

1968

# Universal Underwriters Insurance Company v. Allstate Insurance Comp Any, a Corporation : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errorsL.E. Midgley; Attorney for RespondentHanson & Garrett; Attorneys for Appellant

---

## Recommended Citation

Brief of Appellant, *Universal Underwriters v. Allstate Insurance*, No. 11176 (Utah Supreme Court, 1968).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/110](https://digitalcommons.law.byu.edu/uofu_sc2/110)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

---

UNIVERSAL UNDERWRITERS  
INSURANCE COMPANY,  
a Corporation

*Plaintiff and Appellant,*

vs.

ALLSTATE INSURANCE  
COMPANY, a Corporation,

*Defendant and Respondent.*

Case No.  
11176

---

BRIEF OF APPELLANT

---

Appeal from the Judgment of the  
Third Judicial Court for Salt Lake County  
Honorable Stewart M. Hanson, Judge

---

HANSON & GARRETT  
W. BRENT WILCOX, Esq.  
520 Continental Bank Bldg.  
Salt Lake City, Utah  
*Attorneys for Appellant*

L. E. MIDGLEY, Esq.  
702 El Paso Natural Gas Building  
Salt Lake City, Utah  
*Attorney for Respondent*

---

**FILED**

MAY 13 1962

# INDEX

STATEMENT OF THE KIND OF CASE .....	Page 1
DISPOSITION IN LOWER COURT .....	1
RELIEF SOUGHT .....	2
STATEMENT OF FACTS .....	2

## POINT I.

THE TRIAL COURT ERRED IN GIVING EFFECT TO THE AUTOMOBILE BUSI- NESS EXCLUSION CONTAINED IN THE RESPONDENT'S INSURANCE POLICY INASMUCH AS THE USE OF THE AUTOMOBILE AT THE TIME OF THE ACCIDENT DOES NOT COME WITHIN THE CONFINES OF THE RE- SPONDENT'S NARROWLY DEFINED AUTOMOBILE BUSINESS EXCLUSION.....	4
---	---

## CASES CITED

<i>Allstate Insurance Company vs. Skowinski</i> , 189 N.E. 2nd 365, Illinois (1963) .....	9
<i>Capece vs. Allstate Insurance Company</i> , 207 A. 2nd 207, New Jersey (1965) .....	8
<i>Cherot vs. United States Fidelity &amp; Guaranty Company</i> , 264 F. 2nd 767 (1959) .....	5
<i>Dumas vs. Hartford Accident &amp; Indemnity Company</i> 181 South 2nd 841, Louisiana (1965) .....	10
<i>Goforth vs. Allstate Insurance Company</i> , 220 F. Supp. 616, (DC North Carolina, 1964) .....	6, 8, 14
<i>Lefelt vs. Nasarow</i> , 177 A. 2nd 315, New Jersey (1962) .....	11
<i>National Farmers Union vs. Farmers Insurance Group</i> , 14 Utah 2nd 89, 377 Pac. 2nd 796 (1963) ....	12
<i>Northwestern Mutual Insurance Company vs. Great American Insurance Company</i> , 404 Pac. 2nd 995, Washington (1966) .....	11

## INDEX (Continued)

	<i>Page</i>
<i>Pepsi Cola Bottling Company of Charleston and Travelers Insurance Company vs. Indemnity Insurance Company of North America</i> , 318 F. 2nd 714 (CA 4, 1963) .....	7
<i>Stout vs. Washington Fire &amp; Marine Insurance Company</i> , 14 Utah 2nd 414, 385 Pac. 2d 608 (1963) .....	6
<i>Trolio vs. McClendon</i> , 224 N.E. 2nd 117, Ohio (1967) ....	11
<i>Universal Underwrites vs. Strohkorb</i> , 205 Va. 472, 137 S.E. 2nd 913 .....	13
<i>Western Alliance Insurance Company vs. Cox</i> , 394 S.W. 2nd 238, Texas (1965) .....	11
<i>Wilks vs. Allstate Insurance Company</i> , 177 South 2nd 790, Louisiana (1965) .....	8, 14

## TEXTS CITED

71 ALR 2nd 959 .....	12
----------------------	----

IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

UNIVERSAL UNDERWRITERS  
INSURANCE COMPANY,  
a Corporation,

*Plaintiff and Appellant,*

vs.

