

99-7004

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

GENERAL STAR INDEMNITY COMPANY,
Plaintiff-Appellant,

v.

ANHEUSER-BUSCH COMPANIES, INC., BUSCH
ENTERTAINMENT CORP, and SEA WORLD, INC.,
Defendants-Appellees,

**On Appeal from the United States District Court
for the District of Connecticut**

**BRIEF FOR PLAINTIFF-APPELLANT
GENERAL STAR INDEMNITY COMPANY**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for General Star Indemnity Company certifies that General Star Indemnity Company is wholly owned by General Reinsurance Corporation, a wholly-owned subsidiary of General Re Corporation, which in turn is wholly owned by Berkshire Hathaway Inc., a publicly traded company.

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PRELIMINARY STATEMENT

This is an appeal by plaintiff General Star Indemnity Co. (“General Star”) from a final judgment of the United States District Court for the District of Connecticut (Burns, J.) dismissing its complaint for lack of personal jurisdiction over the defendants and, alternatively, abstaining under the *Brillhart* doctrine. The district court’s original decision dismissing the complaint (A254-A267) is not reported in the Federal Supplement. Its decision granting in part and denying in part’s General Star’s motion for reconsideration (A281-A289) is reported at 28 F.Supp.2d 71.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332. Plaintiff General Star is a Connecticut corporation with its principal place of business in Connecticut. Defendants Anheuser-Busch Cos., Inc. and Busch Entertainment Corp. (collectively, “Anheuser-Busch”) are Delaware corporations with their principal place of business in Missouri. Defendant Sea World, Inc. is a Delaware corporation with its principal places of business in Florida and Ohio. The amount in controversy exceeds \$75,000. The existence of personal jurisdiction over the defendants is an issue in this appeal.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court entered judgment on September 2, 1998, dismissing the complaint for lack of personal jurisdiction or, in the alternative, abstaining from adjudicating the suit. On September 8,

1998, General Star moved for reconsideration. By order dated November 30, 1998, the district court denied reconsideration except to the limited extent of amending several factual findings in its original ruling. General Star filed its notice of appeal on December 29, 1998. The notice was timely under FRAP 4(a)(ii), (iv), and (vi).

STATEMENT OF ISSUES PRESENTED

1. Whether personal jurisdiction exists over Anheuser-Busch pursuant to the Connecticut long-arm statute because:

- (a) General Star's declaratory judgment claims arise out of a contract "to be performed" in Connecticut; and/or,
- (b) General Star's tort claims arise out of "tortious conduct in [Connecticut]," within the meaning of the statute.

2. Whether, if there is jurisdiction over the tort claims, this is a proper case for *Brillhart* abstention.

STATEMENT OF THE CASE

1. The Insurance Policy.

Sea World, Inc., is a wholly-owned subsidiary of Busch Entertainment Corporation ("BEC"), which, in turn, is a wholly-owned subsidiary of Anheuser-Busch

Companies, Inc., the well-known beer maker. (A12).¹ Sea World operates a number of water parks throughout the United States.

In March 1996, Sea World hired World Entertainment Services, Inc. (“WES”), a Florida-based entertainment company, to perform water ski shows at its theme park in Aurora, Ohio. (A36-A61). Among other terms, the contract required WES to procure comprehensive general liability insurance coverage with a combined single limit of \$5 million to cover liability for personal or bodily injuries resulting from WES’s performances. (A47-A49). The contract further specified that “Sea World shall be included as additional named insured * * * under the insurance policies required of [WES].” (A47).

WES contacted an insurance broker in Florida, the Lester Kalmanson Agency, Inc. (“Kalmanson”), to procure the necessary insurance. Kalmanson was an authorized agent of Sphere Drake Insurance P.L.C. (“Sphere Drake”), from which it obtained a \$1 million general liability insurance policy that identified only WES as the “named insured.” (A90). The Sphere Drake policy also provided, however, that Kalmanson could add other interested persons as insureds, provided that it issued certificates of insurance naming the additional insureds and furnished copies of the certificates to Sphere Drake. (A65).

¹ For simplicity, BEC and Anheuser-Busch Cos., Inc. are referred to collectively as Anheuser-Busch.

Kalmanson subsequently issued a certificate of insurance listing “Sea World of Ohio” as an additional insured. (A109).

Sphere Drake was evidently unwilling to provide WES with more than \$1 million in coverage. As consequence, Kalmanson also contacted Sovereign Group International, Ltd., a New Jersey-based, independent insurance broker that sells surplus lines insurance policies underwritten by a number of different surplus lines insurers. (A293).² One of the insurers solicited by Sovereign to provide a price quotation for an excess liability insurance policy for WES was appellant General Star, a Connecticut-based surplus lines insurer. (*Ibid.*).

Sovereign accepted General Star’s proposal, and General Star issued a \$4 million excess liability policy covering WES for liability over \$1 million (*i.e.*, providing WES with a layer of coverage between \$1 million and \$5 million). (A94-A107). That policy listed WES as the sole insured and, unlike the Sphere Drake policy, made no express provision for the inclusion of additional insureds without the consent of General Star. (A95). The policy further provided that “[t]he Insured shall not, except at his own costs, voluntarily make any payment, assume any obligation or incur any expense.” (A106). Both the

² Surplus or excess lines insurers are carriers that are not licensed to do business in the state in which the policy is to be sold. Surplus lines insurers may issue policies in such states only through a licensed surplus lines insurance broker in that state and, even then, only under certain specified conditions. (A277-A279).

Sphere Drake and General Star policies were in force from February 20, 1996, to February 20, 1997.

2. The Accident and Ensuing Coverage Dispute.

On August 17, 1996, during WES's performance of its "Baywatch" water skiing show at the Ohio Sea World, one of the motor boats used in the show unexpectedly (and inexplicably) went out of control. The boat left the water and entered the stands where spectators were watching the show. A number of spectators were injured, several of them quite seriously. A week later, General Star received its first notice from Sovereign of claims arising from the accident. (A142; A145).

Jeffrey Willis, who was attending the show with his wife and two minor children, was among the injured and made a claim for compensation that ultimately reached Anheuser-Busch. In early January 1997, Anheuser-Busch contacted General Star and demanded that it settle the Willises' claims. (A110-A111). General Star was unwilling to do so at that time, however, because, as it explained to Anheuser-Busch, it believed that there had been insufficient opportunity to investigate the Willises' claims. Without such investigation, General Star was not satisfied that the Willises' claims could be appropriately evaluated or that they would exhaust the limits of the Sphere Drake policy and reach the layer of coverage provided by General Star. (A112; A113-A115).

