

# 99-7004

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

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GENERAL STAR INDEMNITY COMPANY,  
Plaintiff-Appellant,

v.

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

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

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

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ANDREW L. FREY  
NORMAN R. WILLIAMS II  
RYAN P. FARLEY  
MAYER, BROWN & PLATT  
1675 Broadway  
New York, New York 10019  
(212) 506-2635  
  
Counsel for Plaintiff-Appellant  
General Star Indemnity Co.

Of counsel:

STEFAN R. UNDERHILL  
JONATHAN B. TROPP  
DAY, BERRY & HOWARD LLP  
One Canterbury Green  
Stamford, Connecticut 06901

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**PLAINTIFF-APPELLANT GENERAL STAR  
INDEMNITY COMPANY’S REPLY BRIEF**

Anheuser-Busch’s attempt to portray itself as the victim of an unauthorized effort to bring it before a Connecticut court simply falls flat. To begin with, Anheuser-Busch, whose own SEC filings describe it as a beer manufacturer, not merely a holding company,<sup>1</sup> offers a distorted account of the dispute and the evidence in the record. It then compounds its error by offering a crabbed interpretation of Connecticut law that has never been adopted by any court in Connecticut, state or federal.

Anheuser-Busch’s defense of the district court’s *Brillhart* abstention ruling is even more strained. Implicitly recognizing that the district court may not abstain from the adjudication of this suit because General Star has presented tort claims for which it seek money damages, not declaratory relief, Anheuser-Busch instead suggests that this Court should disregard the tort claims because General Star did not ask the district court to *reconsider* their dismissal.

Finally, Anheuser-Busch proffers a variety of reasons why, in its view, this dispute should be adjudicated only in Florida state court. But the status of the Florida litigation and its supposed superiority to this suit — which General Star disputes — are beside the

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<sup>1</sup> Although Anheuser-Busch purports (Br. 3) to be only “a holding company,” its Form 10-K relates that the “Company’s” — meaning ABC and not ABI — main product is beer, which is sold nationwide, and that the “Company” has over 24,000 employees, a figure inconsistent with its purported role solely as a “holding company.” (A149, A153).

point: The district court was powerless to abstain in this case because of the presence of General Star's nondeclaratory tort claims.

### **REPLY STATEMENT OF FACTS**

Anheuser-Busch offers a skewed description of the record, treating its own characterization of the insurance dispute as established fact and ignoring the rule that, in reviewing a pre-trial order dismissing a complaint, the facts must be taken as pled by the plaintiff. See *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996).<sup>2</sup> Most of the misstatements are irrelevant to whether personal jurisdiction exists over Anheuser-Busch or whether the district court was correct to abstain. Consequently, we will confine ourselves to several misstatements that are sufficiently material to warrant reply.

Anheuser-Busch asserts (Br. 4) that the General Star policy was issued in Florida by Kalmanson.<sup>3</sup> But the policy expressly states that it was "issued by General Star Indemnity Company, Stamford, Connecticut 06904" (A95), and each endorsement was

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<sup>2</sup> Similarly, to the extent this Court considers any evidence in the record, it should be viewed in the light most favorable to General Star.

<sup>3</sup> Anheuser-Busch also points (Br. 13) to the district court's statement (A263) that Kalmanson was General Star's agent in issuing the policy. Anheuser-Busch fails to mention that General Star has filed a Rule 60 motion asking the district court to correct that clearly erroneous statement. (A290-A293). That motion remains pending at this time.

countersigned by General Star, not Kalmanson (A95-A103). As described in our opening brief (at 3-4) — which description Anheuser-Busch does not dispute — WES procured the General Star policy by contacting Kalmanson, who in turn contacted Sovereign, who in turn solicited bids from several surplus lines insurers, only one of which was General Star. True, Kalmanson, as a licensed surplus lines agent in Florida, paid the surplus lines tax (denoted by the tax stamp on the policy to which Anheuser-Busch refers (A95)); but that act, which is a duty Florida law imposes on the Florida agent, not the insurer (see Fla. Stat. Ann. § 626.932), is a far cry from “issuing” the policy.

Anheuser-Busch also alleges (Br. 5) that, “immediately” after the accident, it notified General Star and requested benefits under the policy. In fact, the notice received by General Star days after the accident came from Sovereign, not Anheuser-Busch; moreover, that notice makes no mention of Anheuser-Busch or any claim for benefits by Anheuser-Busch. (A145). As far as the record discloses, the first communication between Anheuser-Busch and General Star occurred in January 1997 (A110), five months after the accident.

