



APS 12/4/01 11:13

3:98-CV-01251 HAWES V. GENERAL STAR

\*74\*

\*APPJGM.\*

FILED

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NOV 30 2001

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
DEPUTY

NO. 99-56432  
CT/AG#: CV-98-01251-JTM

JAMES W. HAWES; J.W. HAWES INSURANCE SERVICE .

Plaintiffs - Appellants

v.

GENERAL STAR MANAGEMENT COMPANY

Defendant

and

DOES 1 THROUGH 100; GENERAL STAR INDEMNITY COMPANY

Defendants - Appellees

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APPEAL FROM the United States District Court for the  
Southern District of California (San Diego) .

THIS CAUSE came on to be heard on the Transcript of the  
Record from the United States District Court for the  
Southern District of California (San Diego)  
and was duly submitted.

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RECEIVED

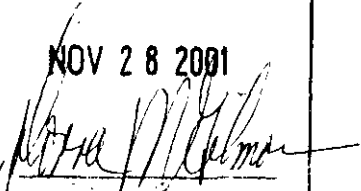
NOV 30 2001

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

**COSTS TAXED**

Filed and entered - 11/6/01.

A TRUE COPY  
CATHY A. CATTERSON  
Clerk of Court  
ATTEST  
NOV 28 2001  
by 

ENTERED ON 12-4-01

**FILED**

**NOV 06 2001**

NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK  
U. S. COURT OF APPEALS

JAMES W. HAWES; J.W. HAWES  
INSURANCE SERVICE,

Plaintiffs-Appellants,

v.

GENERAL STAR MANAGEMENT  
COMPANY,

Defendant

and

DOES 1 THROUGH 100; GENERAL  
STAR INDEMNITY COMPANY,

Defendants-Appellees.

No. 99-56432

D.C. No. CV-98-01251-JTM

MEMORANDUM\*

Appeal from the United States District Court  
Southern District of California  
Jeffrey T. Miller, District Judge, Presiding

Argued and Submitted October 16, 2001  
Pasadena, California

BEFORE: BOOCHEVER, FERNANDEZ and FISHER, Circuit Judges.

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as may be provided by Ninth Circuit Rule 36-3.

James W. Hawes and J.W. Hawes Insurance Services (“Hawes”) appeal the district court’s summary judgment in favor of General Star Indemnity Company and General Star Management Company (“General Star”) in Hawes’ action for breach of contract and breach of the implied covenant of good faith and fair dealing. Hawes argues that, under its business errors and omissions liability insurance policy, General Star had a duty to provide coverage or a defense for Hawes in several actions that resulted from Hawes’ allegedly negligent placement of insurance on behalf of Hawes’ clients. General Star alleges that it was justified in denying coverage because Hawes failed to adhere to the notice requirements of the insurance policy and that the underlying claims were in any event excluded from coverage under the insolvency exclusion of the policy. The district court granted summary judgment on the grounds that Hawes’ notice to General Star was inadequate. The court did not reach the issue of the insolvency exclusion, but we may affirm on any ground supported by the record. *Franklin v. Terr*, 201 F.3d 1098, 1100 n.2 (9th Cir. 2000).

The insured has the initial burden of establishing that a claim falls within the scope of the policy. *Royal Globe Ins. Co. v. Whitaker*, 226 Cal. Rptr. 435, 437 (Ct. App. 1986). Only if this burden is met does the burden shift to the insurer to prove that a specific exclusion in the policy precludes coverage of the claim.

*Merced Mut. Ins. Co. v. Mendez*, 261 Cal. Rptr. 273, 279 (Ct. App. 1989).

Although the coverage provisions of the insurance policy are liberally construed in favor of the insured, the exclusions from coverage are narrowly construed against the insurer. *Charles E. Thomas Co. v. Transamerica Ins. Group*, 72 Cal. Rptr. 2d 577, 579 (Ct. App. 1998). Accordingly, the duty to defend “runs to claims that are merely potentially covered, in light of facts alleged or otherwise disclosed.” *Buss v. Superior Ct.*, 939 P.2d 766, 773 (Cal. 1997). The duty to defend is excused only in the event that “the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage.” *Montrose Chemical Corp. v. Superior Ct.*, 861 P.2d 1153, 1160 (Cal. 1993).