In late January 1997, contemporaneously with the foregoing exchange between Anheuser-Busch and General Star, the Willises sued WES in the United States District Court for the Northern District of Ohio, also naming Anheuser-Busch and the manufacturers of the boat and the engine involved in the accident as additional defendants. (A123). Anheuser-Busch informed General Star that, if General Star would not settle the Willis suit, Anheuser-Busch would negotiate directly with the Willises to settle their claims. (A116-A117). Anheuser-Busch further stated that it would seek reimbursement from General Star for any amounts paid to the Willises. (A117). General Star responded that Anheuser-Busch had no right unilaterally to settle the lawsuit except at its own expense. (A118-A119).

Soon thereafter, Anheuser-Busch settled the Willises' claims against it and its subsidiaries for approximately \$1.25 million. (A140). It then contacted General Star seeking reimbursement for the settlement. (*Ibid.*). Anheuser-Busch threatened to end its business relationship with General Star if General Star was not "responsive" to Anheuser-Busch's demand for reimbursement. (*Ibid.*). Despite this threat, General Star declined to reimburse Anheuser-Busch because it was not an insured under the WES policy and because, even if it were, it had materially breached the terms of the policy by settling the Willis lawsuit unilaterally. (A18-A27).

The complaint in this case alleges that Anheuser-Busch, in retaliation, pressured WES to cancel its excess liability policy with General Star. In particular, Anheuser-Busch threatened to terminate WES, which worked exclusively for Sea World and therefore was wholly dependent for survival on continuing that business relationship, if WES did not switch to a different insurer for its excess liability coverage. Although WES had renewed the policy only a couple of months before, it canceled the General Star excess liability policy effective May 1, 1997. (A143).

3. The Instant Lawsuit and the Subsequent Florida Action.

On December 5, 1997, General Star commenced this action against Anheuser-Busch in the District of Connecticut. The Complaint contains four counts. The first two are based on the excess liability insurance policy issued to WES. Specifically, General Star seeks a declaration that Anheuser-Busch is not an insured under the excess liability policy issued to WES and that, even if it is, General Star is not obligated to indemnify Anheuser-Busch because Anheuser-Busch materially breached the terms of the policy by, among other things, unilaterally settling the Willis lawsuit. (A28-A30). The third and fourth counts allege claims of tortious interference with contract and violation of the Connecticut Unfair Trade Practices Act (Conn. Gen. Stat. § 42-110a *et seq.*) based upon

Anheuser-Busch's demand that WES cancel its insurance policy with General Star. (A30-A31).³

On April 21, 1998, while this action was pending, Anheuser-Busch and Sea World sued Sphere Drake and General Star in Florida state court. (A224). In that action, Anheuser-Busch alleges breach of contract and breach of the duty of good faith, based upon General Star's refusal to indemnify Anheuser-Busch for sums paid in settlement of the Willis suit. General Star sought to remove the Florida action to federal court based upon the diversity of the parties, but the district court in Florida remanded to the state court on the ground that General Star's removal was untimely. (A244-A253).⁴ The Florida action remains pending at this time.

³ The complaint originally named Sea World as a defendant. Sea World was voluntarily dismissed from this lawsuit after General Star discovered (during the course of this litigation) that it was Anheuser-Busch, and not Sea World, that had made the payments to the Willises and that, therefore, it was solely Anheuser-Busch that was claiming a right to reimbursement from General Star.

⁴ Anheuser-Busch served Sphere Drake with the Florida complaint on May 1, 1998. (A215; A222). It did not, however, serve General Star, which first learned in late May that Sphere Drake had been served with the complaint. (A226). General Star thereupon promptly sought, on June 9, to remove the action to federal court. (A228-A229). Anheuser-Busch moved to remand to state court, however, on the ground that the 30-day time limit of 28 U.S.C. § 1446 began to run when Sphere Drake had been served with the complaint and that, therefore, General Star's notice of removal was untimely, even though General Star had yet to be served with the complaint. (A215-A220). The district court agreed with Anheuser-Busch and remanded the action to state court. (A244-A253).

Contemporaneously with the commencement of the Florida action, Anheuser-Busch moved, pursuant to Fed. R. Civ. P. 12(b)(2), to dismiss this action on the ground that the district court lacked personal jurisdiction over it or, in the alternative, that the district court should abstain from adjudicating the suit in favor of the Florida action, pursuant to the doctrine announced in *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942). (A33-A35).

4. The District Court's Decision.

The district court granted Anheuser-Busch's motion and entered judgment dismissing the suit. (A254-A257; A268). The court rejected General Star's argument that personal jurisdiction existed over Anheuser-Busch on the contract claims because those claims arose out of the contract "to be performed" in Connecticut. Conn. Gen. Stat. § 33-929(f)(1). Perceiving a "common thread running throughout" the lower court decisions, the district court ruled that jurisdiction could be established through one of two ways:

Whenever a plaintiff has sought to rely on its own performance of the contract in Connecticut to satisfy the long-arm statute, the courts have found jurisdiction only where (1) the contract expressly contemplated or required performance in Connecticut; or (2) the plaintiff had actually performed its obligations in Connecticut and such performance was the most substantial part of the obligations to be performed under the contract.

(A261-A262).

In the district court’s view, the insurance policy did not contemplate performance in Connecticut but rather in other States such as Florida (where WES was located) or Texas, California, and Ohio (where the covered Sea World theme parks were located). (A262-A263). As for where the contract was in fact performed, the court concluded that the most substantial part of performance took place outside Connecticut. (A263). The court minimized the importance of the fact that General Star officials in Connecticut supervised the processing of claims on the WES policy, labeling these activities as “merely oversight duties, completely normal in the corporate world.” (A264). Moreover, the court attached particular importance to the fact that General Star assigned the responsibility for the day-to-day handling of claims on the WES policy (which included responding to Anheuser-Busch’s demands for reimbursement) to an claims adjuster in Chicago and outside counsel in Ohio. (A264).

The district court similarly rejected General Star’s argument that personal jurisdiction existed over Anheuser-Busch on the tort claims because those claims arose out of “tortious conduct in this state.” Conn. Gen. Stat. § 33-929(f)(4). The court, construing the long-arm statute to require actual conduct by Anheuser-Busch and not merely injury in Connecticut, concluded that jurisdiction was lacking because Anheuser-Busch’s threats to WES to cancel the General Star policy were not alleged to have taken place in Connecticut. (A265-A266).

