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420 F.Supp.2d 601

Page 1

420 F.Supp.2d 601, 97 A.F.T.R.2d 2006-1459  
 (Cite as: 420 F.Supp.2d 601)

**H**

Kennard v. Indianapolis Life Ins. Co.  
 N.D.Tex.,2006.

United States District Court,N.D. Texas,Dallas  
 Division.

Charles D. KENNARD, M.D., et al., Plaintiffs,  
 v.

INDIANAPOLIS LIFE INSURANCE COMPANY,  
 et al., Defendants.

No. Civ.A. 305CV1247-G.

March 9, 2006.

**Background:** Physician and professional association brought diversity action against insurer and its agents alleging violations of Texas Insurance Code and Texas Deceptive Trade Practices Act (DTPA), among other things, regarding attempted creation of tax shelter through purchase of multiple insurance policies. Defendants brought motions to dismiss.

**Holdings:** The District Court, Fish, Chief Judge, held that:

- (1) claims were ripe for adjudication;
- (2) amount in controversy exceeded sum of \$75,000;
- (3) action did not have to be formally abated;
- (4) rescission was viable remedy; and
- (5) plaintiffs stated harm from insurer's alleged misrepresentations.

Motions denied.

West Headnotes

[1] Federal Courts 170B ↪30

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk29 Objections to Jurisdiction,  
 Determination and Waiver

170Bk30 k. Power and Duty of Court.

Most Cited Cases

A motion to dismiss for lack of subject matter jurisdiction must be considered by the court before any other challenge because the court must find jurisdiction before determining the validity of a claim. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

[2] Federal Courts 170B ↪33

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk29 Objections to Jurisdiction,  
 Determination and Waiver

170Bk33 k. Affidavits and Evidence in  
 General. Most Cited Cases

On a motion to dismiss for lack of subject matter jurisdiction, which concerns the court's very power to hear the case, the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

[3] Federal Courts 170B ↪33

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk29 Objections to Jurisdiction,  
 Determination and Waiver

170Bk33 k. Affidavits and Evidence in  
 General. Most Cited Cases

When ruling on a motion to dismiss for lack of subject matter jurisdiction, the court may rely on: (1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts and the

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420 F.Supp.2d 601

Page 2

420 F.Supp.2d 601, 97 A.F.T.R.2d 2006-1459  
**(Cite as: 420 F.Supp.2d 601)**

court's resolution of disputed facts. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

**[4] Federal Courts 170B** ↪32

170B Federal Courts  
 170BI Jurisdiction and Powers in General  
 170BI(A) In General  
 170Bk29 Objections to Jurisdiction, Determination and Waiver  
 170Bk32 k. Pleading. Most Cited Cases

**Federal Courts 170B** ↪34

170B Federal Courts  
 170BI Jurisdiction and Powers in General  
 170BI(A) In General  
 170Bk29 Objections to Jurisdiction, Determination and Waiver  
 170Bk34 k. Presumptions and Burden of Proof. Most Cited Cases  
 When a defendant makes a facial attack on the subject matter jurisdiction of the court by the mere filing of a motion to dismiss for lack of subject matter jurisdiction, the trial court must look at the sufficiency of the allegations in the complaint, which are presumed to be true.

**[5] Federal Courts 170B** ↪33

170B Federal Courts  
 170BI Jurisdiction and Powers in General  
 170BI(A) In General  
 170Bk29 Objections to Jurisdiction, Determination and Waiver  
 170Bk33 k. Affidavits and Evidence in General. Most Cited Cases

**Federal Courts 170B** ↪34

170B Federal Courts  
 170BI Jurisdiction and Powers in General  
 170BI(A) In General  
 170Bk29 Objections to Jurisdiction, Determination and Waiver  
 170Bk34 k. Presumptions and Burden of Proof. Most Cited Cases  
 When a defendant makes a factual attack on the subject matter jurisdiction of the court by providing

affidavits, testimony, or other evidentiary materials, the plaintiffs are required to submit facts in support of jurisdiction and have the burden of proving that the trial court has subject matter jurisdiction over the claims by a preponderance of the evidence. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

