1977

National Farmers Union Property and Casualty Company v. Wesern Casualty and Surety Company : Brief of Appellant

Utah Supreme Court

D. Gary Christian, James R. Blakesley; Attorney for Appellant and PlaintiffGlenn C. Hanni; Attorney for Respondent and Defendant

IN THE SUPREME COURT

OF THE

STATE OF UTAH

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NATIONAL FARMERS UNION
PROPERTY AND CASUALTY
COMPANY,

Appellant - Plaintiff,

vs. Case No. 15317

WESTERN CASUALTY AND
SURETY COMPANY,

Respondent - Defendant.

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BRIEF OF APPELLANT

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Appeal from a Judgment of the District Court
of Salt Lake County
Honorable Dean E. Conder, Judge

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D. GARY CHRISTIAN
JAMES R. BLAKESLEY
KIPP AND CHRISTIAN
600 Commercial Club Building
32 Exchange Place
Salt Lake City, Utah 84111
Attorney for Appellant
and Plaintiff

GLENN C. HANNI
STRONG AND HANNI
604 Boston Building
Salt Lake City, Utah 84111
Attorney for Respondent
and Defendant

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NATIONAL FARMERS UNION
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vs.

WESTERN CASUALTY AND
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BRIEF OF APPELLANT

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NATURE OF THE CASE

This is an action by the plaintiff - appellant, National Farmers Union Property and Casualty Company, against the defendant - respondent, Western Casualty and Surety Company, under a theory of equitable and conventional subrogation and/or contribution, to recover proportionate share of monies paid in settlement of a tort claim.

DISPOSITION IN THE LOWER COURT

There being no real dispute as to the facts of this case, both parties made Motions for Summary Judgment and filed Memorandums of Points and Authorities with respect thereto. Both Motions were heard by Judge Dean E. Conder on the 9th day of June, 1977. Based

upon the written and oral arguments, the Court ordered that appellant's Motion for Summary Judgment be denied and that respondent's Motion for Summary Judgment be granted.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Order granting respondent's Motion for Summary Judgment and denying appellant's Motion for Summary Judgment set aside and further seeks a Judgment in its favor and against the respondent.

STATEMENT OF FACTS

Appellant issued a General Liability-Automobile Policy No. E42-6016A to Weber County Sheriff's Mounted Posse providing for bodily injury limits of $50,000.00 per person and $100,000.00 per occurrence subject to the applicable limit per person and that said policy was in force and effect on June 15, 1972.

Respondent issued a Homeowners Policy No. CH 94 70 59 to Brent G. Story & Ila S. Story providing for bodily injury and liability coverage of $25,000.00 per occurrence and medical payments to others of $500.00 per person and said policy of insurance was in force and effect on June 15, 1972.

At all times material herein, Brent G. Story was the Captain of the Weber County Sheriff's Mounted Posse and in that capacity had the right to control and did in fact control the members of said Posse and had overall general supervision of the conduct of the members of the Posse at all practice drills and parades and other

performances.

On June 15, 1972, the Weber County Sheriff's Mounted Posse was conducting a practice drill on its grounds near Harrisville, Weber County, State of Utah. At that time, Brent G. Story was present and functioning in his capacity as Captain of the Weber County Sheriff's Mounted Posse. Some of the Posse members had completed the drill, but others were still in the process of drilling at 9:30 P. M. when one of the horses owned by Afton LeRoy Cheney escaped from the grounds, ran through an open gate on to the highway and was there struck by a motor vehicle in which Arthur E. Haggen, Jr. was riding as a passenger.

As a result of that collision, Arthur E. Haggen, Jr. was permanently paralyzed from the neck down. Arthur E. Haggen, Jr. filed a lawsuit in the District Court of Weber County naming, among others, as defendants Afton LeRoy Cheney, Brent G. Story and the Weber County Sheriff's Mounted Posse. The case was settled for the sum of $50,000.00.

Based upon the amount prayed for by Arthur E. Haggen, Jr. in his Complaint, and the insurance policy limits of the Weber County Sheriff's Mounted Posse, Afton LeRoy Cheney and Brent G. Story, the Weber County Sheriff's Mounted Posse was to pay fifty percent (50%) of the settlement or $25,000.00, Afton LeRoy Cheney was to pay twenty-five percent (25%) of the settlement or $12,500.00 and Brent G. Story was to pay twenty-five percent (25%) of the settlement or $12,500.00.

