jurisdiction of a federal court. See Begay v. Kerr-McGee Corp., 682 F.2d 1311 (9<sup>th</sup> Cir. 1982) ("[S]tate law may not control or limit the diversity jurisdiction of the federal courts.").

The court is inclined, however, to find that this case is not yet ripe for adjudication. The ripeness of a declaratory judgment depends on "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." United States v. Braren, 338 F.3d 971, 975 (9<sup>th</sup> Cir. 2003) (internal citations omitted). Further, a court's ripeness analysis is guided by the prudential concerns of whether the issue is fit for judicial decision and whether the parties will suffer hardship by the court's withholding of consideration. Id.

The court is inclined to find that a substantial controversy of sufficient immediacy does not yet exist. Kauai has not taken any official action, other than the issuance of a

press release. Although the press release states that research indicates the existence of a public road, the press release cautions that the public should not assume the access runs through existing driveways or roads. The press release also notes that the county will be attempting to meet with the landowner to discuss the location of the public access. The request for this declaratory judgment seems premature, as it is not yet clear what further actions Kauai plans to take.

If the court, contrary to its inclination, finds this matter ripe, the court is inclined to find that the factors articulated in Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942), weigh in favor of entertaining this action. Although the court has concerns that this type of action is traditionally the province of the state courts, this court cannot identify any factors counseling abstention. There is no concurrent state action, and it does not appear that this court would be forced to adjudicate any areas of unsettled state law.

**The Hawaii Coalition for Health v. Westport Insurance Corporation, Civil No. 00-00150 SOM/KSC; Motions for Summary Judgment (posted: October 22, 2004)**

This is a diversity action that seeks a declaratory judgment as to insurance coverage. Plaintiffs Hawaii Coalition for Health, Dr. Arleen Jouxson-Meyers, and Dr. Peter Locatelli filed a motion for summary judgment on August 11, 2004, seeking a declaration that their insurance carrier, Defendant Westport Insurance Corporation, had a duty to defend them in a separate case filed in this court, Int'l Healthcare Mgmt. v. The Hawaii Coalition for Health, et al., Civil No. 00-00757 HG/BMK (D. Haw. 2000) ("IHM District Court Case"). Plaintiffs allege that, in August 2001, Westport was acquired by Defendant Fireman's Fund Insurance Company, placing Fireman's Fund in Westport's shoes. See First Amended Complaint (May 14, 2003) ¶ 21. Westport and Fireman's Fund filed a motion for summary judgment. This cross-motion seeks a declaration that there is no duty to defend Plaintiffs under their insurance policy for the claims brought against them in the IHM District Court Case.

The court is inclined to rule that Westport has no duty to defend the Plaintiffs in the IHM District Court Case. First, the court is inclined to rule that the policy is voidable because Hawaii Coalition for Health misrepresented a material fact in applying for the insurance coverage. Hawaii Coalition for Health had received a letter from an attorney, William Kopit, claiming damages resulting from alleged wrongdoing by Hawaii Coalition for Health and others. Hawaii Coalition for Health then applied for insurance from Westport, answering "no" to questions about claims that had been made or were now pending, or about matters that might afford a future claim. It appears that, had Westport known of this misrepresentation, it would not have issued the policy, or would have issued it only at a higher premium. See Haw. Rev. Stat. § 431:10-209; Park v. Gov't Employees Ins. Co., 89 Haw. 394, 399, 974 P.2d 34, 39 (1999).

Hawaii Coalition for Health argues that it made no misrepresentation when it stated that no claim was pending against it. Hawaii Coalition for Health explains (1) that it did not have a definition of "claim" when it made its representation, and (2) that it relied on the advice of an insurance agent, Ralph Johnson, who said that the Kopit letter was not a claim. The court is inclined to find neither contention persuasive.

