1968

Universal Underwriters Insurance Company v. Allstate Insurance Comp Any, a Corporation : Appellant's Reply Brief

Utah Supreme Court

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

APPELLANT'S REPLY BRIEF

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

HANSON & GAR...
W. BRENT WILCOX
520 Continental Bank...
Salt Lake City, Utah
Attorneys for Appellant

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

INDEX

CASES CITED

INDEX (Continued)

TEXTS CITED

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STATEMENT OF CASE

This is an action brought by plaintiff-appellant to recover from the defendant-respondent amounts of money spent by the appellant in settling a personal injury action brought against Olsen Chevrolet, Inc., which was the insured under a liability policy issued by the respondent and also by the appellant. The respondent has relied below and on appeal upon its automobile business exclusion to exclude any liability for said accident and resulting injuries. Appellant and Respondent have both submitted briefs on that question. No further statement of facts will be attempted inasmuch as it would merely be repetitive of appellant's main brief.

The purpose of appellant's reply brief is to respond to respondent's Statement of Facts and to Point Three of respondent's brief.

REPLY TO RESPONDENT'S STATEMENT OF FACTS

Appellant wishes to clarify the record in regards to respondent's statement of fact that the "other insurance" provision in its policy is excess over any other collectible insurance. The portion of respondent's policy quoted in its Statement of Facts does not portray fully the "other insurance" clause contained in said policy. Exhibit D1 herein provides the full "other insurance" provision which states:

> "Allstate shall not be liable under this Part 1 for a greater proportion of any loss than the applicable limit of liability stated on the Supplement Page bears to the total applicable limit of liability of all collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or a non-owned automobile shall be excess insurance over any other collectible insurance."

REPLY TO RESPONDENT'S POINT THREE

Respondent indicates in Point Three of its brief that should the court rule that the automobile exclusion does not apply, that the court then should hold that the appellant's coverage is primary and the respondent's was secondary. This conclusion is erroneous inasmuch as respondent's p o l i c y in the "other insurance" clause provides for a pro-rata dis-

tribution of coverage except in respect to temporary substitute or non-owned automobiles, where it is excess. The respondent wishes to place itself in the position of covering a temporary substitute or non-owned automobile; however, such is impossible under the facts of this case. Here the automobile involved in the collision was the named automobile under the respondent's policy, and thus the respondent can hardly claim that it was a non-owned or temporary substitute automobile. The respondent must provide coverage from the standpoint of the automobile and its owner and not from the standpoint of the driver.

On the other hand, the "other insurance" clause contained in the appellant's policy provides as follows:

> "If the insured has other insurance against a loss covered by this policy, the company shall not be liable under this policy for a greater proportion such loss than the applicable limit of liability stated in the declaration bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under this policy with respect to loss arising out of the maintenance or use of any hired automobile insured on a cost of hire basis or the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance."

Here the non-owned automobile excess provision correctly applies for the coverage is determined

from the driver's standpoint and not from the standpoint of the automobile. In other words, as to the driver and his insurer, it was a use of non-owned automobile; however, as to the automobile and its insurer, the use was not of a non-owned automobile but rather was the use of the described automobile under that policy. Thus, the coverage situation is as follows: the respondent's policy provides a pro-rata coverage, and the appellant's policy provides an excess coverage.

Where pro-rata and excess clauses conflict, the courts have uniformly held that the policy with the pro-rata clause insuring the automobile is primary, and the excess clause covering the non-owner driver is excess. The general rule is stated in 76 ALR 2nd 505 where the court first of all noted that courts have used varying rationale for arriving at their conclusions and then proceeded to conclude:

> "Despite the foregoing, the cases seem susceptible of a certain amount of generalization. Thus, if the non-ownership coverage offered by one of the policies involved is of the 'excess insurance' type, the conclusion is generally reached — no matter how various the reasoning adopted in support of it and the different cases may be — that the policy issued to the owner of the vehicle is the 'primary' policy, and the company issuing it is liable up to the limits of the policy without apportionment, although the policy contains a pro-rata clause. To state the proposition in another way: if one policy has been issued to the owner of the vehicle causing damage,

and another covers the same loss by virtue of the relationship to the accident of one who is not the vehicle owner, the latter's insurer, at least where its coverage is of the 'excess insurance' variety, is in the favorable position and need not assume any of the loss, although the vehicle owner's policy contains a pro-rata clause . . ."

