

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

THE WEITZ COMPANY, LLC, f/k/a
THE WEITZ COMPANY, INC.,

Plaintiff,

vs.

TRAVELERS CASUALTY & SURETY
COMPANY OF AMERICA, f/k/a AETNA
CASUALTY & SURETY COMPANY OF
AMERICA; TIG INSURANCE COMPANY, f/k/a
TRANSAMERICA INSURANCE COMPANY;
and EMPLOYERS INSURANCE OF WAUSAU,

Defendants.

No. 4:02-cv-40188

**ORDER ON MOTION
TO DISMISS**

This matter comes before the Court on Defendant Travelers Casualty & Surety Company of America's [hereinafter "Travelers"] combined Motion to Dismiss, Stay¹ or Transfer This Action (**Clerk's No. 13**), filed in federal court in Iowa on June 18, 2002. Travelers asks this Court to dismiss or stay this Iowa litigation pursuant to the first-filed rule. Travelers argues this Iowa litigation is parallel to a previously-filed lawsuit in federal court in Connecticut, no exceptions to the first-filed rule apply, and, to preserve judicial resources and avoid inconsistent results, this Iowa litigation ought to be dismissed or stayed while the Connecticut litigation commences. Alternatively, Travelers asks this Court to

¹ During the hearing, Defendants Travelers and TIG acknowledged minimal benefit would arise from the Court granting the Defendants a stay. Based on this expressed position of the parties, the Court deems this aspect of the motion to be withdrawn. Accordingly, this order only addresses Defendant's Motion to Dismiss or Transfer.

transfer this case to the Connecticut forum, pursuant to 28 U.S.C. § 1404(a), for consolidation with the pending Connecticut litigation.

On July 21, 2002, Plaintiff, The Weitz Company, LLC [hereinafter “Weitz”], filed a timely resistance to Travelers’ motion, arguing that the first-filed rule does not apply because the two suits at issue do not qualify as parallel litigation. In support, Weitz contends, *inter alia*, that the two cases involve different parties and address wholly different issues. Therefore, Weitz contends allowing this Iowa litigation to proceed neither wastes valuable judicial resources nor creates a risk of inconsistent results.

On July 30, 2002, Travelers filed a timely reply to Weitz’ resistance. Travelers maintains that Connecticut is the proper forum to completely resolve all issues in dispute between the parties, in part, because Connecticut is the more convenient forum and that transfer is appropriate, especially considering the risk of possible inconsistent results that might occur if these two separate cases continue. On August 1, 2002, Defendant TIG Insurance Company [hereinafter “TIG”] joined in Defendant Travelers’ motion with respect to staying or transferring this action; Defendant Employers Insurance of Wausau [hereinafter “Wausau”] did not join in Defendant Travelers’ motion.

Hearing on the motion was held on August 23, 2002. Kim Baer appeared for Travelers; Megan Antenucci appeared for TIG; Lisa Purdue appeared for Wausau; and John Templer, Jr., appeared for Weitz. Having carefully considered the parties’ arguments as presented in the motions and at the hearing, the Court denies Defendant’s Motion to Dismiss or Transfer for the reasons given below.

I. Background Facts

In 1989, Weitz entered into a general contractor construction contract with Shoreline Care, Limited Partnership [hereinafter “Shoreline”], of North Branford, Connecticut [hereinafter referred to as “Shoreline Phase I Contract”]. Weitz was to construct a continuing care retirement community in North Branford, Connecticut, called Evergreen Woods. In 1990, Weitz subcontracted with Janazzo Services Corporation, f/k/a Janazzo Heating and Air Conditioning, Inc. [hereinafter “Janazzo”], of Milldale, Connecticut, to provide the heating, ventilation, and air conditioning work for Evergreen Woods.

Janazzo, pursuant to the contract between them, agreed to indemnify Weitz from certain claims and legal actions arising out of the work to be performed by Janazzo under the contract. Janazzo also agreed to Weitz’ demand that Weitz be named as an additional insured on Janazzo’s policies for general liability, with such coverage being primary to any insurance carried by Weitz. This case concerns whether any of the policies issued by the Defendants extends coverage to Weitz, specifically, whether Weitz is an additional insured and whether the coverage the policies provide covered the construction problems arising out of the Phase I and Phase II construction contracts.