ALLSTATE INSURANCE  
COMPANY, a Corporation,

*Defendant and Respondent.*

Case No.  
11176

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action by the plaintiff and appellant, Universal Underwriters Insurance Company, against defendant and respondent, Allstate Insurance Company, to recover the amounts of money spent by the plaintiff and appellant in settling a personal injury action brought against Olsen Chevrolet, Inc., which was the insured under a liability policy issued by the appellant and a liability policy issued by the respondent.

DISPOSITION IN LOWER COURT

Upon stipulated facts, both parties moved for summary judgments before the Honorable Stewart M. Hanson; and Memorandums of Law having been submitted and argument made, the court granted

the respondent's Motion for Summary Judgment and denied the appellant's Motion for Summary Judgment.

### RELIEF SOUGHT

Appellant requests this Court to reverse the trial court's judgment denying the appellant's Motion for Summary Judgment and granting the respondent's Motion for Summary Judgment, and granting a summary judgment in favor of the appellant. Or in the alternative, vacate the judgment of the lower court and return the case for the determination of any controlling issues of fact.

### STATEMENT OF FACTS

The parties, by their Complaint and Answer filed herein, have agreed essentially to the following facts:

On or about April 3, 1967, Olsen Chevrolet, a corporation, was in the business of selling, servicing, and repairing new and used cars, with its principal place of business in Layton, Utah. On or about the 3rd day of April, 1967, one Ralph C. Bradbrook had made arrangements with Walter T. Smedley, an owner and agent of Olsen Chevrolet, to have the Bradbrook 1965 Oldsmobile serviced at Olsen Chevrolet's place of business in Layton. It was agreed that in order to accommodate Mr. Bradbrook Mr. Smedley would leave with Mr. Bradbrook an Olson Chevrolet demonstrator to be used by him while his vehicle was undergoing repairs and servicing. The demonstrator was left with Bradbrook, and Smedley

took the Bradbrook automobile to Layton to be serviced and repaired. After the servicing and repairs had been finished, an employee of Olsen Chevrolet was dispatched to deliver the Bradbrook automobile to Bradbrook and to return the demonstrator to Olsen Chevrolet. While said Michael Dean Lee was in the process of returning the Bradbrook automobile, he collided with a minor pedestrian by the name of James Eccleston near the intersection of Utah Highway 232 and 2181 North Hill Field Road in Layton, Utah. As a result of the collision, said minor, through his father William J. Eccleston, made a claim against Olsen Chevrolet and Michael Dean Lee for personal injuries.

At the time of the said accident, Olsen Chevrolet, Inc., was the named insured under a liability policy issued by the appellant, and the Bradbrook Oldsmobile was the described vehicle under a liability policy issued by the respondent to Bradbrook. The policy of insurance issued by the appellant to Olsen Chevrolet limited its liability to that of secondary responsibility in situations where its agents and employees were operating a non-owned vehicle:

**“USE OF OTHER AUTOMOBILES —  
BROAD FORM ENDORSEMENT**

**3. OTHER INSURANCE.** This insurance shall be excess insurance over any other valid and collectible insurance for bodily injury liability, or property damage liability and for automobile medical payments.”

The policy of insurance issued by the respondent to

the said Ralph C. Bradbrook provided primary coverage for liability arising from the use of the described automobile subject, however, to several exclusions, the only pertinent one being the automobile business exclusion, which provided:

“EXCLUSIONS — WHAT THIS PART OF THE POLICY DOES NOT COVER

THIS PART ONE DOES NOT APPLY TO:  
... (2) An owned automobile while used in an automobile business ...”

And said automobile business was defined in the said policy as follows:

“‘Automobile Business’ means the business of selling, repairing, servicing, storing or parking of automobiles.”