Anheuser-Busch next asserts (Br. 6) that General Star was aware of the seriousness of Willis’s injuries but, despite WES’s “clear liability” for those injuries, refused to engage in meaningful settlement discussions. This is a manifest distortion. General Star did not refuse to enter settlement discussion, much less was it reticent to

reach closure in the face of “clear liability.” Rather, General Star rejected what it viewed as a *premature* demand by Anheuser-Busch’s that it enter into settlement discussions with the Willises. As General Star explained to Anheuser-Busch at the time (A112, A118-A119), the accident investigation had yet to establish either that General Star’s insured, WES, rather than the manufacturer of the boat or the boat’s engine, was liable for the accident or that Willis’s injuries, even if attributable to WES, were sufficiently severe to exhaust the \$1 million primary policy issued by Sphere Drake and reach the excess layer of coverage provided by General Star. Although General Star subsequently concluded that Anheuser-Busch was not an additional insured under its policy and refused to indemnify it, General Star continued to investigate the accident (A115, A118-A119) and ultimately did settle WES’s liability to the Willises (A143).

Anheuser-Busch goes outside the record on appeal to describe (Br. 10-11) the Florida litigation. To clarify any misunderstanding regarding the status of that litigation, we have moved contemporaneously with the filing of this reply brief to supplement the record in this case with several of the most recent filings from the Florida action. Those materials reflect that General Star and Anheuser-Busch have agreed “in principle” — the stipulation embodying this agreement has yet to be signed by either party or approved by the Florida trial court — to sever the question whether Anheuser-Busch is an “additional

insured” under the General Star policy from the rest of the action and to adjudicate the “additional insured” issue by cross-motions for summary judgment filed no later than August 30, 1999. Upon resolution of the “additional insured” issue, the parties would proceed with discovery regarding General Star’s tortious interference, CUTPA, and FUTPA counterclaims and, if Anheuser-Busch is an additional insured, its breach of contract and bad faith claims.<sup>4</sup> No timetable for concluding discovery and beginning trial on those claims has been set. Thus, contrary to Anheuser-Busch’s suggestion (Br. 48) that the Florida action is speeding to final judgment (thereby rendering remand in this case a pointless formality), a determination of that Florida action is certainly months — and most likely years — away.

Finally, Anheuser-Busch claims, in discussing the dismissal of Sea World from this action (Br. 11-12), that its \$1.25 million payment to the Willises was “on behalf of” Sea

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<sup>4</sup> General Star has sought discretionary, interlocutory appellate review of the Florida trial court’s refusal to dismiss Anheuser-Busch’s bad faith claim and that the petition remains pending at this time. Contrary to Anheuser-Busch’s assertion (Br. 10-11), this agreement, which provides for expedited consideration solely of the “additional insured” issue, has not mooted General Star’s request for interlocutory appellate review, which addresses the entirely separate bad faith claim.

World of Ohio. Whatever the validity of that claim as a factual matter,<sup>5</sup> it is utterly beside the point. If Anheuser-Busch and Sea World are both additional insureds, Anheuser-Busch may recover if its claims under the policy are valid; if neither is an additional insured, neither would be entitled to recover. And even if Sea World is an insured and Anheuser-Busch is not, only Anheuser-Busch would have a potential claim to reimbursement for the \$1.25 million payment: Sea World, having never been a defendant in the Willis lawsuit and having never paid a cent to the Willises, has no possible claim for reimbursement from General Star. Accordingly, there was no reason to retain Sea World as a separate party in this suit.

## **ARGUMENT**

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

Anheuser-Busch acknowledges (Br. 20) that review by this Court is *de novo*, and that the question to be decided is solely a statutory one: whether the Connecticut long-

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<sup>5</sup> Significantly, the Willis complaint did not name Sea World as a defendant but rather Anheuser-Busch Companies, Inc. and “Busch Entertainment Corporation dba Sea World of Ohio.” (A123-A125). The “dba” reference was mistaken since, as Anheuser-Busch points out (Br. 3), Sea World of Ohio is a division of Sea World, Inc. and not BEC, which does business under its own name. Correspondingly, Anheuser-Busch’s April 3, 1997 letter to General Star notifying General Star of the settlement refers to ABC, BEC, and Sea World of Ohio and then notes that the \$1.25 million payment settled the Willises’ claims against “them” — not “it,” and not “Sea World, Inc.” (A140).

arm statute authorizes jurisdiction over Anheuser-Busch.<sup>6</sup> The answer to that question, we submit, is clear.

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

***1. Anheuser-Busch misstates the applicable standard.***

Anheuser-Busch agrees (Br. 22-23) that jurisdiction may be established on one of two grounds: either that the contract contemplated or required performance in Connecticut, or that it was in fact performed there. It mischaracterizes the second prong, however, when it suggests (Br. 22-23) that General Star must show that its performance in Connecticut was “the *most substantial part* of the obligation to be performed under the contract” (emphasis added).

