

1968

George Martin English and United Pacific Insurance Company, a Corporation v. Dairyland Mutual Insurance Company, a Corporation : Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

GEORGE MARTIN ENGLISH, JR.
UNITED PACIFIC INSURANCE
COMPANY, a Corporation,

Plaintiffs and Appellants

- vs -

DAIRYLAND MUTUAL INSURANCE
COMPANY, a Corporation,

Defendant and Appellee

RESPONSE

Appeal from the
Third Judicial District Court,
Hon. Stephen L. ...

WORSLEY, SNOW & CHRISTENSEN
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GEORGE MARTIN ENGLISH and
UNITED PACIFIC INSURANCE
COMPANY, a Corporation,

Plaintiffs and Appellants

- vs -

DAIRYLAND MUTUAL INSUR-
ANCE COMPANY, a Corporation,

Defendant and Respondent

Case No.
11156

RESPONDENT'S BRIEF

STATEMENT OF FACTS

The facts outlined in Appellants' Brief are substantially accurate, but for clarification, we list a chronological order of events:

- | | |
|---------------|---|
| June 9, 1965 | Dairyland policy issued effective to June 9, 1966 insuring a 1964 Sport Impala automobile. |
| Feb. 15, 1966 | The described 1964 Sport Impala is traded by English for two cars, a 1964 Monza and a 1961 Monza. |

- March 16, 1966 The 30 day period expires for notifying Dairyland by English. No notification given Dairyland.
- April 28, 1966 The two cars, 1964 Monza and 1961 Monza, traded for a 1966 Corvair Convertible.
On the same date, United Pacific agent bound coverage on 1966 Corvair Convertible with alleged oral understanding between United and English. No notification of trade of cars given to Dairyland.
- May 14, 1966 Accident resulting in injuries to passengers.
- May 20, 1966 Accident reported to Dairyland by United's agent, Mr. Ackerlind.

ARGUMENT

POINT ONE

THE FAILURE OF ENGLISH TO NOTIFY DAIRYLAND WITHIN THE 30-DAY PERIOD AVOIDED DAIRYLAND'S COVERAGE.

Under the agreed facts, this Honorable Court is requested to interpret the clear and unambiguous language of the policy, with relation to a newly acquired automobile, which provision is as follows:

“Newly Acquired Automobile — an automobile, ownership of which is acquired by the named Insured or his spouse if a resident of the same household, if (i) it replaces an automobile owned

by either and covered by this policy, or the company insures all automobiles owned by the named Insured and such spouse on the date of its delivery, and (ii) the named Insured or such spouse notifies the company within thirty days following such delivery date."

The above policy provision, which is common in most casualty insurance policies, has universally been upheld and is fully enforceable.

In 34 ALR 2d at 943, the text states:

Sec. 7 — ACCIDENT SUBSEQUENT TO NOTICE PERIOD.

"It is well established that where the automatic insurance clause requires notice of the acquisition of a new automobile to be given the insurer within a specified time after delivery . . . a failure to give notice prior to an accident occurring after the expiration of the designated period, precludes coverage of the new automobile."

The footnote goes on to state:

"It should be noted that the cases listed in support of this proposition all involved a failure to give notice prior to the accident, and are thus not necessarily authority on the question whether notice given after the specified period, but prior to the accident, would effect coverage of the new automobile."

The reason that the provision is upheld is given, in part, in *Mitcham vs. Travelers* (CA 4th) 127 F 2d 27:

"The requirement of notice was of obvious importance to the Company. Amongst other purposes, it served to inform the Company of the

identity and character of the vehicle to be covered by its policy, and to enable the Company to exercise the rights reserved to it in the policy, and to ascertain whether the insured had complied with his obligations thereunder."

It is Appellants' contention, apparently, that no matter how many newly acquired cars are acquired by the insured, a new 30-day period starts to run on each vehicle, even though in the interim, the insured acquires more than one car at a time.

Not one authority has been cited by Appellant to support this contention, as indicated by the following brief resume of the Appellants' cases in the order they appear in the index:

Ashgrove Lime and Portland Cement Co. vs. Southern Surety Co., (1931) 225 Mo. App. 712, 39 SW 2d 434, the policy in question was a fleet policy and did not even contain the provision under review here.

In *Birch vs. Harbor Insurance Co.*, (1954), 126 C.A. 2d 714 272 P.2d 784, the described car was traded for a newly acquired car on November 22nd and the accident occurred on December 22nd, the last day of the automatic coverage period and the Court properly held there was coverage.

In *Glacier General Assurance Co. vs. State Farm Mutual Auto Insurance Co.*, (1968) Mont., 436 P.2d 533, the accident occurred within the 30 day period.

In *Hoffman vs. Illinois National Casualty Co.*, (1947), 159 F.2d 564, again the accident occurred within the 30 day period and the Court upheld the coverage and went on to state:

“Of course, in the absence of a replacement provision in an automobile liability policy, the policy will not cover liability for an injury caused by an automobile other than the one described in the policy.”

