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DISCRETION TO REFUSE JURISDICTION OF ACTIONS FOR DECLARATORY JUDGMENTS

By Edwin Borchard*

Several distinguished insurance lawyers have in recent years charged that the federal courts, in a few insurance cases, had erroneously declined to assume jurisdiction of declaratory actions, notwithstanding the presence of the jurisdictional facts. It is their view that the jurisdiction is mandatory. The latest of such complaints is embodied in an article of Mr. E. R. Morrison, "Federal Declaratory Actions and Casualty Insurance," published in the University of Kansas City Law Review for June 1941.¹ The grievance is directed particularly at the cases of Aetna Casualty & Surety Co. v. Quarles² and American Automobile Ins. Co. v. Freundt³—both of which I believe were correctly decided—and the supposedly harmful influence exerted by these opinions on other cases. Mr. Morrison seems convinced of the soundness of his criticism by reason of the decision of the United States Supreme Court in Maryland Casualty Co. v. Pacific Coal & Oil Co. and Joe Ortega.⁴

It was at one time assumed that a federal court having jurisdiction must exercise it.⁵ In certain actions in personam it had been commonly remarked that even the bringing of a similar action in the state would not oust the federal court of jurisdiction.⁶ Yet certain fairly recent decisions of the Supreme Court,

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¹(1941) 9 U. Kan. City L. Rev. 211. See also bibliography in Borchard, Declaratory Judgments (2d ed. 1941) 312, n. 2.
²(C.C.A. 4th Cir. 1937) 92 F. (2d) 321.
³(C.C.A. 7th Cir. 1939) 103 F. (2d) 613.
⁴(1941) 312 U. S. 270, 61 Sup. Ct. 510, 85 L. Ed. 826.
⁵Cohens v. Virginia, (1821) 6 Wheat. (U.S.) 264, 404, 5 L. Ed. 257.
even in law or equity cases, should have put the insurance lawyers on their guard, the Supreme Court having cited these cases to the proposition that obligatory jurisdiction "has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum."

The broad reasons given by the Supreme Court for this qualification, to be found in "considerations of convenience, efficiency and justice," are especially applicable to the declaratory action because (1) it is not an action strictly legal or equitable but sui generis; (2) because the Uniform Act, merely codifying the general rules of law on the subject, specifically provides that "the court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." This is as much a part of federal law under the Federal Declaratory Judgments Act as if it had been expressly enacted, as is the provision that the "purpose" of the Uniform Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations."

Equally inherent in the remedy is the rule that in principle the declaration must serve a useful purpose. These are broad standards and their application necessarily vests a considerable "discretion" in the courts, state and federal, to determine whether such a useful purpose is served.

The criticism of the insurance lawyers is directed to the refusal of the federal courts in a few cases to entertain jurisdiction of an action of the company for exoneration from liability under the policy when the record showed that a suit against the insured for negligence was pending in the state courts. The circumstances of the case would have enabled the company, without prejudice, to make its defense under the policy in the state courts or there was

F. (2d) 521; 1 Moore, Federal Practice (1938) 227. The tendency of modern legislation, like the Johnson Acts of 1934 and 1937, is to restrict the federal jurisdiction.


*Massachusetts v. Missouri, (1939) 308 U. S. 1, 60 Sup. Ct. 39, 84 L. Ed. 3.*

*Sec. 6.*

*Sec. 12.*

*Borchard, Declaratory Judgments (2d ed. 1941) 279, n. 1.*
some other reason which made it seem appropriate to allow the state jurisdiction to be exercised unhampered by a simultaneous federal suit for contractual immunity. It is these decisions which the insurance lawyers believe erroneous.

In the vast majority of the cases the institution of an autonomous suit for company exoneration from the duty to defend or pay a judgment against the insured in the state action for negligence serves a valuable purpose, of importance also to the injured person, since the state suit may not proceed if it is known that the insurance company, often the only financially responsible entity, never incurred or is released by the insured's breach of warranty or conditions from all liability. The question of policy for the courts is whether jurisdiction of the company's declaratory suit for non-liability or exoneration should be assumed or declined, in the latter event forcing the company (a) to assert its immunity then or later in connection with its defense to the negligence action against the insured, from which duty it claims complete exemption; or (b) to risk standing on its conviction of immunity, let the negligence action, perhaps improperly or even collusively defended by the insured, go to judgment and then make its defense under the policy in a supplemental proceeding for indemnity on the judgment (under statute in some states) or in an action by the insured or injured person in garnishment, or, under some statutes, directly or jointly with the insured.

An immediate decision on the vital question of coverage or company release under the policy is often necessitated by the fact that the company is unable to obtain from the insured a non-waiver agreement, by which, in defending the insured, it reserves its own defenses under the policy. It would therefore enter upon the defense of the state suit in tort, in many states, having unequivocally waived any policy breaches and its defenses thereunder, and would expose itself not only to the expense of defense but to a judgment against the insured. It must either disavow all liability or accept the full defense. Waiver and estoppel bar the assertion of policy defenses. If it fails to defend the state suit and stands on its exemption under the policy, it runs an even greater risk, not only of damages for breach of contract but of a large adverse judgment, since the suit is likely

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to be inadequately defended, if at all, by the insured. While some of the company's defenses under the warranties may be known at once, others, like notice, lack of cooperation, carrying for hire, etc., may not be fully disclosed until the tort action has been begun. In those states where the policy defense may be reserved notwithstanding unwillingness of the insured to sign a non-waiver agreement, or where a waiver is only a presumption which may be overcome, the insurer risks at least the expense and costs of the defense and, unless a state statute limits the insurer's defenses in then contesting the judgment against the insured, he may later have to litigate with the judgment creditor and the insured the question of exemption under the policy.