Pursuant to the settlement agreement, appellant, the insurance carrier for the Weber County Sheriff's Mounted Posse, paid Arthur E. Haggen, Jr. $50,000.00. Subsequently, appellant has recovered $12,500.00 from the insurance carrier of Afton LeRoy Chec representing his pro rata share. However, the respondent, the insura carrier of Brent G. Story, has not, as yet, paid its proportionate sha to the appellant.

Coverage under either insurance policy is not in dispute. The question is one of determining the relative liability of two insuranc companies providing concurrent coverage for the same loss. The "pro rata liability" provision of Brent G. Story's insurance policy with respondent reads:

> This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

The "other insurance" provision of Weber County Sheriff's Mounted Posse's insurance policy with appellant reads:

> The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the company's liability under this policy shall not be reduced by the existence of such other insurance.
>
> When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the company shall

not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below:

* * * *

(b) Contribution by Limits. If any of such other insurance does not provide for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss. [Emphasis added.]

ARGUMENTS AND AUTHORITIES

POINT I

WHERE THERE IS CONCURRENT INSURANCE COVERAGE AND THE "OTHER INSURANCE" CLAUSE OF ONE LIABILITY POLICY CONFLICTS WITH A SIMILAR CLAUSE OF THE OTHER LIABILITY POLICY, REGARDLESS OF THE NATURE OF THE CLAUSE, THE CLAUSES ARE MUTUALLY REPUGNANT AND THE INSURERS SHOULD BE REQUIRED TO SHARE THE LOSS IN PROPORTION TO THE LIMITS OF THEIR RESPECTIVE POLICIES.

Generally "other insurance" clauses take one of the following three forms: (1) Pro rata clauses which provide that the insurer will be liable only for a pro rata share of the loss, usually in proportion to the limits of liability of its policy in relation to the limits of liability of all other valid and collectible insurance;[1] (2) excess clauses which

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1. See: Lamb-Weston, Inc. v. Oregon Auto. Ins. Co., 219 Ore. 110, 118, 341 P. 2d 110, 114 (1959):

> 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 of such loss than the applicable limit of liability . . . bears to the total applicable limit of all valid and collectible insurance. . . .

provide that the insurer will be liable for any loss which exceeds the limits of liability of all other valid and collectible insurance;[2] and (3) escape clauses which provide that the policy affords no coverage if other insurance is available.[3] In addition, some policies contain combinations of the above types: to wit, (1) escape-excess which provides that if other valid and collectible insurance covering a specific loss exists then the insurer will be liable only for any loss which exceeds the limits of liability of said other specific, valid and collectible insurance;[4] (2) pro rata-escape which provide that the insurer will be liable only for a pro rata share of the loss under certain conditions and that the policy affords no coverage if other valid and collectible insura

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2. Id. at 118, 341 P. 2d at 114: "If the Insured's liability under this policy is covered by any other valid and collectable insurance, the this policy shall act as excess insurance over and above such other insurance."

3. See: New Amsterdam Cas. Co. v. Hartford Accident & Indem. Co., 18 F. Supp. 707, 709 (W. D. Ky. 1937):

> If any other Assured included in this insurance is covered by valid and collectable insurance against a claim also covered by this Policy, he shall not be entitled to protection under this Policy.

4. See: Insurance Co. of Texas v. Employers Liab. Assurance Corp., 163 F. Supp. 143, 144 (S. D. Cal. 1958):

> If other valid insurance exists protecting the insured from liability for such bodily injury . . . or destruction of property, this policy shall be null and void with respect to such specific hazard otherwise covered, whether the insured is specifically named in such other policy or not; provided, however, that if the applicable limit of liability of this policy exceeds the applicable limit of such other valid insurance, then this policy shall apply as excess insurance against such hazard in an amount equal to the applicable limit of liability of this policy minus the applicable limit of liability of such other insurance.