Responsibility for the Eccleston claim was tendered to the respondent by the appellant; however, the respondent refused to defend the claim, and the appellant under a reservation of rights agreement with Olsen Chevrolet proceeded to settle the claim for \$300 and in doing so incurred adjustment and settlement expenses of \$261.89.

## ARGUMENT

### POINT I

THE TRIAL COURT ERRED IN GIVING EFFECT TO THE AUTOMOBILE BUSINESS EXCLUSION CONTAINED IN THE RESPONDENT'S INSURANCE POLICY INASMUCH AS THE USE OF THE AUTOMOBILE AT THE TIME OF THE ACCIDENT DOES NOT COME WITHIN THE CONFINES OF THE RESPON-



## DENT'S NARROWLY DEFINED AUTOMOBILE BUSINESS EXCLUSION.

Although the respondent's pleadings do not specifically admit that the respondent's policy was primary if the automobile business exclusion were not to be considered, it nevertheless has been agreed between the parties that for the purpose of this action, it is to be assumed that the respondent would be primary if the automobile business exclusion did not apply. Therefore, the only issue to be decided on this appeal is whether or not under the facts stated the respondent's automobile business exclusion allows the respondent to escape liability on the Eccleston claim.

It is the contention of the appellant that the automobile business exclusion contained in the respondent's policy does not apply to the particular use of the automobile at the time of the accident, and secondly that under the circumstances the policy is also ambiguous and therefore should be construed against the respondent.

It is obvious that under the policy of insurance issued to Bradbrook by the respondent that the coverage was extended to a permissive user of the named automobile and that coverage could only be avoided by a specific exclusion of the particular use of the vehicle at the time of the accident. Such exclusions are to be construed narrowly, *Cherot vs. United States Fidelity & Guaranty Company*, 264 F. 2d 767 (1959), and any doubts therein resolved against

the insurance company issuing said policy. *Stout vs. Washington Fire & Marine Insurance Company*, 14 Utah 2nd 414, 385 Pac. 2nd 608 (1963).

The particular automobile business exclusion used in the Allstate policy is ambiguous on its face and becomes even more ambiguous when applied to the facts in the present case. The Allstate automobile business exclusion has on numerous occasions come before the courts for a determination of its meaning, and the courts have found the policy to be ambiguous and have held that the exclusion did not apply. The case of *Goforth vs. Allstate Insurance Company*, 220 F. Supp. 616, (DC North Carolina, 1964), is on all fours with the present action. There the owner of the private automobile had requested the garage service station operator to repair his automobile; and as an accommodation to his customer, the service station owner was driving the vehicle from the owner's place of business to the garage to affect the repairs during which time an accident occurred. Allstate Insurance Company had issued an automobile liability policy to the automobile owner, and subsequently denied coverage for the accident on the basis that it was being used in the automobile business within the confines of its exclusion. The district court held that the automobile was not being used in the automobile business as defined in the Allstate policy. On appeal to the circuit court, the decision was affirmed by a per curiam decision in 327 F. 2nd 637 (CA 4, 1964). The

district court said as follows in holding that the use of the vehicle at the time of the accident did not come within the Allstate exclusion:

“Herein is the heart of the controversy. Counsel for defendant Allstate contends with some ingenuity that plaintiff must choose between the horns of a dilemma: that if the automobile was ‘used’ within the meaning of the permissive user clause of the policy it must have been used ‘in the automobile business’ which excludes coverage. This is an oversimplification and ignores the definition contained in the policy of ‘automobile business.’ That business could, of course, include the transportation of motor vehicles to and from a garage for the purpose of repairing. No such meaning (i.e. transporting) is found within the definition, and it would have been easy to supply. The policy was written by Allstate and not by the additional insured Melton (service station operator). Wherever ambiguous, it should be read against the scrivener. *Pepsi Cola Bottling Company of Charleston and Travelers Insurance Company vs. Indemnity Insurance Company of North America*, 318 F. 2d 714 (CA 4, 1963). This rudimentary rule of construction applies not only in favor of the policyholder but also in favor of the additional insured, *ibid*. The omission to include *transporting* of automobiles along with selling, repairing, servicing, storing or parking them is significant, and implies an intent not to enlarge the exclusion.” *Supra*, page 618

The court also held that Melton was entitled to the expenses he incurred in defending the action.

