UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

| | |
|---|---|
| The Catholic Mutual Relief Society of America,<br><br>Plaintiff,<br><br>v.<br><br>Arrowood Indemnity Company,<br><br>Defendant. | Court File No. 17-cv-3141 (JRT/LIB)<br><br><br><br>**ORDER** |

This matter comes before the undersigned United States Magistrate Judge pursuant to a general assignment made in accordance with the provisions of 28 U.S.C. § 636(b)(1)(A), and upon Proposed Intervenor Doe 524's Motion to Intervene, [Docket No. 47], and Defendant Arrowood Indemnity Company's Motion for Protective Order, [Docket No. 57]. The Court held a Hearing on the Motions on March 29, 2018. [Docket No. 66]. The Court took the Motions under advisement thereafter.

For the reasons set forth below, the Court **DENIES** Doe 524's Motion to Intervene, [Docket No. 47], and **DENIES** Defendant Arrowood Indemnity Company's Motion for Protective Order, [Docket No. 57].

## I. Background and Statement of Relevant Facts

This is a declaratory action between co-insurers to determine the existence of insurance coverage for and any accompanying duty to defend against state tort claims of sexual abuse against churches which both Plaintiff, The Catholic Mutual Relief Society of America ("Catholic Mutual"), and Defendant, Arrowood Indemnity Company ("Arrowood"), insured. On July 20, 2017, Catholic Mutual initiated this federal declaratory judgment case by filing its Complaint in

this Court. [Docket No. 1]. It seeks a declaration that the insurance policies at issue provided coverage for the relevant timeframe and that Catholic Mutual has a right of contribution from co-insurer, Arrowood, stemming from its duty to defend against the underlying sexual abuse state tort claims brought against Catholic Mutual's member parishes and dioceses. (Id. at 17-23). One of the dioceses facing sexual abuse state tort claims in Minnesota state court is the Diocese of St. Cloud, and the coverage for and duty to defend those claims is one of the issues in the federal declaratory action now before this Court. (See, Id. at 5).

On October 15, 2017, Arrowood filed a Motion to Dismiss for lack of jurisdiction. [Docket No. 30]. Oral argument on the Motion to Dismiss occurred before Chief Judge John R. Tunheim on March 7, 2018, after which Chief Judge Tunheim took the Motion to Dismiss under advisement. (Minute Entry, [Docket No. 53]). As of the date of this Order, the Motion to Dismiss remains under advisement.[1]

## II. Doe 524's Motion to Intervene, [Docket No. 47]

On March 1, 2018, Doe 524 filed the present Motion to Intervene and a Memorandum in Support of his Motion. [Docket Nos. 47 and 49]. Doe 524 asserts that he is a survivor of sexual abuse with a claim[2] against the Diocese of St. Cloud and, as such, Doe 524 argues that he has an interest in this case ("specifically an interest in a determination as to the existence of insurance policies that would cover his claim against the Diocese") which "may not be adequately represented by the existing parties." (Mem. in Supp., [Docket No. 49], 1-2). Therefore, Doe 524

[1] Additional facts as relevant to each of the Motions presently before the Court are included below in the related analysis sections of this Order.

[2] Doe 524 submitted to the Court copies of summonses, proofs of service, and a Complaint detailing Doe 524's Minnesota state-law claims against the "Diocese of St. Cloud a/k/a Diocese of Saint Cloud, and The Church of the Holy Cross of Onamia a/k/a Holy Cross Catholic Church" for public nuisance, private nuisance, negligence, negligent supervision, and negligent retention. (See, [Docket Nos. 50 and 50-1]).

asserts that he is entitled to intervene in the present case as a matter of right or, in the alternative, that he should be allowed permissive intervention. (Id. at 1-2).

On March 8, 2018, Arrowood filed its Memorandum in Opposition to Doe 524's Motion to Intervene, [Docket No. 54]. Arrowood argues that Doe 524 lacks standing to intervene as a matter or right, he does not have the requisite interest in the present litigation to entitle him to intervene as a matter of right, and his state tort claims related to his sexual abuse do not share any common question of law or fact with the insurance coverage and contribution claims in the present lawsuit, such as is required for permissive intervention. (Id. at 5-14).