is available under other conditions;[5] and (3) pro rata-excess which provides that under certain conditions the insurer will be liable only for a pro rata share of the loss, while under other conditions, the insurer will be liable for any loss which exceeds the limits of liability of all other valid and collectible insurance.[6]

The principle case presents one of the most common situations where concurrent insurance coverage exists and there is a conflict between the "other insurance" clauses. Respondent's "other insurance" clause is one of the pure pro rata types which provides that the insurer will be liable only for a pro rata share of the loss. On the other hand, appellant's "other insurance" clause seems to be of the "primary-pro rata" variety which provides primary insurance unless other valid and collectible insurance applies to the loss on the same

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5. See: New Amsterdam Cas. Co. v. Hartford Accident & Indem. Co., 18 F. Supp. 707, 709 (W. D. Ky. 1937):

> If the named Assured carries any other Insurance covering concurrently a claim covered by this Policy, he shall not recover from the Company a larger proportion of any such claim than the sum hereby insured bears to the whole amount of valid and collectable concurrent insurance. If any other Assured included in this insurance is covered by valid and collectable insurance against a claim also covered by this Policy, he shall not be entitled to protection under this Policy.

6. Allstate Ins. Co. v. American Underwriters, Inc., 312 F. Supp. 1386 (N. D. Ind. 1970)

> If there is other insurance . . .
> Allstate shall not be liable under this Part I [bodily injury and property damage] 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.

basis in which event the insurer will be liable only for a pro rata share of the loss.

Initially, several theories were used to resolve the conflicting "other insurance" clause problem. Out of property law concepts, courts developed the "prior-in-time" theory which assigned primary liability to the insurer whose policy first became effective. The case of New Amsterdam Casualty Company v. Hartford Accident & Indemnity Company, 108 F. 2d 653 (6th Cir. 1940) and the case of Air Transportation Manufacturing Company v. Employers Liability Assurance Corporation, 91 Cal. App. 2d 129, 204 P. 2d 647 (1949) are representative of this view. It is doubtful that any jurisdiction follows this approach today, since courts were quick to realize that this particular inquiry was irrelevant where each policy was in effect at the time the liability arose.

Under the "primary tort feasor" theory courts held the insurer primarily liable in whose policy the tort feasor was the named insured. See: Commercial Casualty Insurance Company v. Hartford Accident & Indemnity Company, 190 Minn. 528, 252 N. W. 434 (1934); and American Automobile Insurance Company v. Pennsylvania Mutual Indemnity Company, 161 F. 2d 62 (3d Cir. 1947). More often than not, this theory has been rejected on the grounds that liability policies are usually purchased with the intent of covering persons not specifically named, and because the negligent party frequently is not named in either policy. See: Oregon Automobile Insurance Company v. United States Fidelity & Guaranty Company, 195 F. 2d 958 (9th Cir. 1962); and

Hardware Dealers Mutual Fire Insurance Company v. Farmers Insurance Exchange, 444 S. W. 2d 583, 587 (Tex. 1969).

Finally, what was commonly referred to as the "Pennsylvania rule" and more particularly as the "specific-general coverage" theory which determined the primary insurer on the basis of which policy provided more specific coverage of the insured's loss. This theory has also been rejected on numerous occasions. See: Oregon Automobile Insurance Company v. United States Fidelity & Guaranty Company, supra; Consolidated Shippers, Inc. v. Pacific Employers Insurance Company, 45 Cal. App. 2d 288, 114 P. 2d 34 (1941); Employers Liability Assurance Corporation v. Pacific Employers Ins. Co., 102 Cal. App. 2d 188, 227 P. 2d 53 (1951); Hardware Dealers Mutual Fire Insurance Company v. Farmers Insurance Exchange, supra; Union Insurance Company v. Iowa Hardware Mutual Insurance Company, 175 N. W. 2d 413, 417 (Iowa 1970); and Continental Casualty Company v. Suttenfield, 236 F. 2d 433, 438 (5th Cir. 1956). Nevertheless, a majority and minority position have emerged with regard to the determination of the relative liability of two insurance companies providing concurrent coverage for the same loss. It is our position that the recent trend favoring the minority rule is indicative of the better view. But, in any event, appellant is entitled to recover under either theory.