Given its ruling, the district court found it unnecessary to decide whether due process prohibited the assertion of jurisdiction over Anheuser-Busch. (A266). Finally, the court stated that “even if it had found personal jurisdiction in this case, it would have abstained in favor of the state court action in Florida, where all pertinent parties are involved and where the issues are identical.” (*Ibid.*).

General Star moved for reconsideration, contending that there had been several factual misstatements in the original ruling and asking the district court to reconsider its decision to dismiss the complaint. (A269-A273). Although the district court corrected several misstatements, it adhered to its earlier decision to dismiss the suit. (A285-A286). The court summarily rejected General Star’s contention that it had sufficiently performed the contract in Connecticut to support jurisdiction, stating that, while General Star’s payments of claims from its Connecticut office were “an integral part” of its performance of the contract, they were “merely the end product of extensive investigations handled outside of Connecticut.” (A283).

In addition, the district court elaborated on its statement in the original ruling that, even if it had jurisdiction, it would abstain under *Brillhart*. (A286-A288). The court interpreted *Brillhart* as empowering it to “decline to hear declaratory judgment actions, in favor of pending state actions for reasons of judicial economy, even where the court has jurisdiction.” (A286). Ignoring General Star’s tort claims on the ground that they

were not “‘reserved’ for this Court’s review,” the court announced that it would abstain from adjudicating the two contract claims because the Florida state court action was available to resolve all claims arising from this dispute. (A287-A288). This appeal followed.

SUMMARY OF THE ARGUMENT

I. Jurisdiction

The Contract Claims. Under § 33-929(f)(1) of the Connecticut long-arm statute, which governs the issue of jurisdiction over the declaratory contract claims in this case, jurisdiction exists over claims relating to contracts “to be performed” in Connecticut. In this case, the WES insurance contract contemplated performance by General Star in Connecticut and was in fact performed there.

The district court’s contrary conclusion was predicated on the erroneous belief that subsection (f)(1) requires that “the most substantial part of the [contractual] obligations” be performed in Connecticut. But the statute speaks only of “perform[ance],” not of “substantial” or “most substantial” performance. And, of course, a contract may be performed in more than one state, so that the fact that WES, and even General Star, performed some portion of the contractual obligations outside Connecticut is of absolutely no moment.

The district court's error becomes clear when one considers exactly what the contemplated performance of General Star was under the policy -- *i.e.*, what WES was paying for with its premiums, what Anheuser-Busch asserts General Star failed to do, and what the issue is in this lawsuit: the *payment of claims* allegedly covered by the policy. Had General Star accepted Anheuser-Busch's demands to pay the Willises' claims, payment would have been made from Connecticut, as indeed it was with respect to claims made against WES itself.

The fact that activities ancillary to determining General Star's policy obligations, such as the receipt of notice and the evaluation of claims, may have occurred outside Connecticut does not change this, since General Star's bargained-for performance was payment, not those preliminary, self-protective actions. Moreover, General Star personnel in Connecticut were active in dealing with Anheuser-Busch's claims and others under the policy.

In sum, the contract contemplated performance by General Star in Connecticut, and performance actually occurred there. This provided an ample basis under the statute for jurisdiction.

The Tort Claims. Jurisdiction over the tort claims is governed by subsection (f)(4), which turns upon the existence of "tortious conduct in [Connecticut]." The district court read that phrase literally, *i.e.*, as requiring that Anheuser-Busch's acts have been

done in Connecticut. But this approach is inconsistent with that taken by both the Connecticut Supreme Court and this Court, each of which has upheld jurisdiction in Connecticut over a defendant who made fraudulent or defamatory statements outside Connecticut that caused injury in the State. Courts interpreting “in the state” language in the long-arm statutes of other states have reached the same conclusions: jurisdiction exists over non-residents on claims, including tortious interference claims, arising out of acts done outside the state but directed against and/or causing injury to persons inside the state.

Any other result makes no sense. It is difficult to imagine that any state would withhold from its own citizens protection against torts committed by actors outside the state but causing harm within it. This case is of that type: Anheuser-Busch acted for the purpose of causing harm in Connecticut to a Connecticut business and did cause such harm. Indeed, Connecticut has created causes of action, including under CUTPA, to protect its residents against harms of the kind alleged here. Surely Connecticut did not intend to relegate plaintiffs invoking the protections of Connecticut law to the courts of other states.

Pendent Jurisdiction. If personal jurisdiction over Anheuser-Busch exists as to any of General Star’s claims, then pendent jurisdiction exists over all claims arising out

of the same nucleus of operative facts. Here, proof of the contract and the dispute regarding it is an essential part of the litigation of the tort causes of action.

II. Abstention

The district court held, in the alternative, that even if it had jurisdiction it would dismiss the case in the exercise of *Brillhart* abstention. This was error. First, *Brillhart* abstention is limited to claims seeking declaratory judgments; the tort claims in this case, which seek money damages, are not subject to abstention but rather to the general principle that federal courts should exercise the jurisdiction given to them by Congress. This result pertains even if the action includes claims requesting declaratory relief. Indeed, the presence of claims not subject to abstention weighs strongly in favor of adjudicating all the claims in this suit rather than abstaining on some of them, at least where there is significant overlap among the claims and therefore little judicial economy to be gained by adjudicating only a portion of this suit.

Abstention is especially inappropriate in this case, because the Florida action itself was subject to removal to federal court. It is only because of Anheuser-Busch's maneuvering and an erroneous remand decision by the federal court that there is any state proceeding in favor of which to abstain. It would be inequitable to deprive General Star of its Connecticut federal forum on that account.

ARGUMENT

I. THE DISTRICT COURT HAS PERSONAL JURISDICTION OVER ANHEUSER-BUSCH.

To exercise personal jurisdiction over a defendant, the district court must satisfy itself that (1) the applicable state long-arm statute authorizes the assertion of jurisdiction, and (2) the exercise of jurisdiction does not violate due process. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir.), cert. denied, 117 S.Ct. 508 (1996). The district court did not address the second, constitutional question⁵ but focused solely on whether jurisdiction exists under Connecticut's long-arm statute, which provides in pertinent part:

Every foreign corporation shall be subject to suit in this state, by a resident of this state or by a person having a usual place of business in this state, whether or not such foreign corporation is transacting or has transacted business in this state and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows: (1) Out of any contract made in this state or to be performed in this state; * * * or (4) out of tortious conduct in this state, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

Conn. Gen. Stat. § 33-929(f). The district court concluded that the Connecticut long-arm statute does not confer jurisdiction over either the contract or the tort claims.