**[6] Federal Courts 170B** ↪13

170B Federal Courts  
 170BI Jurisdiction and Powers in General  
 170BI(A) In General  
 170Bk12 Case or Controversy Requirement  
 170Bk13 k. Particular Cases or Questions, Justiciable Controversy. Most Cited Cases  
 Claims were ripe for adjudication, that physician and professional association brought against insurer and its agents regarding attempted creation of tax shelter through purchase of multiple insurance policies, where plaintiffs already had suffered damages and continued to incur expenses, in defending audit by Internal Revenue Service (IRS); although IRS had yet to rule on validity of tax deduction, plaintiffs' injuries already were immediate and definite. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

**[7] Federal Courts 170B** ↪34

170B Federal Courts  
 170BI Jurisdiction and Powers in General  
 170BI(A) In General  
 170Bk29 Objections to Jurisdiction, Determination and Waiver  
 170Bk34 k. Presumptions and Burden of Proof. Most Cited Cases  
 A party attempting to invoke federal court jurisdiction bears the burden of establishing that jurisdiction.

**[8] Federal Courts 170B** ↪340.1

170B Federal Courts  
 170BV Amount or Value in Controversy Affecting Jurisdiction  
 170Bk340 Particular Cases, Claim or Value  
 170Bk340.1 k. In General. Most Cited

420 F.Supp.2d 601

Page 3

420 F.Supp.2d 601, 97 A.F.T.R.2d 2006-1459  
(Cite as: 420 F.Supp.2d 601)

## Cases

Amount in controversy exceeded sum of \$75,000, for purpose of court's exercise of diversity jurisdiction over lawsuit brought by physician and professional association against insurer and its agents regarding attempted creation of tax shelter through purchase of multiple insurance policies, where plaintiffs asserted damages "totaling at least \$500,000"; physician already had incurred over \$40,000 solely in professional expenses to defend audit, physician already spent more than \$300,000 on premiums for insurance policies, and plaintiffs sought to recover treble damages. 28 U.S.C.A. § 1332(a).

**[9] Federal Courts 170B ↪350.1**

## 170B Federal Courts

170BV Amount or Value in Controversy Affecting Jurisdiction

170Bk350 Fictitious or Colorable Claims

170Bk350.1 k. In General. Most Cited Cases

**Federal Courts 170B ↪359**

## 170B Federal Courts

170BV Amount or Value in Controversy Affecting Jurisdiction

170Bk357 Evidence

170Bk359 k. Weight and Sufficiency. Most Cited Cases

The sum claimed by a plaintiff controls the court's "amount in controversy" analysis under the diversity jurisdiction statute, unless it appears to a legal certainty that the claim is really for less than the jurisdictional amount. 28 U.S.C.A. § 1332(a).

**[10] Federal Courts 170B ↪357.1**

## 170B Federal Courts

170BV Amount or Value in Controversy Affecting Jurisdiction

170Bk357 Evidence

170Bk357.1 k. In General. Most Cited Cases

In general, a court will look to the plaintiff's complaint regarding the pleaded amount in controversy, when conducting an "amount in

controversy" analysis under the diversity jurisdiction statute, but the court is also free to look to other information before the court, including any discovery material and affidavits. 28 U.S.C.A. § 1332(a).

**[11] Federal Civil Procedure 170A ↪833**

## 170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(E) Amendments

170Ak833 k. Liberality in Allowing Amendment. Most Cited Cases

**Federal Civil Procedure 170A ↪1838**

## 170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)5 Proceedings

170Ak1837 Effect

170Ak1838 k. Pleading Over. Most Cited Cases

If it appears that a more carefully drafted pleading might state a claim upon which relief could be granted, the court should give the claimant an opportunity to amend his claim rather than dismiss it; furthermore, leave to amend a pleading should be freely given and should be granted unless there is some justification for refusal. Fed.Rules Civ.Proc.Rules 12(b)(6), 15, 28 U.S.C.A.

