

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS

MEDMARC CASUALTY INSURANCE	)	
COMPANY, INC., a Corporation,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	
ASKOUNIS & BORST, P.C., a	)	FILE NO.: 07CV3666
Professional Corporation, GULFCOAST	)	
WORKSTATION GROUP, INC., an	)	JUDGE KENDALL
Illinois Corporation, and VINCENT T.	)	MAG. JUDGE COLE
BORST,	)	
	)	
Defendants.	)	

**DEFENDANTS ASKOUNIS & BORST, P.C.'S AND  
VINCENT T. BORST'S MOTION TO STAY**

Defendants Askounis & Borst, P.C. and Vincent T. Borst ("Defendants") hereby move this Court to stay the Plaintiff's declaratory judgment action pending a resolution of the underlying malpractice litigation.

**PROCEDURAL HISTORY**

This is a declaratory judgment action brought by Medmarc Casualty Company ("Medmarc") against two of its insureds and a malpractice claimant. Defendant Askounis & Borst, P.C. is a Chicago law firm insured by Medmarc. [Complaint, ¶¶ 3 and 8]. Vincent T. Borst is a shareholder in Askounis & Borst and is an insured under Medmarc's policy. [Complaint, ¶ 4; Exh. 1 to Complaint]. Gulfcoast Workstation Group, Inc. ("Gulfcoast") is a former client of Askounis & Borst and Mr. Borst. [Complaint, ¶ 9].

The Defendants represented Gulfcoast in a bankruptcy adversary proceeding in which the debtor sought to recover approximately \$2.1 million from Gulfcoast as preferential transfers and in an adversary proceeding where the Debtor sought to disallow a setoff for approximately

\$700,000.00. [Complaint, ¶ 10]. With respect to the \$2.1M adversary claim, among the defenses raised by the Defendants on behalf of Gulfcoast was that the debtor's transfers to Gulfcoast were made in the ordinary course of business within the meaning of 11 U.S.C. § 547(c)(2). [Complaint, ¶ 11]. After a trial of both adversary matters, the bankruptcy court ruled that Gulfcoast had not established that the transfers were made in the ordinary course of business. [Complaint, ¶ 12]. The bankruptcy court's decision was later affirmed by the U.S. Court of Appeals for the Eighth Circuit. [Complaint, ¶ 18]. Gulfcoast gave notice to the Defendants of its intent to bring a malpractice claim on June 29, 2006. [Complaint, ¶ 19]. The Defendants gave notice to Medmarc the following day. [Complaint, ¶ 20]. With respect to the set-off adversary, Gulfcoast prevailed.

On or about July 31, 2006, Gulfcoast filed a malpractice lawsuit against the Defendants in an action styled *Gulfcoast Workstation Corp. v. Vincent T. Borst and Askounis & Borst, P.C.*, in the Circuit Court of the City of St. Louis, Missouri, Case No. 0622-CC05129. [A true and accurate copy of Gulfcoast's Petition is attached hereto as Exhibit "A"]. In its malpractice suit, Gulfcoast contends that the Defendants committed legal malpractice by, *inter alia*, failing to introduce evidence to establish Gulfcoast's defenses in the bankruptcy proceeding. [Exh. A, ¶ 25(a)]. The Defendants have answered Gulfcoast's suit, denying that any malpractice was committed. [A true and accurate copy of the Defendants' Answer is attached hereto as Exhibit "B"].

In this declaratory judgment action, Medmarc seeks to avoid its duties to defend and indemnify the Defendants on the basis that the Defendants waited too long to give Medmarc notice of Gulfcoast's claim. [Complaint, ¶¶ 36 and 38]. Among the bases for Medmarc's declaratory judgment action is its allegation that the Defendants failed to introduce evidence

available to them to establish Gulfcoast's defenses in the bankruptcy proceeding. [Complaint, ¶ 14].

### ARGUMENT AND CITATION OF AUTHORITY

In Illinois, "as a general matter, a declaratory judgment action to determine an insurer's duty to indemnify its insured should not be decided prior to the adjudication of the underlying action where the issues to be decided in both actions are substantially similar." Allianz Ins. Co. v. Guidant Corp., 355 Ill. App. 3d 721, 731, 839 N.E.2d 113, 120 (2005). "[I]t has been held that a declaratory judgment action to determine an insurer's duty to indemnify its insured, brought prior to a determination of the insured's liability, is premature since the question to be determined is not ripe before adjudication." Bituminous Cas. Corp. v. Fulkerson, 212 Ill. App. 3d 556, 561, 571 N.E.2d 256, 260 (1991) (internal quotations removed).