Janazzo obtained insurance coverage from TIG covering the period of September 1, 1991, through September 1, 1992. Regarding TIG policy # 30790261, there is no dispute as to whether TIG “un-officially” made Weitz an additional insured. “Mathog & Monielo, the insurance agent [who] obtained coverage for Janazzo, provided certificates of insurance to Weitz that confirmed that Weitz was named as an additional insured on the TIG policy.” See

Complaint at ¶ 27. Regarding the TIG policy then, the central dispute is whether Weitz' status as an additional insured formally made it to the TIG policy. The other issue is, assuming Weitz is an additional insured on the TIG policy, whether the coverage provided under the TIG policy covers the types of problems arising out of the Phase I and Phase II construction.

Janazzo purchased three new insurance policies from Travelers (collectively the "Travelers policies") covering the period from September 1, 1992, through September 1, 1995, with Weitz being added as an additional insured to the Travelers policies. Janazzo also had two policies with Employers Insurance of Wausau [hereinafter "Wausau policies"] covering the period from September 1, 1989, through September 1, 1991, to which Weitz was also added as an additional insured. With respect to the Travelers and Wausau policies, at the time of this hearing, there was no issue as to Weitz' status as an additional insured on the respective policies.²

Pursuant to a separate, second contract entered into with Shoreline on April 30, 1991, Weitz acted as general contractor for the construction of Phase II of Evergreen Woods [hereinafter referred to as "Shoreline Phase II Contract"]. Problems were discovered with

² Defendant Employers Insurance of Wausau, in separate and subsequent filings since the present motion was argued, has now moved for summary judgment, arguing *inter alia*, that Weitz was not an additional insured to either of the two policies Wausau issued. The Court points out that at the time of this hearing, TIG was the only party arguing that Weitz was not an additional insured on their respective policy. Furthermore, the fact that Wausau is not even a named party to the Connecticut action between Travelers and TIG strengthens the Court's belief that the Southern District of Iowa is the more "complete" or "comprehensive" arena in which to address all aspects of all the issues related to all of the parties.

the air ventilation system constructed during Phase II Contract, and, around June 7, 1994, Shoreline initiated an arbitration against Weitz pursuant to an arbitration demand filed by Shoreline [hereinafter referred to as the “Phase II Arbitration”]. Phase II Arbitration commenced February 6, 1995, and concluded on December 18, 1995. The arbitrator’s decision of January 18, 1996, assessed liability to Weitz but did not assess damages against Weitz.

Additional problems with that portion of the air ventilation system constructed during the Phase I Contract were subsequently discovered, and, on May 2, 1996, Shoreline brought suit against Weitz in an action called Shoreline Care Limited Partnership v. Jansen and Rogen Consulting Engineers, P.C., et al., Case No. CV 94-0368715S (Conn. Super. Ct.) [hereinafter “Phase I Lawsuit”]. The Phase I Lawsuit concluded on February 28, 2002, with a decision expected sometime in the fall of 2002.

The essential claim of Shoreline in the Phase I Lawsuit and the Phase II Arbitration was that Weitz and Janazzo were negligent in performing the Evergreen Woods work when each knew or should have known that there were design errors and/or omissions in the design of the HVAC (air handling) system so that the HVAC system would not function. Additionally, Shoreline alleged that Weitz was negligent in performing certain work related to the sprinkler lines at Evergreen Woods.

In connection with the Phase I Lawsuit, Travelers obtained legal services from Milano & Wanat to defend Weitz, incurring over \$750,000 in costs as of June 2002. Wanting to monitor the attorneys provided by Travelers, Weitz obtained independent legal counsel and

has incurred, to date, attorneys fees and related costs of approximately \$35,196.08 associated with the Phase I suit, for which Weitz has not been reimbursed. In connection with the Phase II Arbitration, Weitz incurred defense costs totaling approximately \$338,778.83 and has been reimbursed for none of these arbitration expenses. According to Weitz, the claims asserted against it by Shoreline in the Phase I Lawsuit and Phase II Arbitration fall within coverage provided by the policies because Shoreline has alleged that Weitz is legally obligated to Shoreline for “property damage” occurring to Shoreline caused by an “occurrence” during the policy period.