The annotation then proceeds to discuss the following cases which support the proposition that the owner's policy with the pro-rata provision provides the primary coverage: *American Surety Company vs. Canal Insurance Company*, 258 F. 2nd 934 (1958, CA 4 S.C.); *Maryland In Neighbours vs. Harleysville Mutual Casualty Company*, 169 F. Supp. 368 (1959, DC Md); *Citizens Mutual Automobile Insurance Company vs. Liberty Mutual Insurance Company*, 273 F. 2nd 189 (1959, CA6 Michigan); *United Services Automobile Association vs. Russom*, 241 F. 2nd 296 (1957, CA5 Texas); *Mountain States Mutual Casualty Company vs. American Casualty Company*, 135 Montana 475, 342 Pac. 2nd 748 (1959); *American Motorists Insurance Company vs. Weir*, 46 Atlantic 2nd 7, (Connecticut, 1946); *Busch & Company vs. Liberty Mutual Insurance Company*, 158 N.E. 2nd 351 (Massachusetts, 1959); *Eicher vs. Universal Underwriters*, 83 N.W. 2nd 895 (Minnesota, 1957); *General Accident, Fire & Life Assurance Corporation vs. Piazza*, 152 N.E. 2nd 236 (New York, 1958); *American Surety Company vs. American Indemnity Company*, 72 A. 2nd 798 (New Jersey, 1950); *Con-*

tinental Casualty vs. American Fidelity & Casualty Company, 275 F. 2nd 381 (Illinois, 1960); *Turpin vs. Standard Reliance Insurance Company*, 99 N.W. 2nd 26 (Nebraska, 1959); *American Auto Insurance Company vs. Republic Indemnity Company*, 341 Pac. 2nd 675 (California, 1959); *Pacific Indemnity Company vs. California State Automobile Association*, 12 Cal. Reporter 20; *National Indemnity Company vs. Lead Supplies, Inc.*, 195 F. Supp. 249 (DC Minnesota); *Lindon & Lancashire Insurance Company vs. Government Employees Insurance Company*, 168 A. 2nd 855, New Jersey; *Motorists Mutual Insurance Company vs. Lumbermans Mutual Insurance Company*, 205 N.E. 2nd 67, Ohio; and *Safeco Insurance Company vs. Pacific Indemnity Company*, 401 Pac. 2nd 205, Washington. The latter case is typical of all of the cases cited. There the owner of the vehicle was an automobile dealership whose insurer issued a policy containing a pro-rata clause, the driver of the vehicle was a prospective purchaser whose insurance policy contained an excess insurance while driving a non-owned automobile. The court held that the dealer's policy was the primary insurance.

Appellant has been able to find two Utah cases which are in point. *National Farmers Union Property & Casualty Company vs. Farmers Insurance Group*, 14 Utah 2nd 89, 377 Pac. 2nd 786 (1963), wherein the situation was just the reverse of the present case. There the car was owned by an em-

ployee of the automobile dealer, which had been loaned to a customer while his vehicle was being repaired. Without stating what types of "other insurance" clauses were contained therein, the court stated that the insurance on the owner was primary and the insurance of the driver was excess. The provisions as contained in the present policies being standard, we would assume that the same provisions were contained in the policies in that case.

The second case which is even more helpful is the case of *Russell vs. Paulson*, 18 Utah 2nd 157, 417 Pac. 2nd 658 (1966). There the court was concerned with the construction of the "other insurance" provisions in regards to uninsured motorist coverage. The owner and driver of the insured vehicle had a policy which provided a pro-rata coverage where the insured was the named insured under other similar insurance. The passenger in the car who was injured had a policy of insurance which provided that the coverage was excess where said insured was injured while occupying a non-owned automobile. The court stated on page 159 to 160: "Where there is a conflict between a pro-rata and an excess 'other insurance' clause, a majority of the courts imposed primary liability on the pro-rata insurer and hold the excess insurer responsible only for secondary coverage of the loss."

> "The pro-rata clause is considered inoperative on the theory that the policy with the excess provision is not the "other insurance" required for its application; the excess

clause, on the other hand, is held to limit its policy to only secondary coverage, leaving the pro-rata insurer liable to the limits of its policy."

The court then stated after reviewing the minority position set forth in the case of *Lamb-Weston, Inc., vs. Oregon Automobile Insurance Company*, 346 Pac. 2nd 643 (Oregon, 1959):

> "The reasoning of the Oregon court is persuasive, but we are construing to adopt the majority rule which imposes primary liability on the pro-rata insurer and secondary liability on the excess insurer."

Thus, it is clear that the rule of Utah and that of the overwhelming majority of the states is that the insurer of the owner of the vehicle having a pro-rata "other insurance" clause provides the primary coverage, and the non-owner driver's insurer with an excess "other insurance" clause is excess only. With this established, it is obvious that where the excess carrier undertakes the defense of the lawsuit after the primary carrier denies coverage, that it is entitled to recover from said primary carrier the amount of money spent in the settlement and the expenses incurred therein. This point was specifically decided in the previously cited case of *National Farmers Union Property & Casualty Company vs. Farmers Insurance Group*, supra, wherein this court held that the excess or secondary insurer was entitled to recover from the primary insurer the ex-

penses and other costs involved in settling with the injured plaintiff.

Appellant respectfully submits that the respondent has the primary responsibility for coverage in this case and that it should therefore reimburse the appellant the amounts expended in settling the claim.

Respectfully submitted,

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

By W. Brent Wilcox