In *Johnson Red-E-Mix Construction Co. vs. United Pacific Insurance Co.*, (1961) 11 Utah 2nd 279, 358 P.2d 337, the question at issue was whether the insured had given the company notice of an accident “as soon as practicable,” and that problem is not even involved in the case at bar.

In *Jorgensen vs. Hartford Fire Insurance Co.*, (1962), 13 Utah 2d 303, 373 P.2d 580, the case is wholly immaterial to this appeal inasmuch as it dealt with a fire policy.

In *Kaczmark vs. LaPierrier*, (1953), Mich., 60 NW 2d 327, notice of the newly acquired car was actually given by the insured to the agent *before* the accident, and the agent “assured him the Pontiac was covered by the insured’s policy,” which facts, of course, are not present in the instant case.

In *Maryland Indemnity & Fire Insurance Exchange vs. Steers*, (1962), 21 Md. 380, 157 A. 2d 803, the insurance policy did not contain a provision requiring notice of a newly acquired car.

In *National Indemnity Co. vs. Giampapa*, (1965), 65 Wash. 2d 627, 399 P.2d 81, the newly acquired car was obtained on March 11, 1961 and the accident occurred on March 15, 1961, and the Court properly upheld the automatic coverage.

In *Rasmussen vs. Western Casualty & Surety Co.*, (1964), 15 Ut. 2d 333, 393 P.2d 376, the insurance policy was a fleet policy which insured "any automobile" and the automatic coverage provision was not in the policy.

In *Stout vs. Washington Fire and Marine Insurance Co.*, (1963), 14 Utah 2d 414, 385 P.2d 608, again the policy is a fire policy, and the case is inapplicable.

In *Western Casualty & Surety Co. vs. Lune*, (1956), 10 Cir. Okla., 234 F 2d 916, the insured, all within 30 days, traded a DeSoto for a Ford and the Ford for an Oldsmobile and was involved in an accident, and the Court, of course, held the policy was in force under the automatic coverage provision.

In *Yahnke vs. State Farm Fire & Casualty Co.* (1966), 4 Ariz. App. 287, 419 P.2d 548, a disabled Jeep was purchased by the Plaintiff's father one year before, during which time he made repairs. Less than 30 days before the accident, the father gave the Jeep to the Plaintiff (son) and the Court held "The 30 day period began to run when the Plaintiff became the owner of the Jeep" thereby upholding the 30 day provision.

For other jurisdictions who have upheld the automatic 30 day coverage provision, we refer the Honorable Court to the following:

Thompson vs. Dairyland Mutual Insurance Company, (Wis.) 140 NW 2d 200.

Employers Liability Insurance Corp. vs. Howey, 126 F. Supp. at 345.

Iowa National Mutual Insurance Company vs. Richards, 29 F 2d 210 (7th CCA).

Summerwell vs. Farmers Insurance Exchange, 50 Wash. 2d 636, 313 P 2d 1112.

Clow vs. National Indemnity Company, 54 Wash. 2d 198, 339 P 2d 82.

Everly vs. Creech, 139 Cal. App. 2d 651, 294 P. 2d 109.

Mistele vs. Ogle, (Mo.), 293 SW 2d 330.

Standard Accident Insurance Company vs. Cochardo, 152 NYS 2d 645.

Courtney vs. Allstate, (La.) 174 So. 2d 296.

POINT TWO

THE BREACH OF CONTRACT CASES ARE INAPPLICABLE TO THE CASE AT BAR.

The Wisconsin Supreme Court in *Thompson vs. Dairyland Mutual Insurance Company* (Supra) in upholding the 30 day automatic coverage provision, stated:

“This is not a case of a claimed breach of a policy provision perpetrated by the insured. Rather it is the failure of the insured to perform

a requirement of a provision of the policy, i.e. to give notice of a change of vehicle in order to gain coverage of a different vehicle under the policy. It is not a question of discontinuing coverage because of some act by the insured that breaches his contract; rather, it is the insured's failure to do some act that is required to bring about coverage. By his failure to give proper notice, Levy was not insured by the subject policy at the date of the accident. Thus, the breach cases are not in point at all."

The Appellants' contention, therefore, that prejudice must be shown is not borne out by law or reason.

POINT THREE

EVEN IF DAIRYLAND'S COVERAGE WERE DEEMED IN FORCE, ITS COVERAGE WOULD BE EXCESS OVER AND ABOVE UNITED'S.

As admitted in the Appellants' Brief at Page 4, the policy provision in question contained the following language:

"The insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured or his spouse has other valid and collectible insurance."

United wrote a liability policy describing the vehicle involved in the accident, for which United received a premium.

United can hardly complain that their policy is primary. Certainly their agent, Ackerlind, on the date of the alleged oral understanding with English, had only

to pick up the telephone and call Dairyland, if United were not anxious at that time to write the insurance for English.

We will not belabor the point because of our certainty that, for reasons stated previously, Dairyland's policy afforded no coverage to English on the date of the accident.

CONCLUSION

We respectfully submit that the Judgment of the District Court of Salt Lake County should be affirmed.

Respectfully submitted,
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