⁵ Nor do we address it, as we believe it is beyond serious dispute that, if jurisdiction in fact lies under the Connecticut long-arm statute, due process does not prohibit the assertion of jurisdiction over Anheuser-Busch. (A146-A211).

In so doing, however, the district court misconstrued the statute and misread both the pleadings and the limited evidence available to it at this stage of the proceedings. As explained below, there is personal jurisdiction over Anheuser-Busch on the contract claims because those claims arise out of a contract “to be performed in this state” and on the tort claims because they arise out of “tortious conduct in this state.” Moreover, so long as personal jurisdiction exists over *any* claim in this suit, the district court may adjudicate *all* the claims, exercising pendent personal jurisdiction over those claims that the long-arm statute does not reach.

A. Standard of Review.

The district court’s decision on jurisdiction is reviewed *de novo* on appeal. *PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.*, 138 F.3d 65, 69-70 (2d Cir. 1998). Moreover, at this stage of the litigation (prior to commencement of discovery), General Star need make out only a *prima facie* showing of jurisdiction based on the pleadings. *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990).

B. General Star’s Declaratory Judgment Claims Arise Out Of A Contract “To Be Performed” In Connecticut.

1. As an initial matter, the district court announced (and applied) an overly restrictive test for establishing jurisdiction under § 33-929(f)(1) for claims arising out of

a contract “to be performed” in Connecticut. Although the Connecticut Supreme Court has yet to give content to this provision, the lower Connecticut courts and the federal courts sitting in Connecticut have established a rough guide, concluding that jurisdiction exists *either* where (1) the contract requires or contemplates performance by one of the parties in Connecticut (*e.g.*, *Bowman v. Grolsche Bierbrouwerij B.V.*, 474 F.Supp. 725, 732 (D. Conn. 1979)); *or* where (2) one of the parties actually performs its obligations in Connecticut (*e.g.*, *Combustion Eng’g, Inc. v. NEI Int’l Combustion, Ltd.*, 798 F.Supp. 100, 104-105 (D. Conn. 1992)).

Although the district court correctly recognized that jurisdiction may be established by showing that the contract either required or contemplated performance in Connecticut, it significantly narrowed the alternative means for establishing jurisdiction, requiring not just that one of the parties actually perform its obligations in Connecticut but rather that the “most substantial part of the obligations” under the contract be performed in Connecticut. This more restrictive formulation is erroneous in two respects.

First, the requirement that “substantial” performance take place in Connecticut has no support either in the text of the Connecticut long-arm statute or in the case law. Subsection (f)(1) of the statute refers only to “performance,” not to “substantial performance,” let alone “most substantial performance.” Moreover, no prior decision has described the Connecticut long-arm statute as requiring “substantial” performance. To

the contrary, courts typically recite the statutory language (see, *e.g.*, *Bowman*, 474 F.Supp. at 729 (“[t]o establish in personam jurisdiction under this provision, American initially must establish prima facie that a contract existed and that it was to be performed in Connecticut”)), and the Connecticut Supreme Court itself has observed, albeit in *dictum*, that “even incidental acts of performance of contracts in this state would come within our statute if the defendant had other significant contacts with this state.” *Lombard Bros., Inc. v. General Asset Management Co.*, 460 A.2d 481 (Conn. 1983).

Admittedly, some district courts have noted, in cases *upholding* jurisdiction, that “substantial” performance of the particular contract there at issue occurred in Connecticut. See, *e.g.*, *Teleco Oilfield Servs., Inc. v. Skandia Ins. Co., Ltd.*, 656 F.Supp. 753, 757 (D. Conn. 1987) (jurisdiction exists over non-resident insurer because insured’s payment of premiums from Connecticut constitutes “actual and substantial performance of the terms of the contract”); *Clemco Corp., Inc. v. Frantz Mfg. Co.*, 609 F.Supp. 56, 57 n.1 (D. Conn. 1985) (jurisdiction exists where “[i]t cannot be seriously disputed that, pursuant to the express terms of the contract, [the plaintiff] was to render substantial performance in Connecticut”). Obviously, however, the fact that those courts found jurisdiction to exist where “substantial” performance occurred in Connecticut does not mean that jurisdiction exists *only* where the in-state performance is “substantial.” Indeed, no court has rejected a claim of jurisdiction on the ground that, although there

was some performance in Connecticut, that performance was insufficiently substantial; rather, those courts denying jurisdiction uniformly have found that no performance at all occurred in Connecticut. See *Chemical Trading, Inc. v. Manufacture de Produits Chimiques de Tournan*, 870 F.Supp. 21, 24 (D. Conn. 1994) (no jurisdiction where “performance was neither articulated, contemplated, required, nor possible in Connecticut”); *Bross Utils. Serv. Corp. v. Aboubshait*, 489 F.Supp. 1366, 1372 (D. Conn. 1980) (Cabranes, J.) (no jurisdiction where all contracts “were to be performed in Saudi Arabia”).

Second, whatever else may be said, it is quite a jump from the requirement that “substantial performance” occur in Connecticut to the district court’s requirement here that the “most substantial part” of the contract be performed in Connecticut. The latter requirement is utterly at odds with the statutory language. Moreover, the decision from which the court below appears to have drawn its holding, *Publications Group, Inc. v. American Soc’y of Heating, Refrigerating & Air-Conditioning Engineers, Inc.*, 566 F.Supp. 316, 320 (D. Conn. 1983), did not adopt such a stringent requirement. To the contrary, that court, in finding jurisdiction to *exist*, simply observed that “[t]he most substantial part of the performance of the contract *at issue here* clearly was rendered in Connecticut by PGI.” *Ibid.* (emphasis added).

The district court's requirement that "the most substantial" portion of the performance take place in Connecticut significantly limits the reach of the Connecticut long-arm statute. In this increasingly integrated, "global" economy, contracts will often be performed in a variety of places. Under the district court's interpretation, however, Connecticut residents are unable to sue contractual counterparties in their home forum, no matter how significant the performance in Connecticut, whenever more performance took place outside Connecticut than inside it. In the absence of legislative history suggesting that Connecticut intended to restrict the jurisdiction of its courts in this fashion, this Court should not endorse such a narrow interpretation, which is at odds with economic realities.