The reasoning followed by the court in the *Go-*

*forth* decision appears to be irresistible to the present facts. Not only are the facts identical, but the same insurance company and the same provision are also at issue. Other states presented with the same problem as *Goforth* also denied effect to the Allstate exclusion. Some of those cases are:

*Capece vs. Allstate Insurance Company*, 207 A.2d 207, New Jersey (1965). In this case the owner had left her automobile with the service station to be serviced. As her car was being driven into the service station, the plaintiff was injured. Allstate provided insurance for the driver of the vehicle at the time of the accident. As one of its grounds for refusing to defend the case, Allstate set forth the automobile business exclusion. In holding that the exclusion did not apply, the court said:

“... A customer’s automobile which is left in the custody of the proprietor of a service station for servicing or repairs is not being used in the automobile business within the meaning of an exclusion such as the one here involved . . .” *Supra*, page 214

*Wilks vs. Allstate Insurance Company*, 171 South 2nd 790, Louisiana (1965). The owner of the vehicle, Calhoun, had driven to a service station and told the owner Jacobs to wash the car and fill it with gas. Jacobs sent his employee Dronet to drive Calhoun to his place of business and then return the car back to the service station so the repairs could be accomplished. While Dronet was driving the car

from Calhoun's place of business back to the service station, he was involved in a collision with Wilks. Allstate provided coverage for the described automobile. The trial court granted Allstate's Motion for Summary Judgment based upon the automobile business exclusion. On appeal the Supreme Court of Louisiana reversed, holding that the automobile business exclusion in the Allstate policy did not apply under the facts. In so holding the court said:

"We think it is obvious from the above-discussed jurisprudence that the exclusionary clause in the present case is at least ambiguous. The clause, 'used in the automobile business,' is certainly susceptible of at least two meanings. It could mean (1) that the automobile is excluded if it is simply in the possession of the automobile business, or it could mean (2) that the automobile is excluded only if being driven in furtherance of the business or as a means of furnishing services to customers, as for instance a delivery truck, tow car, etc. It is too well settled in our jurisprudence to require citation of authority that if an insurance policy is ambiguous, it must be construed against the insurer." *Supra*, page 794

And in the case of *Allstate Insurance Company vs. Skowinski*, 189 N.E. 2nd 365, Illinois (1963), the court held that the Allstate automobile exclusion did not apply where an accident occurred as the car was being driven into the service station.

It is clear from the above-cited cases that the

Allstate policy is at the very least ambiguous where an attempt is being made to apply it under circumstances where the accident occurs while the automobile is being delivered either to or from the place of service. And equally obvious is the fact that the Allstate policy is limited to the definition which it contains and that following the rule of strict construction where coverage is being excluded, the use of the automobile as in the present situation is outside the scope of the exclusion. Had the Allstate policy contained a definition of the automobile business which included words describing the activity of delivering cars to and from the place of service, then, of course, a much different situation would be presented; however, such is not the case here.

Other cases involving similar fact situations and automobile business exclusions identical with the Allstate exclusion have also come to the same result. In the case of *Dumas vs. Hartford Accident & Indemnity Company*, 181 South 2nd 841, Louisiana (1965), the owner of a service station had completed the servicing of the automobile and as an accommodation to the owner was driving the vehicle back to the owner's residence when he was involved in a collision. The insurer of the automobile, Hartford, denied coverage for the reason that the car was being used in the automobile business. The court held that the accident occurred after completion of the servicing, and not while the business of servicing the automobile was being performed, and that

therefore the Hartford exclusion would not apply.

*Lefelt vs. Nasarow*, 177 A. 2nd 315, New Jersey (1962). There the customer's automobile was being test driving after the repairs has been completed. The court held that it was not being used within the meaning of the automobile business exclusion clause, which was identical with the Allstate exclusion here.

