

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED

June 6, 2008

No. 07-30844

Charles R. Fulbruge III
Clerk

COREGIS INSURANCE CO

Plaintiff-Appellant

v.

SCHOOL BOARD OF ALLEN PARISH; TANYA GUILLORY; JODY
BENOIT; JOHN DOE, ON BEHALF OF JANE DOE

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 2:06-CV-353

Before JONES, Chief Judge, and WIENER and CLEMENT, Circuit Judges.

PER CURIAM:*

Plaintiff insurer challenges the district court's dismissal of its duty-to indemnify claim under the Declaratory Judgment Act. We vacate the dismissal and remand to the district court for reconsideration.

BACKGROUND

On August 31, 2005, John Doe filed a petition individually and on behalf of his minor daughter, Jane Doe, in a Louisiana state court. The petition alleges,

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

inter alia, that Tanya Guillory and Jody Benoit, both employees of Allen Parish School Board ("APSB"), served alcohol to and committed sexual battery upon Jane Doe, who was a minor at the time of the incident.¹ The petition named Guillory, Benoit, and APSB as defendants.

In March 2006, Coregis Insurance Company ("Coregis") filed this action in federal court² seeking a declaration that the general liability policy it issued to APSB provides no coverage for the acts complained of in the state court lawsuit, and that no defense is owed to any of the defendants in that suit. Coregis then moved for summary judgment on the basis that the policy's exclusion of liability for damages that arise out of "criminal acts" precluded defense or indemnity. John Doe filed a motion to dismiss, arguing the case was not ripe because the Louisiana state court action had not yet determined whether APSB was liable.

The district court denied Coregis's motion and dismissed its claims with prejudice. It concluded that the policy clearly indicated that Coregis was required to defend against John Doe's claims unless, according to the policy, "the 'Insured' has been convicted of or pleads no contest or nolo contendere to a felony arising out of such conduct," meaning "criminal acts." Because Coregis produced no evidence that Guillory or Benoit pleaded to or were found guilty of any "criminal acts," Coregis's duty-to-defend claim was dismissed.

¹ The state lawsuit alleges that Jane Doe was 17 years of age or younger on the date of the filing of the petition, which was August 31, 2005. That indicates Jane Doe was 14 years old or younger when the alleged injury occurred on April 27, 2002. It is undisputed that Guillory and Benoit were over the age of 18 at the time of the alleged injury.

² The complaint named Guillory, Benoit, APSB, and John Doe as defendants.

The district court also concluded that because the policy does not define “criminal acts,” whether a criminal act occurred was a disputed issue of material fact precluding summary judgment. And when Coregis failed to produce evidence that Guillory and Benoit were charged with or convicted of criminal acts, the district court dismissed Coregis’s duty-to-indemnify claim.³ Coregis now appeals only the dismissal of its duty-to-indemnify claim.

DISCUSSION

Coregis argues that the term “criminal acts” in the policy is unambiguous and, because Guillory and Benoit clearly committed criminal acts, the policy exclusion must be applied. APSB argues that the district court properly concluded that the term “criminal acts” was ambiguous. John Doe filed a brief arguing that the case was not ripe for review because the underlying state court action had not proceeded to discovery.

We review a district court’s grant of summary judgment de novo. *Morris v. Equifax Info. Servs., LLC*, 457 F.3d 460, 464 (5th Cir. 2006). Summary judgment is appropriate when “there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). The district court’s interpretation of an insurance contract is a question of law also subject to de novo review. *Canutillo Indep. Sch. Dist. v. Nat’l Union Fire Ins. Co.*, 99 F.3d 695, 700 (5th Cir. 1996).

The policy states:

This insurance does not apply to liability for “damages” which are in whole or in part caused by or arising out of: . . .

³ The court declined to reach the issue whether the “criminal acts” exclusion was void under Louisiana public policy, as argued by APSB.

6. Fraud, dishonesty, criminal acts or omissions, or unlawful profit or advantage. [Coregis] will, however, defend the "Insured" against such claims, unless, the "Insured" has been convicted of or pleads no contest or nolo contendere to a felony arising out of such conduct.