Federal Rule of Civil Procedure 24 states:

> **(a) Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
> **(1)** is given an unconditional right to intervene by a federal statute; or
> **(2)** claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
> **(b) Permissive Intervention.**
> **(1)** ***In General.*** On timely motion, the court may permit anyone to intervene who:
> **(A)** Is given a conditional right to intervene by a federal statute; or
> **(B)** has a claim or defense that shares with the main action a common question of law or fact.

"Rule 24 is construed liberally, and we resolve all doubts in favor of the proposed intervenors." United States v. Union Elec. Co., 64 F.3d 1152, 1158 (8th Cir. 1995). However, "'[t]he decision to grant or deny a motion for permissive intervention is wholly discretionary.'" Franconia Minerals (US) LLC v. United States, 319 F.R.D. 126, 266 (D. Minn. 2017) (quoting S.D. ex rel. Barnett v. U.S. Dept. of Interior, 317 F.3d 783, 787 (8th Cir. 2003)).

**A. Intervention as a Matter of Right**

> Rule 24(a)(2) allows a party to timely intervene as a matter of right if: (1) the motion is timely; (2) the intervenor "claims an interest relating to the property or transaction that is the subject of the action": (3) disposition of the action "may as a practical matter impair or impede the movant's ability to protect its interest"; and (4) the existing parties do not "adequately represent" the interest. In deciding a motion to intervene, the ruling court should "be mindful that 'the interest test' is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.

George v. Uponor, Inc., 290 F.R.D. 574, 577 (D. Minn. 2013) (citations omitted).

With respect to the merits of the present Motion to Intervene, Doe 524 asserts that his Motion was timely and no other party disputes the timeliness of the Motion to Intervene; therefore, this Court may proceed to the second factor. (Mem. in Supp., [Docket No. 49], 5). See, e.g., Nat'l Parks Conservation Ass'n v. U.S. E.P.A., 759 F. 3d 969, 975 (8th Cir. 2014) (skipping timeliness factor of motion to intervene when timeliness not challenged). On this point, the Court agrees.

Doe 524 next asserts that he has a "significant protected interest in the outcome of this litigation"—namely, that the determination of the present cases "will substantially affect the funds available to the Diocese to compensate Doe 524 and the numerous other [sex abuse] survivors with claims." (Mem. in Supp., [Docket No. 49], 6).

As Doe 524 acknowledges, in Medical Liability Mut. Ins. Co. v. Alan Curtis LLC, 485 F.3d 1006, 1008 (8th Cir. 2007) (hereinafter referred to as "Alan Curtis"), the Eighth Circuit clearly held that a tort plaintiff's interest in "ensur[ing] that the defendants in her state lawsuit have sufficient resources to satisfy any judgment she might obtain against them" was an interest "too remote and indirect to qualify as a cognizable interest under Rule 24(a)(2)." (See, Mem. in Supp., [Docket No. 49], 6). However, Doe 524 attempts to distinguish the present cases by

asserting that the interest alleged by the single proposed intervenor in Alan Curtis "was not as great as Doe 524's here" because the proposed intervenor in Alan Curtis sought to intervene in a federal declaratory action to determine insurance coverage only to protect her own interest in ensuring that the insured defendant to her state tort claims had sufficient resources to satisfy a potential judgment against her. (Mem. in Supp., [Docket No. 49], 6-7). See, also, Alan Curtis, 485 F.3d at 1007-08 (setting forth factual background and arguments). Doe 524 asserts in his written submissions to the Court that he "is one of more than seventy survivors of sexual abuse with a current claim against the Diocese of St. Cloud in state court," all of whom "will be impacted by the outcome here." (Mem. in Supp., [Docket No. 49], 6). Moreover, Doe 524's counsel asserted at the March 29, 2018, Motion Hearing that Doe 524's counsel represents 52 other potential state tort plaintiffs who are also "interested in" the outcome of the present case. (Mar. 29, 2018, Motion Hearing, Digital Record, 1:43-44). Therefore, Doe 524 contends, he has a greater interest in the present cases than did the proposed intervenor in Alan Curtis.