While the Phase I Lawsuit was pending, both Travelers and TIG agreed between themselves to provide Weitz with a defense, with both companies fully reserving rights afforded them under their respective policies. Subsequently, Travelers and TIG agreed between themselves to equally share the cost of defending Weitz in the Phase I Lawsuit. Later, a dispute arose between TIG and Travelers, resulting in TIG changing its position and alleging that Weitz was not an additional insured to the Janazzo policy issued by TIG. Pursuant to its new position, TIG is now refusing to share in the costs of any portion of Weitz’ defense.

On March 8, 2002, Travelers responded to TIG’s position by filing a diversity suit in the United States District Court for the District of Connecticut (Travelers v. TIG, Case No. 302-cv-408). Travelers alleged two counts of breach of contract against TIG, seeking enforcement of TIG’s oral agreement with Travelers promising to share in half of the costs of Weitz’ defense in the Phase I Lawsuit. Travelers alleged a third count of

misrepresentation on the part of TIG; a fourth count seeking a declaration of estoppel preventing TIG from now claiming Weitz was not an additional insured; and a fifth count against TIG related to promissory estoppel.

On April 23, 2002, the present case was filed in the United States District Court for the Southern District of Iowa by Weitz against all three previously mentioned insurance companies. In this Iowa litigation, Weitz asserts two causes of action against the three insurance company defendants: breach of the duty to defend and a request for a declaratory judgment as to the duty to indemnify.

Weitz is an Iowa limited liability company with its principal place of business in Iowa; Travelers is a Connecticut corporation with its principal place of business in Connecticut; TIG is a California corporation with its principal place of business in Texas; and Wausau is a Wisconsin corporation with its principal place of business in Wisconsin.

II. Applicable Law

United States Fire Insurance Co. v. Goodyear Tire & Rubber Co., 920 F.2d 487 (8th Cir. 1991), discusses the applicable standards for determining this motion as well as discussing what has come to be known as the "first-filed rule". Goodyear, 920 F.2d at 488-89. According to the first-filed rule, a district court has the discretion to transfer a case if an earlier-filed, related case involving the same parties and issues was filed in a different district. Monsanto Tech. LLC., v. Syngenta Crop Prot., Inc., 2002 WL 1760644, at *1 (E.D. Mo. July 30, 2002). The first-filed rule is well established in the Eighth Circuit, and, with respect to cases of concurrent jurisdiction, "the first court in which jurisdiction attaches has

priority to consider the case”. Orthmann v. Apple River Campground, Inc., 765 F.2d 119, 121 (8th Cir. 1985). The Orthmann court cautioned, however, that the first-filed rule “is not intended to be rigid, mechanical, or inflexible”. Orthmann, 765 F.2d at 121. Heeding the Orthmann court’s caution, the Goodyear court discussed that the first-filed rule “is to be applied in a manner best serving the interests of justice”. Goodyear, 920 F.3d at 488.

The Eighth Circuit Court of Appeals has indicated that “[t]o conserve judicial resources and avoid conflicting rulings, the first-filed rule gives priority, for purposes of choosing among possible venues *when parallel litigation* has been instituted in separate courts, to the party who first establishes jurisdiction”. Northwest Airlines, Inc. v. American Airlines, Inc., 989 F.2d 1002, 1006 (citing Goodyear, 920 F.2d at 488) (emphasis added). As is apparent from language in Northwest Airlines, the first-filed rule only arises when both cases at issue are parallel of one another. Thus, the initial question this Court must decide is whether the litigation in the Southern District of Iowa is parallel to the litigation set to take place in the District of Connecticut.

Numerous cases have analyzed whether two cases were parallel where one case has been filed in federal court and another case in state court. See, e.g., Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). Over the years, the so-called “Colorado River abstention” developed, and now grants a federal court, in certain circumstances where parallel litigation has been instituted in both state and federal courts, the discretion to refrain from exercising its jurisdiction to avoid duplicative litigation. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817-19 (1976).

