UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-10409
Summary Calendar

UNITED STATES FIRE INSURANCE CO.,

Plaintiff-Appellee,

VERSUS

MASSEY IRRIGATION & LIQUIDATION, INC.,

Defendant-Appellant,

Appeal from the United States District Court
For the Northern District of Texas
(3:93-CV-1692-R)

(November 3, 1994)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:[1]

In this declaratory judgment action, Massey Irrigation and Liquidation, Inc. ("Massey") appeals the district court's grant of summary judgment in favor of United States Fire Insurance Company ("U.S. Fire"). Because the petition in the underlying litigation alleged facts which clearly exclude the loss from coverage under Massey's policy, we affirm.

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[1] 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

On April 22, 1991, Robert Vega was allegedly injured while working on a sprinkler system manufactured by Lindsey Manufacturing Co. ("Lindsey"). Massey allegedly performed repairs to the system before Vega's accident. Vega and his wife filed a personal injury action (the "Vega suit") against Massey in state court, alleging that Massey was responsible for these inquiries because it was negligent in the repair or modification of the Lindsey sprinkler. Specifically, the Vegas alleged that Massey was negligent by:

> (a) failing to recommend or provide adequate shields to prevent clothing of persons from becoming snagged on the drive shafts;
> (b) failing to provide any warning or adequate warnings concerning the hazards of removal;
> (c) failing to recommend a shut-off switch in the vicinity of the drive shaft to enable emergency turn-off of the motion that powers the drive shaft; and
> (d) using improper bolts or other replacement parts that were not recommended by the manufacturer.

At the time of Vega's injury, U.S. Fire insured Massey under Texas Commercial Package Insurance Policy No. 503 094707 1 (the "Policy"), which requires U.S. Fire to defend Massey against any suit seeking damages because of bodily injury or property damage to which the insurance applies. U.S. Fire brought this action for declaratory judgment pursuant to 28 U.S.C. § 2201, seeking a declaration that it has no duty to defend or indemnify Massey against the Vega suit. It subsequently moved for summary judgment, contending that the Vegas' allegations were excluded under the Policy.

U.S. Fire contended it provided no coverage for this accident and owed no defense to Massey because of its "products-completed operations hazard" exclusion. The Policy defines "products-

completed operations hazard" as all such injuries or damages "occurring away from premises you own or rent arising out of `your product' or `your work.'" It further defines "your product" and "your work" as follows:

> 14. "Your product" means:
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> a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
> (1) You;
> (2) Others trading under your name; or
> (3) A person or organization whose business or assets you have acquired; and
> b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.
>
> "Your product" includes:
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> a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and
> b. The providing of or failure to provide warnings or instructions.
>
> "Your product" does not include vending machines or other property rented to or located for the use of others but not sold.
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> 15. "Your work" means:
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> a. Work or operations performed by you or on your behalf; and
> b. Materials, parts or equipment furnished in connection with such work or operations.
>
> "Your work" includes:
>
> a. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and
> b. The providing of or failure to provide warnings or instructions.

The district court granted U.S. Fire's motion for summary judgment and held that U.S. Fire had no duty either to defend or indemnify Massey because the Vegas' allegations "fall squarely"

within the "unambiguous language" of the Policy's "products-completed operations hazard" exclusion. Massey challenges that order in this appeal.

II.

We review a grant of summary judgment **de novo**, "reviewing the record under the same standards which guided the district court." **Walker v. Sears, Roebuck & Co.**, 853 F.2d 355, 358 (5th Cir. 1988). Summary judgment is proper when no issue of material fact exists that would necessitate a trial. **Celotex Corp. v. Carrett**, 477 U.S. 317, 324-25 (1986); Fed. R. Civ. P. 56(c). In determining whether summary judgment was proper, we review all facts in the light most favorable to the nonmovant. **Walker**, 853 F.2d at 358. Questions of law are always decided de novo. **Id.**

Whether an insurer has a duty to defend an insured is a question of state law. **Travelers Indem. Co. v. Holman**, 330 F.2d 142, 144 (5th Cir. 1964). In determining a duty to defend, Texas courts follow the "eight corners" rule. **Cluett v. Medical Protective Co.**, 899 S.W.2d 822, 827-28 (Tex. App.--Dallas 1992, writ denied). Under this rule, the court looks only to the pleadings and the policy. **Snug Harbor Ltd. v. Zurich Ins.**, 968 F.2d 538, 546 (5th Cir. 1992). The insurer has a duty to defend if any allegation in the complaint is potentially covered by the policy. **Enserch Corp. v. Shand Morahan & Co., Inc.**, 952 F.2d 1485, 1492 (5th Cir. 1992).