Anheuser-Busch simply ignores *all* our arguments on this point. We contended (Br. 18-21) that the statutory text does not require that the “most substantial” part of the performance occur in Connecticut, and no court — federal or state — has endorsed such a requirement. Indeed, the sole case upon which Anheuser-Busch relies, *Publications*

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<sup>6</sup> Anheuser-Busch agrees (Br. 20-21) that the constitutional question, which was not raised in the court below, is not before this Court. Although Anheuser-Busch would be free to raise that issue on remand, it could not possibly prevail if it loses on the statutory question, since Connecticut asserts jurisdiction in only a subset of the constitutionally permissible circumstances. Moreover, evidence already in the record (A144; A164-A211) demonstrates that Anheuser-Busch has constitutionally sufficient “minimum contacts” with Connecticut.

*Group, Inc. v. American Soc’y of Heating, Refrigerating & Air-Conditioning Engineers, Inc.*, 566 F.Supp. 316 (D. Conn. 1983), did not adopt a “most substantial” requirement; rather, as we explained (Br. 20-21), that court simply observed, in **upholding** jurisdiction, that the most substantial part of the performance of the contract in that case had taken place in Connecticut.

Anheuser-Busch’s alternatively argues (Br. 28-30) that, at least when the Connecticut performance is that of the plaintiff, Connecticut courts require “substantial performance” of the contract in Connecticut. Once again, however, Anheuser-Busch does not confront most of our contentions on this point.<sup>7</sup> Moreover, the cases it relies on, all of which found jurisdiction to be **present** because there was “substantial performance” in Connecticut, provide no support for Anheuser-Busch’s far different claim that jurisdiction is **absent** whenever the in-state performance is not substantial.

Indeed, Anheuser-Busch fails to cite even one case rejecting jurisdiction for the lack of

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<sup>7</sup> Anheuser-Busch does challenge (Br. 34) our reliance on the dictum in *Lombard Bros., Inc. v. General Asset Management Co.*, 460 A.2d 481, 487 (Conn. 1983), that “even incidental acts of performance of contracts in this state” would satisfy the statutory requirement. Anheuser-Busch argues that the “incidental acts” to which the court referred must be those of the non-resident defendant (Anheuser-Busch), not the resident plaintiff (General Star). The quoted statement, however, says no such thing; rather, the language in question suggests only that the “other significant contacts” that are necessary to satisfy constitutional requirements for jurisdiction must be the non-resident defendant’s. Thus, jurisdiction exists where there are incidental acts of performance by the resident plaintiff, provided, as the Constitution requires, that the non-resident defendant has other significant contacts with Connecticut.

“substantial performance.” Rather, courts deny jurisdiction on this ground only where there is *no* performance by either party in Connecticut. *E.g.*, *Bennett v. Performance Racing & Marine, Inc.*, 1999 WL 68552, at \*2 (Conn. Super. Jan. 27, 1999) (no personal jurisdiction over New Jersey defendant where “the contract between the parties was made and performed *entirely* in New Jersey”) (emphasis added).

In short, to establish jurisdiction based on the actual (rather than contemplated) performance of the contract in Connecticut, General Star need show only that some (more than trivial) performance — not a “substantial” part and certainly not the “most substantial” part — of the contract took place in Connecticut.

## ***2. The policy contemplated performance in Connecticut.***

In our opening brief (at 22-23), we advanced a straightforward argument for jurisdiction on this ground: the performance that WES expected under the policy of insurance, and for which it paid premiums, was the payment of claims by General Star if losses occurred that were within the coverage of the policy. Such payments would necessarily be made from Connecticut, the *only* state in which General Star was licensed to do business. The contract is thus fundamentally different from those in *Bross*, *Bowman*, and *Chemical Trading*, on which Anheuser-Busch relies (Br. 23-25), in all of

which the Connecticut plaintiff was being paid to perform services entirely outside of Connecticut.

Anheuser-Busch contends (Br. 26-27) that (1) the “mere fact” that General Star is located in Connecticut does not mean that the policy contemplated performance in Connecticut; (2) the policy’s reference to the four Sea World theme parks at which WES was to perform its shows evidenced the parties’ intention that the contract be performed outside Connecticut; and (3) because General Star’s management affiliate, General Star Management Company (GSMC), maintained offices outside Connecticut to process claims, “even Gen Star contemplates its contractual obligations will be performed in locations other than Connecticut in many, if not most, cases.”