The courts have recognized this dilemma of the insurer, and have not only granted an independent declaration on the crucial question of coverage and company exoneration under the policy, but until late years occasionally granted an injunction against the prosecution of the state action until the preliminary and vital federal issue had been determined. While such injunctions are now no longer possible,\textsuperscript{14} a matter to be referred to hereafter, judicial economy has not thereby been promoted. The insurance lawyers, not satisfied with the great advantages they have won by the opportunity to institute an independent action for non-liability, have tempted fate by complaining of the few cases in which the federal courts have declined, by refusing jurisdiction, to interfere even indirectly with a state suit already pending involving identical issues. They have also on occasion brought into the federal courts by declaratory action issues which were appropriately sub judice in the state courts, and have thereby aroused prejudice against the insurance companies and against the procedure itself.\textsuperscript{15} It is believed that these complaints and abuses are due to the fact that the declaratory action has been misunderstood and that its justifiable limitations have not been perceived. The misconception has been promoted by the assumption that the recent Supreme Court decision in \textit{Maryland Casualty Co. v. Pacific Coal }\&\textit{ Oil Co.}\textsuperscript{16} holds that the grant of a declaratory judgment is obligatory when the jurisdictional facts are present. This is not justified.

The \textit{Maryland Casualty v. Pacific Case} was a typical federal


\textsuperscript{15}Maryland Casualty Co. v. Boyle Construction Co., (C.C.A. 4th Cir. 1941) 123 F. (2d) 558, 566. Cf. infra p. 691.

\textsuperscript{16}(1941) 312 U. S. 270, 61 Sup. Ct. 510, 85 L. Ed. 826.
action for a declaration of non-liability for lack of coverage brought against the insured and the injured person, one Orteca. Orteca, who had begun a state action in Ohio against the insured, moved in the federal action to be dropped as a defendant, on the alleged ground that a controversy had not yet arisen between Orteca and the insurance company. The circuit court of appeals granted the motion. This view, had it been sustained, would have had a disastrous effect on actions of this kind, since the federal judgment would not have terminated the issue of policy coverage, the injured person remaining unbound, with the further effect that if and when the injured person sought to enforce his state judgment against the insurance company under supplemental process or otherwise, different interpretations of the policy might be announced by federal and state courts. The United States Supreme Court therefore reversed the circuit court of appeals, holding that there was a substantial controversy between the company and Orteca and that he was properly joined as defendant with the insured. This question of the joinder of the injured person as a necessary or proper party defendant was the only one on which there had been an identifiable conflict between decisions of the circuit courts of appeals and the only one on which certiorari was granted.

The mere fact that both insurer and injured person were vital parties in interest, even had they been only potential adversaries, should have sufficed to produce justiciability. This is not the place to criticize the general narrowness of the Supreme Court's view on the question of justiciability, but it is not believed, in spite or because of the Court's refusal to enjoin the state action, that there was any avowal by the Supreme Court that a declaratory action in insurance cases, as Mr. Morrison has assumed, was obligatorily within the jurisdiction of the federal courts. While saying nothing on this subject, it could as readily be concluded that the Court realized the discretionary character of the jurisdiction and the remedy but considered it properly exercised in the case before the Court. The fact is not overlooked that the word "discretion" is ambiguous, and that while it affords the courts some leeway in determining when a useful purpose will be served

17 (C.C.A. 6th Cir. 1940) 111 F. (2d) 214, 215.
18 "Basically, the question in each case is whether . . . there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. . . . That the complaint in the instant case presents such a controversy is plain." 61 Sup. Ct. 510, 512.
19 Borchard, Declaratory Judgments (2d ed. 1941) pp. 33 et seq.
by assuming jurisdiction, and obviously by granting the relief sought, the discretion is not an uncontrolled and unreviewable discretion, but has been hardened by experience into rule, so that we can reasonably well establish under what circumstances the Court is or is not justified in taking jurisdiction of a federal declaratory action. The very fact, however, that the special circumstances of each case must be examined before a definite conclusion can be ventured makes it seem desirable to retain the concept of discretionary jurisdiction, classifying cases under the criterion of the propriety or impropriety of using the discretion to assume or refuse jurisdiction in particular cases. Typical situations undoubtedly develop from this effort to classify facts, and in such cases it is not improper to suggest that discretion has hardened into rule. Since the state and federal issues in the Maryland Casualty Company Case were not the same; and since a useful purpose was served by trying separately the single yet crucial question of coverage under the policy, the Supreme Court obviously was correct in assuming jurisdiction of the company’s federal suit.20

II.

We may assume that the broad scope of the power conferred upon the courts to render declaratory judgments empowers them to determine when a declaration will serve a useful purpose. We may also assume that an autonomous suit by an insurance company asserting non-coverage is usually entertained, certainly where the company, as indicated above, suffers any prejudice or disadvantage by being relegated to its defenses in the state suit for negligence. The important question is to determine when the refusal to exercise full jurisdiction is proper and when it is improper. Experience has now given us perhaps a hundred cases from which conclusions and opinions may be appropriately drawn.

We know, for example, that the refusal is proper where a state action is already pending which can easily adjudicate the entire issue between and among all the parties in interest, a fact which it is believed was present in the Quarles Case and also in the recent case of Maryland Casualty Co. v. Boyle Construction Co.