Doe 524's attempt to distinguish Alan Curtis from the case presently before the Court is unpersuasive.

As the Court noted without objection at the March 29, 2018, Motion Hearing, Doe 524 has not asserted in any part of this proceeding that he wishes to legally represent the interests of others in similar positions; in the present case, he represents only his own interests. (See, Mar. 29, 2018, Motion Hearing, Digital Record, 1:43-45). The mere existence of additional potential plaintiffs with discrete, but similar, claims against St. Cloud does not alter in any way Doe 524's posture as an individual proposed intervenor who wishes to intervene in the present declaratory actions to "ensure that the defendants in [his] state lawsuit have sufficient resources to satisfy any judgment [he] might obtain against them." See, Alan Curtis LLC, 485 F.3d at 1008

(emphasis added). Doe 524's interest in the present declaratory action is materially indistinguishable from that at issue in Alan Curtis; therefore, as the Eighth Circuit has clearly held, Doe 524's asserted interest in the present case is "too remote and indirect to qualify as a cognizable interest under Rule 24(a)(2)." See, Id.

Further, in Alan Curtis, the Eighth Circuit noted:

> [The proposed intervenor] was neither a party to nor intended beneficiary of the insurance contract between [the insurance provider and the entity who was the tort-claim defendant in the related state-court case]. Moreover, there is nothing in the record to indicate that she had obtained a judgment against [the defendant in her state-court case] at the time that she moved for intervention. Her interest in [the insurance provider's] liability to defendants is therefore contingent not only on obtaining such a judgment, but also on her inability to satisfy that judgment against any defendant to her action.

Id. at 1009. Again, this is materially indistinguishable from the posture of Doe 524 in the case presently before the Court. Doe 524 has not obtained a judgment against the Diocese of St. Cloud—which is not even a party to the present Federal declaratory action—in any Minnesota state court proceeding. In addition, Doe 524 is neither a party to nor an intended beneficiary of the insurance contracts at issue in the present Federal declaratory action. Thus, even the purely economic interest he asserts is especially speculative and indirect.[3]

Doe 524 also cites cases from outside the Eighth Circuit in which other courts have found interests similar to his own are sufficient to justify intervention. (Mem. in Supp., [Docket No. 49], 7-8). However, in light of the extremely clear controlling authority provided by the Eighth Circuit on this question under materially indistinguishable facts, the existence of other merely

[3] Again, the fact that Doe 524's counsel represents additional potential Minnesota state court tort-claim plaintiffs with alleged claims against St. Cloud is irrelevant. First, Doe 524 does not purport to be a class representative. Second, o the record presently before the Court, neither Doe 524 nor any of counsel's additional alleged clients have any present cognizable interest in the litigation occurring in this Court. Even assuming solely for the sake of argument that there was any aggregation of the interests of Doe 524 and the other asserted potential tort-claim plaintiffs with similar interests, if Doe 524 has zero cognizable interest, the existence of 52 additional individuals in similar positions does not increase that interest.

persuasive authority carries no weight. Under Alan Curtis, Doe 524 has no cognizable interest in the present litigation of the sort that entitles him to intervene in the present case as a matter of right under Federal Rule of Civil Procedure 24(a).

Therefore, for all of the reasons stated above, to the extent that Doe 524 seeks to intervene in the present case as a matter of right under Rule 24(a)(2), Doe 524's Motion to Intervene, [Docket No. 47], is **DENIED**.