The first of these points misapprehends our argument, which does not depend simply on the fact that General Star is located in Connecticut, but on the particular character of the performance to be made under a contract of insurance involving an insurer that operates only in a single state. Nor, contrary to Anheuser-Busch’s insinuation (Br. 27), do we depend on the physical act of sending the check as constituting performance; if General Star arbitrarily arranged to send a payment from Oklahoma or Wyoming or some other place having no connection with it or WES, there would be no constitutional basis for jurisdiction in such state. Here, however, payment would be made from the state in which General Star did its business.

Second, it is of no moment that there is a policy endorsement listing the four Sea World theme parks at which WES's activities would be covered. The performance of a contract does not occur in the abstract; it is composed of discrete acts undertaken by the parties to the contract — here, the payment of a premium on one side and the undertaking to pay claims on the other. Indeed, when WES put on shows at a Sea World facility, it was not in any way performing *this* contract. Thus, the location of the covered sites — whether in Ohio, Hawaii, or Kathmandu — was irrelevant to the performance of either party's primary contractual duty.

For a similar reason, there is no merit to Anheuser-Busch's third argument, that, since GSMC maintains offices outside Connecticut to process claims, "even Gen Star contemplates its contractual obligations will be performed in locations other than Connecticut in many, if not most, cases." GSMC is not a party to the contract, nor is it mentioned in the policy;<sup>8</sup> indeed, Anheuser-Busch does not contend that the policy obligated GSMC to perform any duty, much less the key contractual duty to pay claims. And it is absurd to say that the performance for which WES paid its premiums was the *investigation* of claims, an activity undertaken for the primary benefit of General Star itself. Thus, that GSMC has offices outside Connecticut says nothing about where

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<sup>8</sup> GSMC is a distinct corporate entity from General Star Indemnity Company, the plaintiff in this case, a fact that Anheuser-Busch, given its sensitivity in this regard (see AB Br. 3), should appreciate.

General Star was expected to perform its contractual obligations under the terms of the policy.

Finally, citing *Teleco Oilfield Servs.*, 656 F.Supp. 753, Anheuser-Busch argues (Br. 27) that the place of the contemplated performance under the policy was not where General Star would make payments to the policy claimants but where the claimants would *receive* their payments (*i.e.*, presumably Missouri, if Anheuser-Busch's claim for benefits under the policy were correct). Far from endorsing that restrictive view, *Teleco* held that a Connecticut insured's payment of premiums to a foreign insurer constituted performance of the insurance policy in Connecticut. *Id.* at 757. Nothing in *Teleco* suggests, as Anheuser-Busch claims, that performance of the policy could occur *only* where the claimant mailed its premium payments or would receive payment of any claim. Rather, the clear inference from *Teleco* is that the transmittal of a payment to or from Connecticut pursuant to an insurance contract is sufficient to constitute performance of the contract in Connecticut.

**3. *The policy was in fact performed in Connecticut.***

Although it is a fair inference from the policy that it would be performed, at least in part, in Connecticut, as things turned out, there can be no doubt that this contract was actually performed, at least in material part, in Connecticut. Anheuser-Busch responds by stressing the importance of activities on General Star's behalf outside Connecticut and

by attempting to minimize the significance of General Star's activities in Connecticut. This approach fails to carry the day.

Anheuser-Busch's focus on activities undertaken on General Star's behalf outside Connecticut — for example, Anheuser-Busch's communications with GSMC personnel in Illinois and with General Star's outside counsel in Ohio (see AB Br. 30)<sup>9</sup> — is rooted in the erroneous assumption that a contract may be performed in only one state. A contract may, however, be performed in many places, and significant performance in one state (*e.g.*, manufacture of goods ordered by a customer) does not mean that significant performance (*e.g.*, delivery of the same goods) cannot occur in another state. Thus, no matter how significant General Star's "performance" in Illinois or Ohio, it does not detract from the significance of General Star's performance in Connecticut.

Nor is there any merit to Anheuser-Busch's related attempt to minimize the significance of General Star's Connecticut activities. For example, Anheuser-Busch declares (Br. 30) that, from its point of view, "Gen Star took no observable action in Connecticut." This conveniently ignores Anheuser-Busch's own communications with General Star officials in Connecticut (A140; A274-A275); by writing directly to General Star's President in Connecticut and demanding that General Star reimburse it for the

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<sup>9</sup> We assume for purposes of this point that such activities constitute "performance" of the contract rather than ancillary acts, a point that General Star disputes (see pp. 11-12, *supra*).

Willis settlement (A140), Anheuser-Busch plainly anticipated performance of the contract in Connecticut.