Hawes’ policy with General Star contained a provision which explicitly excluded from coverage claims arising out of the insolvency of any insurer. The underlying actions against Hawes resulted when Hawes’ clients were harmed because First Assurance & Casualty Company (“FACC”), the insurer with which Hawes placed the clients, turned out to be fraudulent, became insolvent and did not pay claims against it. On April 22, 1993, the California Department of Insurance (“DOI”) issued a cease-and-desist order to FACC. The DOI ordered FACC to refrain from taking any new or renewal business because it had a negative surplus of more than \$5 million and was insolvent under DOI standards.

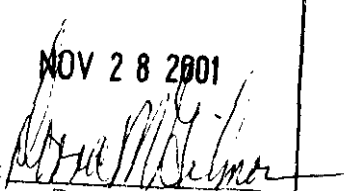
Although Hawes argues that FACC stopped paying claims months earlier, the first instance in which the record indicates that FACC stopped paying claims to the specific underlying claimants is in a June 4, 1993 letter from Hawes to underlying claimant D & H Trucking. In the letter, Hawes informed the claimant that FACC “is not presently paying claims or properly defending its policyholders” and urged the claimant to join a legal action in order to obtain settlement of its claims. FACC subsequently filed for Chapter 11 bankruptcy on October 22, 1993. In March 1994, the Turks & Caicos Islands, FACC’s place of incorporation and licensing, initiated liquidation proceedings against FACC. FACC’s court-appointed bankruptcy trustee and liquidator declared that FACC was insolvent at that time.

The record contains no evidence that FACC stopped paying claims to the specific underlying claimants prior to April 1993, when the DOI found that FACC’s liabilities far exceeded its assets and declared FACC insolvent. The reason behind FACC’s lack of funds is largely irrelevant to our analysis so long as FACC was insolvent prior to its refusal to pay claims to the specific underlying claimants. This condition is met here. The underlying actions against Hawes arose out of FACC’s insolvency. Therefore, coverage was excluded under the insolvency exclusion and General Star was under no duty to defend Hawes.



Hawes' notice to General Star did not comply exactly with the strict terms of the policy, and certainly did not provide sufficient information to determine why Hawes believed the underlying actions would trigger covered claims against him. Nonetheless, because his notice letter was sent in response to an invitation from General Star's agent, there may be questions whether General Star's failure to inquire into the attempted notice was proper. Because the insolvency exclusion of the policy precludes coverage, we do not reach the issue of the adequacy of the notice.

AFFIRMED.

A TRUE COPY  
CATHY A. CATTERSON  
Clerk of Court  
ATTEST  
NOV 28 2001  
by:   
Deputy Clerk

INTERNAL USE ONLY: Proceedings include all events.  
99-56432 Hawes, et al v. Does 1 thru 100, et al

JAMES W. HAWES  
Plaintiff - Appellant

Jack B. Winters, Jr., Esq.  
619-234-9000  
[COR LD NTC ret]  
WINTERS & ATCHLEY  
1901 First Avenue  
Suite 400  
San Diego, CA 92101

J.W. HAWES INSURANCE SERVICE .  
Plaintiff - Appellant

Jack B. Winters, Jr., Esq.  
(See above)  
[COR LD NTC ret]

v.

GENERAL STAR MANAGEMENT  
COMPANY  
Defendant

No Appearance  
No Address

DOES 1 THROUGHT 100  
Defendant - Appellee

No Appearance  
(See above)

GENERAL STAR INDEMNITY COMPANY  
Defendant - Appellee

Alan H. Barbanel, Esq.  
310/282/8088  
Suite 350  
[COR LD NTC ret]  
Amy Dantzler, Esq.  
310/282/8088  
Suite 350  
[COR LD NTC ret]  
Christian W. Trunnell, Esq.  
310/282/8088  
Suite 350  
[COR LD ret]  
BARBANEL TREUER & DANTZLER  
1925 Century Park East  
Los Angeles, CA 90067

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
BILL OF COSTS**

For Official Use Only

**NOTE:** If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. 1920, and Circuit Rule 39-1 when preparing your bill of costs.

