

1989

Truck Insurance Exchange v. Motor Cargo : Certification of Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jay D. Gurmankin; Mark Y. Hirata; Giaugue & Bendinger; Attorneys for Appellant.
unknown.

Recommended Citation

Legal Brief, *Truck Insurance Exchange v. Motor Cargo*, No. 89180 (Utah Court of Appeals, 1989).
https://digitalcommons.law.byu.edu/byu_ca1/1497

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

**UTAH
DOCUMENT**

Jay D. Gurmankin (#A-1275)
Mark Y. Hirata (#A-5087)
GIAUQUE & BENDINGER
500 Kearns Bldg.
136 S. Main Street
Salt Lake City, Utah 84101
Telephone: 801-533-8383

**K F U
50
.A10**

DOCKET NO.

89-180 CA

CLERK OF THE COURT
UTAH COURT OF APPEALS

Attorneys for Appellant

IN THE UTAH COURT OF APPEALS

TRUCK INSURANCE EXCHANGE, a corporation,)	
)	
Plaintiff/Respondent,)	Case No. 890180-CA
)	
vs.)	
)	
MOTOR CARGO, a Utah corporation,)	Argument Priority
)	Classification 14b
Defendant/Appellant.)	

CERTIFICATION OF PETITION FOR REHEARING

Counsel for petitioner Motor Cargo hereby states that the Petition for Rehearing filed herewith is well-grounded, presented in good faith, and not for purposes of delay.

DATED this 10th day of August, 1990.

GIAUQUE & BENDINGER
500 Kearns Bldg.
Salt Lake City, Utah 84101
Telephone: (801) 533-8383

BY Mark Y. Hirata
Mark Y. Hirata
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing CERTIFICATION OF PETITION FOR REHEARING was mailed, first-class, postage prepaid, this 10~~th~~ day of August, 1990, to the following:

Harold C. Verhaaren
Mark F. Bell
Mazuran, Verhaaren & Hayes, P.C.
Parkview Plaza, Suite 260
2180 South 1300 East
Salt Lake City, Utah 84106

A handwritten signature in cursive script, appearing to read "Gary W. White MS", is written above a horizontal line.

cmw/533

FILED

AUG 10 1990

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

Jay D. Gurmankin (#A-1275)
Mark Y. Hirata (#A-5087)
GIAUQUE & BENDINGER
500 Kearns Bldg.
136 S. Main Street
Salt Lake City, Utah 84101
Telephone: 801-533-8383

Attorneys for Appellant

IN THE UTAH COURT OF APPEALS

TRUCK INSURANCE EXCHANGE, a corporation,)	
)	
Plaintiff/Respondent,)	Case No. 890180-CA
)	
vs.)	
)	
MOTOR CARGO, a Utah corporation,)	Argument Priority
)	Classification 14b
Defendant/Appellant.)	

PETITION FOR REHEARING

Petitioner Motor Cargo ("Motor Cargo"), by and through its counsel of record, hereby submits the following Petition for Rehearing. This petition is filed in response to the Court of Appeal's Opinion dated July 30, 1990, affirming the judgment rendered against Motor Cargo in the Trial Court below.

Motor Cargo contends that the Court of Appeals erred in two respects. First, upon concluding that the insurance contract at issue, Retrospective Agreement B (Retro Agreement B), was ambiguous, the Court of Appeals relied on extrinsic evidence not found in the record below in resolving the ambiguity against the

insured, Motor Cargo. Second, in doing so, the Court of Appeals disregarded the well-established axiom that an ambiguous insurance agreement should be construed against its drafter. Motor Cargo therefore requests a rehearing to clarify the above matters.

I. ALL AMBIGUITIES IN RETRO AGREEMENT B SHOULD BE RESOLVED AGAINST ITS DRAFTER, TRUCK INSURANCE EXCHANGE.

A. There Is No Extrinsic Evidence In The Record Below Supporting The Denial Of An Excess Premium Refund Owed To Motor Cargo In The Event Of Early Cancellation.

In its Opinion, the Court of Appeals held that Retro Agreement B is ambiguous, given the conflicting provisions of paragraphs 16 and 13 therein. Truck Insurance Exchange v. Motor Cargo, Case No. 890180-CA, p. 3 (Utah Ct. App., July 30, 1990). The Court of Appeals therefore looked to extrinsic evidence admitted by the Trial Court to resolve the ambiguity. Id.