In any event, it does not matter what Anheuser-Busch “observed.” The question is whether General Star in fact acted to carry out its contractual obligations in Connecticut, and, here, the evidence is compelling. It shows that General Star officials in Connecticut supervised GSMC’s claims-handling on the WES policy and that those Connecticut-based officials retained the authority to settle claims made on that policy. (A142-A143). In fact, when General Star made payments on the WES policy, those payments were made from Connecticut.

Anheuser-Busch conclusorily dismisses (Br. 31) the relevance of General Star’s supervisory actions in Connecticut. But Anheuser-Busch’s belittling of those action demonstrates a striking lack of understanding of how the business of insurance works. The ultimate decision whether to pay a claim (as opposed to preliminary claims investigation, such as that performed by GSMC in Illinois) is secondary in its importance only to the actual act of payment; indeed, Anheuser-Busch’s breach of contract and bad faith claims in the Florida action are based on General Star’s ultimate refusal to pay Anheuser-Busch’s claim, a refusal made by personnel in Connecticut. Thus, Anheuser-Busch’s own actions belie its claim that General Star’s determination not to settle was inconsequential to General Star’s performance of the policy.

So too, Anheuser-Busch's dismissal of the significance of the "mere act" of issuing a settlement check lacks merit. Far from being insignificant, the act of payment is the central act of performance; that is what WES bargained and paid its premiums for. Indeed, the district court acknowledged that this performance was "integral" to the contract. (A283). Again, as noted, it is General Star's refusal to perform another such "mere act" that underlies Anheuser-Busch's breach of contract and tort claims in Florida.

Alternatively, Anheuser-Busch attempts to minimize the significance of General Star's payment of claims on the WES policy out of Connecticut by arguing (Br. 32) that the performance of policy obligations to other parties is "entirely irrelevant" to the jurisdictional inquiry. According to Anheuser-Busch, the relevant issue is whether General Star undertook any performance in Connecticut vis-a-vis Anheuser-Busch. That claim, while imaginative, is meritless: The Connecticut long-arm statute requires only that the claim arise out of a "contract made in this state or to be performed in this state"; it conspicuously does not require the claim to arise out of a "contract made in this state or to be performed *for the defendant's benefit* in this state." Indeed, Anheuser-Busch is unable to cite a single decision even remotely supporting its patently self-serving interpretation of Connecticut law.

Anheuser-Busch is similarly mistaken in criticizing (Br. 33-34) our reliance on *Travelers*. Anheuser-Busch contends that the ruling upholding personal jurisdiction in that case depended on the fact that the defendant, a non-resident insured, maintained a bank account in Connecticut. In fact, the trial court relied solely on the Connecticut-based insurer's performance in Connecticut of its duties, such as the supervision of claims-handling by regional offices (1998 WL 70587 at \*3). Indeed, the *Travelers* court described the insurer's actions in Connecticut and discussed at length whether performance by a resident plaintiff was sufficient by itself to establish jurisdiction. That discussion would have been wholly unnecessary had jurisdiction been found even in part on the basis of the insured's maintenance of a bank account in Connecticut. In fact, the court rejected the precise argument proffered by Anheuser-Busch here, holding unequivocally that "[performance [in Connecticut] by one party is sufficient" to establish jurisdiction. *Ibid.*<sup>10</sup> In short, it was the Connecticut insurer's in-state actions, not the

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<sup>10</sup> Significantly, the trial court ruled that "***performance*** by one party is sufficient" for jurisdiction, not "***substantial performance***" (emphasis added).

non-resident insured's maintenance of a bank account, that was the key to concluding that jurisdictions existed in that case.<sup>11</sup>

Finally, Anheuser-Busch appears to contend (Br. 35-37) that jurisdiction is lacking because General Star's declaratory judgment claims are based on the interpretation of policy provisions that have no relation to the acts performed in Connecticut. Anheuser-Busch points to the issuance of the certificate by Kalmanson and its unilateral settlement of the Willises' claim (which General Star most definitely contends was a breach, not a performance, of the insurance contract). It omits, however, the most important action underlying this litigation: the determination that Anheuser-Busch was not an additional insured under the policy and had no right to reimbursement. It is, in short, not meaningful to slice the cheese as finely as Anheuser-Busch seeks to do in separating the allegedly relevant acts of performance from the allegedly irrelevant acts.