**[12] Federal Civil Procedure 170A ↪636**

## 170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(A) Pleadings in General

170Ak633 Certainty, Definiteness and Particularity

170Ak636 k. Fraud, Mistake and Condition of Mind. Most Cited Cases

When both fraud and non-fraud claims are alleged, heightened pleading requirements sometimes apply to both, but compliance with heightened pleading requirements is necessary only when the non-fraud claims are so intertwined with the fraud averments that it is not possible to describe a simple redaction to separate the two. Fed.Rules Civ.Proc.Rules 8(a), 9(b), 28 U.S.C.A.

420 F.Supp.2d 601

Page 4

420 F.Supp.2d 601, 97 A.F.T.R.2d 2006-1459  
(Cite as: 420 F.Supp.2d 601)

**[13] Abatement and Revival 2 ↻19**

## 2 Abatement and Revival

2III Defects and Objections as to Parties and Proceedings

2k19 k. Nonperformance of Condition Precedent. Most Cited Cases

**Antitrust and Trade Regulation 29T ↻286**

## 29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(E) Enforcement and Remedies

29TIII(E)I In General

29Tk286 k. Notice and Demand Requirements; Opportunity to Cure. Most Cited Cases

(Formerly 92Hk36.1 Consumer Protection)

Action brought by physician and professional association against insurer and its agents under Texas Deceptive Trade Practices Act (DTPA) did not have to be formally abated, although plaintiffs did not give notice before filing suit; plaintiffs did give requisite notice to all defendants after case had been filed, case had been automatically abated pursuant to DTPA, and 60-day period already had expired by time that federal district court ruled on defendant's motion to abate. V.T.C.A., Bus. & C. § 17.505(b).

**[14] Insurance 217 ↻1969**

## 217 Insurance

217XIII Contracts and Policies

217XIII(R) Rescission for Fraud or Mistake

217k1969 k. By Insureds or Beneficiaries.

Most Cited Cases

Rescission was viable remedy under Texas common law for alleged misrepresentations made by insurer's agents in marketing insurance policies as legal tax shelters and insurer in issuing unapproved life insurance policies in State of Texas, where there was no indication that purchaser knew that policy was unapproved or that tax shelter was not legal, and if court granted requested equitable relief, both parties would have been returned to status quo ante and neither would have been unjustly enriched as result of transaction, and public interest would have

been upheld by assuring that policies distributed in Texas conformed to Texas Insurance Code.

**[15] Cancellation of Instruments 69 ↻3**

## 69 Cancellation of Instruments

69I Right of Action and Defenses

69k2 Right to Cancellation

69k3 k. In General. Most Cited Cases

Under Texas law, the decision to grant rescission of a contract lies within the trial court's sound discretion.

**[16] Cancellation of Instruments 69 ↻1**

## 69 Cancellation of Instruments

69I Right of Action and Defenses

69k1 k. Nature and Scope of Remedy. Most Cited Cases

Under Texas law, rescission is an equitable remedy that operates to extinguish a contract that is legally valid but must be set aside due to fraud, mistake, or for some other reason to avoid unjust enrichment.

**[17] Cancellation of Instruments 69 ↻3**

## 69 Cancellation of Instruments

69I Right of Action and Defenses

69k2 Right to Cancellation

69k3 k. In General. Most Cited Cases

Because rescission is an equitable remedy used as a substitute for monetary damages when such damages would not be adequate under Texas law, a court must weigh several factors to determine whether such equitable relief should be granted; specifically, the court should look to the probability of irreparable damage to the moving party in the absence of relief, the possibility of harm to the non-moving party if the requested relief is granted, and the public interest.

**[18] Cancellation of Instruments 69 ↻18**

## 69 Cancellation of Instruments

69I Right of Action and Defenses

69k18 k. Estoppel or Waiver. Most Cited Cases

Under Texas law, the right to rescind a contract may be lost by inaction and conduct showing an

420 F.Supp.2d 601

Page 5

420 F.Supp.2d 601, 97 A.F.T.R.2d 2006-1459  
 (Cite as: 420 F.Supp.2d 601)

affirmation of the contract after a knowledge of the facts which are grounds for rescission.