The instructions to the October 15, 1999, Application for Nonprofit Organization Liability Insurance told Hawaii Coalition for Health to refer to a Westport insurance policy for

the definition of "claim." It is undisputed that Hawaii Coalition for Health did not possess a copy of a Westport insurance policy at that time. However, the instructions also told Hawaii Coalition for Health that, if it was unsure what was meant by the word "claim," it should contact its insurance agent or its attorney. The court is inclined to find that there is nothing in the record indicating that Hawaii Coalition for Health did either. Instead, it appears that it relied on a statement by Johnson that the Kopit letter was not a claim for purposes of a different insurance policy that Hawaii Coalition for Health had with a different insurance company. The court is inclined to rule that, at the time Johnson made the statement, he was not an agent for Westport, and that the record does not indicate facts that would in any way go against the general rule that an insurance broker like Johnson acts on behalf of the insured and cannot bind the insurer. See 7 Holmes' Appleman on Insurance 2d, § 47.10 (1998) ("A conversation between the broker and insured would not be admissible to bind the company, in the absence of a showing of agency, ratification, or estoppel."); see also id. ("The insurer would not be bound, ordinarily, by the mistakes or negligence of a broker."). In May 2000, Arleen Jouxson-Meyers, president of Hawaii Coalition for Health, filled out and signed a Warranty Form to obtain an amended Westport policy. At that time, she (and Hawaii Coalition for Health) had the original Westport insurance policy. Accordingly, the court is inclined to rule that Hawaii Coalition for Health had a definition of "claim" in its possession when Jouxson-Meyers filled out the Warranty Form.

Second, the court is inclined to rule that Westport has no duty to defend because the "claim" at issue in the IHM District Court Case was first made in August 1998. The court is inclined to find that the Kopit letter of August 1998 would have been a "claim" under the policies, which defined "claim" as "any demand for compensatory damages, whether formal or informal, written or oral, as a result of a 'wrongful act'." The Kopit letter demanded \$3.5 million in compensatory damages in light of alleged antitrust violations, tortious interference, and defamation. The court is inclined to rule that, when Hawaii Coalition for Health, Jouxson-Meyers, and Locatelli were sued in the IHM District Court Case, the claims asserted in that case arose out of the same alleged wrongful acts or interrelated wrongful acts as the claims in the Kopit letter, as they were brought by the same plaintiffs and were based on the same conduct discussed in the Kopit letter. The court is inclined to rule that these facts satisfy the policies' definition of an "interrelated wrongful act," which is "an act that arises out of, or is based upon the same, similar, related or repeated fact,

matter, cause of action, demand, transaction, event, circumstances, or situation underlying the circumstances of a 'wrongful act,' whether such 'wrongful act' involves the same or different 'insureds', or the same or different legal causes of action, or the same or different claimants." The court is inclined to rule that, under this definition, it does not matter that the Kopit letter was addressed to Hawaii Coalition for Health, as the claims against the other plaintiffs in this case, Jouxson-Meyers and Locatelli, fall under the definition of "interrelated wrongful act."

Hawaii Coalition for Health argues that the IHM District Court case possibly contained a different claim because the court case involved alleged conduct that occurred after the Kopit letter was sent. Given the definitions used in the policies, the court is inclined to find this argument unpersuasive. Similarly, the court is inclined to find unpersuasive Hawaii Coalition for Health's argument that it tendered new claims in August 2001. Although a motion to file a first amended complaint in the IHM District Court Case had been filed that added claims for libel and trade libel, the court is inclined to rule that those claims arose out of the same conduct discussed in the Kopit letter, especially the conduct underlying the defamation claim in the Kopit letter.

In any event, the parties should come to the hearing prepared to answer the following questions:

- (1) Who was Hawaii Coalition for Health's insurance carrier at the time the Kopit letter was received?
- (2) How did the insurance policy in effect in August 1998 define "claim"?
- (3) In August 1998, what was Johnson's relationship with Hawaii Coalition for Health's insurance carrier and Westport?
- (4) Is there any dispute that, at the time Johnson told Rafael Del Castillo that the Kopit letter did not have to be reported, Johnson did not make that statement on behalf of Westport, as Hawaii Coalition for Health had not even applied for a Westport insurance policy at that time? In other words, is there any dispute about whether Johnson was speaking for Westport when he discussed the Kopit letter in 1998?
- (5) The court notes that the exhibits attached as "Counterclaim" exhibits do not appear to be properly authenticated. Is there any dispute as to the authenticity of any exhibit?