2. Application of the proper standard leads to the conclusion that General Star's contract claims arise from a contract "to be performed" in Connecticut. Although either contemplated or actual performance suffices to establish jurisdiction, both bases exist here: the General Star excess liability insurance policy contemplated performance in Connecticut; and, in fact, General Star did perform its contractual obligations in Connecticut.

a. The General Star insurance policy does not expressly state where General Star must perform its obligations; nevertheless, it is a fair inference from the contract that General Star would perform its obligations in Connecticut. The policy itself identifies General Star as located in Connecticut (A95), and, indeed, General Star itself (as distinct from its management affiliate) does not even exist outside of Connecticut, the only State in which it is licensed to do business. (A277; A279). Moreover, the policy designates the corporate secretary in Connecticut as the recipient of any process served in a suit arising out of the policy. (A102). Thus, in light of the fact that the policy does not specify an alternative location for General Star's performance, it is fair to infer that the policy contemplates that General Star would perform at least some of its obligations in Connecticut. Cf. *Publications Group*, 566 F.Supp. at 317, 320 (contract was performed in Connecticut where, *inter alia*, plaintiff was incorporated in Connecticut, its operations were located there, and the contract references the plaintiff's Connecticut address).

Indeed, one need only consider the nature of General Star's promised performance to see clearly that such performance was contemplated to occur in Connecticut. The promise that WES purchased with its premiums was not that General Star would receive notice or that it would investigate claims, but that it would *pay* claims covered by the policy. That payment was to be made, and in fact was made, from Connecticut. Indeed,

“the performance at issue here” (*Publications Group*, 566 F.Supp. at 320) would be, if Anheuser-Busch’s position is legally sound, the payment of Anheuser-Busch’s claim. Significantly, one of the cases cited by the district court as requiring “substantial performance” held that the payment or receipt in Connecticut of premiums and benefits *was sufficient* to sustain jurisdiction. See *Teleco Oilfield Servs.*, 656 F.Supp. at 757 (premium payment from Connecticut insured to foreign insurer and, conversely, receipt of claims check issued by foreign insurer to Connecticut insured sufficed to confer jurisdiction).

In ruling to the contrary, the district court focused on the location of WES and its activities at the Sea World theme parks, concluding that the policy contemplated performance not in Connecticut but rather in those other States where WES or the Sea World theme parks were located. The district court’s focus on WES’s contemplated activities and its concomitant disregard of General Star’s duties under the policy, however, gives short shrift to Connecticut law, which authorizes personal jurisdiction over non-residents so long as any party to the contract -- not just the non-resident defendant -- performs its obligations in Connecticut. See *Combustion Eng’g*, 798 F.Supp. at 104 (resident plaintiff’s performance of contract in Connecticut is sufficient to confer jurisdiction over non-resident defendant); *Bowman*, 474 F.Supp. at 731-732 (same). Thus, no matter where WES was expected to perform its obligations under the

policy, the fact that the policy contemplated performance by General Star in Connecticut suffices to establish jurisdiction.

b. Even putting aside where the contract *contemplated* performance, there *was* sufficient performance in Connecticut to support jurisdiction. The policy originated in General Star's home office in Stamford, Connecticut. (A142). After the Sea World accident occurred, Connecticut-based personnel played an integral role in the management of claims made against the WES policy. In particular, those personnel were critical in evaluating Anheuser-Busch's entitlement to coverage and establishing a reasonable settlement value for the Willises' claims. (A142-A143). Indeed, telephone conversations between Anheuser-Busch and General Star regarding Anheuser-Busch's assertion that it was an additional insured under the policy involved General Star officials located in Connecticut. (A274).

Moreover, authority to settle claims made on the WES policy remained with individuals located in the home office in Stamford. (A142-A143). And, as noted, when General Star ultimately settled the Willises' claims against WES, it made the payment by a check issued from its Connecticut office. (A143). General Star made other payments in satisfaction of its indemnity obligation to WES from Connecticut as well. (A143). These activities are more than sufficient to establish that General Star performed its obligations under the policy in Connecticut.

c. Although the district court acknowledged these Connecticut activities, it belittled their significance, characterizing them as “merely oversight duties, completely normal in the corporate world.” (A264). The court emphasized that “the persons who were actually handling the monitoring and investigating of the Occurrence” were in Illinois and Ohio (*ibid.*), and it dismissed the cutting of checks in Connecticut, though “integral” to the contract’s performance, as “merely the end product of extensive investigations handled outside of Connecticut.” (A283).

Tellingly, however, the district court provided no authority to support its peremptory dismissal of General Star’s Connecticut activities. Rather, its denigration of those activities and its concomitant emphasis on the activities of others outside Connecticut appear to be rooted in the misguided assumption that a contract may be performed only in one place. Indeed, at one point the district court appeared to suggest that the contract was performed exclusively in Florida, because that was the place where WES gave notice to Kalmanson, which the district court characterized as General Star’s agent. (A263-A264).⁶

⁶ General Star resolutely disputes the district court’s statement that Kalmanson was General Star’s agent, which reflects a fundamental misunderstanding of the surplus lines insurance business. Consequently, contemporaneous with the filing of its notice of appeal, General Star filed a Rule 60 motion in the district court seeking to correct the misstatement. (A290-A291). That motion is still pending before the district court at this time.

But, of course, a contract may be performed in more than one State, so that the pertinent question is not whether some, or even most, of the performance occurred outside Connecticut, but instead whether some non-trivial portion occurred within that State. Cf. *Travelers Ins. v. Par Indus., Inc.*, 1998 WL 70587, at *3 (Conn. Super. Feb. 5, 1998) (rejecting jurisdictional challenge because non-resident failed to demonstrate that contract “was performed completely outside of Connecticut”).

