

2002

Jimmy Calhoun and John Calhoun v. State Farm Mutual Automobile Insurance Company and Progressive Insurance Company : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JIMMY CALHOUN and JOHN CALHOUN,

Plaintiffs/Appellants,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY and
PROGRESSIVE INSURANCE COMPANY,

Defendants/Appellees.

CASE NO. 2002080¹₅ - SC

REPLY BRIEF OF APPELLANTS

Appeal from a Judgment of Third Judicial District Court
of Salt Lake County, State of Utah
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UTAH SUPREME COURT

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PAT BARTHOLOMEW
CLERK OF THE COURT

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POINT ONE

STATE FARM AND PROGRESSIVE CONCEDE THAT THEIR POLICIES MUST CONFORM TO THE STATUTORY REQUIREMENTS

Since 1973, the Utah legislature has required each owner of a motor vehicle to either buy insurance or be self-insured. U.C.A. §41-12a-301(2)(a) requires “. . . every resident owner of a motor vehicle [to] maintain owner’s or operator’s security in effect at any time that the motor vehicle is operated . . . within the state . . .”. This “security” is legislatively defined as “an insurance policy . . . conforming to Section 31A-22-302 . . .”. U.C.A. §41-12a-103(9). For those owners who choose to purchase insurance rather than self-insure, “[e]very policy of insurance . . . purchased to satisfy the owner’s or operator’s security requirement of Section 41-12a-301 shall include motor vehicle liability coverage under Sections 31A-22-303 and 304. . .”. There is no question that John purchased the Progressive policy to satisfy the required security, and Jimmy purchased the State Farm policy to satisfy the required security.

This Court has repeatedly acknowledged that an insurance policy purchased to satisfy the minimum security requirements of §41-12a-301 must provide the coverages required by statute. *Arredondo v. Avis Rent A Car System, Inc.*, 2001 UT 29; 24 P.3d 928; 418 Utah Adv. Rep. 3; 2001 Utah LEXIS 54. The Progressive policy concedes this, by stating that “[w]hen we certify this policy as proof of financial responsibility, this policy will comply with the law to the extent required”. This required coverage under §31A-22-303(1)(a)(ii)(A) requires the policy to “insure the person named in the policy”. In this case, the person named in the Progressive policy is John. This Court has previously taken “note that the language of Code section 31A-22-303 requires, among other things,

that ‘an owner’s policy . . . insure the person named in the policy’.” *Dairyland Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 882 P.2d 1143, 1145 fn.2; 249 Utah Adv. Rep. 31; 1004 Utah LEXIS 68. The Court need offer no opinion on the question of whether a policy may legitimately exclude the named insured’s use of other vehicles owned by the named insured, a question not present here, because it is conceded that John was driving an SUV owned by Jimmy. This Court should hold, however, that when a person purchases insurance, as a named insured, that insurance must insure them while driving another person’s vehicle with that person’s permission.

POINT TWO

PROGRESSIVE DID NOT WRITE AN “OWNER’S POLICY” SEPARATE FROM AN “OPERATOR’S POLICY”

State Farm and Progressive argue that §31A-22-303(1)(a)(ii)(A) does not require them to insure the named insured while driving any other vehicle other than the listed vehicle. This sweeping argument (which goes well beyond consideration of the named driver exclusion) is based upon a distinction between an “owners policy”, described in §31A-22-303(1)(a)(ii)(A), and an “operator’s policy” described in §31A-22-303(1)(a)(ii)(B). According to the insurers, a policy can be either one or the other but, apparently, not both. Thus, a named insured who owns a vehicle gets coverage while driving his own vehicle, only. And a named insured who does not own a vehicle gets coverage while driving someone else’s vehicle, only. The insurers argue that the Progressive policy is an “owner’s policy” only, and that any grant of coverage beyond John’s use of his own listed vehicle is a matter of contract between Progressive and John. This Court should decline to draw this hair-breadth

distinction.¹

First, the Progressive policy purchased does not draw this distinction. It does not identify whether it is an “owner’s policy” or an “operator’s policy”. It simply calls itself a “UTAH MOTOR VEHICLE POLICY”. The actual contents of the policy reveal it to be both an “owner’s policy” and an “operator’s policy”. This is apparent in the insuring clause:

“[w]e will pay damages . . . for property damage for which an insured person becomes legally responsible because of an accident arising out of the ownership, maintenance, or use of a vehicle.”