Federal jurisdiction is also properly refused where it is sought to foreclose the rights of absent injured parties by an uncontested suit by insurer against insured in which the insured connives with the insurer or supplies the evidence to enable him to establish "no coverage" or to decide crucial issues of fact by default; or in a case where great inconvenience to several persons would be caused by compelling them all to defend a federal action for immunity; or where the declaratory procedure is used for procedural fencing or to harass the defendants. To permit federal jurisdiction in such cases has been regarded as an abuse of power, and in such cases the companies have properly been relegated to their defenses in the state court.

While it is unusual to decline federal jurisdiction of an independent suit by the insurer placing in issue the sole question of coverage, there may be attendant facts which justify the federal court in declining to segregate that issue. The pendency of a state suit for negligence alone is not a sufficient ground for declining federal jurisdiction. But if such suit involves the identical issues and complete justice can be done to all parties, including the insurer, by leaving the matter to the state courts, there seems no reason to accept for trial a subsequently brought federal suit on the issue of coverage. When the issues are to be deemed "identical" will presently be examined.

Thus, by way of example, federal jurisdiction has been prop-

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21 Actua Casualty & Surety Co. v. Quarles, (C.C.A. 4th Cir. 1937) 92 F. (2d) 321. It was presumably not present in Associated Indemnity Co. v. Manning, (C.C.A. 9th Cir. 1939) 107 F. (2d) 362, where state judgments had already been obtained, and Maryland Casualty Co. v. The Texas Co., (C.C.A. 8th Cir. 1940) 114 F. (2d) 952. Note, Declaratory Judgments and Judicial Discretion, (1941) 9 Geo. Wash. L. Rev. 440.

22 (C.C.A. 4th Cir. 1941) 123 F. (2d) 558.


24 Ibid.

erly exercised where no state action was pending, where though pending it would not have completely adjudicated the rights or some crucial rights of all the parties in interest because the insurer was not an actual or imminent party or because the issue of coverage or company immunity was not immediately involved, i.e. where the issues are not identical, or where all the necessary parties were not joined in the state action;26 where an accounting between the petitioning company and another company or other parties was required;27 where the state remedy for any reason was deemed inadequate;28 where the state court could not get jurisdiction over all the necessary parties;29 where a multiplicity of state negligence actions made it seem desirable to adjudicate the fundamental issue of company liability before the state suits were carried to completion;30 or where the company would suffer prejudice or jeopardy in being forced to assume a defense in the state suit while denying any liability under the policy.31

But the court’s discretion is not properly used when the declaratory action is dismissed because the defendant might sue the insured in some future action;32 or because the court erroneously assumes that a “demand to defend” is a condition of a company’s declaratory action denying the duty to defend;33 or that judgment against the insured is a condition precedent to a federal “case or controversy” or of a declaratory action denying the obligation


29Supra, n. 26.


to pay a judgment found against the insured; or that the court lacks "jurisdiction" merely because a state action for negligence is pending; or for other errors in law. There is no "discretion" to refuse to assume jurisdiction over a case which is properly before the court and which is entirely appropriate for declaratory adjudication. This is doubtless what was meant by Circuit Judge Charles E. Clark, sitting as District Judge, in his opinion in the case of Associated Indemnity Corp. v. Garrow Co., a refusal which, had it taken place, is called by the affirming circuit court of appeals, an "abuse of discretion."

III.

Let us now look at the cases which Mr. Morrison believes were wrongly decided, and whose influence he seems to think is pernicious. In the Quarles Case Mrs. Quarles had in a South Carolina court sued her husband, the insured, for injuries sustained in an automobile accident while her husband was driving. The casualty company was called upon to defend. Thereupon the company began its federal suit for a declaratory judgment that

34 Merchants Mutual Casualty Co. v. Leone, (1937) 298 Mass. 96, 9 N. E. (2d) 552.
36 Aetna Casualty & Surety Co. v. Howell, (C.C.A. 5th Cir. 1939) 108 F. (2d) 148 (refusal of lower court to permit amendment of petition called "abuse of discretion"); Pennsylvania Threshermen & Farmers Mut. Cas. Ins. Co. v. Gorsuch, (Baltimore, Md., Superior Court, 1940) 6 C. C. H. (Auto Cases) 1204 (the court cites most of the dubious, overruled and criticized cases to dismiss the suit of one insurance company against others to establish petitioner's proportionate duty to pay insured in a complicated situation, advancing as reasons the untenable ground that there was no privity of contract between the several insurance companies and the defendants; that there was a remedy in the suit at law on the policies; that there was inadequate "interest" for joinder of defendants; that consolidation of independent disputes and parties is not sanctioned; that declaratory judgments do not relate to torts; that there is no community of interest among defendants; that declaratory practice excludes the adjudication of "fact unmixed with law;" and that court has "discretion" to dismiss).
38 (C.C.A. 2d Cir. 1942) 125 F. (2d) 462.
inasmuch as the insured had failed to cooperate with the company in defending what the company considered a collusive suit—alleged policy breach—the company was not bound to defend or pay any judgment recovered against the insured. While the declaratory action was pending Mrs. Quarles recovered judgment against her husband and sued the insurance company thereon. A motion to dismiss had theretofore been filed in the declaratory action. After hearing this motion the petition was amended to show the recovery of the judgment and the institution of a suit against the insurance company in the state court. In that situation the district court, affirmed by the circuit court of appeals through Judge Parker, concluded that it would be better to let Mrs. Quarles' South Carolina suit against the company go to trial and not to draw practically the identical action with parties reversed into the federal courts. Mr. Morrison seems to think it an operative fact that Mrs. Quarles' suit against the company had been instituted after the declaratory action was filed—irrelevant in this case—and charges, erroneously, it is believed, that the right of the insurance company was determinable by the situation as it existed at the time the declaratory action was filed.