According to the majority view, the relative liability of insurers is determined on a primary and secondary basis through a construction of the "other insurance" clauses. The basic premise of the majority rule is that conflicting "other insurance" clauses are

amenable to the usual rules of interpretation of insurance contracts for determining the intention of the parties. The case most often cited in support of the majority view is Zurich General Accident & Liability Insurance Company v. Clamor, 124 F. 2d 717 (7th Cir. 1941). In short, the majority view rests ultimately on the language of the "other insurance" provision and reconciliation of any conflict which may exist is subject to the draftsmanship of the various insurance provisions.

Under the minority view, courts have held that where concurrent insurance policies carry like "other insurance" clauses they are mutually repugnant and should be disregarded. Apportionment is to be prorated with regard both to damages and to the expense of defending the lawsuit. The leading representative of the minority view is Oregon Automobile Insurance Company v. United States Fidelity & Guaranty Company, 195 F. 2d 958 (9th Cir. 1962). In that case, the Ninth Circuit Court of Appeals was faced with conflicting excess and escape clauses on two automobile insurance policies. The insurer whose policy contained the escape clause appealed from a judgment assigning primary liability to it. The basis of the lower court decision was that the insurance policy containing the excess clause constituted "other insurance" to effectuate the escape clause. The Circuit Court reversed that decision and held that liability should be prorated among the insurers thereby specifically rejecting the majority view as a means to reconcile concurrent liability. At one point, the court state

> In our opinion the "other insurance" provisions of the two policies are indistinguishable in meaning and intent. One cannot rationally choose between them. . . . Here, where both policies carry like "other insurance" provisions, we think they must be held mutually repugnant and hence be disregarded. Our conclusion is that such view affords the only rational solution of the dispute in this case. The proration is to be applied in respect both of damages and of the expense of defending the suits. (at 960)

The minority position rejects the theory that "other insurance" clauses are reconcilable through interpretation. In the case of Union Insurance Company v. Iowa Hardward Mutual Insurance Company, supra, the court stated that attempting to reconcil conflicting clauses, by attempting to assign primary and secondary liability on the basis of the language of the provisions, was "at best a pseudo-solution in that it only aggravates a circular riddle."

In another recent case involving conflicting "other insurance" provisions of two automobile insurance policies, the court in Allstate Insurance Company v. American Underwriters, Inc., supra, rejected the majority view and adopted the minority position stating:

> Cases of this type cannot be resolved either by a literal reading of the language used or by an inquiry into intent.
>
> * * * *
>
> And the only way to effectuate the intent of both companies would be by holding neither liable--a result which would obviously be contrary to public policy. Under the circumstances, the only fair solution, and the one

> which this court believes would be adopted by the Indiana courts, is to find the excess clause and the escape clause mutually repugnant, and to require the two insurers to share the loss in proportion to the limits of their respective policies. (at 1388)

Two recent Law Review articles have outlined the advantages of the minority view. See: 20 Hastings Law Journal, 1292, 1304 (1969) Conflicts Between "Other Insurance" Clauses in Automobile Liability Insurance Policies; and 1971 Indiana Law Journal, 270-285, Resolution of Conflicting "Other Insurance" Clauses: New Developments in Indiana. At various times, the following have been cited as advantages of the minority position: (1) It avoids circular reasoning, depending as it were, on which policy one happens to read first; (2) it avoids the difficulty of searching for the intent of insurers through a construction of the clauses when they are but "fortuitous adversaries" with no privity of contract existing between them; (3) it recognizes the self-evident fact that the intentions of both the insurers are, in fact, to reduce or eliminate liability in this instance; (4) arguably, under the majority view, the rights of the insured become badly obscured, if not defeated, by the contractual contest engaged in by casualty insurers; (5) the majority view encourages the continuing battle of draftsmanship of still more specific policy terms; (6) the minority view does not arbitrarily pick one of the conflicting clauses and give effect to it; (7) it does not deprive the insured of any coverage; (8) it is not prejudicial in giving a windfall to one insurer at the expense of another; (9) it does

not encourage litigation between insurers; (10) it does not delay settlements; (11) it does enable underwriters to predict the losses of the insurers more accurately; (12) it does preclude the use of illogical rules developed by the various courts (e.g., first in time, specific v. general and primary tort feasor doctrines); (13) and it does give a basis for uniformity of result; (14) in addition, prorating the loss among all insurers is a rule that can be applied regardless of the number of insurers involved and regardless of the type of conflicts that are created by the "other insurance" clauses; and (15) finally, the rule is simplier, more convenient and easier to apply than the majority rule. The philosophy underlying the minority rule is best articulated in the case of Fireman's Insurance Company v. St. Paul Fire & Marine Insurance Company, 243 Ore. 10, 411 P. 2d 271, 274 (1966) wherein it states:

> This court believes it is good public policy not to put an insured plaintiff, or a defendant who is fortunate enough to have duplicate coverage, in a position where there is any possibility one insurer can say, "After you, my dear Alphonse!" while the other says, "Oh, no, after you, my dear Gaston." They must walk arm in arm through the door of responsibility.

In Russell v. Paulson, 18 Utah 2d 157, 417 P. 2d 658 (1966) the Utah Supreme Court adopted the majority rule, as described, with regard to the construction of "other insurance" provisions of uninsured motorist automobile coverage. That case involved conflicting "excess" and "pro rata" clauses. Specifically, the court stated:

> Where there is a conflict between a pro rata and an excess "other insurance" clause, a majority of the courts have imposed primary liability on the pro rata insurer and hold the excess insurer responsible only for secondary coverage of the loss.
>
> * * * *
>
> Plaintiff urges this court to adopt a minority view that the "other insurance" provisions are mutually repugnant because there is no rational basis to find United has primary liability and therefore each company should pay a pro rata share of the judgment up to the limits of the policies. This is evidently the view adopted by the lower court.
>
> * * * *
>
> . . . [W]e are constrained to adopt the majority rule which imposes primary liability on the pro rata insurer and secondary liability on the excess insurer. (at 660-661)

Justice Crockett in a concurring opinion noted the following:

> It is my opinion that if there is in fact multiple coverage, it would generally be fair and equitable to require the insurance companies to share the loss as provided in the pro rata clauses. . . . The fundamental questions to be determined are whether the claimant is covered, and whether there is in fact multiple coverage. If there is, I would reject tortuous and specious rationalizations on the basis of priority in time, more specificness as to vehicle or individual, or as to primary tortfeasor, and make an equitable apportionment of the loss. (at 663)

A year later in the case of Prudential Federal Savings & Loan Association v. St. Paul Insurance Companies, 20 Utah 2d 95,

P.2d 602 (1967), this court apparently adopted the archaic, and generally disregarded, rule commonly known as the "Specific-General Coverage" theory which determines the primary insurer on the basis of which policy provided more specific coverage of the insured's loss. The court described the fact situation as follows:

> . . . One Rowley was a loan officer for Prudential. Hw owned and sold to Parker in 1962 realty on a contract. He (Rowley) had given First Federal a first mortgage on this realty of some $14,000. In December of 1962 Parker applied to Prudential for a mortgage loan of $16,300, to be secured by a first lien on this realty purchased from Rowley. Prudential obtained from Security Title a Preliminary Title Report showing the mortgage to First Federal and advising Prudential a title policy for $16,300 would be issued on vesting of Prudential's interest. Prudential later loaned Parker $16,300, and Rowley took $14,600 to liquidate his contract with Parker and the balance was paid to Prudential to cover loan costs. Prudential's Trust Deed was dated December 26, 1962. The first mortgage to First Federal was not discharged, hence it retained its first lien. In 1965, Prudential discovered Rowley . had embezzled sizeable sums over past years and learned for the first time that First Federal held a first mortgage on the Parker property. This, doubtless, prompted the instant case. . . . (at 602-603)

Basically, Prudential contended that Rowley's peculations were the sole and proximate cause of their loss of the first lien on the Parker property. On the other hand, St. Paul argued that the title insurance was primary liable, because Prudential's claim was limited to the lack of a first lien, and it was this deprivation that

constituted the primary responsibility of the title insurance policy. This court concurred with the latter and ruled in pertinent part that:

> The rule having wide applicability provides that where a blanket policy contains a provision limiting its liability to an excess over specific insurance, the blanket policy must respond, only if the specific fails to satisfy the loss. (at 603)