**B. Permissive Intervention**

"Normally, parties seeking permissive intervention pursuant to Rule 24(b) must show: (1) an independent ground for jurisdiction, (2) timeliness of the motion, and (3) that the applicant's claim or defense and the main action have a question of law or fact in common." Flynt v. Lombardi, 782 F.3d 963, 966 (8th Cir. 2015). Once again, "Rule 24 is construed liberally, and we resolve all doubts in favor of the proposed intervenors." Union Elec. Co., 64 F.3d at 1158. Moreover, "'[t]he decision to grant or deny a motion for permissive intervention is wholly discretionary.'" Franconia Minerals (US) LLC v. United States, 319 F.R.D. 126, 266 (D. Minn. 2017) (quoting S.D. ex rel. Barnett v. U.S. Dept. of Interior, 317 F.3d 783, 787 (8th Cir. 2003)). The "principal consideration" in determining whether to grant intervention under Rule 24(b) "is 'whether the proposed intervention would unduly delay or prejudice the adjudication of the parties' rights.'" See, N.D. ex rel. Stenehjem v. United States, 787 F.3d 918, 923 (8th Cir. 2015) (quoting S.D. ex rel. Barnett, 317 F.3d at 787).

Citing a different version of the three factors required for permissive intervention, Doe 524 does not address in any way whether he has an independent ground for jurisdiction. (Mem. in Supp., [Docket No. 49], 11-12). Rather, he asserts that the Motions to Intervene are timely; permitting him to intervene would not unduly delay these cases, which is still in their early

stages; and his "claim shares a question of law or fact in common with the main action – specifically, questions as to the existence of disputed insurance policies available to cover [Doe 524]'s state court claim." (Id. at 11).

Doe 524 does not further explain his foregoing conclusory assertion regarding common questions of law or fact, and it is plainly incorrect.

None of Doe 524's asserted Minnesota state court tort claims require the determination of whether Arrowood issued insurance policies that covered the asserted tortious acts in question and thus give rise to a duty by Arrowood to defend the Diocese of St. Cloud in the Minnesota state court tort actions, which are the issues in the present Federal declaratory action. Rather, Doe 524's asserted Minnesota state court tort claims will determine the liability of the defendants therein. The determinations in the federal declaratory judgment action presently before the Court will not affect the liability issues in the Minnesota state court actions.

Therefore, for all of the reasons stated above, to the extent that Doe 524 seeks permissive intervention in the present case under Rule 24(b), Doe 524's Motion to Intervene, [Docket No. 47], is **DENIED**.

### III. Arrowood's Motion for Protective Order, [Docket No. 57]

As already noted above, on October 15, 2017, Arrowood filed a Motion to Dismiss for lack of jurisdiction. [Docket No. 30]. On January 24, 2018, the Court issued an Order setting the Rule 16 Pretrial Conference for February 14, 2018. [Docket No. 43].[4] Arrowood then filed a Letter to the Court requesting that the Court continue the Pretrial Conference "until after the Court's decision on Arrowood's Motion to Dismiss." [Docket No. 44]. On February 6, 2018, the Court issued an Order continuing the Pretrial Conference sine die. [Docket No. 45].

[4] Arrowood concedes that the parties have conferred as required under Rule 26(f), so Rule 26(d)'s prohibition on seeking discovery prior to the 26(f) conference does not apply here. (See, Mem. in Supp., [Docket No. 59], 6).

On February 27, 2018, Catholic Mutual served Arrowood with its first sets of Interrogatories and Requests for Production. (Ventura Dec., Exh. A, [Docket No. 60-1], 1-31). Arrowood asked Catholic Mutual to withdraw its discovery requests and to agree to stay all discovery until after a ruling on Arrowood's Motion to Dismiss, and Catholic Mutual declined to do so. [Dockets No. 60-2 and 60-3]. Meanwhile, briefing was completed on Arrowood's Motion to Dismiss, and oral argument on the Motion took place on March 7, 2018. [Docket No. 53].

On March 9, 2018, Arrowood filed the present Motion for Protective Order, in which it asks the Court to "stay discovery in this matter pending the determination of Arrowood['s] Motion to Dismiss." (Motion, [Docket No. 57]). Catholic Mutual filed its Memorandum in Opposition to the Motion on March 16, 2018. [Docket No. 65]. The Court held a Hearing on the Motion on March 29, 2018, after which it took the Motion for Protective Order under advisement. (Minute Entry, [Docket No. 66]).