Following its review of the extrinsic evidence admitted below, the Court of Appeals erroneously concluded: "Such evidence showed that parties discussed the provisions at issue prior to entering into the agreement and that they knew the excess premium refund would be lost in the event of cancellation by Motor Cargo." Id. (emphasis added.) There is absolutely no extrinsic evidence in the record supporting Motor Cargo's knowledge of a waiver of its excess premium refund in the event of early cancellation.

A careful review of Truck Insurance Exchange's ("TIE") affidavits (Affidavit of Wendell Wells and Paul J. Semons), demonstrates that Motor Cargo was never told by TIE that, in the event of early cancellation under Retro Agreement B, Motor Cargo would lose its right to an excess premium refund provided by ¶ 13. Wendell Wells, one of TIE's representatives, stated in his Affidavit that he conducted preliminary discussions with representatives of Motor Cargo regarding the execution of Retro Agreement B. (R. 229.) In these discussions, Wells stated that he explained the contents of Retro Agreement B to Motor Cargo's representatives and, in particular, "how the cancellation provisions of paragraph 16 would apply." Id. Mr. Wells further explained:

[A]ll interim refund and premium adjustments were subject to a final adjustment and settlement at the end of the agreed three-year term . . . [and] if the agreements were terminated by Motor Cargo before the end of the three-year term, that the provisions of paragraph 16 of the Retro Agreement would apply, and that the premium then due would be the greater of the retrospective or basic premium computed under the terms of the policy, plus a ten percent (10%) short-range cancellation charge, and that Motor Cargo would lose the benefits of retrospective rating.

(R. 229-30.) Based upon this evidence, the Trial Court specifically made Finding of Fact No. 16:

The cancellation provision was specifically explained to an officer of Motor Cargo when the Retro Agreement was entered into, that is, that in the event of cancellation of the

Policy before the three (3) year term ended,
Motor Cargo would lose the benefit of
retrospective rating.

(R. 392.) (Emphasis added.)

Nowhere in the affidavits of Mr. Semons or Mr. Wells, or anywhere in the record, is there any evidence that TIE explained to Motor Cargo at the time it entered into Retro Agreement B that, in the event of early cancellation by Motor Cargo, it would lose its right to an excess premium refund expressly provided for under ¶ 13. Finding of Fact No. 16 in effect acknowledges this shortcoming. There, the Trial Court erroneously equated the general statement, "losing the benefit of retrospective rating" with losing the right to the excess premium refund. The Court of Appeals made the same erroneous conclusion.

Moreover, the admissible portions of the Affidavit of William K. Maxwell concerning discussions with Harold Tate, Motor Cargo's officer, demonstrate that there is extrinsic evidence in the record below supporting Motor Cargo's reasonable interpretation of paragraphs 13 and 16 in the event of cancellation. (R. 176.) There were no findings of fact made by the Trial Court concerning these communications, which implies that the Trial Court failed to acknowledge this evidence. Here, it would appear that the Court of Appeals similarly disregarded such critical extrinsic evidence.

B. The Ambiguity Created by Paragraphs 13 And 16
Should Have Been Resolved Against Truck Insurance
Exchange As Drafter of Retro Agreement B.

Based on a review of the extrinsic evidence in the record, the Court of Appeals should have concluded that since Retro Agreement B was ambiguous, and based on general principles of contract interpretation involving insurance agreements, the ambiguity should be read and interpreted against TIE as the drafter. In the alternative, the Court of Appeals should have remanded to the Trial Court with directions to resolve the ambiguity through consideration of any pertinent extrinsic evidence.

CONCLUSION

Based on the foregoing, Motor Cargo petitions the Court of Appeals for a rehearing to resolve the matters discussed herein.

DATED this 10th day of August, 1990.

GIAUQUE & BENDINGER
500 Kearns Bldg.
Salt Lake City, Utah 84101
Telephone: (801) 533-8383

BY Mark Y. Hirata
Mark Y. Hirata
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITION FOR REHEARING was mailed, first-class, postage prepaid, this 10~~th~~ day of August, 1990, to the following:

Harold C. Verhaaren
Mark F. Bell
Mazuran, Verhaaren & Hayes, P.C.
Parkview Plaza, Suite 260
2180 Sough 1300 East
Salt Lake City, Utah 84106



cmw/536