General Star’s activities in Connecticut in this case are very similar to those undertaken by the Connecticut-based insurer in *Travelers*. There, the Connecticut insurer brought suit for breach of contract for failure to pay premiums due under a health insurance plan issued to the Mississippi insured. The insured, like Anheuser-Busch here, argued that personal jurisdiction was lacking because the contract was not performed in Connecticut. The Connecticut court rejected the jurisdictional challenge, however, noting that the Connecticut-based insurer paid sums pursuant to the policy in Connecticut and otherwise managed claims made under the policy from its Connecticut office. *Id.* at *3. In fact, the court held that jurisdiction existed in Connecticut even though, comparably to here, some claims management activities occurred in the insurer’s field offices outside Connecticut. *Ibid.* General Star’s Connecticut activities are as substantial as those of the insurer in *Travelers*, and, therefore, the district court here should have concluded that the General Star insurance policy was performed in Connecticut.

C. General Star’s Tort Claims Arise Out Of “Tortious Conduct Within This State.”

Section 33-929(f)(4) confers jurisdiction over non-resident corporations on claims arising out of “tortious conduct in this state.” The district court interpreted this provision literally to require some conduct by Anheuser-Busch in Connecticut. This was an unduly narrow interpretation of the long-arm provision. While the specific issue presented by this case has not yet been decided in Connecticut, it is apparent that the Connecticut courts would interpret the long-arm statute to confer jurisdiction over non-residents whose activities outside Connecticut are *deliberately targeted* to cause harm in Connecticut.

As an initial matter, the district court’s strict focus on the location where the tortfeasor acts is at odds with decisions of both the Connecticut Supreme Court and this Court, which have eschewed such narrow focus on the place where the tortfeasor acted and have adopted a more pragmatic approach. For example, in *Knipple v. Viking Communications, Ltd.*, 674 A.2d 426, 431 (Conn. 1996), the Connecticut Supreme Court upheld personal jurisdiction over a non-resident corporation that made fraudulent misstatements outside Connecticut that were then communicated to individuals inside

Connecticut. As the court bluntly noted, “[f]alse representations entering Connecticut by wire or mail constitute tortious conduct in Connecticut under § 33-411(c)(4).” *Ibid.*⁷

Similarly, this Court ruled that personal jurisdiction existed in Connecticut over a New York publisher whose defamatory statements about a Connecticut resident were distributed in Connecticut. *Buckley v. New York Post Corp.*, 373 F.2d 175, 178-179 (2d Cir. 1967). Judge Friendly, writing for the Court, analogized the publisher’s actions in New York to “the frequently hypothesized but rarely encountered gunman firing across a state line,” over whom the Connecticut courts would no doubt have jurisdiction. *Id.* at 179.

These decisions demonstrate that the Connecticut courts do not focus exclusively, as did the district court, on where the putative tortfeasor’s actual conduct took place. Indeed, the decisions provide potent support for the conclusion that Connecticut’s long-arm statute reaches non-resident tortfeasors whose acts outside the State are deliberately targeted at residents inside the State.

Judge Friendly’s analogy to the “much hypothesized” gunman is particularly instructive. No one could doubt that the Connecticut long-arm would reach a gunman

⁷ Section 33-411 was the predecessor to § 33-929, which became effective on January 1, 1997. The relevant language of the two statutes is identical, and therefore decisions interpreting the prior statute apply to § 33-929 as well. (A260 n.2).

in New York who shoots across the state border into Connecticut, injuring a Connecticut resident. That, essentially, is the holding of *Knipple*. And if the gunman had fired under duress from another person, that person too would surely be subject to Connecticut's jurisdiction. Yet, under the district court's literal reading of "tortious conduct within this state," both the gunman and his coercer would be utterly immune to Connecticut process. Here, WES "fired" the bullet (the injurious policy termination) under duress from Anheuser-Busch. *Knipple* and *Buckley* make clear that such action, which deliberately targets a Connecticut victim, constitutes "tortious conduct within this state."

This view is consistent with the construction given by other States to their long-arm statutes. Several have enacted long-arm statutes like Connecticut's that refer to tortious acts or conduct "within this state." See, e.g., Colo. Rev. Stat. § 13-1-124(1)(b) ("tortious act within this state"); Haw. Rev. Stat. § 634-35(a)(2) (same); Mo. Rev. Stat. § 506.500 (same); N.H. Rev. Stat. § 510:4 (same); N.M. Stat. § 38-1-16 (same); Tenn. Code Ann. § 20-2-214 ("tortious act or omission within this state"). Significantly, those same States interpret the statutes to reach tortious acts done outside the State that target or harm residents inside the State. See *Jenner & Block v. District Court*, 590 P.2d 964, 965-966 (Colo. 1979); *Kailieha v. Hayes*, 536 P.2d 568, 569 (Haw. 1975); *Fulton v. Chicago, Rock Island & Pac. R.R. Co.*, 481 F.2d 326, 331 (8th Cir. 1973) (Missouri

law); *Mosier v. Kinley*, 702 A.2d 803, 806 (N.H. 1997); *Roberts v. Piper Aircraft Corp.*, 670 P.2d 974, 977 (N.M. Ct. App. 1983); *McCombs v. Cerco Rentals*, 622 S.W.2d 822, 824 (Tenn. Ct. App. 1981). As one court put it, in words that resonate here, “[p]urposeful or negligent conduct initiated in a foreign state which causes injury in Colorado constitutes tortious conduct [in Colorado] within the meaning of the long-arm statute.” *Pace v. D&D Fuller CATV Constr., Inc.*, 748 P.2d 1314, 1316 (Colo. Ct. App. 1987).

In the case factually closest to the instant case, *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997) (Easterbrook, J.), the Seventh Circuit held that the provision of the Illinois long-arm statute providing jurisdiction over non-residents on claims arising from the “commission of a tortious act within [Illinois]” (Ill. Comp. Stat. § 5/2-209(2)) conferred personal jurisdiction over a California company on a claim of tortious interference with prospective economic advantage where the California company induced a New Jersey company to cancel an order the latter had placed with an Illinois corporation. The court specifically ruled that the California company’s telephone call to New Jersey was tortious conduct *within the State of Illinois* for purposes of the long-arm statute. *Ibid.* See also *VDI Techs. v. Price*, 781 F.Supp. 85, 89 (D.N.H. 1991) (non-resident commits tort within the state by inducing other non-residents to end business relationship with resident of state); *International Merchandising Assocs., Inc.*

v. *Lighting Systems, Inc.*, 380 N.E.2d 1047, 1054 (Ill. App. Ct. 1978) (same); *Pure, Ltd. v. Shasta Beverages, Inc.*, 691 F.Supp. 1274, 1277-1278 (D. Haw. 1988) (same).

