

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

TRUSOUTH OIL, LLC

CIVIL ACTION NO. 11-cv-0493

VERSUS

JUDGE HICKS

BURLINGTON INSURANCE CO., ET AL

MAGISTRATE JUDGE HORNSBY

MEMORANDUM ORDER

TruSouth Oil, LLC filed this civil action in state court against PetroTech Energy, LLC based on allegations that PetroTech sold TruSouth a defective blended base stock. TruSouth also named as defendants Burlington Insurance Company and First Financial Insurance Company. The petition alleges in paragraph 10 that Burlington and/or First Financial issued a policy of liability insurance to PetroTech that renders them liable with PetroTech for all damages incurred by TruSouth.

First Financial has filed a Motion to Dismiss (Doc. 12) that invokes Rule 12(b)(6) and argues that the petition fails to state a claim against First Financial upon which relief can be granted. When assessing a Rule 12(b)(6) motion, the court must accept as true all of the factual allegations contained in the complaint, which in this case includes a direct allegation that First Financial issued a policy that provided coverage. First Financial, however, does not base its motion on the allegations in the petition as is appropriate for a Rule 12(b)(6) motion, but on the contents of an affidavit in which a First Financial official testifies that the company did not issue any policies to PetroTech. Such extra-complaint evidence may not be

considered on a Rule 12(b)(6) motion unless the motion is converted as provided for in Rule 12(d) .

Rule 12(d) provides that if, on a motion under Rule 12(b)(6), matters outside the pleadings (such as an affidavit) are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all material that is pertinent to the motion. Accordingly, the parties are notified that the court will consider the affidavit submitted by First Financial and treat the motion as one for summary judgment. Any opposing parties should submit any competing summary judgment materials within the time permitted by the briefing schedule issued by the Clerk of Court.

THUS DONE AND SIGNED in Shreveport, Louisiana, this 29th day of June, 2011.



MARK L. HORNSBY
UNITED STATES MAGISTRATE JUDGE