Judge Parker states, after concluding that the rendering of a declaratory judgment is under the law discretionary:

"The question is not as to whether jurisdiction shall be assumed but as to whether in exercising that jurisdiction a discretion exists with respect to granting the remedy prayed for. No one would question the power of the federal courts to grant injunctive relief in proper cases; but nothing is better settled than that whether or not injunctive relief shall be granted is a matter resting in the sound discretion of the trial judge. The same is true of specific performance and of the legal remedy of mandamus. The declaring of 'rights and other legal relations' without executory or coercive relief is an extraordinary remedy the granting of which like the remedies mentioned should certainly rest in the sound discretion of the court because of the liability of abuse to which it might otherwise be subjected."

A few comments may be made on this quotation. First, the court might safely have said that the federal courts do not need to entertain jurisdiction—not merely grant the remedy, which obviously is discretionary—if no useful purpose could thereby be served, and from the imminence of the supplemental action on

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40(1941) 9 U. Kan. City L. Rev. 211, 222.

41This may be a correct statement in some cases—Anderson v. Aetna Life Ins. Co., (C.C.A. 4th Cir. 1937) 89 F. (2d) 345—but is not true in all cases.
the judgment against the company, there seemed no reason to take
the case out of the hands of the state court. Second, it was an
inadvertence, corrected in other cases, to consider the declaratory
action "an extraordinary remedy," since if that were so it would be
necessary to show that no ordinary remedy is available. As Judge
Parker says, quoting the report of the Senate Committee, the
procedure is neither distinctly at law nor in equity but sui generis.
If it were purely equitable it would be necessary to show that no
adequate remedy at law is available, and clearly such a showing
is quite unnecessary. If it were an extraordinary remedy it
would not be an alternative remedy and that it distinctly is, not-
withstanding the attempt of the Pennsylvania and Maryland
courts to consider it a remedy to be used only when no other
remedy is available. Twenty years of effort have gone into dis-
sipating this erroneous assumption, which conflicts with the ex-
press wording of the statutes and with Federal Rule 57.42

Mr. Morrison may be more correct in challenging the sug-
gestion of the Court that the federal action would be a "piecemeal"
trial, a conception which has been misused in some cases to deny
the opportunity to segregate the important issue of coverage and
to question the propriety of an autonomous suit for the
exoneration of the company. As Mr. Morrison says, the declara-
tory action would have disposed of the controversy in the Quarles
Case in its entirety and not by piecemeal, and as to both husband
and wife, whereas in fact Mr. Quarles was not a party to the
wife’s suit against the company, and presumably would not be
bound by any adjudication therein. And yet it is probable that in
view of the history of the litigation, it was preferable at that
advanced stage of the proceedings to leave the adjudication of Mrs.
Quarles’ complaint against the company to the state court. This
was not a question of coverage but of defenses for policy breach,
and the court has some discretion in determining whether it is
more appropriate to make those defenses in the state court or make
them the subject of a separate declaratory action in the federal
court.

In the Freundt Case43 which Mr. Morrison believes to have
been Unfortunately influenced by the Quarles decision, the de-

42Mutual Life Ins. Co. of New York v. Krejci, (C.C.A. 7th Cir.
1941) 123 F. (2d) 594.
43Borchard, Declaratory Judgments (2d ed. 1941) 318 et seq.
44Cf. a good note in (1941) 19 N. Y. U. L. Quar. Rev. 70.
45American Automobile Ins. Co. v. Freundt, (C.C.A. 7th Cir. 1939)
103 F. (2d) 613.
fendant, Freundt, the party injured, had obtained a judgment against the insured in Illinois and proposed to file garnishment proceedings against the insurance company under the Illinois statute. Before such proceedings were instituted, however, the company brought a federal action against Freundt and the insured jointly for a declaration that the policy did not cover the car involved in the state suit and asked exoneration. The District Court dismissed the bill on the ground that the company's defenses would be available in the state court action and should be relegated to trial in that forum.46

In the circuit court of appeals47 Judge Treanor affirmed the decision below dismissing the petition in what he called the exercise of a "sound judicial discretion." He says that it was not intended to use the federal Act to enable a party to accomplish "what could not be accomplished under the removal act"47a—a questionable dictum. Nor, said he, should the declaratory action be used "as an instrument of procedural fencing either to secure delay or choose a forum." Mr. Morrison correctly says that the power to institute an independent declaratory action is not governed by the supposed power to remove, which as a rule is open only to non-residents. He denies the charge of "procedural fencing." But he stands on the view that the state proceedings are not in the least affected by the plaintiff's right to institute a federal declaratory action, and refers to the frequency of concurrent suits. But therein lies a misapprehension of the function of the declaratory action, which is designed to promote judicial economy and not to multiply the adjudication of identical issues. The company being a party to the state supplemental proceedings, it suffered no perceptible disadvantage at that stage in making its defense in the state court. Had it been in the dilemma of defending the original state action only under risk of losing or jeopardizing the defense of no-coverage or even of incurring expenses from which it claimed immunity, a federal action for exoneration would in theory have been permissible. It is not known why the company did not begin its federal declaratory action before the state negligence suit had progressed to judgment.