In any event, if Anheuser-Busch means to suggest that the long-arm statute requires General Star's declaratory judgment claims to be based on the violation of the particular policy provisions involving conduct in Connecticut, the answer is that the statute requires only that the cause of action arise out of a "contract \* \* \* to be

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<sup>11</sup> That the trial court found the insured's maintenance of a bank account in Connecticut relevant to the due process inquiry is hardly surprising: that inquiry, unlike the inquiry under the long-arm statute, focuses exclusively on the non-resident defendant's contacts with the state.

performed” in Connecticut, not a “contract *provision* \* \* \* to be performed” there. Indeed, the Connecticut Supreme Court has rejected such a strict nexus between the contract and the cause of action, ruling that the long-arm statute “does not require a causal connection between the defendant’s forum-directed activities and the plaintiff’s lawsuit.” *Thomason v. Chemical Bank*, 661 A.2d 595, 601 (Conn. 1995).

Similarly, there is no merit to Anheuser-Busch’s related claim (Br. 36-37) that General Star may not simultaneously invoke the policy as the basis for jurisdiction over Anheuser-Busch and seek a declaration that Anheuser-Busch has no rights under the policy. Such suits are a common occurrence, and nothing in the Declaratory Judgment Act (28 U.S.C. § 2201 *et seq.*) or the Connecticut long-arm statute prohibits them. In fact, Connecticut courts routinely adjudicate declaratory judgment claims in which the plaintiff, invoking a contract as the basis for jurisdiction over the defendant, seeks a declaration that the defendant does not have a particular right under the contract. *E.g.*, *Uniroyal Chem. Co., Inc. v. Drexel Chem. Co., Inc.*, 931 F.Supp. 132, 135-136 (D. Conn. 1996) (jurisdiction over non-resident defendant exists on claim seeking declaration that defendant has no right to chemical studies under contract that is basis for jurisdiction). Indeed, it is Anheuser-Busch that is speaking out of both sides of its mouth

when it contends that it is contractually entitled to benefits from a Connecticut-based insurer yet disputes that it may be sued in Connecticut on that policy.

**B. General Star’s Tort Claims Arise Out of “Tortious Conduct Within [Connecticut].”**

Anheuser-Busch’s defends the district court’s dismissal of General Star’s tort claims on two grounds: (1) that the district court was correct in interpreting the Connecticut long-arm statute literally, to require that the alleged tortious conduct took place in Connecticut; and (2) even if the long-arm reaches conduct outside Connecticut that deliberately targets Connecticut residents, Anheuser-Busch did not target a Connecticut resident by inducing WES to cancel its insurance policy with General Star. Neither argument has merit.

In defense of the district court’s literal interpretation of the long-arm statute, Anheuser-Busch points (Br. 37-38) to the district court decision in *Bross Utilities Service Corp. v. Aboubshait*, 489 F.Supp. 1366 (D. Conn. 1980). But Anheuser-Busch overlooks controlling decisions of the Connecticut Supreme Court and this Court, which have expressly rejected a literal reading of the long-arm statute and have construed the statute to reach conduct that takes place outside Connecticut’s borders. See *Knipple v. Viking Communications, Ltd.*, 674 A.2d 426, 431 (Conn. 1996); *Buckley v. New York Post Corp.*, 373 F.2d 175, 178-179 (2d Cir. 1967).

Moreover, Anheuser-Busch concedes (Br. 40) that other states with identically-worded long-arm statutes have interpreted their statutes to reach conduct outside the state that targets in-state residents. It points to no legislative history showing that the Connecticut legislature intended to depart from this general and eminently sensible practice by drastically limiting its courts' judicial powers to protect Connecticut residents.

Lastly in this regard, Anheuser-Busch offers no response to our argument that, by creating causes of action such as CUTPA that reach tortious conduct outside the state, the Connecticut legislature has signaled its understanding that such non-resident tortfeasors should be answerable for their actions in the Connecticut courts. In short, Anheuser-Busch asks this Court to overlook controlling precedent and endorse an interpretation that is at odds with the practice of other States and is, at base, utterly illogical. A lone district court decision is too slender a reed to support such an interpretation.

Anheuser-Busch's alternative claim (Br. 40) that it did not target General Star and that General Star suffered no injury in Connecticut is simply fanciful, resting on a distorted interpretation of General Star's argument and an utterly misleading characterization of the evidence in the record. To begin with, General Star does not claim that it suffered an injury in Connecticut solely because it is located there. General Star also suffered an injury in Connecticut because that is where the injurious event,

receipt of the notice that WES was canceling its policy, occurred (A143-A144). As this Court has recognized, that is more than sufficient to constitute an “injury” in Connecticut. See *Buckley*, 373 F.2d at 178-179 (defamatory statement made outside Connecticut that reaches a Connecticut resident constitutes “injury” inside Connecticut).

