1998

Workmen's Auto Insurance Company v. Chubb Customer Center, Inc., dba Chubb Group of Insurance Companies : Petition for Rehearing

Utah Court of Appeals

981413-CA

IN THE UTAH COURT OF APPEALS

WORKMEN'S AUTO INSURANCE COMPANY, Plaintiff and Appellant, vs. CHUBB CUSTOMER CENTER, INC., dba CHUBB GROUP OF INSURANCE COMPANIES, Defendant and Appellee.	Case Number: 981413 - CA District Court No: 960013632 CV Priority Number: 15

WORKMEN'S AUTO INSURANCE COMPANY'S PETITION FOR REHEARING

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE WILLIAM W. BARRETT, PRESIDING

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INTRODUCTION

Ambiguous terms in an insurance contract are typically construed in favor of the insured. Nevertheless, this Court adopted an interpretation favoring the insurer.

Other courts have construed an "insured contract" as a contract whose substance is the affirmative assumption of liability because, under the factual circumstances presented to those courts, the "insured contract" clause acted as an exclusion from coverage. The strict interpretation was adopted by those courts because, otherwise, "commercial liability insurance would be severely limited in its coverage." Gibbs M. Smith, Inc. v. United States Fid. & Guar., 949 P.2d 337, 341 (Utah 1997). In other words, the clause was interpreted in favor of coverage for the insured.

By granting the same restrictive interpretation to Chubb's use of the term "insured contract" under the peculiar circumstances of this case, the Court erred. The dispute before the Court centered on an *extension* of coverage, not an *exclusion* of coverage. Therefore, the Court should reverse its decision and reverse the district court's ruling.

ARGUMENT

I. THE AMBIGUOUS LANGUAGE IN CHUBB'S INSURANCE POLICY MUST BE CONSTRUED IN FAVOR OF COVERAGE BECAUSE, IN THIS CASE, THE LANGUAGE ACTS AS AN EXTENSION OF COVERAGE.

The Court's affirmation of the district court's ruling was based on the following reasoning:

> The phrase "liability assumed by the insured under any insured contract" has been plainly and reasonably construed by courts "to apply only to indemnification and hold-harmless agreements, whereby the insured agrees to 'assume' the tort liability of another."

Memorandum Decision filed December 31, 1998 at p. 2 (quoting Gibbs M. Smith, Inc. v. United States Fid. & Guar., 949 P.2d 337, 341 (Utah 1997)). The Court then noted that Wagon Tongue never entered into an indemnity agreement or a hold-harmless agreement with Catherine Jacobsen.

The connotation of an "insured contract" adopted by the *Gibbs* court was adopted because the language at issue is ambiguous. Therefore, the court construed the language against the insurer in order to provide insurance coverage to the insured.

By adopting the *Gibbs* connotation in this case, the Court violated a fundamental principle of contract interpretation. The Court construed the language contained in Chubb's policy to favor Chubb even though it is required to construe all ambiguous

language contained in Chubb's insurance policy in favor of Chubb's insured. See, e.g., Hardy v. Beneficial Life Ins. Co., 787 P.2d 1 (Utah App. 1990) ("[W]e note a fundamental principle operative in this case: 'any ambiguity or uncertainty in the language of an insurance policy must be resolved in favor of coverage. Also, since the policy is drawn by the insurer, ambiguities are construed against that party.'") (quoting LDS Hosp. v. Capitol Life Ins. Co., 765 P.2d 857, 858 (Utah 1988)); see also Wagner v. Farmers Ins. Exch., 786 P.2d 763, 765 (Utah App. 1990); see also Wilburn v. Interstate Elec., 748 P.2d 582, 585 at n.2 (Utah App. 1988).

It is a longstanding principle of insurance contract interpretation that words and phrases used to exclude coverage are to be interpreted in one manner and words and phrases used to extend coverage are to be interpreted in another manner.

> [I]nsofar as the cases involve insurance policies, they can be roughly divided into cases involving policies excluding from coverage . . . and those extending coverage. . . . **[I]n the extension cases the questioned terms are broadly interpreted, while in the exclusion cases the same terms are given a much more restricted interpretation.** This is necessary because **in both situations the courts favor an interpretation in favor of coverage**. . . . [T]hese cases illustrate that the **interpretation of the terms involved is not fixed** but varies according to the circumstances of the case. They also demonstrate that most courts will interpret the terms so as to extend the coverage if this can be done under any reasonable interpretation of the facts.

