an EAJA application] begins after the final judgment (affirming, modifying, or reversing) is entered by the court and the appeal period has run, so that the judgment is no longer appealable...." *Id.* at ——, 113 S.Ct. at 2630, *quoting Melkonyan*, 501 U.S. at ——, 111 S.Ct. at 2165 (internal quotation marks omitted). The Court nevertheless found that Schaefer's EAJA application was not time-barred because the district court had not entered a separate judgment as required by Fed.R.Civ.P. 58. *Schaefer*, —— U.S. at ——, 113 S.Ct. at 2632.

An EAJA application may be filed until "30 days after the time for appeal has ended." *Id.* In suits to which a federal officer is a party, the time for appeal does not end until 60 days after the entry of a Rule 58 judgment. The district court should have entered a Rule 58 judgment when it remanded to the Secretary in April 1989. That court's failure to enter a "formal judgment" meant that the April 1989 order remained "appealable"; therefore, Schaefer's July 1990 petition for EAJA fees was timely.

In this case, as in *Schaefer*, the district court entered a fourth-sentence remand order but did not enter a separate Rule 58 judgment. Freeman's district court petition for EAJA fees was timely because the district court's May 1989 remand to the Secretary was still "appealable." *Schaefer*, —— U.S. at ——, 113 S.Ct. at 2632. Thus, the district court's order denying attorneys' fees is VACATED, and the case is REMANDED to the district court for reconsideration in the light of *Schaefer*.

VACATED and REMANDED.

SENTRY INSURANCE, a Mutual Company, Plaintiff–Counter Defendant–Appellee,

v.

R.J. WEBER COMPANY, INC., et al., Defendants,

R.J. Weber Company, Inc. and R.J. Weber, Individually, Defendants–Counter Plaintiffs–Appellants.

No. 93–1222
Summary Calendar.

United States Court of Appeals, Fifth Circuit.

Aug. 20, 1993.

Insurer brought declaratory judgment action, seeking declaration that it had no duty to defend or indemnify insured against claim of copyright infringement. The United States District Court for the Northern District of Texas, Jerry Buchmeyer, J., entered summary judgment in favor of insurer, and appeal was taken. The Court of Appeals held that policy covering advertising injuries caused in course of insured's advertising its goods did not cover copyright claims, absent connection between copyright claims and insured's advertising activity.

Affirmed.

1. Federal Courts ⇐776

On appeal from district court's grant of summary judgment, Court of Appeals reviews record de novo to ascertain whether any genuine issue exists as to any material fact.

2. Federal Courts ⇐776

Reach of insurance contract is matter of law that Court of Appeals reviews de novo.

3. Insurance ⇐514.10(1)

In Texas, if allegations in complaint will allow plaintiff to recover on theory within scope of insurance policy, there is potential liability against which insurer is obligated to defend.

4. Insurance ⇐514.21(1)

Under Texas law, burden is generally on insured to show that claim against him is potentially within his policy's coverage.

5. Insurance ⇐437.1(1)

Under Texas law, insurer bears burden of establishing that one of policy's limitations or exclusions constitutes avoidance or affirmative defense to coverage. V.A.T.S. Insurance Code, art. 21.58(b).

6. Insurance ⇐448.1(1)

Insurance policy clause stating that insurance applies to advertising injury only if caused by offense committed in course of advertising insured's goods, products or services was not policy limitation or exclusion for purposes of Texas law providing that insurer bears burden of establishing that policy limitation of exclusion constitutes avoidance or affirmative defense to coverage; rather, clause defined policy coverage with respect to "advertising injuries." V.A.T.S. Insurance Code, art. 21.58(b).

7. Insurance ⇐435.22(2)

Insurance policy covering advertising injuries caused in course of advertising insured's products or services did not cover corporation's complaint alleging that insured infringed its copyrights by copying, publishing, distributing and selling copies of its "numerical parts record" and "parts book library"; there was no connection between corporation's copyright claims and insured's advertising activity.

Kevin J. Cook, Payne & Blanchard, Dallas, TX, for appellants.