The district court's contrary view simply makes no sense as a matter of policy. Connecticut courts recognize that conduct outside the State that causes injury inside the State may give rise to a cause of action under Connecticut law. *Uniroyal Chem. Co. v. Drexel Chem. Co. Inc.*, 931 F.Supp. 132, 140 (D. Conn. 1996) ("at least under Connecticut's choice of law principles, a tort is deemed to have occurred where the injury was sustained"). Indeed, in *Uniroyal*, the district court ruled that the plaintiff made out a CUTPA claim based on events outside Connecticut that injured a Connecticut resident's business -- a circumstance precisely parallel to that here. *Id.* at 140. Under the district court's interpretation, however, the same acts that give rise to a cause of action under Connecticut law are insufficient to support jurisdiction over the non-resident tortfeasor. Stated another way, the district court's position requires the extremely implausible supposition that Connecticut has created causes of action against tortfeasors over which its courts may not exercise personal jurisdiction. The absurdity of such a conclusion may explain why no prior court -- federal or state -- has announced it to be the law of Connecticut.

In short, absent some indication that the Connecticut legislature intended the narrow interpretation given by the district court here -- and there is none -- this Court should not construe the Connecticut long-arm statute to force a Connecticut resident to go elsewhere to litigate Connecticut claims against a non-resident tortfeasor whose acts were deliberately targeted to cause harm in Connecticut. Since there can be little dispute that Anheuser-Busch, by inducing WES to cancel its insurance policy with General Star, intended to harm General Star, a Connecticut resident, this Court should conclude that the complaint alleges “tortious conduct within this state” by Anheuser-Busch and therefore supports jurisdiction under the Connecticut long-arm statute.

D. If Jurisdiction Exists As To Any Of General Star’s Claims, Pendent Personal Jurisdiction Exists Over The Remainder.

Even if the Connecticut long-arm statute does not independently confer jurisdiction over Anheuser-Busch on every one of General Star’s claims, pendent personal jurisdiction exists if the Connecticut long-arm statute encompasses at least one of the claims. In *Hargrave v. Oki Nursery, Inc.*, 646 F.2d 716, 720 (2d Cir. 1981), this Court held that, where a district court sits in diversity, pendent personal jurisdiction exists for claims that arise from the same “nucleus of pertinent facts” as claims for which the state long-arm statute provides jurisdiction. As the Court explained, Congress’s use of the term “actions” in 28 U.S.C. § 1332 -- rather than “claims” -- denoted its intent that all

of the plaintiff's claims be resolved in one suit so long as there was personal jurisdiction over one of them. *Id.* at 719-720. Moreover, as this Court recognized, pendent personal jurisdiction furthers the judiciary's complementary interests in having "the whole case tried at one time" and discouraging duplicative litigation in other fora. *Id.* at 720. The same result has been reached by other courts. See, e.g., *Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 913 (7th Cir. 1994) (Posner, J.).

Here, General Star's contract and tort claims arise from a "common nucleus of operative fact." The excess liability policy issued to WES and Anheuser-Busch's demand for payment pursuant to that policy underlie all of the claims. Indeed, General Star's tort claims cannot be litigated without evidence of the underlying contractual dispute, for the events upon which the contract claims are based are the necessary prologue to the tort claims. Thus, so long as the Connecticut long-arm reaches some of General Star's claims, personal jurisdiction exists over Anheuser-Busch on all of General Star's claims.

II. BRILLHART ABSTENTION WAS IMPROPER.

As an alternative basis for its decision, the district court ruled that it would dismiss this suit under the doctrine of *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942), and its progeny, because this is a declaratory judgment action and there is an action pending in Florida state court in which the same claims can be litigated between the same parties. (A266; A288). In so ruling, the district court declined to consider the

possible impact of General Star's tort claims, which it had already found were not within the jurisdictional reach of the Connecticut long-arm statute. In fact, however, the presence of those claims renders *Brillhart* abstention inappropriate. Moreover, even if abstention were permissible, the proper remedy was to stay the suit, not dismiss it outright.

A. Standard Of Review.

The district court's abstention decision is reviewed for abuse of discretion. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995). As this Court recently acknowledged, however, it applies a "somewhat rigorous" standard of review to such decisions:

In abstention cases, however, because we are considering an exception to a court's normal duty to adjudicate a controversy properly before it, the district court's discretion must be exercised within the narrow and specific limits prescribed by the particular abstention doctrine involved. Thus there is little or no discretion to abstain in a case which does not meet traditional abstention requirements.

Dittmer v. County of Suffolk, 146 F.3d 113 (2d Cir. 1998) (internal quotation marks and citation omitted).

B. The District Court May Not Abstain Because This Lawsuit Involves Tort Claims For Which Money Damages Are Sought.

1. As a general rule, the federal courts “have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). In *Brillhart*, however, the Supreme Court acknowledged a narrow exception for declaratory judgment suits when there is an action pending in state court between the same parties and involving the same subject matter. *Id.* at 494.

Justice Frankfurter, writing for the Court, explained:

Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided.

Id. at 495.⁸ The Supreme Court subsequently reaffirmed *Brillhart* in *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), holding that the discretionary standard articulated in *Brillhart* and not the “exceptional circumstances” test from *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), governs the decision to abstain from adjudicating a declaratory judgment action because of the existence of parallel state court proceedings.

2. In both *Brillhart* and *Wilton*, the sole claims presented in the federal court action were declaratory judgment claims. Indeed, the decisions in those cases endorsing abstention in such suits turned expressly upon the discretionary nature of declaratory relief. *Brillhart*, 316 U.S. at 494; *Wilton*, 515 U.S. at 286 (“[d]istinct features of the Declaratory Judgment Act” justify abstention in such actions).

⁸ Justice Frankfurter was careful, however, to emphasize that the district court must assure itself that the state court is a suitable forum for adjudicating the claims that are the basis of the federal declaratory judgment action (*ibid.*):

Where a district court is presented with a claim such as was made here, it should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court. This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. The federal court may have to consider whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process in that proceeding, etc.

Non-declaratory claims, on the other hand, are governed by *Colorado River*, not *Brillhart*, and that is true notwithstanding the presence of declaratory claims in the same case. “Claims that exist independent of the request for a declaration are not subject to the Declaratory Judgment Act’s discretionary jurisdictional rule.” *Snodgrass v. Provident Life & Accident Ins. Co.*, 147 F.3d 1163, 1167 (9th Cir. 1998). Rather, those claims “invoke the ‘virtually unflagging’ obligation of the district court to hear jurisdictionally sufficient claims” and, therefore, “the district court is without discretion to remand or decline these causes of action.” *Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 n.6 (9th Cir. 1998) (en banc).