Mr. Morrison's assumption that the federal jurisdiction is obligatory in the presence of the jurisdictional facts, leads him to

46Mr. Morrison erroneously believes this to be in violation of Federal Rule 57, but as observed below, this is inaccurate.
47(C.C.A. 7th Cir. 1939) 103 F. (2d) 613, 614.
47a"Quoted in Thompson v. Moore, (C.C.A. 8th Cir. 1940) 109 F. (2d) 372.
conclude that these cases were wrongly decided. He seems to believe that the pendency of two cases, state and federal, involving the identical issues presents no opportunity for the exercise of discretion not to proceed with the federal suit. In that he is believed to be in error. Nor is it believed to be true that the Pacific Coal & Oil Case before the United States Supreme Court overruled the decision in the Freundt Case, although it is barely possible that under the facts the circuit court of appeals might now allow the federal action to proceed to judgment. It depends on the view taken of the effect of a state judgment, to be followed by supplemental proceedings, on the federal action. It is a fact that the Supreme Court in the Pacific Case by implication held the casualty company to have a right to maintain its action in the federal court notwithstanding the injured party's right to proceed by supplemental proceedings in the state court if he obtained judgment for damages. It may be that the first decision on the segregated issue of coverage would become res judicata. But the issues in the negligence suit were not the same as the federal issues under the policy, and it was for that reason that the federal suit could properly survive. The point involved in the Pacific Coal & Oil Case, namely, the propriety of the joinder of the injured person, could not have been passed upon had the Court been willing to say that under no circumstances could the Maryland Casualty Company institute a federal action. In the Freundt Case it may well be that "considerations of convenience, efficiency and justice" justified the court in concluding that the state proceeding should be left undisturbed and no concurrent jurisdiction assumed. It is not possible to pass upon these questions in the abstract. The state of the calendars of the state and federal courts, respectively, and the utility of the declaratory action, have something to do with the court's conclusion. But in any event there is some discretion in the federal courts in determining—certainly near the very end of the proceedings—which is the more appropriate forum, although experience with decided cases gives us a fair indication of when the declaratory action in the federal courts ought not to be dismissed.

While the Freundt Case bears some similarity to the Pacific Coal & Oil Company Case, it is proper to note that in the Freundt Case judgment had already been recovered by the injured person.

49Rogers v. Guaranty Trust Co. of New York, (1933) 308 U. S. 1, 60 Sup. Ct. 295, 84 L. Ed. 3.
against the insured, and that garnishment proceedings were about to begin. In the Pacific Coal & Oil Company Case, on the other hand, no judgment had yet been obtained against the insured, thus affording much more justification for an independent declaratory action on the issue whether the truck causing the injury had been "hired by the insured," a subject of dispute in both cases. The only substantial issue before the Supreme Court was the question whether in the federal suit the company had stated a cause of action against Orteca, the injured person. This by no means goes to the root of the question whether in a particular case the court should assume federal jurisdiction. The suit in Employers Liability Assurance Corp. v. Ryan had actually gone to judgment in the Ohio state court and was therefore subject merely to supplemental proceedings against the insurer. The circuit court of appeals might well therefore have exercised its discretion not to entertain at that stage a separate suit by the insurance company on its defense issue of the adequacy of the notice of injury. The dissenting opinion of Judge Allen called attention to that fact. The majority was clearly in error in assuming that the pendency of a state suit which might eventually have decided the issue was within the terms of Federal Rule 57 by which "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." That is a misconception of the meaning of Rule 57, as will be shown below.

Based upon his view that the Quarles and Freundt Cases were wrongly decided, Mr. Morrison also objects to the decision in Mutual Life Ins. Co. of New York v. Brannen. That case involved two life insurance policies in the face amount of $2500 each. The beneficiary had brought one suit on both policies in the state court. This was removed to the federal court by the company and there dismissed on motion of the beneficiary for the purpose of enabling him to bring individual suits on each policy in the state court, thus preventing removal. Thereupon, the insur-

50 (C.C.A. 6th Cir. 1940) 109 F. (2d) 690.
51 It cannot be said categorically that judgment against the insured in the state court is a bar to the company's federal declaratory action for non-liability. Aetna Life Ins. Co. v. Martin, (C.C.A. 8th Cir. 1940) 108 F. (2d) 824 (effect of state judgment); U. S. Fidelity & Guaranty Co. v. Koch, (C.C.A. 3d Cir. 1939) 102 F. (2d) 288 (delay in executing state judgment); Associated Indemnity Co. v. Manning, (C.C.A. 9th Cir. 1939) 107 F. (2d) 362 (question unnoticed).
52 (1941) 9 U. Kan. City L. Rev. 211, 225.
53 (S.D. Iowa 1940) 31 F. Supp. 123.
ANCE COMPANY FILED AN ACTION FOR A DECLARATORY JUDGMENT DISCLAIMING LIABILITY. THIS SUIT ALSO THE BENEFICIARY SUCCESSFULLY MOVED TO DISMISS. DISTRICT JUDGE DEWEY CONCEDED THAT HE HAD JURISDICTION OF THE FEDERAL ACTION BUT THOUGHT THAT IT SHOULD PROPERLY BE LEFT IN THE STATE COURT IN THE EXERCISE OF AN ADMITTED DISCRETION. HE DEPRECATED "AN UNSEEMLY SCRAMBLE BETWEEN THE ATTORNEYS AS TO WHICH COURT SHOULD HEAR AND DETERMINE THE CASE." NOTING THE CONCURRENT JURISDICTION, HE CALLED ATTENTION TO THE FACT THAT THE FEDERAL COURT WOULD NOT HAVE ANOTHER JURY IN THAT DISTRICT UNTIL THE FALL, BY WHICH TIME THE STATE COURT WOULD VERY LIKELY HAVE REACHED A DECISION. THESE GROUNDS HE THOUGHT ADEQUATE TO SUSTAIN HIS VIEW THAT STATE JURISDICTION WAS THE PREFERABLE ONE. SINCE MR. MORRISON DENIES THE DISCRETIONARY POWER TO DECLINE JURISDICTION, HE PROBABLY WOULD NOT CONCEDE THAT JUDICIAL ECONOMY SUPPORTS THE COURT'S DECISION OR AT LEAST MAKES IT IMPOSSIBLE TO SAY THAT THE DISCRETION WAS IMPROPERLY USED.54

