1999

J. Kent Curtis, Bonnie L. Curtis, John H. Wilcox and Kathleen Wilcox v. Farmers Insurance Exchange, and John Paris : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

J. KENT CURTIS, BONNIE L. CURTIS, JOHN H. WILCOX and KATHLEEN WILCOX,

Plaintiffs,

v.

FARMERS INSURANCE EXCHANGE, and JOHN PARIS,

Defendants.

Case No. 990058 CA

Priority No.15

APPELLANTS' REPLY BRIEF

Appeal from a Judgment of the Third District Court, Salt Lake County
Hon. Douglas Cornaby, sitting for Hon. Roger A. Livingston

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SUMMARY OF ARGUMENT

An insurance application and the resulting policy must be considered together to determine the intent of the parties. If the policy delivered by the insurer varies from the signed application, the insurer should be bound by the representations in the application. In this case, the application referred to insurance for "all perils", a legal term of art in the insurance field which refers to coverage for all risks or perils not caused by the insured's fraud. However, the policy only covered certain specifically listed perils, and was not an all perils policy. The listed perils did not include snow damage to the Insureds' cabin. Because the insurance application must be considered with the policy to determine the intent of the parties, the trial court should have found coverage, or at least an ambiguity in they type of insurance that Farmers had agreed to provide.

DETAIL OF ARGUMENT

POINT ONE

THE INSURANCE APPLICATION AND POLICY SHOULD BE CONSTRUED TOGETHER TO DETERMINE THE INTENT OF THE PARTIES

Farmers apparently concedes that *U.C.A.* §31A-21-105(1)(a) (1986) binds the insurer to a statement or representation in the application for insurance. Despite admitting that it is bound to any statement in the application, Farmers argues that the application is only considered as part of the contract if it is attached to the policy when delivered to the insured. This completely misreads *U.C.A.* §31A-21-106 (1986). That statute creates three sources for the terms of the insurance contract: 1) the policy, 2) the application, 3) any other document attached to the policy. The phrase "attached to the policy" only modifies the third category, of other documents not a part of the policy or the application. To hold otherwise would create an inconsistency between §31A-21-105 and §31A-21-

106 (1986). Statutes are construed in a manner to eliminate inconsistency rather than to create inconsistency.

Farmers also overlooks *U.S.F.&G. v. Sandt*, 854 P.2d 519 (Utah 1993), where the Utah Supreme Court expressly looked to the insurance application to determine the amount of coverage the insured was purchasing. The Court there stated:

> A reasonable purchaser of insurance could surely read the USF & G policy to provide $300,000 coverage in excess of public liability insurance coverage. **The application for insurance (a request for policy change in this case) stated that the underinsured motorist coverage was $300,000 each accident.** At the beginning of the section [of the application] on underinsured motorist coverage is a blank for the insertion of the dollar amount for the limit of liability for "each accident". That section's language indicates that the insured has a fixed maximum dollar amount of coverage.

Id. at 523, emphasis added. The *Sandt* court then went on to compare the application language above with the insurance contract itself, and concluded there was an ambiguity. The critical point is that the *Sandt* court expressly referred to the insurance application as part of the overall insurance contract with the insurer. The trial court, however, refused to consider the policy as having any bearing on the intent of the parties to this insurance contract. This was a clear legal error.

Farmers trots out the case of *Cullum v. Farmers Ins. Exch.*, 857 P.2d 922 (Utah 1993) in support of its argument. But *Cullum* did not involve a statement in the application for insurance setting forth what the policy limits would be. *Cullum* would truly be analogous if the *Cullum* insureds had requested $100,000.00 in insurance, but Farmers only issued a policy for $25,000.00, the statutory minimum. In that situation, one would hope that this court would easily conclude that the *Cullum* insureds would be entitled to the full coverage set forth in the application.

POINT TWO

FARMERS SHOULD BE ESTOPPED TO REFUSE PROVIDING THE COVERAGE SET FORTH IN THE INSURANCE APPLICATION

In *Allen v. Prud. Prop. & Cas. Ins. Co.*, 839 P.2d 798 (Utah 1992) the court recognized that traditional contract doctrines such as estoppel would still be needed to fill in the gaps between legislative and executive regulation of insurance policies. This case simply calls for the application of one of those traditional contract doctrines, that of estoppel. In the application, printed by Farmers, it created an impression that it was selling "all perils" insurance. The insureds expressly relied upon that application and the impression that they were being offered "all perils" insurance. Having created that impression by their own written application, Farmers should now be estopped to argue that the policy is not so broad. The case of *Perkins v. Great-West Life Assurance Co.*, 814 P.2d 1125 (Utah App. 1991) only held that a party could not rely upon a course of conduct in paying claims to create estop the insurer from relying upon the written expression of the parties' intent. Where the insurer has indicated in writing what the contract will consist of, the court should estop the insurer from doing otherwise.

Farmers also makes a factual argument that the Insureds were unreasonable as a matter of law in relying upon the insurance application as opposed to the policy. Questions of reasonableness are ordinarily left up to a jury, who might well beg to differ with Farmers' counsel on that point.

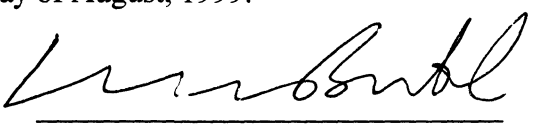
CONCLUSION

To adopt Farmers' rule would completely negate the intent of the parties as expressed in the insurance application, which is a contract in and of itself. It would allow insurers to substitute insurance with less coverage than is agreed to in the application, so long as the application is not physically attached to the policy. It would relegate insurance purchasers to a sort of third-class

consumer world, where "bait and switch" is judicially condoned, leaving insurance purchasers with less protection than consumers of any other good or service. Requiring insurers to comply with the written terms of an insurance application only promotes honesty and fair dealing between insurers and prospective insureds.

For these reasons, the court should construe the application with the policy and any attachments to the policy in determining the intent of the parties. The insureds are not suggesting that the court go beyond the written expressions of the parties' intent, to create a new contract out of whole cloth based upon the insureds' reasonable expectations. The insureds only ask this court to enforce the *Allen* rule, by requiring the insurer to live up to the complete written transaction between the parties, including the application.

DATED this 16th day of August, 1999.



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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of August, 1999, I served a true and correct copy of the foregoing APPELLANTS' REPLY BRIEF upon the following, by depositing copies thereof in the United States mails, postage prepaid, addressed as follows:

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