"The primary concern is that an untimely determination in the declaratory judgment action could subsequently prejudice a party in the underlying action through application of collateral estoppel." Bonnie Owen Realty, Inc. v. The Cincinnati Ins. Co., 283 Ill. App. 3d 812, 819, 670 N.E.2d 1182, 1187 (1996). "Therefore, the court in the declaratory judgment action must not determine the ultimate question of the insured's liability or the facts upon which such liability is based." Id.

The law in the Seventh Circuit is identical to the law in Illinois. In Old Republic Ins. Co. v. Chuhak & Tecson, P.C., 84 F.3d 998 (7th Cir. 1996), the Seventh Circuit stated that an insurer should not be allowed to proceed with discovery in its declaratory judgment suit to determine its duty to defend because "discovery might well undermine possible defenses by [the insureds] against [the underlying suit]." Id. at 1002. This is the same collateral estoppel rationale

underlying the Illinois state decisions. Additionally, this Court has expressly adopted the Illinois analysis and case law. Travelers Indemnity Co. v. Bally Total Fitness Holding Corp., 448 F. Supp. 2d 976, 985 (N.D. Ill. 2006).

The only exception to this general rule is where the issues involved in the declaratory judgment action are separable from those in the underlying action, and therefore would not prejudice the insured. Bonnie Owen Realty, 283 Ill. App. 3d at 818, 670 N.E.2d at 1186-1187; Murphy v. Urso, 88 Ill. 2d. 444, 455, 430 N.E.2d 1079, 1084 (1981). In this case, it is clear that the issues in the declaratory judgment action are identical to and inseparable from the issues in the underlying malpractice litigation. Moreover, if allowed to proceed with its declaratory judgment action, Medmarc would prejudice the defense of the Defendants in the underlying action. As a result, a stay of this action is required.

A review of Medmarc's allegations and the allegations asserted by Gulfcoast in the underlying malpractice suit shows that both cases involve identical issues. Medmarc contends that the Defendants are not entitled to coverage under Medmarc's policy because the Defendants knew they committed malpractice prior to purchasing the policy. Specifically, Medmarc contends that the Defendants failed to introduce evidence available to them at the time of the trial of the bankruptcy proceeding. [Complaint, ¶ 14]. This allegation is identical to Gulfcoast's allegations in the malpractice suit, which the Defendants have expressly denied. [Exh. A., ¶ 25(a); Exh. B., ¶ 25].

There can be no question that Medmarc's declaratory judgment action would prejudice the Defendants. Simply put, Medmarc cannot succeed in this declaratory judgment action without prejudicing the Defendants in the malpractice litigation. At a time when it should be protecting its insured in the malpractice case, Medmarc has instead filed this action potentially

undermining the Defendants' defense. By allowing this declaratory judgment action to proceed concurrently with the underlying malpractice action, the Defendants would be forced to fight this same battle on two fronts. Under these circumstances, the law is clear that Plaintiff's declaratory judgment action should be stayed to avoid prejudice to the insureds in the underlying action.

**WHEREFORE**, Defendants request that all proceedings be stayed pending the resolution of the underlying malpractice action.

Respectfully submitted this 9th day of October, 2007.

FELLOWS LABRIOLA LLP

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Shattuck Ely  
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*(application for admission pending)*  
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ASKOUNIS & BORST, P.C.

s/Alex Darcy  
Alex Darcy  
Two Prudential Plaza  
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(312) 861-7100  
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Attorney for Defendants,  
Askounis & Borst, P.C. and Vincent T. Borst

# Exhibit A

REC'D JUL 31 2006

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS  
STATE OF MISSOURI

GULFCOAST WORKSTATION CORP., )

Plaintiff, )

) Legal Malpractice/Negligence

v. )

) Case No.

