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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0725**

Ross Nesbit Agencies, Inc.,  
Appellant,

vs.

Atlantic Mutual Insurance Company,  
Respondent,

Dean Soltis, et al.,  
Respondents.

**Filed March 3, 2009  
Affirmed  
Bjorkman, Judge**

Hennepin County District Court  
File No. 27-CV-07-20510

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Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and  
Bjorkman, Judge.

## UNPUBLISHED OPINION

**BJORKMAN**, Judge

Appellant challenges the district court's dismissal under Minn. R. Civ. P. 12.02(e) of this declaratory-judgment action, arguing the court erred in determining that the complaint did not present a justiciable controversy. We affirm.

### FACTS

Respondents Dean and Melissa Soltises' home sustained wind and hail damage on September 21, 2005. The Soltises submitted an insurance claim for the damage to respondent Atlantic Mutual Insurance Company. Atlantic Mutual denied coverage, asserting that appellant Ross Nesbit Agencies, Inc., and its principal Ross Nesbit, the independent insurance agent who prepared the insurance-policy quote for the Soltises, did not bind coverage for the Soltises. Nesbit Agencies acknowledges that it had not yet notified Atlantic Mutual of the Soltises' policy as of the date of loss, but nonetheless asserts that it bound coverage for a period from August 2, 2005, through August 2, 2006.

Nesbit Agencies subsequently asked the Soltises to assign their interests and claims against Atlantic Mutual arising out of the denial of coverage. In consideration for this proposed assignment, Nesbit Agencies agreed to adjust the Soltises' property-damage claim as if it were Atlantic Mutual and the proposed insurance policy had been in force on the date the damage occurred. The Soltises signed the agreement on September 20, 2007, but it was not fully executed until November 30, 2007.

On September 21, 2007, before the assignment was fully executed and before Nesbit Agencies had adjusted the Soltises' claim, Nesbit Agencies initiated this

declaratory judgment action against Atlantic Mutual and the Soltises, seeking a declaration that “Atlantic Mutual Insurance Company is obligated to insure Soltis[es] and the Property,” and “Nesbit [Agencies] is entitled to indemnity from Atlantic Mutual Insurance Company for all monies Nesbit [Agencies] expends to adjust the Soltis[es’] property insurance claim.” The complaint alleges that Nesbit Agencies “stands ready to adjust the Soltis[es’] September 21, 2005 property insurance claim in exchange for an assignment by Soltis[es] to Nesbit [Agencies] of Soltis[es’] contractual rights against Atlantic Mutual Insurance Company.” The complaint further alleges that Nesbit Agencies “asserts its right of indemnity against Atlantic Mutual Insurance Company under the anticipated assignment of rights and pursuant to the applicable principles of agency/principal law.” Nesbit Agencies attached to its complaint a copy of the quote Atlantic Mutual proposed on July 27, 2005.

Atlantic Mutual moved to dismiss the complaint pursuant to rule 12.02(e) for failure to state a claim upon which relief can be granted. The district court granted Atlantic Mutual’s motion, finding that the complaint fails to present a justiciable controversy, and dismissed Nesbit Agencies’ claims without prejudice. This appeal follows.

## **D E C I S I O N**

### **I. The district court dismissed this case under rule 12.**

The submission to the district court of matters outside of the pleadings ordinarily converts a rule 12 motion to dismiss into a motion for summary judgment. Minn. R. Civ. P. 12.02. But a district court may consider, within the rule 12 framework, written

documents, such as contracts, if “the complaint refers to the contract and the contract is central to the claims alleged.” *In re Hennepin County 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 497 (Minn. 1995). Nesbit Agencies contends that the district court considered the assignment document in connection with the rule 12 motion and that we should likewise consider it on appeal. We note the district court referenced Nesbit Agencies’ attempt to “arrange an assignment of the Soltises['] rights in relation to Atlantic Mutual” in the memorandum accompanying the dismissal order, but observe that the district court expressly stated that no assignment had taken place. We conclude that rule 12 governs the scope of our review.

When reviewing cases dismissed under Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the only question we consider is “whether the complaint sets forth a legally sufficient claim for relief.” *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997).