Hawes, et al. v. General Star Indemnity Co. CA No. 99-5642

The Clerk is requested to tax the following costs against: James W. Hawes & J.W. Hawes Ins. Co.

**FILED**

NOV 15 2001

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

| COST TAXABLE UNDER<br>FRAP 39, 28 U.S.C. 1920,<br>Circuit Rule 39-1 | REQUESTED                     |                    |                 | ALLOWED          |                  |                    |               |                  |
|---|-------------------------------|--------------------|-----------------|------------------|------------------|--------------------|---------------|------------------|
|   | Each column must be completed |                    |                 |                  |                  |                    |               |                  |
|   | No. Of Documents*             | Pages per Document | Cost per Page** | Total Cost       | No. Of Documents | Pages for Document | Cost for Page | Total Cost       |
| Excerpt of Record   | 1                             | 520                | \$ .20          | \$104.00         |                  |                    |               |                  |
| Appellant's Brief   | 1                             | 73                 | \$ .20          | \$ 14.60         |                  |                    |               |                  |
| Appellee's Brief  | 15                            | 80                 | \$ .20          | \$240.00         |                  |                    |               | 240.00           |
| Appellant's Reply Brief   | 1                             | 26                 | \$ .20          | \$ 5.20          |                  |                    |               |                  |
| Other Suppl. Exc. of Record   | 7                             | 283                | \$ .20          | \$396.00         |                  |                    |               | 396.00           |
|   |                               |                    |                 | TOTAL: \$ 760.00 |                  |                    |               | TOTAL: \$ 636.20 |

Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys Fees cannot be requested on this form.

\*If more than 7 excerpts or 20 briefs are requested, a statement explaining the excess number must be submitted.  
\*\* Costs per page may not exceed 20¢ or actual cost, whichever is less. Circuit Rule 39-1.

I, Amy L. Dantzier, swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed. The printer's itemized statement showing actual costs per page is attached.

Signature: Amy L. Dantzier Date: November 14, 2001  
Name of Counsel (printed or typed) Amy Dantzier Attorney for: General Star

Date: 11/28/01 Costs are taxed in the amount of \$ 636.20

Clerk of Court

By: [Signature] Deputy Clerk

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1925 Century Park East, Suite 350, Los Angeles, California 90067.

On **November 14, 2001**, I caused the foregoing documents described as **Bill of Costs** be served on the following parties in this action:

by placing  the original  a true copy thereof enclosed in sealed envelopes addressed as follows:

Alicia M. Bonagura, Esq.  
Winters & Associates  
1901 First Avenue, Suite 400  
San Diego, California 92101

Clerk of the U.S. District Court  
Southern District of California  
940 Front Street  
San Diego, CA 92101

I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

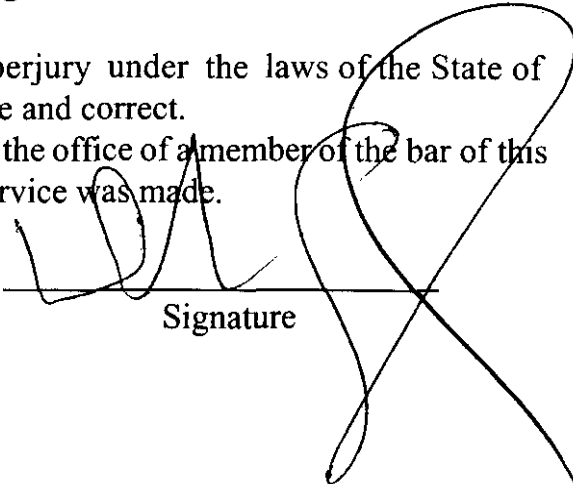
I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **November 14, 2001**, at Los Angeles, California.

   (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Deborah Greenwood  
Type or Print Name

  
Signature