(Emphasis added.) We are asked to determine whether Guillory's and Benoit's conduct, as pleaded by John Doe, amounted to "criminal acts" as that term is defined in the policy. As noted above, the district court concluded this was a disputed issue of material fact. But the district court later dismissed Coregis's duty-to-indemnify claim when Coregis produced no evidence that Guillory and Benoit were either charged with or convicted of "criminal acts." Essentially, the district court granted summary judgment for APSB by concluding the policy's "criminal acts" exclusion is triggered only when the insured is actually charged or convicted of a "criminal act."

Here, the district court simply assumed that "criminal acts" required the presence of a charge or conviction, but provided no analysis as to why that is the case. Although the issue whether the "criminal acts" exclusion requires an actual charge or conviction appears at first glance a fairly straightforward analysis, courts across the nation have struggled to apply these exclusions. See generally COUCH ON INSURANCE § 101:25; see also *Littlefield v. Acadia Ins. Co.*, 392 F.3d 1, 8 n.9 (1st Cir. 2004) (concluding "criminal acts" exclusion was unambiguous, but noting the possibility that the exclusion may be ambiguous in numerous other factual contexts). Louisiana appears to be no exception. See, e.g., *Hooper v. State Farm Mut. Auto. Ins. Co.*, 782 So. 2d 1029, 1033 (La. Ct. App. 2001) ("criminal acts" exclusion "clear and unambiguous"); *Young v. Brown*, 658 So. 2d 750, 754 (La. Ct. App. 1995) ("criminal acts" exclusion ambiguous and void against public policy in some contexts); see also *Gills v. Brown*, 672 So. 2d

1093, 1097–98 (La. Ct. App. 1996) (discussing Young and “criminal acts” exclusion), vacated by *Gills v. Brown*, 675 So. 2d 274 (La. 1996).

In light of the difficulty courts have had interpreting “criminal acts” exclusions, as well as the fact-specific nature of the inquiry, further factual development at the state level is essential before a court decides whether Coregis must indemnify APSB, and this will prevent the federal court from rendering an unnecessary advisory opinion. The latter concern is compelling here because the parties have failed to provide any legal support for their interpretation of the relevant policy exclusion.

In *Northfield Insurance Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 536–37 (5th Cir. 2004), we concluded, in a similar declaratory judgment action, that the district court properly ruled that the duty-to-indemnify issue was not ripe when the underlying state court lawsuit had not been completed. In such a circumstance, Texas law requires that after the district court concludes that the insurer has a duty to defend, the indemnity issue is nonjusticiable pending resolution of the liability suit.⁴ Louisiana appears to apply the same rule as Texas.⁵

⁴ Generally, Texas law considers the duty-to-indemnify question justiciable only after the underlying suit is concluded, unless “the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify.” *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997) (emphasis omitted).

⁵ See *Quinlan v. Liberty Bank & Trust Co.*, 575 So. 2d 336, 348–49 (La. 1990) (concluding duty to indemnify in a liability insurance contract arises when liability attaches); *Mossy Motors, Inc. v. Cameras Am.*, 898 So. 2d 602, 607 (La. Ct. App. 2005) (stating that duty to indemnify issue was premature and nonjusticiable when liability had not yet been established in underlying litigation); see also *Nat’l Union Fire Ins. Co. v. St. Bernard Parish Gov’t*, 2004 WL 877379, at *2 (E.D. La. Apr. 21, 2004) (concluding that duty to indemnify issue in declaratory judgment action was not ripe under Louisiana law when liability had not been established in underlying state court lawsuit).

Based on the reasoning of *Loving Home Care*, the district court erred by addressing the merits of Coregis's duty to indemnify. Lacking any facts in the summary judgment record, neither we nor the district court can discern whether criminal acts were actually perpetrated, nor can the federal courts properly interpret and apply on a vacant record the complicated body of case law relating to these exclusions. Consequently, we must vacate the district court's dismissal. On remand, the district court should consider staying Coregis's suit or dismissing it without prejudice until the underlying state court action is resolved. See *Loving Home Care*, 363 F.3d at 536–37 (noting that under the Declaratory Judgment Act, district courts have discretion to refuse to rule on the duty to indemnify pending completion of the underlying litigation).

For these reasons, the judgment of the district court is VACATED and the case is REMANDED.