VINCENT T. BORST, )

Serve at: Two Prudential Plaza )  
180 North Stetson St. )  
Suite 3400 )  
Chicago, IL 60601 )

and )

ASKOUNIS & BORST, P.C., )

Serve: Thomas V. Askounis )  
Registered Agent )  
Two Prudential Plaza )  
180 North Stetson St. )  
Suite 3400 )  
Chicago, IL 60601 )

Defendants. )

PETITION

COMES NOW Plaintiff Gulfcoast Workstation Corp. ("Gulfcoast") and respectfully states to the Court as follows:

Parties:

1. Gulfcoast is an Illinois corporation which maintained its principal place of business in Largo, Florida.
2. Askounis & Borst, P.C. (the "Law Firm") is an Illinois Professional Corporation with its principal place of business in Chicago, Illinois.
3. Vincent T. Borst ("Borst," together with the Law Firm, the "Attorneys") is an individual who, upon information and belief, resides in the State of Illinois.

**Venue:**

4. Venue is proper in the Circuit Court for the City of St. Louis because Gulfcoast's injuries arose out of Attorneys' tortious acts occurring in the City of St. Louis.

**Facts:**

5. On February 15, 2001, Bridge Information Systems, Inc. and certain of its affiliates (collectively, "Bridge") filed for protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Missouri (the "Bankruptcy Court").

6. During the course of Bridge's Chapter 11 proceedings, the Bankruptcy Court entered an order dated February 13, 2003, confirming the Second Amended Joint Plan of Reorganization (the "Chapter 11 Plan") submitted on behalf of Bridge and certain other proponents.

7. Pursuant to the Chapter 11 Plan, Scott D. Peltz was appointed as the "Plan Administrator" and was authorized to pursue certain causes of action on behalf of Bridge's bankruptcy estate and/or its creditors.

8. On February 11, 2003, the Plan Administrator commenced an adversary proceeding against Gulfcoast in the Bankruptcy Court pursuant to the provisions of 11 U.S.C. §§ 547 and 550 (the "Adversary Proceeding"), wherein the Plan Administrator has sought to recover \$2,155,105.80 in payments made by Bridge to Gulfcoast during the ninety (90) days preceding Bridge's bankruptcy filing.

9. The Adversary Proceeding was styled Scott Peltz, Plan Administrator for Bridge Information Systems, et al. v. Gulfcoast Workstation Group (In re Bridge Information Systems, Inc.), Adv. No. 03-4360-293.

10. Gulfcoast retained the Attorneys to represent it in the Adversary Proceeding.



11. Pursuant to the Answer it filed in the Adversary Proceeding, Gulfcoast asserted various defenses to the claims asserted by the Plan Administrator in the Adversary Proceeding, including but limited to the defenses that the payments at issue were not subject to avoidance and recovery under 11 U.S.C. § 547 because they were protected under the “ordinary course of business” exception set forth in 11 U.S.C. § 547(c)(2) and the “subsequent new value” exception set forth in 11 U.S.C. § 547(c)(4).

12. On October 23, 2003, the Bankruptcy Court conducted a trial in the Adversary Proceeding at which the Attorneys represented Gulfcoast.

13. The trial was conducted in the Eagleton Federal Courthouse located in the City of St. Louis, Missouri.

14. Following the trial, the Bankruptcy Court entered a judgment and accompanying memorandum opinion in the Adversary Proceeding on July 7, 2004, (collectively, the “Trial Court Decision”), wherein it held that Gulfcoast was liable to the Plan Administrator in the amount of \$2,155,105.80. A true and accurate copy of the Trial Court Decision is attached hereto as Exhibit A and incorporated herein by reference.

15. In the Trial Court Decision, the Bankruptcy Court determined that the Attorneys had failed to introduce sufficient evidence in support of and/or had otherwise waived the defenses asserted by Gulfcoast in the Adversary Proceeding.

16. On October 8, 2004, Gulfcoast appealed the Trial Court Decision to the U.S. District Court for the Eastern District of Missouri (the “District Court”), said appeal having been designated Gulfcoast Workstation Corp. v. Scott P. Peltz, Plan Administrator on behalf of Bridge Information Systems, Inc., et al., Case No. 4:04-CV-1481HEA.

17. On June 14, 2005, the District Court entered an Opinion, Memorandum and Order (the “District Court Decision”) affirming the Trial Court Decision entered on July 7, 2004. A

true and accurate copy of the District Court Decision is attached hereto as Exhibit B and incorporated herein by reference.