Anheuser-Busch’s related claim (Br. 41-42) that it did not deliberately target General Star or know that “Gen Star was a Connecticut corporation at the time in question” is especially specious. Anheuser-Busch’s purpose, no matter how it attempts to justify it as merely pursuit of its own “self-interest,” was patent: to induce WES to cancel the General Star policy because of its unhappiness over General Star’s handling of its claim. (A27-A28; A30-A31; A143-A144). How that action does not constitute targeting General Star, the only party that conceivably could be injured by it, is mystifying.

As for the suggestion that Anheuser-Busch did not know General Star was a Connecticut resident, that would seem entirely immaterial to the exercise of Connecticut’s protective jurisdiction. In any event, the WES policy itself denoted General Star’s Connecticut residency (A95; A107), and Anheuser-Busch wrote to General Star in Connecticut (before the WES policy was canceled) threatening to take the very action it ultimately did. (A140).

**C. If Jurisdiction Exists As To Any Of General Star's Claims, Pendent Personal Jurisdiction Exists Over The Remainder.**

Anheuser-Busch disputes that pendent personal jurisdiction is applicable here, contending (Br. 42-43) that pendent personal jurisdiction exists only where the suit includes a pendent federal claim. In *Hargrave v. Oki Nursery, Inc.*, 646 F.2d 716, 720 (2d Cir. 1981), however, this Court rejected that restrictive view and held that pendent personal jurisdiction also applies in suits in which there are no federal claims, but only state-law claims. Anheuser-Busch attempts (Br. 43) to distinguish *Hargrave* on the ground that, there, the assertion of jurisdiction satisfied constitutional requirements. But here too the constitutionality of the exercise of jurisdiction over all counts must be presumed, since the constitutional question was not raised below and is not before this Court. In short, as this Court ruled, 28 U.S.C. § 1332 authorizes the exercise of pendent personal jurisdiction over state law claims that the state long-arm statute does not reach, so long as all the claims arise from a common nucleus of operative fact, a circumstance that Anheuser-Busch does not dispute exists here.

## **II. *BRILLHART* ABSTENTION WAS IMPROPER.**

Anheuser-Busch makes no attempt to argue that *Brillhart* abstention applies to lawsuits involving claims for legal (as opposed to declaratory) relief. Rather, it contends (Br. 46-47) that, because General Star did not seek reconsideration of the district court’s decision to dismiss its tort claims for lack of personal jurisdiction, those claims “have no bearing on the abstention analysis.” Anheuser-Busch then proclaims that, for a variety of reasons, Florida is a superior forum for adjudicating this suit. The former claim is patently unfounded, and the latter claim is both wrong and irrelevant.

### **A. General Star’s Tort Claims Are Properly Before This Court And May Not Be Disregarded.**

Anheuser-Busch attempts to capitalize on the course of the proceedings below, suggesting that the tort claims should play no role in this Court’s consideration of the abstention issue because General Star did not seek reconsideration of the district court’s decision to dismiss them for lack of personal jurisdiction. That remarkable assertion — for which Anheuser-Busch offers no supporting authority — has no merit.

General Star vigorously opposed Anheuser-Busch’s motion to dismiss the tort claims for lack of personal jurisdiction. See Opposition to Motion to Dismiss at 19-22. After the district court nevertheless granted dismissal, General Star moved for

reconsideration of the portion of the ruling dismissing the declaratory judgment claims. (A269-A272). While General Star disagreed with the district court's reasoning regarding the tort claims, it had no plausible claim that its arguments had been overlooked or misconstrued, rendering it pointless — indeed, inappropriate — to ask for reconsideration of that part of the order. General Star made clear, however, that it was not waiving those claims. See Memorandum of Law in Support of Plaintiff's Motion for Reconsideration at 2.

In opposing the motion for reconsideration, Anheuser-Busch invoked *Brillhart* abstention as an alternative ground for dismissal of the declaratory judgment claims. In reply, General Star pointed specifically to the presence of the tort claims (Reply Brief in Support of Reconsideration at 4). But the district court refused to take those claims into consideration in making its abstention ruling because General Star, which had not foreseen that Anheuser-Busch would invoke *Brillhart* abstention as an alternative ground for relief, had not requested the district court to reconsider the dismissal of the tort claims, so that, in the district court's view, they were not before it for purposes of the reconsideration decision.

Anheuser-Busch attempts to transform the district court's debatable ruling that the tort claims were not preserved for the purposes of its ruling on the *Brillhart* issue on

reconsideration into a bar on General Star having *this Court* consider those claims as part of its appeal from the final judgment. There is absolutely no support for that position, a point underscored by Anheuser-Busch's failure to cite even one decision supporting such a view. In this appeal, where General Star has challenged the dismissal of its tort claims — which issue Anheuser-Busch cannot deny is properly before this Court — those claims are “preserved” for this Court's review of the abstention ruling. In short, this Court may not simply affirm the district court's abstention decision on the ground that General Star did not move the district court, at a time when *Brillhart* abstention was not in issue, to reconsider its dismissal of the tort claims.

