UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-60154
Summary Calendar

SUDS SHOP, INC.,

Plaintiff-Appellant,

versus

COMMERCIAL UNION INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA-3:92-290)

(July 18, 1994)

Before POLITZ, Chief Judge, JONES and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

The Suds Shop, Inc. appeals an adverse summary judgment in its suit for extra-contractual damages against its liability insurer, Commercial Union Insurance Company. Finding no reversible error we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

The Suds Shop, a drive-through beer retailer, was sued by the estate of David Scott Summers for allegedly selling beer to the teenaged driver of a vehicle involved in an accident resulting in Summers' death. Commercial Union initially defended the suit under a reservation of rights. It then withdrew but two months later it reinstated its defense. The underlying claim settled and the Suds Shop sued Commercial Union in Mississippi state court for punitive damages and for $6,665 in attorney's fees incurred during the two-month lapse. Commercial Union removed the case to federal court and paid the attorney's fees. The district court granted summary judgment dismissing the claim for punitive damages. The Suds Shop timely appealed.

Under Mississippi law, an insurer's obligation to provide a defense to its insured is determined by the allegations of the complaint.[1] An insurer must defend against a complaint that alleges facts bringing the injury within the coverage of the policy even if the allegations are groundless.[2] Further, where a complaint alleges facts within a policy exclusion, an obligation to defend accrues if the insurer learns of facts which indicate coverage.[3] To reach a jury with a claim of bad-faith refusal to defend, the insured generally must make a showing that the insurer

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[1]**Foreman v. Continental Casualty Co.**, 770 F.2d 487 (5th Cir. 1985); **State Farm Mutual Automobile Ins. Co. v. Taylor**, 233 So.2d 805 (Miss. 1970).

[2]**Taylor**.

[3]**Id.**; **Meng v. Bituminous Casualty Corp.**, 626 F.Supp. 1237 (S.D.Miss. 1986).

lacked an arguable basis for its conduct and acted with gross negligence or malice.[4] Unless the showing is sufficient to permit a reasonable jury to find in favor of the insured, summary judgment is appropriate.[5]

Commercial Union claims an arguable basis for withdrawing its defense -- the policy's exclusion of liability for a business selling alcoholic beverages. According to the agent who wrote the policy, however, the intent was to include coverage of beer sales. The agent attested by affidavit that he had so informed Commercial Union's adjuster prior to the withdrawal of representation.

We need not decide whether a jury could find that Commercial Union had an adequate basis for denying representation on these facts because we conclude that the Suds Shop did not create a jury question with respect to gross negligence or intentional misconduct, the second element of a bad-faith claim. Commercial Union consulted an attorney before deciding to deny representation. The attorney advised that the alleged injury fell within the policy exclusion.[6] Commercial Union had not provided the lawyer with the agent's statement but the omission was remedied promptly when the Suds Shop protested. Three weeks later Commercial Union reinstated its defense. When the case settled, Commercial Union contributed

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[4]**Merchants National Bank v. Southeastern Fire Ins. Co., Inc.**, 751 F.2d 771 (5th Cir. 1985); **Lewis v. Equity National Life Ins. Co.**, _____ So.2d _____, 1994 WL 179091 (Miss. 1994).

[5]See **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242 (1986); **Celotex v. Catrett Corp.**, 477 U.S. 317 (1986).

[6]See **Wilson v. U.S. Fidelity & Guaranty Ins. Co.**, 830 F.2d 588 (5th Cir. 1987).

to the settlement. As a matter of law, these facts do not constitute the kind of egregious abuse required for bad-faith claims.

AFFIRMED.