*Trolio vs. McClendon*, 224 N.E. 2nd 117, Ohio (1967). There the repairman had finished the repairs on the automobile and was test driving it when the accident occurred. The automobile business exclusion contained in the automobile insured's policy was identical to that of Allstate's policy here. The court held that testing repairs after they had been completed was not within the meaning of the exclusion contained in that policy.

*Western Alliance Insurance Company vs. Cox*, 394 S.W. 2nd 238, Texas (1965), where it was held that the automobile was not being used in the automobile business as defined in the policy, which was identical with that of the Allstate policy where it appeared that the owner had driven his car to a service station for servicing and was then driven back to his place of business, the accident occurring when the service station operator's agent was driving the car from the owner's place of business back to the service station to accomplish the repairs.

In the case of *Northwestern Mutual Insurance*

*Company vs. Great American Insurance Company*, 404 Pac. 2nd 995, Washington (1966), the operator of a service station had picked up the insured's automobile at his home, drove it to his service station where he serviced it, and then while he was returning the car to the owner he was involved in a collision. The court held that the automobile was not being used in the automobile business as defined in the automobile business exclusion of the owner's insurance policy.

The above cases are a sampling of cases contained in 71 ALR 2nd 959 and its supplements, which are directly in point with the present case and have held against applying the automobile business exclusion under similar facts.

The respondent in its Memorandum of Law filed in support of its Motion for Summary Judgment relies upon the case of *National Farmers Union vs. Farmers Insurance Group*, 14 Utah 2nd 89, 377 Pac. 2nd 796 (1963), which case was relied upon by the lower court in granting the respondent's Motion for Summary Judgment. Appellant respectfully submits that that case does not concern itself with the point here at issue. It merely held that a customer using a salesman's car was not involved in the automobile business. If anything relative to the present situation could be gleaned from that case, it is the statement of the court that an essential factor in determining whether the exclusion applied would be whether or not the car was being used for a busi-



ness purpose as defined by the policy. The respondent obviously would argue that that case stands for the proposition that if the use of the car was for a business purpose connected with the repair and servicing of the automobile, it came within the exclusion. However, the Utah court limited business purpose by conditioning it upon the definition in the policy of the automobile business. Thus we get back to the original proposition that the liability of Allstate falls upon the application of its particular definition of automobile business to the present facts. Obviously in the present case the use of the vehicle was not for a business purpose inasmuch as it was merely an accommodation to the owner. However, even if it were said to be a business purpose to deliver the car to the owner, such facet of the automobile business was not provided for in the Allstate definition of automobile business, and therefore said use is outside the sphere of the exclusion.

In regards to the *Universal Underwriters vs. Strohkorb* case cited by the respondent in its Memorandum of Law, that case could be readily distinguished on the basis that the vehicle was being used to affect the repairs on it; that is, driving the car from one location of the garage business to another location of that business to complete the repairs. In this regard appellant acknowledges that there have been cases which have upheld the automobile business exclusion; however, an examination of those cases will reveal that the facts differ from those in

the present case in that the accident occurred while the vehicle was being used directly within the definition contained in the particular policy, with some policies being more broad than the Allstate policy, thus providing a greater range of activities falling within the exclusion. Appellant contends, however, that the present case is no different than the other above-cited Allstate cases, especially the *Goforth* case, and that the Allstate policy is ambiguous as stated in the above-cited *Wilks* case, and that Allstate has restricted itself to a definition of activities within which the delivery of an automobile after the repairs had been completed fails to fall. It therefore being obvious as a matter of law that the Allstate exclusion does not apply to the use in question, and the primary responsibility of Allstate therefore attaches for the expenses incurred by the appellant in settling the Eccelston claim.

Appellant therefore respectfully requests the Court to reverse the lower court, and grant the appellant's Motion for Summary Judgment.

Respectfully submitted,

HANSON & GARRETT  
W. BRENT WILCOX, Esq.  
520 Continental Bank Bldg.  
Salt Lake City, Utah  
*Attorneys for Appellant*

By W. Brent Wilcox