Under Federal Rule of Civil Procedure 26(c), a party may move the Court for an order staying discovery. A court may issue such an order upon the movant's showing of good cause. Fed. R. Civ. P. 26(c). Whether to grant or deny a motion to stay discovery is within the court's discretion. See, Lovelace v. Delo, 47 F.3d 286, 288 (8th Cir. 1995) (reviewing ruling on a motion to stay discovery for abuse of discretion).

"Standing alone, the pendency of a dispositive motion does not establish 'good cause' to stay discovery. Instead, 'the Court inevitably must balance the harm produced by a delay in discovery against the possibility that the motion will be granted and eliminate the need for such discovery.'" Corp. Comm'n. of the Mille Lacs Band of Ojibwe v. Money Ctrs. of Am., Inc., No. 12-cv-1015 (RHK/LIB), 2012 WL 12549570, *3 (D. Minn. Aug. 21, 2012) (citations omitted). In considering a motion to stay all discovery because of a pending dispositive motion, some

federal district courts have "taken a 'peek' at the merits of the pending dispositive motion [and] considered the breadth of pending discovery," but "the determination is practical, and largely left to the district court's discretion." TE Connectivity Networks, Inc. v. All Sys. Broadband, Inc., No. 13-cv1356 (ADM/FLN), 2013 WL 4487505, *2 (D. Minn. Aug. 20, 2013).

Essentially, Arrowood asks the Court to stay discovery until after the Motion to Dismiss is decided because Arrowood believes that it will prevail on the Motion to Dismiss and the Court will dismiss the entire case. (Mem. in Supp., [Docket No. 59], 7-12). At the March 29, 2018, Motion Hearing, Arrowood asserted its belief that a decision on the Motion to Dismiss could reasonably be expected within another 30 to 60 days. (Mar. 29, 2018, Motion Hearing, Digital Record, 2:06-08). Thus, Arrowood argues that the requested stay will likely be of short duration. (Id.).

In response, Catholic Mutual argues that Arrowood has not shown the requisite good cause to justify a stay of discovery. (Mem. in Opp., [Docket No. 65], 2). Specifically, Catholic Mutual contends that time is of the essence in this case because "press reports indicate that the Diocese of St. Cloud may file bankruptcy, which could impact its ability to continue its own litigation against Arrowood." (Id.). Moreover, Catholic Mutual argues that granting the present Motion would require the undersigned, in essence, to issue an advisory opinion on the merits of the Motion to Dismiss that is pending before Chief Judge Tunheim. (Id. at 6).

The Court agrees. As the Court stated in Great Lakes Gas Transmission Limited Partnership v. Essar Steels Minnesota, LLC, No. 9-cv-3037 (SRN/LIB), 2012 WL 12895231, *3 (D. Minn. July 5, 2012):

> Although some district courts have taken a "preliminary peek" at the merits of the dispositive motion to see if it "appears to be clearly meritorious and truly case dispositive," the Court is persuaded by other courts who have taken a more

> cautious approach when determining whether to issue a protective order staying discovery pending the outcome of a dispositive motion is justified. These courts have recognized the "awkward nature" of reviewing a dispositive motion's likelihood of success because the magistrate judge is "not the judge who will hear and resolve" the motion and the district judge may "take a different view of the merits." Likewise, the Court here is "not inclined to issue an advisory opinion on a dispositive motion addressed to the district judge." As such, "[i]n the absence of a clear and unmistakable result, this Court does not believe the issuance of a protective order should depend upon its prediction of how the District Judge will decide defendants' dispositive motion."

Id. at *3 (citations omitted).[5]

Rather, the Court will consider other relevant circumstances, including the type of pending motion, whether it is a purely legal challenge or a challenge to the sufficiency of the allegations; the nature and complexity of the case; the procedural posture of the litigation; and the expected extent of discovery. Id. In addition, the Court will consider the purpose of Rule 1 and construe and administer the Federal Rules of Civil Procedure "'to secure the just, speedy, and inexpensive determination of every action.'" Id. at *4 (citation omitted).