In this case, in addition to the contract claims on which it seeks declaratory relief, General Star has alleged two tort claims on which it seeks money damages. (A30-A32). The question arises, therefore, whether *Brillhart* abstention is applicable to the declaratory contract claims where the federal action also includes non-declaratory tort claims not subject to abstention. This Court has not heretofore passed on that question, nor did the district court address it in this case, instead declaring enigmatically that the non-declaratory tort claims were not “reserved” for its review and that, therefore, “all that is left” are the two declaratory contract claims. (A287-A288).

Since the tort claims *must* be adjudicated by the district court, it *should* also adjudicate the intertwined contract claims. As the Ninth Circuit observed, “when other claims are joined with an action for declaratory relief (e.g., bad faith, breach of contract, breach of fiduciary duty, rescission, or claims for other monetary relief), the district court should not, as a general rule, remand or decline to entertain the claim for declaratory relief.” *GEICO*, 133 F.3d at 1226. Thus, district courts typically retain jurisdiction over declaratory judgment claims where the suit includes other claims for monetary relief. See, e.g., *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1367 (9th Cir. 1991) (district court was correct to adjudicate declaratory judgment claims where suit included claim for monetary relief).

True, retaining jurisdiction over the declaratory contract claims will still leave pending the duplicative contract claims asserted by Anheuser-Busch in the Florida action. But that consideration can be of little force in light of the principle, declared in *Colorado River* and applicable to the vast majority of claims, that the right of access to federal court generally outweighs any duplication or waste inherent in the existence of parallel state proceedings. *Colorado River*, 424 U.S. at 813-814, 817.

Other considerations also point to the conclusion that the district court should retain jurisdiction over the declaratory contract claims. This action was, after all, commenced first, before Anheuser-Busch initiated the duplicative state court action, so

that any waste associated with the existence of parallel proceedings cannot be laid at General Star's door. As the Ninth Circuit observed in these circumstances in *GEICO*, 133 F.3d at 1226 n.7, "principles of comity and federalism do not require that federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in a state court." See also *Maryland Cas. Co. v. Knight*, 96 F.3d 1284, 1289 (9th Cir. 1996) (upholding decision to adjudicate declaratory judgment claims, along with other claims for monetary relief, where, like here, the state court action was filed after and in response to the federal court suit).

Indeed, the circumstances of this case make abstention especially inappropriate because not only did Anheuser-Busch initiate the duplicative state court litigation after this action was commenced, it also carefully manipulated the Florida litigation to avoid having it removed to federal court. As the Court will recall (see page 8 n.4, *supra*), after Anheuser-Busch filed the Florida action, it served only Sphere Drake with the complaint; Anheuser-Busch (inexplicably) did not serve General Star at the same time. When General Star learned that Sphere Drake had already been served with the complaint, it promptly filed its notice of removal -- doing so even before it had been served with the complaint. Nevertheless, Anheuser-Busch convinced the federal district court to remand the case to the state court on the ground that General Star's removal was untimely because the 30-day time limit for removal had commenced with the service upon Sphere

Drake. In short, Anheuser-Busch succeeded in its effort to “trap” an otherwise removable suit in state court. Had the Florida federal court retained the suit, as it now appears it should have done,⁹ *Brillhart* abstention clearly would have been inappropriate since there would have been no pending state court action in favor of which to abstain. In light of this fact, Anheuser-Busch should not be rewarded by allowing the Florida litigation to be the basis for abstention in this case. Indeed, to do so is to encourage the filing of duplicative state court lawsuits brought solely for the purpose of defeating federal court jurisdiction.

Finally, we note a practical point. A refusal to adjudicate the contract claims will not alleviate the burdens of the federal court in Connecticut because the circumstances surrounding those claims must in any event be litigated as part of the adjudication of General Star’s tort claims. Any duplication caused by Anheuser-Busch’s filing of the Florida lawsuit should not, therefore, be a basis for refusing to adjudicate the declaratory contract claims.

⁹ See *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, No. 97-1909, 1999 WL 181158 (April 5, 1999), in which the Supreme Court held that the 30-day time limit for filing a notice of removal does not begin to run until the defendant is formally served with process. Here, since General Star was not served with the Florida complaint prior to the time it sought removal, its notice was not too late.

C. Any Abstention Should Have Taken the Form of a Stay, Not A Dismissal.

Even if the district court correctly abstained from adjudicating General Star's contract claims, the proper action was to stay the federal adjudication of those claims, not dismiss the suit outright. The Supreme Court indicated in *Wilton* that a stay is the preferable remedy:

We note that where the basis for declining to proceed is the pendency of a state proceeding, a stay will often be the preferable course, because it assures that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy.

Wilton, 515 U.S. at 288 n.2. See also *Fuller v. Ulland*, 76 F.3d 957, 960-961 (8th Cir. 1996) (stay, not dismissal, is proper form of *Brillhart* abstention). Indeed, *Wilton* affirmed the entry of a stay, not a dismissal. 515 U.S. at 290. Mindful of the Supreme Court's instruction, the courts of appeals have reversed *Brillhart*-based abstention orders that dismiss the lawsuit and have ordered the district court to enter a stay. *E.g.*, *Night Clubs, Inc. v. City of Fort Smith, Arkansas*, 163 F.3d 475, 481-482 (8th Cir. 1998).

The distinction between a dismissal and a stay is not purely academic. As the Supreme Court noted in *Wilton*, there will often be no assurance that the state court action will ultimately adjudicate all of the federal declaratory claims. That is true here. The Florida action is only in its infancy: the district court recently denied General Star's motion to dismiss -- from which General Star intends to seek interlocutory review as

permitted under Florida law -- and General Star has yet to answer the Florida complaint, though it must do so in the near future. At this point, there is no way to be sure that the Florida court will adjudicate the merits of Anheuser-Busch's contract claims (which are the flip side of General Star's contract claims in this action). By the time the Florida court ultimately rules, the statute of limitations on General Star's contract claims may have run in Connecticut, thereby preventing General Star from refiling this lawsuit. Thus, at a minimum, this Court should reverse the district court order dismissing the contract claims on abstention grounds and order it to enter a stay pending completion of the Florida action.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted,

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APRIL 9, 1999