**II. The district court correctly concluded that Nesbit Agencies’ complaint fails to set forth a justiciable controversy.**

The Uniform Declaratory Judgments Act (UDJA) gives courts the power to “declare rights, status, and other legal relations.” Minn. Stat. § 555.01 (2008). Declaratory relief is a unique statutory remedy that serves an “important social function of deciding controversies at their inception.” *State Farm Mut. Auto Ins. Co. v. Skluzacek*, 208 Minn. 443, 447, 294 N.W. 413, 415 (1940) (quotation omitted). But the UDJA “cannot create a cause of action that does not otherwise exist.” *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 916 (Minn. App. 2003); *see also Hoeft v.*

*Hennepin County*, 754 N.W.2d 717, 722 (Minn. App. 2008), *review denied* (Minn. Nov. 18, 2008) (addressing justiciability requirements in declaratory-judgment action).

The UDJA does not, by itself, confer jurisdiction on a court over the action. *Alliance for Metro. Stability*, 671 N.W.2d at 915. Rather, a declaratory-judgment action must present a justiciable controversy or a district court has no jurisdiction to declare rights under the act. *Onvoy, Inc. v. ALLETE, Inc.*, 736 N.W.2d 611, 617 (Minn. 2007). A claim presents a justiciable controversy if it “(1) involves definite and concrete assertions of right that emanate from a legal source, (2) involves a genuine conflict in tangible interests between parties with adverse interests, and (3) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion.” *Id.* at 617-18. Determining whether a justiciable controversy exists, and thus whether a district court has jurisdiction over a declaratory-judgment action, is a question of law, which we review de novo. *Cincinnati Ins. Co. v. Franck*, 621 N.W.2d 270, 273 (Minn. App. 2001).

Here, the district court found that Nesbit Agencies’ complaint does not present a justiciable controversy because “[n]o claim has been brought by the Soltises against [Nesbit Agencies] and although Nesbit Agencies states that it stands ready to adjust the Soltises[‘] claim, no assignment has taken place and the claim has not been adjusted.” Nesbit Agencies argues the district court erred because Nesbit Agencies obtained the assignment from the Soltises of their breach-of-contract claim against Atlantic Mutual. We address each justiciability factor in turn.

**A. Nesbit Agencies' complaint does not present definite and concrete assertions of right that emanate from a legal source.**

Nesbit Agencies' argument is premised on its claimed assignment of the Soltises' claim against Atlantic Mutual and agreement to adjust the Soltises' claim. In tacit recognition of the fact that no assignment was in effect at the time it initiated this action and no adjustment of the Soltises' claim has occurred, Nesbit Agencies argues it possesses "a bona fide legal interest which has been, or with respect to the ripening seeds of a controversy is about to be, affected in a prejudicial manner." *State ex rel. Smith v. Haveland*, 223 Minn. 89, 92, 25 N.W.2d 474, 477 (1946). Nesbit Agencies asserts that the ripening-seeds analysis applies because the policy it allegedly bound for the Soltises contained a two-year limitations provision, and it brought the declaratory judgment action within two years to avoid losing its right to assert a claim against Atlantic Mutual. We find Nesbit Agencies' argument unpersuasive.

The ripening-seeds analysis may relax the "present controversy" inquiry in declaratory-judgment actions, but it does not do away with the justiciability requirements. *Rice Lake Contracting Corp. v. Rust Env't & Infrastructure, Inc.*, 549 N.W.2d 96, 99 (Minn. App. 1996), *review denied* (Minn. Aug. 20, 1996). And unlike the cases Nesbit Agencies relies on, this case does not present a party with a bona fide legal claim. *See, e.g., Holiday Acres No. 3 v. Midwest Fed. Sav. & Loan Ass'n of Minneapolis*, 271 N.W.2d 445, 448-49 (Minn. 1978) (supreme court held that a property owner could obtain a declaration as to the validity of a "due-on-sale" clause before a proposed sale after already losing one potential buyer). It is undisputed that at the time Nesbit Agencies

served its complaint, it had not been sued by the Soltises, had not made any payment to the Soltises, and did not have an assignment of the Soltises' claim against Atlantic Mutual. At the time of the rule 12 hearing, Nesbit Agencies had still not been sued and had made no payments to the Soltises related to their property damage. The district court properly determined that declaratory judgments cannot be granted based on such remote contingencies. *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 322 (Minn. App. 2007) (quoting *Seiz v. Citizens Pure Ice Co.*, 207 Minn. 277, 283, 290 N.W. 802, 805 (1940)).