**B. Regardless Of The Status Of The Florida Litigation, *Brillhart* Abstention Is Inapplicable In This Case.**

Anheuser-Busch does not question the controlling legal authority (cited at GS Br. 37-38) holding that *Brillhart* does not permit the district court to abstain from the adjudication of claims for legal relief. That should be the end of the story, since the presence of General Star's tort claims distinguish this case from *Brillhart* and *Wilton*, neither of which involved claims for legal relief. Anheuser-Busch nevertheless persists in arguing (Br. 47-50) that Florida is a better forum for adjudicating this suit.

As an initial matter, whether or not the Florida litigation is a superior means of resolving this dispute, *Brillhart* abstention simply is not applicable in suits involving claims for non-declaratory relief. Indeed, Anheuser-Busch tellingly fails to cite even one decision upholding *Brillhart* abstention in a case involving non-declaratory claims. Non-declaratory claims are instead governed by *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-814, 817 (1976), which does not license a district court to abstain in favor of parallel state court proceedings, even if it thinks that those proceedings are “superior” to the pending federal court action.<sup>12</sup>

In any event, Anheuser-Busch’s claim regarding the “superiority” of the Florida proceedings is based on a series of either dubious or incorrect statements. For example, while Anheuser-Busch now claims (Br. 47-48) that Sea World is “an absolutely indispensable party to this case,” it fails to mention that it did not object to General Star’s voluntary dismissal of Sea World from this action. If there are any truly indispensable parties to this litigation — which is doubtful (see pp. 5-6, *supra*) — Anheuser-Busch is free to join them or, if that is not possible, file a Rule 19 motion. So too, Anheuser-Busch’s assertion (Br. 48-49) that Florida law would apply to this dispute is both

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<sup>12</sup> Anheuser-Busch has not argued, either here or before the district court, that *Colorado River* abstention would be appropriate in this case.

debatable (since Connecticut has as much, if not more, interest in this litigation than Florida) and irrelevant (since the district court can apply Florida law if that is appropriate).

Most problematical is Anheuser-Busch's reliance on a claim (Br. 48) that General Star "has voluntarily stipulated to move forward expeditiously with the Florida action." As discussed above (at pp. 4-5, *supra*), the actual filings in the Florida case show that only the "additional insured" issue is teed up for (relatively) expeditious determination. Indeed, Anheuser-Busch omits to inform this Court of perhaps the most significant aspect of the Florida proceeding: if the Connecticut suit is reinstated, Florida law directs the Florida trial court to stay *that* litigation in favor of the Connecticut suit. See, *e.g.*, *Florida Crushed Stone Co. v. Travelers Indem. Co.*, 632 So.2d 217 (Fla. Dist. Ct. App. 1994) (holding that it is "abuse of discretion to refuse to stay a subsequently filed state court action in favor of a previously filed federal action which involves the same parties and the same or substantially similar issues").

In sum, while there is an understandable aversion to the waste of resources inherent in parallel proceedings, that aversion does not justify depriving General Star of the Connecticut forum it has selected, if jurisdiction over Anheuser-Busch exists. Moreover, duplicative proceedings are not a given here, since, as noted above, Florida

law would require a stay of the Florida action.<sup>13</sup> In any event, even if duplicative proceedings were inevitable, the existence of parallel proceedings does not license a federal court to abstain from the exercise of its Congressionally mandated jurisdiction. *Colorado River*, 424 U.S. at 813-814, 817. Finally, whatever waste occurs in this case is attributable solely to Anheuser-Busch, which commenced the duplicative proceedings in Florida *six months after* General Star filed this suit. In short, Anheuser-Busch should not be heard to complain about duplicative parallel proceedings, much less be allowed to use the second-filed, duplicative Florida proceeding as the basis for dismissing the first-filed Connecticut suit.

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<sup>13</sup> Reinstating this action and staying the Florida suit would not entail any waste since any discovery undertaken in the Florida case may be used in Connecticut.

## CONCLUSION

The judgment should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted,

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ANDREW L. FREY  
NORMAN R. WILLIAMS II  
RYAN P. FARLEY  
MAYER, BROWN & PLATT  
1675 Broadway  
New York, New York 10019  
(212) 506-2500

Counsel for Plaintiff-Appellant  
General Star Indemnity Company

Of Counsel:

STEFAN R. UNDERHILL  
JONATHAN B. TROPP  
DAY, BERRY & HOWARD LLP  
One Canterbury Green  
Stamford, Connecticut 06901

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