Applying the same rule, Justice Tuckett in his dissenting opinion would have ruled that the St. Paul policy was primary. He states:

> It appears to me that the loss we are here concerned with stemmed directly from Rowley's peculation and that this specific risk was covered by St. Paul's policy. St. Paul, having insured the specific risk, became obligated to pay plaintiff's loss to the extent of its policy and the title insurance policy should be treated a general insurance covering only a general risk of loss to the plaintiff by reason of a title defect that can only be resorted to in the event that the specific coverage is exhausted. (at 604)

Chief Justice Crockett in his dissenting opinion noted the inherent difficulties with the rule adopted by the majority and stated his objections as follows:

> . . . This, for me, emphasizes the desirability of the practical solution which I suggest would be fair and equitable: that where two insurance policies would each cover the same loss, that is, where either of them would have to pay the loss if the other did not exist, they should each pay their equitable share of the loss.

* * * *

> . . . And there are other problems encountered in attempting to determine which of two insurers covering the same loss should be held liable. One is that a specific coverage is usually held accountable ahead of a general coverage. The argument proceeds thus: that since it was the first mortgage protection that was lost, this was specifically covered by title insurance policy, and that company should pay. Opposed to this is the argument that the foundational cause of the loss was the embezzlement by Rowley, which is specifically covered by St. Paul, wherefore, the latter should pay. And so we are led through circuitous rationalizations in an effort to fix liability on one insurer and to exclude the other, and are urged to see the answer to this problem as either black or white, in an area which, to me, is grey.
>
> For the reasons above stated, in my opinion it would be more fair and realistic to rule that where there are two or more insurance coverages, each of which would be liable for a loss except for the existence of coverage by the other, each should bear its fair share of the loss. This would normally mean that if the loss is within their policy limits, they should share equally in paying it. . . . (at 605)

In the case of National Farmers Union Property and Casualty Company v. Farmers Insurance Group, 14 Utah 2d 89, 377 P. 2d 786 (1963) and in the case of Christensen v. Farmers Insurance Exchange, 21 Utah 2d 194, 443 P. 2d 385 (1968), this court also dealt summarily with this issue, not discussing it in length, holding that, in the context of automobile insurance, the insurance of the owner of an automobile is presumed to be primary and the insurance of the non-owner driver of the automobile is presumed to be secondary where

there is concurrent coverage and a conflict between the two policies. Because we are dealing with a different variety of insurance policies (comprehensive automobile liability policy and homeowners policy) and different fact situations, neither of the two above-mentioned owner-driver automobile cases nor presumptions stated therein are particularly helpful.

Applying the minority rule to the facts of this case, the pro rata "other insurance" clause of Brent G. Story's homeowners policy with respondent and the primary-pro rata "other insurance" clause of Weber County Sheriff's Mounted Posse's comprehensive automobile liability policy with appellant are mutually repugnant and should be disregarded, and the court should order an equitable apportionment of the loss on a pro rata basis. That appears to be the only equitable result where there is multiple coverage and each would be responsible for the loss but for the existence of coverage by the other.

Applying the majority rule to the facts of this case, apportionment of the loss should still be made on a pro rata basis. The "other insurance" clause of Brent G. Story's homeowners policy with respondent provides that respondent shall not be liable for a greater proportion of any loss than the amount thereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not. Essentially, it is a pure pro rata provision as compared to an escape, excess, escape-excess, pro

rata-escape, pro rata-excess, etc., type provision. In other words, it is the intent of the policy to provide primary insurance with a pro rata qualification if there is other insurance covering the peril, whether collectible or not.

Looking to the language of the "other insurance" provision of Weber County Sheriff's Mounted Posse's insurance policy with appellant, it states in substance that: (1) The insurance policy provides primary insurance; (2) when the insurance is primary and the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the company's liability under said policy shall not be reduced by the existence of such other insurance; and (3) when this insurance and other insurance apply to the loss on the same basis the company shall not be liable for a greater proportion of such loss than the applicable limit of liability of all valid and collectible insurance against such loss. The intent being that the insurance be primary, but if there is other applicable insurance which applies on the same basis and doesn't apply on a contingency or excess basis, then the loss should be sustained proportionately.