Geico v. Dennis 645 P.2d 672 (Utah 1982) (citations omitted); see also Workmen's

Auto's Brief at pp. 6-7; Workmen's Auto's Reply Brief at n. 1.

Because *Gibbs* — like all of the cases cited therein — was an exclusion case, the language at issue was properly interpreted in a restrictive manner. This case, however, is an extension case, and the adoption by this Court of *Gibbs's* restrictive interpretation of the same ambiguous language was improper.

Chubb's named-insured assumed the tort liability of its employee pursuant to its contract of employment, thus Chubb's liability coverage is primary:

> [T]his Coverage Form's Liability Coverage is primary for *any liability* assumed under . . . [t]hat part of *any* . . . *contract or agreement* pertaining to your business . . . under which you assume the tort liability of another to pay for . . . "property damage" to a third party . . . .

Chubb Coverage Form at Section IV(B)(5)(c) and V(F)(5). The phrase "any liability . . . assumed under . . . any contract or agreement" is very broad. See, e.g., Viking Ins. Co. v. Coleman, 927 P.2d 661 (Utah App. 1996) (adopting a broad interpretation of the "arising out of the ownership, maintenance or use of a vehicle" clause so long as there is a causal nexus between an accident or injury and the insured vehicle). Thus, the language should be given its broadest interpretation in order to provide coverage to the insured. See Fuller v. Director of Finance, 694 P.2d 1045, 1047 (Utah 1985) ("An insured is entitled to the broadest protection he could have reasonably understood to be provided by the policy.").

Workmen's Auto's interpretation of Chubb's policy is reasonable and should be adopted in order to afford coverage to Chubb's insured.

II. THE PRIOR JUDICIAL INTERPRETATION OF THE "INSURED CONTRACT" LANGUAGE IS UNAVAILING.

Sometimes when language has been given a prior judicial interpretation, it is not considered ambiguous. See Draughon v. Cuna Mut. Ins. Soc'y, 771 P.2d 1105 at n. 5 (Utah App. 1989). However, this exception only applies when the prior judicial interpretation is applied to the same language under the same factual circumstances.

As explained above, the language at issue has only been interpreted as an exclusion from coverage. Prior judicial interpretation of "insured contract" when it acted as an exclusion is irrelevant where, as here, the language used by the insurer acts as an extension of coverage to the insured. See Geico v. Dennis 645 P.2d 672 (Utah 1982).

III. CHUBB IS SOLELY RESPONSIBLE FOR LIMITING ITS EXPOSURE.

The appellate courts of this state have repeatedly explained that this Court "will not insert words into a policy under the guise of interpretation where the insurer could have easily avoided the problem by drafting its policy more carefully and precisely." Draughon v. Cuna Mut. Ins. Soc'y, 771 P.2d 1105 (Utah App. 1989). If Chubb did not want to provide primary coverage for the acts of its insureds' employees when driving their own vehicles, it could have refused to do so. But:

> When an insurance company, in drafting its policy of insurance, uses a "slippery" word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term. All who may, by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction, the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be found.

Geico v. Dennis 645 P.2d 672 (Utah 1982) (citations omitted).

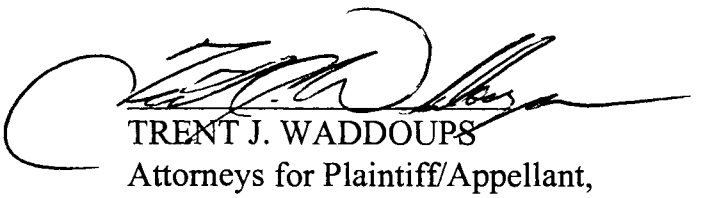
Chubb was not required to provide an exception to the general rule that primary coverage is provided by the vehicle's owner. However, Chubb chose to provide primary coverage under the facts of this case. The Court should not protect Chubb from its own election.

CONCLUSION

Based upon the foregoing, the Court should reverse its decision and the district court's ruling. The Court should then enter a summary judgment in favor of Workmen's Auto and, because Chubb's coverage was concurrently primary, order Chubb to pay the sum of $3,790.95 plus prejudgment interest to Workmen's Auto.

I HEREBY CERTIFY pursuant to Utah R. App. 35 that this Petition for Rehearing submitted this 6 day of January, 1999 is presented in good faith and not for delay.

CARR & WADDOUPS



TRENT J. WADDOUPS
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Workmen's Auto Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6 day of January, 1999, a true and correct copy of the foregoing WORKMEN'S AUTO INSURANCE COMPANY'S PETITION FOR REHEARING was mailed, via U.S. Mail, postage prepaid, to the following:

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