With regard to Colorado River abstention, suits are considered parallel where “substantially the same parties litigate substantially the same issues in different forums”. See, e.g., Kingland Systems Corp. v. Colonial Direct Fin. Group, Inc., 188 F. Supp.2d 1102, 1112-13 (N.D. Iowa 2002) (using guidance from other circuits in concluding that parallel cases for Colorado River abstention in the Eighth Circuit require analyzing whether substantially the same parties litigating substantially the same issues exist). Finally, at least for purposes of the Colorado River abstention doctrine, it seems clear that mere commonality of subject matter does not amount to the “contemporaneous exercise of concurrent jurisdictions”. See Kingland Systems, 188 F. Supp.2d at 1112 (citing Dittmer v. County of Suffolk, 146 F.3d 113, 118 (2d Cir. 1998)).

The situation before this Court involves the question of whether, as between two cases occurring simultaneously in federal court, they are parallel to one another. Therefore, although illustrative on certain points, the Colorado River abstention doctrine is not controlling in this situation. This Court must instead arrive at some determination as to what a parallel case is in the context of two simultaneous federal suits.

In Terra Intern, Inc., v. Mississippi Chem. Corp., the court examined what was meant by the term “parallel litigation” within the context of the first-filed rule. See Terra Intern, Inc., v. Mississippi Chem. Corp., 896 F. Supp. 1468, 1476 (N.D. Iowa 1995). As Judge Bennett suggests, “parallel litigation” within the context of the “first- filed rule” clearly exists where the same parties and the same issues are brought in another forum. Id. (citing Horn & Hardart Co. v. Burger King Corp., 476 F. Supp. 1058, 1059 (S.D.N.Y. 1979)).

Determining whether the same issues are present in the two lawsuits in question does not necessarily require this Court to find a precise identity of issues, but, rather, this Court should focus its inquiry on whether there is a danger of inconsistent results and a duplication of judicial proceedings. *Id.* (citing Horn & Hardart Co., 476 F. Supp. at 1059).

In fact, even if the specific legal theories in each complaint are different, a legal and factual nexus between the two complaints will suffice to meet the “same issues” requirement under the “first-filed rule”. See, e.g., Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 189 F.2d 31, 34 (3d Cir. 1951) (observing that the same issues existed where the first complaint sought damages for patent infringement and the second complaint sought a declaratory judgment that the patents were invalid.). While the two cases do not have to be identical to one another, they must have issues that substantially overlap. Monsanto Tech. LLC., v. Syngenta Crop Prot., Inc., 2002 WL 1760644, at *1 (E.D. Mo. July 30, 2002).

In the situation confronting this Court, the parties in the two suits in question are not identical. Furthermore the issues involved in the two cases are not the same, nor are they substantially similar. To be sure, the Connecticut proceeding will focus on Travelers and TIG only in evaluating Weitz’ status as an additional insured on the TIG policy, and whether Travelers and TIG entered into an enforceable oral agreement to share the costs associated in defending Weitz in the Shoreline Phase I Lawsuit.

In contrast, the central issues in this Iowa proceeding concern whether any or all of the three named defendants breached a duty to defend and indemnify Weitz with respect to the Shoreline Phase I Lawsuit and Phase II Arbitration. In this Iowa case, the Court will also

address whether a declaration that some or all of the defendants are obligated to provide a defense and indemnity to Weitz with respect to the Shoreline Phase I Lawsuit is appropriate. This necessarily means that Weitz' status as an additional insured on all three policies will be examined in this Iowa proceeding. Thus, the issue the two cases have in common, potentially creating a parallel situation, is Weitz' status as an additional insured to the TIG policy.