Even if we look beyond the complaint and consider the assignment agreement that the Soltises and Nesbit Agencies executed after this action was commenced, the complaint fails to state a definite legal claim. By its terms, the assignment agreement does not represent a full assignment of legally enforceable rights to Nesbit Agencies. The agreement does not set forth an amount that Nesbit Agencies would pay to adjust and settle the Soltises' claim. Indeed, the agreement expressly permits the Soltises to sue Nesbit Agencies in the event they are unable to resolve the damage claim. Nesbit Agencies cannot assert a right based on an incomplete agreement that was not effective at the time the complaint was filed.

Nesbit Agencies also seeks a declaration that it is entitled to indemnity from Atlantic Mutual for any payments it eventually makes to adjust the Soltises' claim. This claim fails as well. A declaration that Atlantic Mutual is required to indemnify Nesbit Agencies for unspecified future payments would also be based on remote contingencies and thus improper for determination by declaratory judgment. Nesbit Agencies has not

made any payments to the Soltises and thus has not suffered a direct injury or loss for which it may be indemnified by Atlantic Mutual.<sup>1</sup>

**B. Nesbit Agencies' complaint does not present a genuine conflict in tangible interests between parties with adverse interests.**

Nesbit Agencies asserts its interests are adverse to Atlantic Mutual based on the assignment agreement. The district court rejected this claim, stating:

The Complaint does not involve definite claims by parties with adverse interests. [Nesbit Agencies] cannot make a cognizable claim against Atlantic Mutual for indemnity and/or contribution where no claim for indemnity has been made against [Nesbit Agencies]. [Nesbit Agencies] has not suffered a direct injury, has not entered into a settlement agreement with the Soltises and has not paid any settlement amounts.

We agree with the district court. Whether we consider the assignment agreement or not, this case does not involve parties with adverse interests. Nesbit Agencies has not adjusted the Soltises' damage claim and has not made any payments to the Soltises. The agreement contemplates litigation between the Soltises and Nesbit Agencies in the event no adjustment is made by agreement of the parties. Any legal claim based on Nesbit Agencies' payment on Atlantic Mutual's behalf is speculative.

Nesbit Agencies alternatively contends that the second prong of justiciability is met because, under agency-law principles, it has an independent cause of action against Atlantic Mutual for wrongfully denying coverage to the Soltises. Nesbit Agencies claims "the law implies a promise of indemnity from a principal to his agent for any damages

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<sup>1</sup> At oral argument, Nesbit Agencies' attorney informed this court that the Soltises initiated suit against Nesbit Agencies approximately two months earlier.

resulting from the acts of the agent in the good faith execution of that agency,” citing the Restatement (Third) of Agency § 8.14 (2006).

But, absent a contract between them, any cause of action Nesbit Agencies might have against Atlantic Mutual for indemnification would be available only “when the agent makes a payment” or “when the agent suffers a loss that fairly should be borne by the principal in light of their relationship.” Restatement (Third) of Agency, § 8.14(2)(a), (b). Neither of these events has taken place here because Nesbit Agencies has not yet adjusted the Soltises’ claim. Moreover, Nesbit Agencies offers no explanation as to why or how its failure to notify Atlantic Mutual of the fact that it bound coverage for the Soltises constitutes good-faith execution of its agency. Under these circumstances, the district court did not err in concluding that the complaint “does not involve definite claims by parties with adverse interests.”

**C. Nesbit Agencies’ complaint does not present a claim that is capable of specific resolution by judgment.**

Nesbit Agencies contends the district court erred when it found that “[a]ny ruling . . . would result in a premature, advisory opinion based upon hypothetical facts or anticipated events.” We disagree.

Nesbit Agencies’ complaint requests declaratory relief based on contingent future events that, at the time Nesbit Agencies served the complaint, were only anticipated occurrences. Even if the district court issued a declaration that coverage existed, the action could not be fully resolved until Nesbit Agencies adjusts the Soltises’ damage claim and makes a settlement payment. Such circumstances do not meet the justiciability

requirements for declaratory judgment; to be justiciable a matter must be “capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion.” *Onvoy, Inc.*, 736 N.W.2d at 618.

Because Nesbit Agencies’ complaint fails to set forth a justiciable controversy, the district court did not err in dismissing its claims without prejudice pursuant to rule 12.02(e).

**Affirmed.**