Robert D. Allen, Aaron Linzy Mitchell, Vial, Hamilton, Koch & Knox, Dallas, TX, for appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before JOLLY, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

Sentry Insurance ("Sentry") insured R.J. Weber and his corporation, R.J. Weber Co., Inc., (collectively "Weber") against claims based on personal and advertising injuries. Sentry brought the declaratory judgment action before us seeking a declaration that it had no duty to defend Weber against a claim of copyright infringement. The district court granted summary judgment in favor of Sentry because it found that the copyright infringement suit was not related to Weber's advertising activity. Finding no error, we affirm.

I

In January of 1992, Caterpillar, Inc. ("Caterpillar") brought suit against Weber alleging copyright infringement. Caterpillar has copyrighted two original works titled "Numerical Parts Record" and "Parts Book Library." It claimed that Weber infringed its copyrights by copying, publishing, distributing, and selling copies of these works without first obtaining permission from Caterpillar.

Sentry insured Weber against personal and advertising injuries. The policy provides Sentry "will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal injury' or 'advertising injury' to which this insurance applies." In clause IV.B.1.c., the policy further provides that:

> This insurance applies to "advertising injury" *only if caused by an offense committed:*
>
> (1) In the "coverage territory" during the policy period; and
>
> (2) *In the course of advertising* your goods, products or services. [Emphasis supplied.]

Later on in section V, the policy defines an advertising injury as follows:

> *"Advertising injury" means injury arising out* of one or more of the following offenses:
>
> (1) Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> (2) Oral or written publication of material that violates a person's right of privacy;

(3) Misappropriation of advertising ideas or style of doing business; or

(4) *Infringement of copyright*, title or slogan. [Emphasis supplied.]

Weber believed that the policy covered Caterpillar's suit and asked Sentry to defend it against Caterpillar's claims. Sentry agreed to defend Weber, but it reserved the right to bring suit to determine whether the policy applied.

II

In June of 1992, Sentry filed this declaratory judgment action seeking a declaration that it had no duty to defend or indemnify Weber against Caterpillar's claims in the underlying lawsuit. Weber counterclaimed that Sentry did have a duty to defend. Sentry moved for summary judgment in October of 1992. After Weber responded, the district court granted Sentry's motion. On January 5, 1993, the district court entered judgment in favor of Sentry. Weber moved the district court to reconsider, and Sentry asked for reimbursement of the attorney's fees it incurred while defending Weber. The district court denied Weber's motion, but it granted Sentry its attorney's fees. Weber filed a timely notice of appeal and brought this appeal.

III

[1, 2] Weber contends that the district court erred when it granted Sentry summary judgment because there is a potentiality that, liberally construed, Caterpillar's complaint states a claim that was caused by or related to Weber's advertising. Because this is a diversity case, we apply the substantive law of Texas. *Stine v. Marathon Oil Co.*, 976 F.2d 254, 259 (5th Cir.1992) (citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 77–78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938)). On appeal from the district court's grant of summary judgment, we review the record *de novo* to ascertain whether any genuine issue exists as to any material fact. *Pullman–Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982). The reach of an insurance contract, moreover, is a matter of law that we review *de novo*. *Matter of World Hospitality Ltd.*, 983 F.2d 650 (5th Cir.1993); *Stine*, 976 F.2d at 260.

[3–5] In Texas, if the allegations in the complaint will allow the plaintiff to recover on a theory within the scope of the insurance policy, there is potential liability against which the insurer is obligated to defend. *Terra Intern. v. Commonwealth Lloyd's*, 829 S.W.2d 270, 271 (Tex.App.—Dallas 1992, writ denied). The burden is generally on the insured to show that the claim against him is potentially within his policy's coverage. *See, e.g., Employers Cas. Co. v. Block*, 744 S.W.2d 940, 944 (Tex.1988). The insurer, however, bears the burden of establishing that one of the policy's limitations or exclusions constitutes an avoidance or affirmative defense to coverage. Tex.Ins.Code Art. 21.58(b).