Although the two proceedings have this issue in common, considering the differences between the scope of the two cases clearly demonstrates the two cases are not substantially the same. See *McLaughlin v. United Va. Bank*, 955 F.2d 930, 935 (4th Cir. 1992) (stating that although the two actions involved similar claims and had facts in common, the actions were not parallel because neither the parties nor the legal theories were the same); *New Beckley Mining Corp. v. Int'l Union, UMWA*, 946 F.2d 1072, 1074 (4th Cir. 1991) (noting that "some factual overlap does not dictate that proceedings are parallel"); see also *Kingland Systems Corp. v. Colonial Direct Fin. Group, Inc.*, 188 F. Supp.2d 1102, 1112 (N.D. Iowa 2002) (citing *Dittmer v. County of Suffolk*, 146 F.3d 113, 118 (2d Cir. 1998)), indicating that in terms of the Colorado River abstention doctrine, commonality of subject matter does not amount to the "contemporaneous exercise of concurrent jurisdictions."). The litigation before the federal court in Connecticut involves (1) whether Weitz is an additional insured under TIG's policy for purposes of the Shoreline Phase I Lawsuit, and (2) whether Travelers is entitled to recoup from TIG half of the defense costs incurred in defending Weitz in the Shoreline Phase I Lawsuit. The Iowa lawsuit involves (1) Weitz' asserting a breach of the duty to defend and indemnify against Travelers, TIG, and Wausau with regard to the Shoreline

Phase I Lawsuit and Phase II Arbitration, and (2) Weitz' seeking a declaration from this Court that some or all of the defendants owe to Weitz a duty to indemnify Weitz for any losses Weitz may incur in connection with the Shoreline Phase I Lawsuit.

Between the two proceedings, the Iowa proceeding offers the only forum for the complete resolution and litigation of all pertinent coverage issues involving Weitz and arising out of both Phase I and Phase II construction activities. The duty owed to Weitz, if any, by all possible insurers will be fully addressed in the Iowa proceeding, and there can be little doubt that the Iowa proceeding is the more comprehensive or inclusive of the two proceedings. See Federated Rural Elec. Ins. Corp. v. Arkansas Elec. Cooperatives, Inc., 48 F.3d 294, 298-99 (8th Cir. 1995) (giving preference to a more comprehensive federal insurance coverage action even though a state court action was first-filed because, *inter alia*, the federal action could resolve issues relating to all of the insurance policies at issue, whereas the other case would only address issues relating to one policy); see also Moses H. Cone Mem'l Hosp. v. Mercury Constr., 460 U.S. 1, 16 (1983) (implying the court's preference for comprehensive litigation because there is a clear federal policy of avoiding piecemeal adjudication).

The issue both actions have in common, that is, Weitz' status as an additional insured to the TIG policy, does not pose a serious risk of inconsistent judgments thereby justifying a dismissal or transfer of this case to Connecticut. Ultimately, determining this issue requires either court to look at the same documents and circumstances before arriving at a determination as a matter of law.

Weitz' status as an additional insured turns on the same background facts and circumstances regardless of which court, the Connecticut or Iowa court, makes the decision. The factual background necessary to decide the questions regarding the status of Weitz' coverage under the polic[ies] (should Weitz be found to be an additional insured) are largely already before this Court since policy provisions, limitations, exceptions, and exclusions to coverage are a part of the record before this Court. Additionally, the dates the policies were in effect, as well as the factual circumstances surrounding Phase I and Phase II of the construction project, are also before this Court. The same TIG policy would need to be analyzed by either court before determining Weitz' status as an additional insured. The underlying and related conduct of a broker can be assessed in either court. In making this determination, both courts would be required to refer to and apply principles from the same body of insurance law.

Determining what duty to defend, if any, is owed to Weitz, and by whom, will also be determined as a matter of law, based on this Court's review of the aforementioned record and policies at issue. See, e.g., Norwalk Ready Mixed Concrete, Inc. v. Travelers Ins. Co., 246 F.3d 1132 (8th Cir. 2001). In both this action and the Connecticut action, there will be very little outside of the existing record for the parties to dispute regarding Weitz' status as an additional insured and the various policy coverage issues. See Bd. of Educ. v. St. Paul Fire and Marine Ins. Co., 801 A.2d 752, 755 (Conn. 2002) (discussing that "[a]n insurer's duty to defend, being much broader in scope and application than its duty to indemnify, is determined by reference to the allegations contained in the [underlying] complaint ... [h]ence, if

the complaint sets forth a cause of action within the coverage of the policy, the insurer must defend.”) (quoting Cmty. Action for Greater Middlesex County, Inc. v. American Alliance Ins. Co., 757 A.2d 1074, 1081 (Conn. 2000)).