18. In the District Court Decision, the District Court determined that the Bankruptcy Court had correctly concluded that the Attorneys had failed to introduce sufficient evidence in support of and/or had otherwise waived the defenses asserted by Gulfcoast in the Adversary Proceeding.

19. On July 11, 2005, Gulfcoast appealed the Trial Court Decision and the District Court Decision to the U.S. Court of Appeals for the Eighth Circuit (the "Eighth Circuit"), said appeal having been designated Gulfcoast Workstation Corp. v. Scott P. Peltz, Plan Administrator on behalf of Bridge Information Systems, Inc., et al., Case No. 05--2984EM.

20. On June 23, 2006, the Eighth Circuit entered a memorandum opinion (the "Eighth Circuit Opinion") affirming the Trial Court Decision entered on July 7, 2004. A true and accurate copy of the Eighth Circuit Opinion is attached hereto as Exhibit C and incorporated herein by reference.

21. In the Eighth Circuit Opinion, the Eighth Circuit determined that the Bankruptcy Court had correctly concluded that the Attorneys had failed to introduce sufficient evidence in support of and/or had otherwise waived the defenses asserted by Gulfcoast in the Adversary Proceeding.

#### **COUNT I – LEGAL MALPRACTICE**

22. Gulfcoast realleges and incorporates herein the allegations contained in Paragraphs 1 through 21.

23. At all times relevant hereto, an attorney-client relationship existed between Attorneys and Gulfcoast.

24. Attorneys had a duty to possess the skill and knowledge ordinarily possessed by well-informed members of the legal profession practicing in the area of bankruptcy law under the same or similar circumstances.

25. Attorneys, by and through their agents, servants and employees, failed to utilize the appropriate level of skill, knowledge, and care when they represented Gulfcoast with respect to the Adversary Proceeding, by acting negligently in one or more of the following respects:

(a) failing to introduce evidence sufficient to establish Gulfcoast's defenses in the Adversary Proceeding despite such evidence being readily available to Attorneys;

(b) negligently waiving one or more of the defenses asserted by Gulfcoast in the Adversary Proceeding; and/or

(c) such other respects as will be proven at trial.

26. As a direct and proximate result of Attorneys' negligence, Gulfcoast was injured and sustained damages including, but not limited to, the following:

(a) the loss of \$2,155,105.80 it properly received from Bridge in the ordinary course of business;

(b) the loss of any pre-judgment and/or post-judgment interest relating to the Trial Court Decision;

(c) attorney fees and costs incurred in the underlying action and, in particular, attorney fees and costs associated with the appeals of the Trial Court Decision;

(d) other damages to be proven at trial.

27. The damages suffered by Gulfcoast resulted from the natural and probable consequences of Attorneys' negligence in that, but for Attorneys' failure to introduce evidence supporting the ordinary course of business defense and/or Attorneys' negligent waiving of the subsequent new value defenses, Gulfcoast would have retained the \$2,155,105.80 it properly

received from Bridge, interest, attorney fees, costs, and other damages.

WHEREFORE, Gulfcoast requests that this Court enter judgment in its favor in an amount that is fair and reasonable in excess of \$25,000, for attorney's fees and other costs incurred in pursuit of this cause of action, for interest, and for such other and further relief as is just and proper.

Respectfully submitted,

**SAUTER•SULLIVAN LLC**

By: \_\_\_\_\_  
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IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS  
STATE OF MISSOURI

FILED  
CIRCUIT CLERKS OFFICE  
LOUIS V. FAVAZZA

2006 OCT -2 PM 4: 35

GULFCOAST WORKSTATION CORP., )  
)  
Plaintiff, )  
)  
vs. )  
)  
VINCENT T. BORST, and )  
ASKOUNIS & BORST, P.C., )  
)  
Defendants. )

FILE ROOM

CLERK

Cause No. 0622-CC05129

Division No. 4

JURY TRIAL DEMANDED

ANSWER OF DEFENDANTS

COMES NOW Defendants and, for their answer to Plaintiff's Petition, state as follows:

1. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 1 of Plaintiff's Petition.
2. Defendants admit the averments contained in paragraph 2 of Plaintiff's Petition.
3. Defendants admit the averments contained in paragraph 3 of Plaintiff's Petition.
4. Defendants deny the averments contained in paragraph 4 of Plaintiff's Petition.
5. Defendants admit the averments contained in paragraph 5 of Plaintiff's Petition.
6. Defendants admit the averments contained in paragraph 6 of Plaintiff's Petition.
7. Defendants admit the averments contained in paragraph 7 of Plaintiff's Petition.