Even less questionable is the recent decision of the fourth circuit court of appeals in Maryland Casualty Co. v. Boyle Construction Co.55 Here a non-resident insurer had sought a declaratory judgment that the decedent whose death resulted from an automobile accident was an employee of the insured and that the exclusive remedy for his injuries and death lay under the South Carolina Workmen's Compensation Act. This identical issue was pending in an action by the administrator against the insured in the South Carolina court. Judge Parker in a long opinion, after holding that realignment was proper and therefore federal jurisdiction absent, deals with the question whether the federal court should under the facts have assumed jurisdiction at all. He concludes that since the identical issue was already pending in the state action, there was no useful purpose served by transferring the issue to a federal court and permitting two courts, possibly differently, to decide one issue—even if the first decision reached is res judicata. He says that had there been a bona fide controversy over the meaning or coverage of the policy or over the question of its validity or expiration, he would have had no qualms about rendering a declaratory judgment in an action against the insured and the injured person, but he considered this action an effort of

54 Similar preference for an already invoked state jurisdiction on identical issues was displayed in Western Supplies Co. v. Freeman, (C.C.A. 6th Cir. 1940) 109 F. (2d) 693, 695 (patent licenses); and Prudential Ins. Co. v. Bohlken, (W.D. Mo. 1941) 40 F. Supp. 494 (federal suit v. assignor deemed equivalent to state suit of assignee v. company).

55 (C.C.A., 4th Cir. 1941) 123 F. (2d) 558.
the insurance company to drag into the federal court the trial of a cause which was properly pending in the state court and was not subject to removal. While paying tribute to the Federal Declaratory Judgments Act as "an important development in procedural law," which should be "liberally construed," he adds—perhaps influenced by the effort to convert a state suit into a federal suit—"if these efforts are persisted in and are sanctioned by the courts, such abuse of the remedy may well lead to the repeal by Congress of one of the most beneficent pieces of procedural legislation enacted in recent years."

IV.

Proponents of the mandatory theory of federal jurisdiction proceed from certain major premises, some of which have already been noticed. The assumption that federal jurisdiction may not be denied notwithstanding the pendency of an identical state suit overlooks the effect and weight of those considerations which led to the adoption of the declaratory action, namely, convenience, expediency, need, desirability, public interest or policy. These considerations necessarily import the employment of discretion, so that as opposed to the general though by no means universal rule in actions at law or in equity, the action for a declaratory judgment in the federal courts does not lie automatically but only where a useful purpose will be served. Such a useful purpose is served in those cases where a preliminary separate federal suit for a declaratory judgment goes to the root of the question of coverage. As was stated in Maryland Casualty Co. v. United Corp. of Massachusetts, such a suit can determine once and for all (1) that the insurer is or is not under an obligation to defend the action in the state court; (2) that the insured, if held liable in the state negligence action, is or is not entitled to indemnity under the policy; and (3) if the injured persons obtain judgment against

56(C.C.A. 4th Cir. 1941) 123 F. (2d) 558, 566.

57 In a dictum it was remarked by one of our best federal judges that even identical issues would not bar the federal suit. Carpenter v. Edmonson, (C.C.A. 5th Cir. 1937) 92 F. (2d) 895, 897. This was a relatively early case. See criticism in Borchard, Declaratory Judgments (2d ed. 1941) 659. In Standard Ace. Ins. Co. v. Meadows, (C.C.A. 5th Cir. 1942) 125 F. (2d) 422, the federal issue of coverage might have been deemed included within the larger issues pending in the state suit. Federal jurisdiction was taken. Perhaps there was good reason for permitting the two suits in Rydstrom v. Massachusetts Accident Co., (D. Md. 1938) 25 F. Supp. 359 to be tried simultaneously.

58(C.C.A. 1st Cir. 1940) 111 F. (2d) 443.
the insured in the state action, that they will or will not be entitled to proceed against the insurer.

More difficult questions arise when the company places in issue by an autonomous suit the adequacy of its defense because of contract breach by the insured. Here an intelligent appreciation of the status of the state action is required to determine how far it has proceeded toward judgment, whether the insurer is a party to the state action, whether there is any inconvenience to the insurer in making his defense in the state action, and whether convenience would be served by permitting a federal action which, though dealing with a company defense, might nevertheless serve all parties concerned in deciding a fundamental issue at the very beginning. Again, the condition of the record, of the state of the respective calendars, of the motive for bringing the federal action, of the balance of convenience to be served, are essential criteria. No categorical rule can be laid down governing all cases.