### [19] Cancellation of Instruments 69 ↪8

#### 69 Cancellation of Instruments

##### 69I Right of Action and Defenses

##### 69k2 Right to Cancellation

##### 69k8 k. Injury Sustained or Anticipated.

#### Most Cited Cases

Because rescission is an equitable remedy under Texas law, such relief is not granted for a mere breach of contract; instead, a plaintiff must show that he will sustain serious and irreparable pecuniary injury unless rescission is granted.

### [20] Insurance 217 ↪1969

#### 217 Insurance

##### 217XIII Contracts and Policies

##### 217XIII(R) Rescission for Fraud or Mistake

##### 217k1969 k. By Insureds or Beneficiaries.

#### Most Cited Cases

Purchaser stated that he had been harmed by insurer's alleged misrepresentations that insurance policies were both approved and would function as legal tax shelter, for purposes of "serious and irreparable pecuniary injury element" necessary to prevail on his claim of rescission under Texas law, by alleging damages "totaling at least \$500,000," which included \$40,000 in professional expenses already incurred to defend audit by Internal Revenue Service (IRS), and he spent more than \$300,000 on premiums for insurance policies.

**\*604 EricMadden**, Diamond McCarthy Taylor Finley Bryant & Lee, Edward Philip Bush, Locke Liddell & Sapp, M. David Bryant, Cox Smith Matthews Incorporated, Dallas, TX, for Plaintiffs.

David A. Jones, Jessica Spangler Taylor, Akin Gump Strauss Hauer & Feld, San Antonio, TX, Cara Foos Pierce, Akin Gump Strauss Hauer & Feld, Charles W. Branham, III, Law Offices of Charles W. Branham III, Larry W. Johnson, Anna L. Raines, Cowles & Thompson, Dallas, TX, David M. Skeens, J. Michael Vaughan, Walters Bender Strohbehn & Vaughan, Kansas City, MO, Frank Johnson, Johnson Law Firm, San Diego, CA, for

Defendants.

### **MEMORANDUM OPINION AND ORDER**

FISH, Chief Judge.

Before the court are (1) the motion of the defendant Indianapolis Life Insurance Company ("Indianapolis Life") to dismiss one claim against it; (2) the motion of the defendant xélan,<sup>FN1</sup> the Economic Association of Health Professionals ("Xelan") to dismiss, or in the alternative, to abate the action against it; and (3) the motion of the defendant Benjamin Daniel Kennedy, III ("Kennedy") to dismiss for lack of subject matter jurisdiction and for failure to state claims upon which relief can be granted. For the reasons stated below, the motions are denied.

FN1. In its motion this defendant refers to itself as xélan Association. Motion to Dismiss under Rule 12(b)(6) or, in the Alternative, to Abate at 1. The plaintiffs refer to this defendant as Xelan, the Economic Association of Health Professionals, Inc. Original Complaint ¶ 9. The court is unsure whether the name should be capitalized but will use the plaintiffs' convention.

### I. BACKGROUND

This suit arises from the attempted creation of a tax shelter through the purchase of multiple insurance policies. Charles D. Kennard is a physician residing in Texas, Original Complaint ¶ 5, who organized a professional association known as Charles D. Kennard, M.D., P.A. *Id.* ¶ 6. This professional association established a defined benefit plan ("Charles D. Kennard, M.D., P.A. Defined Benefit Plan" or "Kennard DBP") to provide retirement benefits for its employees and their beneficiaries.<sup>FN2</sup> *Id.* ¶ 7.