The policy defines an “insured person” as the named insured “with respect to an accident arising out of the ownership, maintenance, or use of any vehicle with the express or implied permission of the owner of the vehicle”. This tracks the language of the purported “operator’s policy” portion of the statute. But the Progressive policy also provides the coverage set forth in the “owner’s policy” portion of the statute when it includes as an insured person “any person with respect to an accident arising out of that person’s use of a covered vehicle with the express or implied permission of [the named insured]”. The term “covered vehicle” is defined to include “any vehicle shown on the Declarations Page”. Having drawn no distinction between owner’s and operator’s coverage in the policy, and having purported to grant both kinds of coverage, Progressive is now in no position to argue that the policy be limited to just the scope of §31A-22-303(1)(a)(ii)(A). The insured, upon reading the policy, would have no way of knowing that Progressive intended to only provide the

¹A majority of this Court has never sliced a statutorily required policy into two portions, an “owner’s policy” and an “operator’s policy”. This distinction has always been found as dicta in concurring, minority opinions.

statutorily required coverage of §31A-22-303(1)(a)(ii)(A) but not the statutory coverage in §31A-22-303(1)(a)(ii)(B). At a minimum, before arguing such a distinction to this Court, the insurer must draft a policy that contains such a distinction. This Court has repeatedly stated that it has no obligation to re-draft policy provisions for the benefit of either party.

POINT THREE

THERE IS NO STATUTORY DISTINCTION BETWEEN AN "OWNER'S POLICY" AND AN "OPERATOR'S POLICY"

Second, the Legislature has used the terms "owner's security", "operator's security", and "owner's or operator's security", interchangeably, in referring to complete insurance coverage for both owners and operators. For example, §41-12a-103(9) uses "owner's or operator's security" as a single descriptive name for a policy which conforms to §41-12a-302. Also, it appears that the phrase "owner's or operator's security" is used as a single descriptive phrase in §41-12a-302. The apparent distinction being made in §41-12a-103(9) between "owner's security" and "operator's security" refers to a situation where an insured buys both an owner's policy and an operator's policy, but from separate insurers. This would explain the reference to a "combination of policies" to satisfy the required financial responsibility described in §41-12a-103(9) and in §31A-22-302. If one does not read the statute this way, the phrase "combination of policies" has no meaning.

Further, accepting the position of the insurers in this case would upset the long-held view that the Financial Responsibility Act insures both the named insured and the vehicle listed in the policy. If these insurers are correct, then no insurer is required to insure anything beyond the permissive use of the listed vehicle. A named insured and/or a household member could be left completely uninsured

when borrowing any other vehicle not listed in the named insured's policy. This completely sabotages the statutory intent of creating a safety net of financial responsibility for all automobile accidents.

The Court should also be given pause by the fact that acceptance of an exclusion for vehicles not listed in the policy, owned by resident relatives, leads to the anomalous result that, for instance, a couple who never marries may swap insured cars without a gap in coverage, while a married couple who swaps separately insured cars does so at their financial peril. In yet another scenario, the insurers' distinction would result in the named insured being able to loan his car to a friend without worry that there will be coverage if involved in an accident, but not being able to borrow a car from a friend without worrying whether he will have any insurance coverage in an accident.

Presumably, the insurers' real concern is that a named insured will title each of several vehicles in separate names of family members, and only purchase insurance for one vehicle. This Court need not opine on whether public policy would allow an exclusion for uninsured vehicles owned by a household member. The Calhouns attempted to play by the rules; they did each buy insurance. As to them, the exclusion for vehicles owned by other household members has no legitimate rationale. Thus, the Calhouns only argue that the Court acknowledge that when a policy of liability insurance is purchased to independently satisfy the statutory financial security requirements, it may not contain an exclusion denying coverage when the named insured/named excluded driver borrows a car insured under the policy excluding coverage.

This result follows from the recognition that the named driver exclusion statute essentially creates a new household consisting only of the named, excluded driver. The automobile liability insurance statutes and the insurance policies that implement them are based around insuring a named

insured and a household. The named, excluded driver statute essentially carves out a new, subset of the original household. Thus, in this situation only, the named excluded driver and the original named insured form two separate statutory households. If the Court adopts this rationale, the non-owned vehicle exclusion remains a viable tool in every other context to combat a named insured's efforts to get a free lunch by only insuring one vehicle in a multi-vehicle household. On the other hand, it thwarts the efforts of an insurer who has demanded and received a premium from the named, excluded driver, to get a free lunch by avoiding coverage for its named insured when borrowing insured vehicles from other family members. The important public policy of ensuring financial responsibility and compensation of innocent third parties in the event of an accident is also served. And the essential bargain between insurer and insured is honored: Progressive charged John a premium knowing who it was insuring, and State Farm did not.

POINT FOUR

STATE FARM TOOK THE RISK THAT PROGRESSIVE WOULD NOT PROVIDE THE MINIMUM STATUTORY LIABILITY INSURANCE

The alternative position is that Progressive was within its rights when it excluded coverage for John's use of Jimmy's SUV. In this scenario, State Farm still has to provide the liability coverage and insure John. This position finds support in the Legislative history to the 2000 amendments to the named driver exclusion. These amendments were contained in HB 423. While those amendments do not apply to the Calhouns' policies, which pre-dated the amendments, the understanding of the insurance industry and the legislators involved is revealing. A letter from GEICO insurance to Rep. Mel Brown, the Speaker of the House (contained in the file on HB 423 at the Office of Legislative

Research) states:

As written, **this language [the named driver exclusion statute] requires insurers to determine if an excluded person is sufficiently covered elsewhere before writing the named-driver exclusion, and creates an on-going requirement to ensure the excluded driver continues to satisfy mandatory insurance requirements elsewhere.** This is simply impractical and unworkable. Insurers must try to get information from a third-party, not in privity of contract or any other reason to provide us with accurate and timely information. What if the excluded provides proof of appropriate insurance elsewhere and based upon this representation we write the exclusion for our insured. How would we know if that excluded driver cancelled his/her other policy immediately afterwards? **According to the statutory obligation, the requirement to ensure the excluded driver satisfies the requirements is on-going.** Since we have no way of effectively tracking this, the named driver exclusion currently provided is very risky at best. **Insurers are surely on the hook** where they did not have accurate information regarding the third party.

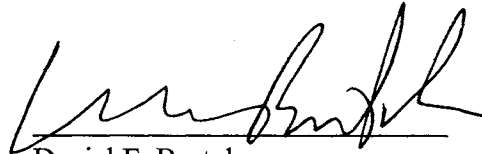
(Emphasis added; full document attached as Addendum.) While the statute may have been “impractical and unworkable” from State Farm’s point of view, making the use of the named driver exclusion “very risky at best”, that is what the statute provided. It is not this Court’s obligation to re-write statutes any more than it must re-write contracts.

CONCLUSION

The Calhouns’ approach makes the statutes workable and consistent with the apparent intent of the Legislature. It honors their efforts to follow the rules, by each buying insurance for their respective vehicles. The insurers, Progressive and State Farm, on the other hand, offer a sweeping argument that would completely disrupt and undermine the statutory scheme of insurance and the expectations of the parties when they attempted to execute a named-driver exclusion. While either result is logical and justified, the Calhouns believe that making Progressive liable most closely honors the expectations of the parties. After all, Progressive agreed to insure John Calhoun and State Farm

did not. If Progressive's limited purpose policy is valid, then State Farm is "surely on the hook" as GEICO stated to Rep. Brown.

DATED this 28 day of July, 2003.



Daniel F. Bertch


Attorney for Plaintiffs/Appellants Calhouns

CERTIFICATE OF SERVICE

I hereby certify that on this 28 day of July, 2003, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, and by deposit in first class mail, postage prepaid to the following counsel of record:

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ADDENDUM

A

Letter from GEICO to Rep. Mel Brown

Lori Beth

Mel,

In follow-up to the discussion in the UT Legislative Planning Meeting, I want to reiterate GEICO's concern with existing UT law addressing the named driver exclusion and need for remedial legislation in this matter.

The specific UT code section regarding excluded drivers is Section 31A-22-303(7) which states:

A policy of motor vehicle liability coverage under Subsection 31A-22-302(1) may specifically exclude from coverage a person who is a resident of the named insured's household, including a person who usually makes his home in the same household but temporarily lives elsewhere, if each person excluded from coverage satisfies the owner's or operator's security requirement of Section 41-12A-301, independently of the named insured's proof of owner's or operator's security.

As written, this language requires insurers to determine if an excluded person is sufficiently covered elsewhere before writing the named-driver exclusion, and creates an on-going requirement to ensure the excluded driver continues to satisfy mandatory insurance requirements elsewhere. This is simply impractical and unworkable. Insurers must try to get information from a third-party, not in privity of contract or any other reason to provide to us accurate and timely information. What if the excluded provides proof of appropriate insurance elsewhere and based upon this representation we write the exclusion for our insured. How would we know if that excluded driver cancelled his/her other policy immediately afterwards? According to the statutory obligation, the requirement to ensure the excluded driver satisfies the requirements is on-going. Since we have no way of effectively tracking this, the named driver exclusion currently provided is very risky at best. Insurers are surely on the hook where they did not have accurate information regarding the third party.

Therefore, we would like the statutory language amended to relieve insurers of this on-going (and impractical) requirement to "keep tabs" on a third-party. Instead, we want language permitting the exclusion where the insured and the excluded driver acknowledge the exclusion only. We propose the following amendment (or something similar):

Section 31A-22-303(7) is amended as follows:

A policy of motor vehicle liability coverage under Subsection 31A-22-302(1) may specifically exclude from coverage a person who is a resident of the named insured's household, including a person who usually makes his home in the same household but temporarily lives elsewhere, if each person excluded from coverage satisfies the owner's or operator's security requirement of Section 41-12A-301, independently of the named insured's proof of owner's or operator's security provided the exclusion is with the written permission of the named insured and the person to be excluded.

What do you (and Gary) think? We would like this proposal to be introduced in the upcoming session. Thanks in advance for your consideration and thoughts and Happy New Year! Lori-Beth