In most of these dual suits, for negligence in the state court, for exoneration in the federal court, the issues or the parties are not identical, so that there is little difficulty in allowing the federal action to proceed. The greater difficulty arises where the issues and the parties are partly identical, although it is not believed that priority as between the state and federal suit is a conclusive criterion of jurisdiction. Presumptions may arise against federal jurisdiction when the state action has already been begun, and in favor of such jurisdiction when it has not. But when are issues identical? The identity of issues is not always easy to determine, especially as the question is usually presented on a motion to dismiss the federal action. In view of the fact that at that stage the federal issues have not yet been formulated, no answer having been filed, and in view of the fact that the federal court generally could hardly have had an opportunity of examining the pleadings in the state case, and that in either case, the pleadings and issues might be amended before trial, it seems somewhat precarious on a motion to dismiss to assume an identity of issues.60

It is also asserted by proponents of the mandatory theory that the pendency of an identical state action is no ground for denying


declaratory relief, since Federal Rule 57 expressly states that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." As already observed, the mere pendency of a state suit is in fact no ground for denying declaratory relief, since the full facts must be known about the state suit before it can be said that the federal declaratory action would serve no useful purpose. But to invoke Federal Rule 57 in this connection is an error, as was pointed out above in discussing the Ryan Case. Federal Rule 57 was designed by its author to overcome the mistaken view of a few state decisions to the effect that the declaratory action was an exclusive remedy not to be employed when another remedy was available. As stated elsewhere, this is a misconstruction of the words of the statute, which provide that declaratory relief may be granted even though coercive relief could have been asked or obtained. This is perhaps the most profound error in the administration of the Acts occasionally still made by a few state courts. But it does not refer to what a court might do if another action were actually pending. Federal Rule 57 refers to unused remedies which might be available, but not to those which have actually been invoked in a pending case.

In this connection it has been sometimes said that New York Rule 212 was intended to indicate that the New York courts had discretion to decline a declaration where another action was available. This has been denied by the New York court of appeals, and is in contradiction with the relevant philosophy and learning. If rule 212 meant that the existence of another remedy was sufficient to empower the court to deny declaratory relief, it would not have required the court to state its reasons for declining a declaration nor made those reasons reviewable on appeal. The truth is that the other remedy which might bar declaratory relief must

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61Borchard, Declaratory Judgments (2d ed. 1941) 315 et seq.
62Jurisdiction discretionary. If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised." Connecticut Civil Practice Book, sec. 250 (c) provides that the superior court will not render declaratory judgments "where the court shall be of the opinion that the parties should be left to seek redress by some other form of procedure."
63Woollard v. Schaffer Stores Co., (1936) 272 N. Y. 304, 311, 5 N. E. (2d) 829, 832 "... we have never gone so far as to hold that, when there exists a genuine controversy requiring a judicial determination the Supreme Court is bound, solely for the reason that another remedy is available, to refuse to exercise the power conferred by section 473 and Rule 212."
64Note, (1941) 19 N. Y. U. L. Quart. Rev. 70.
be a better and a more effective remedy, which would accomplish more complete relief or take in more parties or broader aspects of the case. It would include a special statutory proceeding designed for that special type of case. Such considerations might persuade the court to regard another remedy as more effective or appropriate than declaratory relief in a particular situation.

The express mention of this power in the New York and Connecticut rules and in sec. 6 of the Uniform Act should not lead to any inference that less discretion is afforded the federal courts in denying declaratory relief. The New York and Connecticut rules and the Uniform Act merely codify the accepted learning on the subject, which is necessarily to be applied in the federal courts. The suggestion of proponents of the mandatory theory that the silence of the federal Act implies an intent to reject the rule of discretion is without foundation.

V.

It is thus apparent that the declaratory action imparts a qualification upon the usual rule that where federal and state courts have concurrent jurisdiction, actions in personam may proceed concurrently. The declaratory action is not a suit either at law or in equity, but is a mode of prophylactic relief designed to accomplish a useful social purpose by simplifying procedure. It is especially useful as a vehicle to establish exonerations from liability. In examining the question whether a concurrent state action should bar federal declaratory relief, the inquiry should not be directed primarily to the question whether the state relief fulfills a useful or adequate purpose, but whether the federal declaratory action subserves such a purpose. If it does not and merely constitutes duplication of judicial effort, federal jurisdiction should be declined. Under the precedents this would occur in rare cases only, where the identical issues could be more effectively and speedily determined in a pending state action without handicap to the federal plaintiff.

66Supra, p. 678.
67The Committee Note to Federal Rule 57 provides "... the Uniform Declaratory Judgments Act affords a guide to the scope and function of the federal Act."
In the earlier days of the federal declaratory action, the federal courts, realizing the crucial character of the issue of coverage, had on occasion granted injunctions against the prosecution of the state negligence suit pending the determination of the federal question. In more recent times, however, the federal courts have been more disposed to give literal effect to sec. 265 of the Judicial Code and have denied their power to enjoin the prosecution of the state actions. They were confirmed in this view by the categorical decision of the United States Supreme Court in the *Toucey Case.*

But a view so absolute may result in an unseemly race for priority in decision, including demands for advancement on the federal calendar. It does not exemplify economy in judicial administration. The interests of insurer, insured, and the injured person ought all to be safeguarded. The extraordinary judicial solicitude for state sovereignty—not evident in the political departments of the federal government—ought to yield to an efficient administration of justice in a country that after all is one. The writer has therefore suggested some relaxation in the rigidity of the prohibition against injunctions, and has proposed that either by statute or modification of judicial attitude the following rules be adopted:

1. Where no state suit has yet been begun and the federal action will conclusively decide, without undue delay, the issue of coverage or company liability—or, better still, the tort question also—an injunction should issue.

2. Where a state suit has been begun and the company is making its defense without restrictions, the whole issue being involved, no federal jurisdiction at all should be exercised.