FN2. For ease of reference, all plaintiffs will collectively be referred to as "Kennard."  
 "

According to the complaint, Kennedy and Xelan,

420 F.Supp.2d 601, 97 A.F.T.R.2d 2006-1459  
**(Cite as: 420 F.Supp.2d 601)**

acting as agents for Indianapolis Life, approached Kennard and suggested establishing the Kennard DBP. Original Complaint ¶ 16. Wholly funded by life insurance policies, the Kennard DBP was represented as being in compliance with Section 412(i) of the Internal Revenue Code and would provide significant tax deductions. *Id.* ¶¶ 16, 18. Kennard purchased these policies from Indianapolis Life and subsequently paid more than \$300,000 in premiums. *Id.* ¶¶ 19-20.

In 2004, the Internal Revenue Service (“IRS”) determined that the issuance of policies similar to Kennard’s constitutes a “listed transaction” and would not qualify as a Section 412(i) plan. Original Complaint ¶ 23. In addition, the IRS found that certain transactions involving these policies were not allowable as tax deductions. *Id.* Beyond these issues, Kennard \*605 discovered several other defects associated with the policies. See *id.* ¶¶ 24-26 (the policy jeopardizes the Kennard DBP’s status as a Section 412(i) plan, the policy is subject to an “excessive surrender charge,” and it has not been approved by the Texas Department of Insurance).

On June 17, 2005, Kennard filed this suit, alleging three causes of action: rescission of the non-approved insurance policy; violations of Article 21.21 of the Texas Insurance Code; and violations of the Texas Deceptive Trade Practices Act (“DTPA”). Docket Sheet; Original Complaint. On August 22, 2005, Indianapolis Life and Xelan filed these motions to dismiss, followed approximately a month later by Kennedy’s motion. Docket Sheet.

## II. ANALYSIS

### A. Kennedy’s Motion to Dismiss or Abate

Kennedy moves for dismissal under both 12(b)(1) and 12(b)(6). Under Rule 12(b)(1), Kennedy argues that this court has no subject matter jurisdiction over this dispute because there is neither a ripe claim, nor federal question or diversity jurisdiction. Defendant Benjamin Daniel

Kennedy, III’s Combined Original Motion to Dismiss Claims for Lack of Subject-Matter Jurisdiction and Failure to State Claims Upon Which Relief Can be Granted and, Alternatively, to Abate, and Brief in Support Thereof (“Kennedy Motion”) at 1. Under Rule 12(b)(6), Kennedy argues that the claims against him should be dismissed for failure to meet the Rule 9(b) requirements of pleading fraud with particularity. *Id.* Finally, Kennedy argues that this action should be abated because he did not receive pre-suit notice in accordance with DTPA requirements. *Id.* Kennard disputes all assertions by Kennedy. See generally Plaintiffs’ Response to Defendant Kennedy’s Motion to Dismiss or, in the Alternative, to Abate and Brief in Support Thereof (“Kennard’s Kennedy Response”). The court will address each of these contentions in turn.

### 1. Subject Matter Jurisdiction

#### a. Standard for Rule 12(b)(1) Motion to Dismiss

[1][2][3] Rule 12(b)(1) of the Federal Rules of Civil Procedure authorizes the dismissal of a case for lack of jurisdiction over the subject matter. See FED. R. CIV. P. 12(b)(1). A motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction must be considered by the court before any other challenge because “the court must find jurisdiction before determining the validity of a claim.” *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir.1994) (internal citation omitted); see also *Ruhrgas AG v. Marathon Oil Company*, 526 U.S. 574, 577, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999) (“The requirement that jurisdiction be established as a threshold matter ... is inflexible and without exception”) (citation and internal quotation marks omitted). On a Rule 12(b)(1) motion, which “concerns the court’s ‘very power to hear the case ... [.] the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.’ ” *MDPhysicians & Associates, Inc. v. State Board of Insurance*, 957 F.2d 178, 181 (5th Cir.) (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.), cert. denied, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981)), cert. denied, 506 U.S.

