IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4720

Summary Calendar

Olin Corp.,

Plaintiff,

versus

Koppers Co., Inc., et al.,

Defendants,

Elliott Turbomachinery Co., Inc.,

Defendant, Third-Party Plaintiff

versus

Rhonel Didrikson d/b/a Didrikson & Assoc.,

Third-Party Defendant-Appellant,

versus

Amerisure Insurance Co.,

Third-Party Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(CA-88-1557)

February 18, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Rhonel Didrikson, d/b/a Didrikson & Associates, a third-party defendant in litigation arising from the failure of a steam turbine compressor, demanded that his insurer provide a defense to claims against him. The insurer, Amerisure Insurance Co., sought a declaratory judgment that it owed no duty to defend Didrikson. The district court held that Amerisure has no obligation to defend Didrikson in this litigation. We affirm.

Didrikson is an engineering consulting firm retained by Olin Corporation to provide technical support on its steam turbine. Didrikson performed inspection and supervisory work with respect to the turbine's maintenance. In June 1987, four months after Didrikson was retained, the turbine oversped resulting in a catastrophic failure. Olin sued, among others, Elliott Turbomachinery which allegedly worked on the turbine immediately prior to the accident. Elliott filed a third-party demand against Didrikson, alleging that if Elliott is liable, Didrikson must share that liability because Didrikson supervised, inspected, and tested work done on the turbine.

Amerisure issued a comprehensive general liability policy to Didrikson that was in effect in 1987. An endorsement to that policy excluded claims arising out of the rendering of professional services. After being sued by Elliott, Didrikson formally demanded that Amerisure provide him a defense. Amerisure responded by seeking a determination by declaratory judgment as to whether the policy required it to provide Didrikson with a defense to Elliott's claims.

Despite some procedural irregularities waived by the parties, the district court heard Amerisure's request for declaratory relief.[1] The court considered the pleadings and submissions of both sides, and held that Amerisure did not have a duty to defend. Believing that the district court's grant of declaratory relief was immediately appealable, Didrikson filed a notice of appeal.

Following the notice of appeal, we asked the parties to discuss whether a final order had been entered. Appellant then secured a Rule 54(b) order certifying the decision as a final judgment subject to immediate appeal. A Rule 54(b) certification entered nunc pro tunc after the notice of appeal is effective. Local P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co., 642 F.2d 1065, 1069 (7th Cir. 1981)(Wisdom, J., sitting by designation). We have jurisdiction to hear this appeal under 12 U.S.C. § 1291.

There is some uncertainty as to the appropriate standard of review in this case. We need not determine whether the appropriate standard of review is de novo, see Selective Ins. Co. v. J.B. Mouton & Sons, Inc., 954 F.2d 1075, 1076 (5th Cir. 1992), abuse of discretion, see Mission Ins. Co. v. Puritan Fashions Corp., 706 F.2d 599, 601 (5th Cir. 1983), or somewhere in between, see PPG Industries, Inc. v. Continental Oil Co., 478 F.2d 674, 682 (5th Cir. 1973). Under any of these standards, we would affirm.

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[1]By agreement of the parties, we will treat Amerisure as an intervening third-party defendant with a cross-claim for declaratory relief against Didrikson.

In Louisiana, an insurer's duty to defend is determined by comparing the allegations of the complaint against the insured with the terms of the policy. Jensen v. Snellings, 841 F.2d 600, 612 (5th Cir. 1988). The insurer must provide a defense unless the allegations in the complaint unambiguously exclude coverage. Id. "Thus, the insurer is obligated to defend if the complaint discloses even a possibility of liability under the policy." Id.

The applicable complaint here is Elliott's third-party demand against Didrikson. That complaint alleges that Didrikson "supervise[d] all repairs" of the turbine, "inspect[ed] all repairs," and had the "responsibility of supervising the procurement of parts." Also, Didrikson allegedly was "charged . . . with the responsibility of testing" the turbine to ensure its throttle functioned properly. Elliott contends that if it is liable for negligence related to work on the turbine, Didrikson must indemnify or share liability with Elliott.

Amerisure's policy was issued to Didrikson, whose business is described as "Consulting Engineer-Electrical." It contained an endorsement entitled "Exclusion (Engineers, Architects or Surveyors Professional Liability)." That endorsement excludes coverage for

> [P]roperty damage arising out of the rendering of or the failure to render any professional services by or for the named insured, including . . . (2) supervisory, inspection or engineering services.

This policy unambiguously excludes coverage for all of the claims asserted by Elliott's third-party demand. First, Elliott

seeks to establish liability on the basis that Didrikson engaged in supervision and inspection--conduct expressly denoted by the exclusion. Second, Elliott claims that Didrikson is liable on the basis of its responsibility for testing. Although the exclusion does not use the terms test or testing, its illustrative list of conduct is not exclusive. Any claim based on the rendering of professional services by an engineer is unambiguously excluded. The testing of a steam turbine and its components is clearly a professional service rendered by engineers. Therefore, Amerisure had no obligation to provide a defense for Didrikson against these claims.

Didrikson correctly asserts that extrinsic evidence cannot be considered in determining the existence of the duty to defend. Jensen, 841 F.2d at 612. Besides the policy and Elliott's third-party complaint, the record contains a prospectus of Didrikson's business, portions of Didrikson's deposition, and a copy of Didrikson's contract with Olin. The district court's decision is not dependent upon the contents of any of these documents. We do not rely upon them to find that the district court reached the correct conclusion. Therefore, any error committed by the district court in considering these materials was harmless error.[2]

AFFIRMED.

[2]We find no merit to the contention that the district judge based his decision on his personal experience. The court used himself as an example only by way of illustration.