3. Where the state suit has been begun, but the company has reserved by a non-waiver agreement or, in its absence, under state law, the question of its liability under the policy and has begun a federal action for a declaration of contractual immunity, the federal court should issue an interlocutory injunction of short duration, say for three months, until the federal case can be decided in the district court. If the decision is in favor of policy exemption, the injunction may be extended until the circuit court of appeals and the Supreme Court, if certiorari is granted, decides the issue. If the decision in the district court is against the exemption, the injunction should be dissolved and the state suit be permitted to proceed, the company risking the expense of the

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suit and costs, even during the pendency of the federal appeal. In any event, if the company's defenses to the policy appear to the court from the pleadings or other circumstances not meritorious, no injunction should be granted.

4. State laws or state judicial policy should, where necessary, be changed so as either (a) not to compel the company to waive its policy defense against the insured merely by defending the tort action for negligence, whether a non-waiver agreement is obtained or not, or (b) where the declaratory judgment action for immunity under the policy is pending, whether state or federal, the tort action should be stayed for a short period while provision is made for speeding the decision of the declaratory action for contractual immunity.

VI.

The principle involved in concurrent actions for declaratory and coercive relief is well illustrated in two cases which recently came before the circuit court of appeals for the third circuit, Judge Maris writing the opinions. The concurrent suits, both in the federal courts, but in different districts, were, on the one hand, for declaratory judgment of non-infringement and, on the other, for patent infringement. In each case, the declaratory action was brought first, and since it could adjudicate all the issues involving the validity of the patent, the parties being in both cases the same, Judge Maris gave priority to the declaratory action and permitted an injunction to be issued against the continuation of the infringement suit.

On the other hand, in the second case the later infringement suit in Michigan was deemed to involve more issues (damages for infringement) and more parties (licensees and customers), so that Judge Maris had no hesitation in denying the district court in Delaware, having jurisdiction of the declaratory action, the privilege of enjoining the prosecution of the infringement suit in Michigan, since it was bona fide. Indeed, he authorized the dismissal of the suit for declaratory judgment.

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17Croley Corp. v. Hazeltine, (C.C.A. 3d Cir. 1941) 122 F. (2d) 925.
19He added, "It is well settled that the granting of declaratory relief is not mandatory but lies in the discretion of the court. This is a legal discretion, however, and it must not be exercised arbitrarily but rather in accordance with fixed principles of law. United States Fidelity & Guaranty Co. v. Koch, (C.C.A. 3d Cir. 1939) 102 F. (2d) 288; Samuel Goldwyn, Inc. v. United Artists Corp., (C.C.A. 3d Cir. 1940) 113 F. (2d) 703."
In a recent action in the tenth circuit court of appeals, a reinsurance company upon whom claims had been made by the insured, the original policy having been taken out in a company that had since become insolvent, disclaimed liability for the policies of the insolvent concern. The reinsurance company plaintiff had never been notified of the original accident or of the suits filed in an Illinois court by the injured person and the insured against the original company. The reinsurer's right to maintain a federal action disclaiming liability was sustained by the district court and the circuit court of appeals which, by Judge Huxman, laid down a general rule which in my opinion presents a correct statement of the law. It reads:

"Ordinarily a court having jurisdiction of the subject matter and over the parties to a justiciable controversy must exercise that jurisdiction. This is, however, not an absolute mandate and the court has some discretionary power as to whether it will in each instance assume and exercise the jurisdiction which the statute confers. *Kansas City So. Ry. Co. v. United States*, 282 U. S. 760, 763, 51 S. Ct. 304, 306, 75 L. Ed. 684; *Canada Malting Co., Ltd. v. Paterson Steamships, Ltd.*, 285 U. S. 413, 52 S. Ct. 413, 76 L. Ed. 837; *American Automobile Ins. Co. v. Freundt et al.*, 7 Cir., 103 F. 2d 613; *United States Fidelity & Guaranty Co. v. Koch*, 3 Cir., 102 F. 2d 288.

"Where a prior action has been filed in a court of concurrent jurisdiction between the same parties and involving the same issues, and a decision by that court would adjudicate all the rights of the parties, a federal court, although having jurisdiction to entertain an action brought by a defendant in the pending cause, may within its discretionary powers refuse to entertain jurisdiction. *Aetna Casualty & Surety Co. v. Quarles*, 4 Cir., 92 F. 2d 321; *Maryland Casualty Co. v. Consumers Finance Service, Inc.*, 3 Cir., 101 F. 2d 514; *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 99 F. 2d 665.

"But a federal court may not refuse to assume jurisdiction merely on the ground that another remedy is available or because another suit is pending, if the controversy between the parties will not necessarily be determined therein. *Maryland Casualty Co. v. Consumers Finance Service, Inc.*, supra."

In the earlier state action in the *Excess Insurance Company Case*, the parties were different and the issues were different. That alone was sufficient to justify the federal suit, the decision in which is now pending on certiorari before the United States Supreme Court.

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*Excess Ins. Co. of America v. Brillhart*, (C.C.A. 10th Cir. 1941) 121 F. (2d) 776.
CONCLUSION

It is hoped that this analysis will have helped slightly to clarify the cases in which declaratory relief may properly be refused in the federal courts, in the presence of a state action involving somewhat related, if not identical issues. While judicial economy is the touchstone for entertaining federal jurisdiction, the discretion, never unlimited or unreviewable, has to a considerable extent been hardened into rule, so that predictability is within limits possible. Used with discretion and where a useful purpose is manifest, declaratory relief ministers to a social need. Used for other purposes by insurance companies, its employment will arouse justifiable criticism.