420 F.Supp.2d 601, 97 A.F.T.R.2d 2006-1459  
**(Cite as: 420 F.Supp.2d 601)**

861, 113 S.Ct. 179, 121 L.Ed.2d 125 (1992). In ruling on a motion to dismiss under Rule 12(b)(1), the court may rely on: "1) the complaint alone; 2) the complaint supplemented by undisputed facts; or 3) the complaint supplemented by undisputed facts and the court's resolution of disputed facts." \*606 *MCG, Inc. v. Great Western Energy Corporation*, 896 F.2d 170, 176 (5th Cir.1990) (citing *Williamson*, 645 F.2d at 413).

[4][5] The standard for reviewing a motion under Rule 12(b)(1), however, depends on whether the defendant makes a facial or factual attack on the plaintiffs' complaint. *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir.1981). The defendant makes a facial attack by the mere filing of a Rule 12(b)(1) motion. *Id.* In that case, the trial court must look at the sufficiency of the allegations in the complaint, which are presumed to be true. *Id.* The defendant makes a factual attack, on the other hand, by providing affidavits, testimony, or other evidentiary materials challenging the jurisdiction of the court. *Id.* In a factual attack, the plaintiffs are also required to submit facts in support of jurisdiction and have the burden of proving, by a preponderance of the evidence, that the trial court has subject matter jurisdiction over the claims. *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir.1986).

In the instant motion, Kennedy has presented the court with a facial attack on the standing of each plaintiff, asserting (without evidentiary support) that the court lacks subject matter jurisdiction over this dispute because the case is not ripe for resolution and there is neither federal question nor diversity jurisdiction. Kennedy Motion at 1. For the reasons discussed below, the court concludes that the instant dispute is ripe and diversity jurisdiction is present.

#### b. Ripeness

[6] In his motion to dismiss, Kennedy argues that Kennard's claims are not yet ripe because Kennard's "legal basis for actual damages-disqualification of the [Kennard DBP]-is admittedly potential and unrealized." Kennedy Motion at 5. Because Kennard is currently undergoing an audit by the

IRS, Kennard's Kennedy Response at 2, which has yet to disqualify the Kennard DBP, Kennedy argues that there is no ripe case or controversy. *Id.* Ripeness-the fact that a case is neither "premature [n]or speculative"-is a constitutional prerequisite to the exercise of jurisdiction." *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir.) (citing *United Transportation Union v. Foster*, 205 F.3d 851, 857 (5th Cir.2000), and *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967)), cert. denied, 537 U.S. 1071, 123 S.Ct. 663, 154 L.Ed.2d 565 (2002). As explained below, the fact that the IRS has yet to rule on the Kennard DBP's validity for tax deduction purposes is irrelevant; Kennard has already suffered damages and continues to incur expenses, most notably while defending his audit. See Affidavit of E. Philip Bush ¶¶ 4-5, attached to Kennard's Kennedy Response as Exhibit A ("Bush Affidavit") (noting that "Dr. Kennard became the subject of [an] IRS audit as a result of his reliance on advice and representations by Benjamin Daniel Kennedy, III, and others" and has subsequently incurred expenses of \$40,880 as a result of this audit).<sup>FN3</sup> These injuries are already immediate and definite, so the fact that the other damages from the IRS audit remain contingent at \*607 this time do not make this dispute premature or speculative. See *Seippel v. Jenkins & Gilchrist, P.C.*, 341 F.Supp.2d 363, 371 (S.D.N.Y.2004) (finding that the damages alleged-fees paid to defendants, losses incurred in tax shelter transactions, expenses paid to defend audit, losses from forced sale of assets, and tax penalties-were sufficient to satisfy ripeness requirement). Accordingly, the court finds this case to be ripe for judicial resolution.

FN3. The court notes that Kennedy objects to the consideration of this affidavit in the court's determination of ripeness. Defendant Benjamin Daniel Kennedy, III's Reply to Plaintiffs' Response to Defendant Kennedy's Combined Original Motion to Dismiss or, in the Alternative, to Abate and Brief in Support at 3. The court will look to the affidavit, though, because "[r]ipeness should be decided on the basis of all the information available to the court.