There is no compelling reason to anticipate that inconsistent rulings will result if the two cases are allowed to proceed. To the contrary, the fact that these determinations are resolved as matters of law further supports this Court’s expectation that both the Connecticut court and this Court would reach entirely consistent results with respect to the common issue.³

Responding to the Court’s invitation for additional materials,⁴ Defendant Travelers provided case summaries discussing the nuances that arise when determining insurance coverage issues where a prior proceeding has determined liability. See, e.g., Fidelity & Deposit Co. of Maryland v. Hartford Cas. Ins. Co., 2002 WL 1461959 (D. Kan. June 25, 2002) (discussing factual issues that often need to be resolved in determining whether a

³ The Court recognizes that an argument of issue preclusion might be asserted once one court has decided the common issue. That question would hinge substantially upon the opportunity available to any affected party to litigate the issue, an opportunity that is more appropriately presented by the litigation in this Court.

⁴ At the hearing held on August 21, 2002, this Court left the record open for one week to allow the parties the opportunity to submit additional briefs related to the issue of whether, in this Iowa litigation, determining insurance coverage for Weitz would force this Court to relitigate issues litigated in the Connecticut state court during the Shoreline Phase I Lawsuit and/or determined during the Phase II Arbitration. The Court recognizes that Plaintiff Weitz submitted a lengthy filing going beyond the scope of the Court’s request. Defendant Travelers has filed a motion to strike the additional exhibits attached to the supplemental filing by Plaintiff. The Court did not consider the exhibits attached to Plaintiff’s broad submission for purposes of this ruling, thereby rendering the motion to strike (**Clerk’s No. 32**) moot.

claim constitutes “property damage”); see also Mellon Bank v. Ticor Title Ins. Co., 1995 WL 20825 (E.D. Pa. Jan. 13, 1995) (granting parties’ motion to transfer because factual issues relating to coverage exclusions would require factual findings concerning exclusions).

Under the circumstances of the present action, the Court is not persuaded that additional factual questions related to ultimate coverage issues loom large enough, if at all, to compel movement of the litigation.

Defendants promote the Connecticut forum with the argument of potential need for visits to construction sites, though long after the completion of the projects. This Court is not convinced that the extraordinary procedure of actual site visits in Connecticut is sufficiently likely or necessary to any ultimate issue to weigh heavily on the issue of dismissal or transfer.

As indicated in the Second Circuit’s discussion in Dittmer, while issues of common subject matter to the Connecticut action may be litigated in this Iowa proceeding, that does not, automatically, require a finding of a “contemporaneous exercise of concurrent jurisdiction”. See Dittmer v. County of Suffolk, 146 F.3d 113, 118 (2d Cir. 1998) (indicating, while two cases may have common subject matter, that does not amount to the contemporaneous exercise of concurrent jurisdiction). Although Dittmer’s focus was on the Colorado River abstention doctrine, the reasoning in Dittmer is persuasive since both the Colorado River abstention doctrine and the first-filed rule hinge on two suits existing in courts that are “contemporaneous[ly] exercis[ing] ... concurrent jurisdictions”. Compare Orthmann v. Apple River Campground, Inc., 765 F.2d 119, 121 (8th Cir. 1985) (discussing, *inter alia*, for

purposes of the first-filed rule, “[w]here two courts have concurrent jurisdiction ...”) with Dittmer v. County of Suffolk, 146 F.3d 113, 118 (2d Cir. 1998) (indicating that “[t]he principles of Colorado River are to be applied only in situations ‘involving the contemporaneous exercise of concurrent jurisdictions’”).

This Court is mindful that “the interest of an insured in binding as many of its insurers as possible to a single adjudication is a factor strongly weighing in favor of maintenance of an inclusive action”. Insurance Co. of the State of Penn. v. Syntex, 964 F.2d 829, 834-35 (8th Cir. 1992). For these reasons, this Court concludes the two cases are not parallel. Allowing this Iowa proceeding to continue while the Connecticut proceeding continues will not create a significant risk of inconsistency between the two cases. Accordingly, the Court denies Defendant Travelers’ motion to dismiss pursuant to the first-filed rule.⁵

As alternative relief, Defendants Travelers and TIG have sought to transfer this Iowa action to the District of Connecticut for consolidation. In support, Defendants point to numerous reasons, including witness convenience, site location, and the fact that there has been related litigation and arbitration in Connecticut over the last few years.