In the case presently before the Court, it notes that the pending Motion to Dismiss based on jurisdiction could potentially dispose of the entire case, and there is no indication that it was filed merely to delay these proceedings. That Arrowood's Motion to Dismiss may dispose of the entire case, however, is not by itself enough to justify granting the present Motion for Protective Order. Although this case is relatively newly filed, the Court must nevertheless remember Rule 1's directive to bring cases to an expedient resolution. Moreover, the record currently before the

[5] The Court is not persuaded by Arrowood's assertion that the June 12, 2006, Order in Riehm v. Engelking, No. 6-cv-293 (JRT/RLE), Docket No. 64, is more analogous to the present case than Great Lakes Gas Transmission Limited Partnership. (See, Mar. 29, 2018, Motion Hearing, Digital Record, 2:09-14). As the Court noted and Arrowood's counsel conceded on the record at the March 29, 2018, Motion Hearing, Riehm is materially distinguishable from the present case in that the pending motion to dismiss in Riehm, if successful, would have resulted in a dismissal with prejudice, whereas the Motion to Dismiss pending in the present case, would likely result in a dismissal without prejudice. Thus, if the pending motion to dismiss in Riehm was granted, the discovery sought would never be required, whereas if the pending Motion to Dismiss in the present case is granted, there is no such guarantee.

Court does not demonstrate that responding to the discovery requests currently at issue would impose an undue burden on Arrowood. Although Arrowood summarily asserts that "allowing discovery in a case that may soon be dismissed would subject Arrowood to undue burden and expense," Arrowood does not further describe or detail the nature of its alleged burden. (See Mem. in Supp., [Docket No. 59], 11). On the other hand, the Court is unconvinced by Catholic Mutual's assertion of urgency because it would be severely prejudiced by a stay of discovery now in light of recent news reports that the Diocese of St. Cloud may file for bankruptcy. (See, Mar. 29, 2018, Motion Hearing, Digital Record, 2:20-23). The case presently before the Court is a declaratory judgment action between co-insurers to determine whether Catholic Mutual has the right to seek equitable contribution from Arrowood to defend the Diocese of St. Cloud in any underlying Minnesota state court tort actions. If the Diocese of St. Cloud—which, again, is not a party to this case—ultimately were to file for bankruptcy, the Court sees no reason why such a filing should affect the discovery proceedings in the present case.

As both parties concede, the filing of a dispositive motion such as Arrowood's Motion to Dismiss in the present case, does not in and of itself justify the issuance of a protective order staying discovery. Moreover, for the reasons stated above, the undersigned will not issue what would be, in essence, an advisory opinion regarding the merits of Arrowood's pending Motion to Dismiss. In the present case, on the record currently before the Court, Arrowood has failed to establish that responding to Catholic Mutual's currently pending discovery requests would impose an undue burden on Arrowood.

Accordingly, for all of the reasons stated above, Arrowood's Motion for Protective Order, [Docket No. 57], is **DENIED.**

## IV. CONCLUSION

For the foregoing reasons, and based on all of the files, records, and proceedings herein,

**IT IS HEREBY ORDERED:**

1. That Doe 524's Motion to Intervene, [Docket No. 47], is **DENIED**;[6] and

2. That Arrowood's Motion for Protective Order, [Docket No. 57], is **DENIED**[7].

Dated: April 23, 2018

s/Leo I. Brisbois
Leo I. Brisbois
U.S. MAGISTRATE JUDGE

[6] Doe 524 also sought to intervene in another declaratory judgment action before this Court, Diocese of St. Cloud, et al. v. Arrowood Indemnity Co., et al., 17-cv-2002 (JRT/LIB). That motion was denied for similar reasons as set forth herein.

[7] Arrowood shall respond to Catholic Mutual's pending Interrogatories and Requests for Production of Documents on or before May 24, 2018.