Returning again to the language of respondent's "other insurance" clause, it does not state that it applies to the loss on an excess or contingent basis. It does not state that it provides excess insurance only should there be concurrent coverage by a specific policy. The presumption should be, based upon the silence of the draftsman where he had the opportunity to speak, that the insurance is primary. Because

after looking at the language of the insurance contracts, interpreting and construing said contracts, multiple coverage exists on the same basis, the court should honor the contracts as written and apportion the loss on a pro rata basis. Within the context of the majority rule, we are wont to agree with the court in Prudential Federal Savings & Loan Association v. St. Paul Insurance Companies, at 603, where it states:

> The rule having wide applicability provides that where a blanket policy contains a provision limiting its liability to an excess over specific insurance, the blanket policy must respond, only if the specific fails to satisfy the loss. . . .

In this case, respondent's homeowners insurance policy does not contain a provision limiting its liability to an excess over specific insurance.

Accordingly, we are of the opinion that based upon both the majority and minority rule, appellant is entitled to recover from respondent its proportionate share of the loss sustained.

POINT II

A SPECIFIC INSURANCE POLICY IS NOT PRIMARY INSURANCE AND A GENERAL INSURANCE POLICY IS NOT EXCESS INSURANCE BY MERE REASON OF FACT THAT LOSS COMES WITHIN COVERAGE OF BOTH POLICIES, ONE BEING DESIGNED SPECIFICALLY FOR LOSS SUSTAINED AND THE OTHER BEING A GENERAL POLICY WHICH INCLUDES PARTICULAR LOSS WITHIN ITS SCOPE

Although initially courts dealing with the problem of

concurrent insurance coverage used the "specific-general coverage" theory to determine the primary insurer on the basis of which policy provided more specific coverage of the insured's loss, today that theory is generally disregarded. With respect thereto, the traditional rule is stated in Couch on Insurance 2d, Section 62:42, Proration between general and specific policies:

> The fact that a loss comes within the coverage of two policies, one being designed specifically for the loss sustained and the other being a general policy which includes the particular loss within its scope, does not make the specific policy primary insurance and the general policy excess insurance. (at 497)

In the case of American Employers' Insurance Company v. Continental Casualty Company, 85 N.M. 346, 512 P.2d 674 (1973) a suit was brought by a comprehensive liability insurer for declaration of its non-liability in respect to defense of insured and counterclaim by professional liability insurer for indemnification and reimbursement for expenditures made by it in defending and settling the suits against the insured. In that case, the Supreme Court of New Mexico held that a specific policy is not primary insurance and a general policy is not excess insurance by mere reason of fact that loss comes within the coverage of both policies, the one being designed specifically for the loss sustained and the other being a blanket policy which includes the particular loss.

As has been previously noted, neither the majority rule,

which looks to the language of the policy to determine the intent of the parties, nor the minority rule, which holds conflicting clauses mutually repugnant and prorates the applicable insurance, maintain that a specific policy is primary insurance and a general policy excess insurance where the loss comes within the coverage of both policies.

CONCLUSION

Based upon the foregoing, appellant seeks to have the Order granting respondent's Motion for Summary Judgment and denying appellant's Motion for Summary Judgment set aside, and further seeks a judgment in its favor and against the respondent.

Respectfully submitted,

D. GARY CHRISTIAN

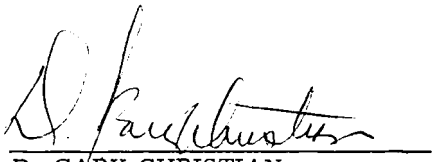
JAMES R. BLAKESLEY

KIPP AND CHRISTIAN
600 Commercial Club Building
32 Exchange Place
Salt Lake City, Utah 84111

Attorneys for Plaintiff
and Appellant

MAILING CERTIFICATE

I hereby certify that I mailed three (3) copies of BRIEF OF APPELLANT to Glenn C. Hanni of Strong and Hanni, attorneys for defendant and respondent, Western Casualty and Surety Company, 604 Boston Building, Salt Lake City, Utah 84111, this 12th day of August, 1977.



D. GARY CHRISTIAN
Attorney for Plaintiff and
Appellant
National Farmers Union Property
and Casualty Company