On appeal, Massey focuses on Vega's allegations that Massey failed to recommend or provide adequate shields or an emergency shut-off switch. Massey's argument appears to be two-fold. First,

it argues that providing services, such as repairs, does not constitute a defective product and thus does not fall within the "products-completed operations hazard" exclusion. Second, it suggests that "failure to warn" claims fall outside a "products hazard" exclusion if they are based on something other than a defect in the product sold by the insured.

Massey cites several cases from other jurisdictions which have interpreted products hazard and completed operations hazard exclusions to apply only to injuries arising out of the sale or manufacture of products as opposed to the rendering of services or repairs. **See, e.g., Chancler v. American Hardware Mut. Ins. Co.**, 712 P.2d 542, 546 (Idaho 1985); **Cooling v. United States Fidelity and Guar. Co.**, 269 So.2d 294, 296 (La. App. 1972); **see also** "Construction and Application of Clause Excluded from Coverage of Liability Policy `Completed Operations Hazard,'" 58 A.L.R.3d 12, 28 [§ 3. Completed operations exclusion as not applicable to service operations].

However, Texas courts have interpreted such exclusions to include the rendering of a service. In **Green v. Aetna Ins. Co.**, 349 F.2d 919 (5th Cir. 1965), decided under Texas law, we held that the exclusion includes rendition of a service. In **Green**, the insured was sued for injuries suffered when a drill collar which it had allegedly repaired broke. This court held that the insurer had no duty to defend because the claim fell within the products hazard exclusion. **Id.** at 923. In doing so, this court explicitly rejected those cases from other jurisdictions which interpret completed operations hazard exclusions to apply only to injuries

arising out of the sale or manufacture of some product as opposed to the provision of services. **Id**.

In **Green**, we relied on **Pan Am. Ins. Co. v. Cooper Butane Co.**, 300 S.W.2d 651 (Tex. 1957). In that case the insured was sued for improper repair of a gas valve which allegedly caused the death of two people. The Texas Supreme Court, without an extended discussion held that the allegations against the insured fell within the completed operations exclusion. The Court therefore implicitly held that "operations" need not be tied to a product which is manufactured, sold, handled or distributed by the insured in order to make the "completed operations hazard" exclusion operative. **Id.** at 655. Thus, under Texas law the completed operations hazard includes rendition of services.

Massey next contends that Vega asserts in substance a negligent failure to warn claim which is not precluded by the "products--completed operations" exclusion. This argument ignores the clear language of the policy which expressly defines "your product" and "your work" to include "[t]he providing of or failure to provide warnings or instructions." Massey relies on one Texas case and several cases from other jurisdictions for the proposition that an allegation of negligent failure to warn does not fall within a "products hazard" exclusion. **See Scarborough v. Northern Assurance Co. of America**, 718 F.2d 130 (5th Cir. 1989) (applying Louisiana law); **Chancler**, 712 P.2d at 547; **Cooling**, 269 So.2d at 297-98; **Hartford Mut. Ins. Co. v. Moorhead**, 578 A.2d 492, 495-96 (Pa. Super. 1990) (citing cases); **LaBatt Co. V. Hartford Lloyd's Ins. Co.**, 776 S.W.2d 795 (Tex. App.--Corpus Christi 1989, no writ).

However, none of the insurance policies at issue in these cases expressly included in the definition of "your product" or "your work" the "failure to provide warnings or instructions."

Massey's "work" was the repair and modification of the sprinklers. That work had been completed. We agree with the district court that any claim that Massey failed to warn of the need for certain devices which would make the sprinkler more safe for use falls squarely within the exclusions for "products--completed operations hazard" under the Policy. The district court correctly concluded that coverage was excluded under U.S. Fire's policy.[2]

III.

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of U.S. Fire.

AFFIRMED.

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[2] Relying on Texas declaratory judgment cases, Massey also argues that the district court lacked jurisdiction to declare that U.S. Fire had no duty to indemnify Massey from the claims brought by the Vegas. However, the federal courts are not controlled by state procedural law in entertaining a declaratory judgment action. **See Skelly Oil v. Phillips Petroleum Co.**, 339 U.S. 667, 674 (1950). The Federal Declaratory Judgment Act allows this court to issue a declaration only "in a case of actual controversy." **Aetna Life Ins. Co. v. Haworth**, 300 U.S. 227, 239-40 (1937); 28 U.S.C. § 2201 (1988). The Supreme Court has held that such a controversy exists where, as here, an insurer seeks a declaratory judgment that it was not liable under its insurance policy to pay a judgment to be rendered in a pending case. **Maryland Casualty Co. v. Pacific Coal & Oil Co**., 312 U.S. 270, 272-74 (1941); **see also Cincinnati Ins. Co. v. Holbrook**, 867 F.2d 1330, 1333 (11th Cir. 1989); **Sears, Roebuck & Co. v. American Mut. Liab. Ins. Co.**, 372 F.2d 435, 440 (7th Cir. 1967). The district court clearly had jurisdiction to decide this controversy.