⁵ Finding the cases are not parallel further determines whether this Court has the discretion to transfer the case pursuant to the first-filed rule. It cannot. See Monsanto, 2002 WL 1760644, at *1 (E.D. Mo. July 30, 2002) (according to the first-filed rule, a district court has the discretion to transfer a case if an earlier-filed, related case involving the same parties and issues was filed in a different district). However, the Court does separately analyze whether transfer of this case to Connecticut is appropriate, despite finding the two cases are not parallel. Finding the two cases are not parallel also determines whether the first-filed rule ought to apply (it does not). Finding this, the Court has no need to address whether the two exceptions to the first-filed rule, balance of convenience or compelling circumstances, apply in this case to override the application of the first-filed rule.

28 U.S.C. § 1404 provides, “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district ... where it might have been brought.” 28 U.S.C. §1404(a). Initially, this Court notes that it appears that transfer is an available option here because the District of Connecticut is a district where Weitz could have originally filed this action. Complete diversity between the parties would exist in Connecticut as it does exist here in Iowa, and the amount in controversy exceeds \$75,000 exclusive of costs and interest. Clearly, Weitz could have filed this action in federal court in Connecticut based on diversity jurisdiction pursuant to 28 U.S.C. § 1332. No doubt, the federal court in the District of Connecticut is a “district where [this case] might have been brought”. See 28 U.S.C. §1404(a).

Weitz, however, did not choose to originally file this action in Connecticut. Instead, Weitz filed this suit in the Southern District of Iowa. Having done so, great deference should be given to Weitz’ choice of forum. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). Despite the deference owed, transfer may still be warranted if the moving party demonstrates by a preponderance of the evidence that a transfer is proper. See Songbyrd, Inc. v. Estate of Grossman, 206 F.3d 172 (2nd Cir. 2000). In making this determination, the Court is mindful that a proposed transfer that only shifts the inconvenience from one party to the other need not be granted. MidAmerican Energy Co. v. Coastal Gas Mktg., 33 F. Supp.2d 787, 791-92 (N.D. Iowa 1998) (analogizing transfer under 28 U.S.C. § 1404(a) in the context of the factors at play in the “balance of convenience” exception to the first-filed rule).

As discussed above, the legal theories pursued in the two actions differ, the remedies sought in the two cases differ substantially, the parties involved in the two cases differ, and this Iowa litigation addresses not only construction taking place pursuant to the Shoreline Phase I Contract, but also addresses the Shoreline Phase II Contract. In this Iowa proceeding, Travelers Insurance is the only corporation with ties to Connecticut. Weitz is an Iowa limited liability company, TIG is a California corporation, and Wausau is a Wisconsin corporation. Transferring this case to Connecticut does little more than shift inconvenience. This, the Court is not required to do. MidAmerican Energy, 33 F. Supp.2d at 791-92.

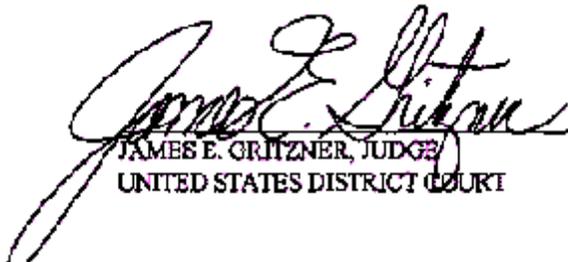
At this time, the Court does not find that Defendants have demonstrated that transfer of this Iowa litigation is appropriate. For this reason, the Court denies Defendant's motion to transfer this case to the District of Connecticut.

Conclusion

Defendant Travelers has not shown that this action is parallel to the Connecticut federal court litigation, and, thus, the first-filed rule is inapplicable. Accordingly, the motion to dismiss is **denied**. Defendants Travelers and TIG have also made a motion to transfer this case to Connecticut to consolidate this action with the previously-filed Connecticut federal court action. For the reasons mentioned, this motion is **denied**.

Dated this 18th day of October, 2002.

IT IS SO ORDERED.



JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT