

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10257
Summary Calendar

FEDERAL INSURANCE COMPANY,

Plaintiff-Counter
Defendant-Appellee,

VERSUS

B.H.P WATER SUPPLY COMPANY,

Defendant-Appellant,

BURT FORMBY,
Individually and as Executor of the Estate of
Bea Formby, d/b/a Formby's KOA Kampgrounds,

Defendant-Counter
Plaintiff-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CV-672-X)

(October 12, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

I.

This is a declaratory judgment action by Federal Insurance

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Company ("Federal"), seeking a declaration that it has no liability or duty to defend B.H.P. Water Supply Corporation ("BHP") in an action brought against it by Burt Formby in his own behalf and as executor of the estate of Bea Formby d/b/a Formby's KOA Kampgrounds. The Formbys had a campground that bought water from BHP. A dispute arose, and BHP imposed conditions for the continuation of water service, conditions that the Formbys thought were too onerous.

The Formbys filed a state court suit for an injunction against BHP. While that suit was pending, Federal issued BHP an insurance policy. Because of the pending state litigation, an endorsement was added to the policy with the obvious intent to exclude from coverage any liability stemming from the subject matter of that litigation. The endorsement stated, in part, the following:

3.1 [Federal] shall not be liable under this policy to make any payment for Loss in connection with any claim(s) made against any Insured . . .

(H) arising from any litigation, claims, demands, causes of action, . . . decrees or judgments against any "Insured(s)", occurring prior to, or pending as of 8/18/86 . . . ;

(I) Arising from any subsequent litigation, claims, demands, causes of action, . . . decrees or judgments against any "Insured(s) arising from, or based on substantially the same matters as alleged in the pleadings of such prior or pending litigation . . . ; or

(J) Arising from any act of any "Insured(s) which gave rise to such prior or pending litigation . . . or judgments against any "Insured(s)."

A year later, the Formbys dismissed the state suit and, on the same day, filed a federal suit. BHP called upon Federal for a defense, which Federal declined. The Formbys and BHP then entered into an agreement whereby judgment was entered against BHP for \$1,307,957.52. BHP assigned its rights against Federal to the Formbys in exchange for the Formbys' agreement to delay execution on the judgment against BHP.

Federal then filed this declaratory judgment action, which was tried without a jury. The district court entered judgment for Federal, concluding that the controversy made the subject of the Formbys federal suit was excluded from coverage by the endorsement in the policy.

II.

The Formbys argue that their federal suit is not subject to the exclusion because in that suit they raised new matters not covered in their prior, state action and that additional parties were sued. On appeal, the Formbys state that "[t]he outcome of this case rests in the determination of whether the matters presented in the Federal Court Suit arose from or were based on substantially the same matters as alleged in the pleadings of the State Court Suit."

We easily answer the question posed by the Formbys in the affirmative. At trial, Formby acknowledged that each of the items of damage claimed in the federal suit traced back to the water controversy that began in 1985. BHP's attorney had stated,

in correspondence, that "the matters in controversy in both suits are identical" and "arise out of the same factual background."

It is obvious that the Formbys, seeking a deep pocket, dismissed the state suit and immediately filed the federal suit in an effort to circumvent the restrictions imposed by the policy endorsement. It is just as obvious that the two suits involved "substantially the same matters."

The judgment is AFFIRMED.