18. Defendants deny the averments contained in paragraph 18 of Plaintiff's Petition.

19. Defendants admit the averments contained in paragraph 19 of Plaintiff's Petition.

20. Defendants admit the averments contained in paragraph 20 of Plaintiff's Petition.

21. Defendants deny the averments contained in paragraph 21 of Plaintiff's Petition.

**COUNT I – LEGAL MALPRACTICE**

22. Defendants restate and incorporate by reference their answers to paragraphs 1-21 above.

23. Defendants admit they had an attorney-client relationship with Gulfcoast at certain relevant times. Defendants deny the remainder of the averments contained in paragraph 23 of Plaintiff's Petition.

24. Paragraph 24 of Plaintiff's Petition states a legal conclusion to which no answer is required. Therefore, Defendants deny the averments contained in paragraph 24 of Plaintiff's Petition.

25. Defendants deny the averments contained in paragraph 25 of Plaintiff's Petition, and all subparts thereto.

26. Defendants deny the averments contained in paragraph 26 of Plaintiff's Petition.

WHEREFORE, Defendants request that the Court dismiss Plaintiff's Petition with prejudice, and award Defendants their costs and expenses.

AFFIRMATIVE DEFENSES

COMES NOW Defendants and, for their affirmative defenses to Plaintiff's

Petition, states as follows:

1. Plaintiff's Petition fails to state a claim upon which relief can be granted.
2. Plaintiff's claims are barred under the doctrines of waiver and estoppel.
3. Plaintiffs' claims are barred by the applicable Illinois statute of limitations, 735 ILCS 5/13-214.3 (2005).
4. This Court has no personal jurisdiction over Defendants under the Missouri long-arm statute or the Due Process Clause of the United States Constitution.
5. In the event Defendants are held liable to respond in damages to the Plaintiff (which Defendants deny), Plaintiff is barred from recovery under Missouri's comparative fault doctrine, and in the event that Defendants are held liable, Defendants pray that a determination be made of the relative distribution of fault between Plaintiff, all Defendants, and others who are not parties, with an apportionment of responsibility for the payment of any damages that may be awarded to the Plaintiff and a determination of the right of contribution and indemnity between Plaintiff, all Defendants, and others who are not parties but who may be responsible for the injuries and damages claimed by the Plaintiff.
6. Plaintiff has failed to mitigate its damages.
7. Further answering and by way of affirmative defense, Defendants note that under §537.060, R.S.Mo., when an agreement by release, covenant not to sue, or not to enforce a judgment is given in good faith to one of two or more persons liable in tort for the same injury or wrongful death, such agreement shall reduce the claim by the



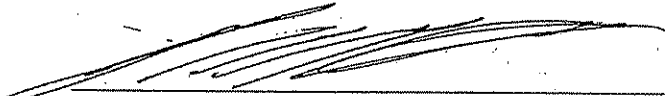
stipulated amount of the agreement or in the amount of the consideration paid, whichever is greater. If these Defendants are found to be liable to Plaintiff (which Defendants deny), then these Defendants are entitled to a set-off, pursuant to §537.060, in the amount of any such agreement between Plaintiff and any other person or entity, or in the amount actually paid to Plaintiff by any other person or entity under any such agreement, whichever is greater.

8. Plaintiff's claims are barred by the doctrines of collateral estoppel, judicial estoppel, and res judicata.

9. Plaintiff's claims are barred by the doctrines of intervening and/or superceding causes.

WHEREFORE, Defendants request that the Court dismiss Plaintiff's Petition with prejudice, and award Defendants their costs and expenses.

LATHROP & GAGE L.C.



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Attorneys for Defendants

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was forwarded this 2nd day of October, 2006, to the following attorneys of record by U. S. Mail with proper first-class postage affixed thereon:

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Matthew J. Sauter #40645

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