[6] Weber contends that the district court erred because it placed the burden on Weber to prove the existence of an advertising injury. According to Weber, clause IV. B.1.c. of the insurance contract is a policy limitation. Weber, thus, concludes that the Texas Insurance Code required Sentry to prove that the limitation does not apply. Weber is incorrect. Clause IV.B.1.c. is not a policy limitation. On the contrary, it defines policy coverage with respect to "advertising injuries." Specifically, the policy covers advertising injuries that are caused in "the course of advertising your goods, products or services." In sum, the clear language provides that the policy covers a copyright infringement suit only if Weber infringes someone's copyright in the course of its advertising. If Weber infringes a copyright in another context, there is no coverage under the terms of the policy.

A review of the insurance policy's other provisions makes unmistakable our conclusion that clause IV.B.1.c is not a policy limitation or exclusion. The policy contains explicit exclusions and limitations in section IV.B.2. This section excludes, for instance, advertising injuries that arise out of a "failure of the goods, products or services to conform with the advertised quality or performance." Similarly, the policy excludes advertising injuries that arise out of the "wrong description of the price of goods, products or services." In light of section IV.B.2., we think any argument that clause IV.B.1.c. is a policy exclusion or limitation is precluded.

[7] Thus, the question before us is whether Weber can sustain its burden of establishing that Caterpillar's complaint potentially states a claim that the policy covers. As noted above, Caterpillar claimed that Weber infringed its copyrights by copying, publishing, distributing and selling copies of its "Numerical Parts Record" and "Parts Book Library" without first obtaining permission from Caterpillar. Weber admits the complaint states nothing about advertising. Weber, however, resorts to arguing that the federal system of notice pleading requires only a "short and plain statement of the claims." Fed.R.Civ.P. 8. Weber argues that, under the federal system, Caterpillar does not have to state every instance Weber infringed its copyright. Weber contends that Caterpillar's complaint would allow it to show in a federal trial that Weber infringed its copyright in the course of Weber's advertising.

Weber's argument does not bear scrutiny. Under such general reasoning, the complaint would not serve as an indication of whether there was coverage. Other courts that have examined this issue have required the insured to demonstrate that there is some connection between its advertising activity and the plaintiff's claim. *See, e.g., Nat. Union Fire Ins. Co. v. Siliconix, Inc.*, 729 F.Supp. 77 (N.D.Cal.1989); *Lazzara Oil Co. v. Columbia Cas. Co.*, 683 F.Supp. 777, 780 (M.D.Fla.1988), *aff'd mem.*, 868 F.2d 1274 (11th Cir.1989); *Bank of the West v. Superior Court of Contra Costa County*, 2 Cal. 4th 1254, 10 Cal.Rptr.2d 538, 553, 833 P.2d 545, 560 (Cal.1992). In the case before us, Weber does not identify any connection between Caterpillar's claims and Weber's advertising activity. We, therefore, conclude that the policy does not cover Caterpillar's claims and that Sentry has no duty to defend Weber in the underlying suit.

IV

For all the foregoing reasons, the decision of the district court is

AFFIRMED.

UNITED STATES of America, Plaintiff–Appellee,

v.

Andy Jesus VALLEJO, Defendant–Appellant.

No. 92–7562
Summary Calendar.

United States Court of Appeals, Fifth Circuit.

Sept. 2, 1993.

Rehearing Denied Sept. 30, 1993.

Defendant appealed order entered in the United States District Court for the Southern District of Texas, Hayden W. Head, Jr., J., denying his motion for hearing on his motion to reconsider extent of downward departure from Sentencing Guidelines. The Court of Appeals held that District Court was justified in denying motion for hearing on motion to reconsider, which was based on alleged need for psychological examination of defendant at sentencing.

Affirmed.

1. Criminal Law ⇐1147

Abuse of discretion standard governed review of district court's refusal to hold hearing on its denial of defendant's motion to reconsider extent of downward departure from Sentencing Guidelines. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

2. Criminal Law ⇐1316

District court was justified in refusing to grant hearing on defendant's motion to reconsider extent of downward departure from Sentencing Guidelines; although defendant contended that court should have conducted psychological examination at sentencing so that it could understand that what seemed to court to be lack of veracity was instead caused by psychological problems, he did not object to court's stated rationale for its sen-