

1968

Harold Robinson and William C. Ward, Dba Crystal Palace Market v. Employers' Liability Assurance Corporation, Limited : Brief of Appellant

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

HAROLD ROBINSON and WIL-
LIAM C. WARD, dba CRYSTAL
PALACE MARKET,

Plaintiffs and Appellants,

- vs. -

EMPLOYERS' LIABILITY
ASSURANCE CORPORATION,
LIMITED, a corporation,

Defendant and Respondent.

BRIEF OF APPELLANTS

Appeal from the District Court
of Salt Lake County
Honorable Stewart M. Hansen, Judge

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FILE

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Clerk, Supreme Court

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- vs. -

EMPLOYERS' LIABILITY
ASSURANCE CORPORATION,
LIMITED, a corporation,

Defendant and Respondent.

Case No.
11,308

BRIEF OF APPELLANTS

STATEMENT OF KIND OF CASE

This is an action for indemnity, based upon the refusal of the defendant to afford automobile liability coverage to the appellants under the loading and unloading provision of its policy.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the summary judgment in the lower court as a matter of law and judgment in their favor as a matter of law for the sum of \$15,000, the amount paid to settle the claim of Robert E. Kodat and for their costs incurred in the lower court and on this appeal.

STATEMENT OF FACTS

On November 10, 1965, Robert E. Kodat filed suit against Harold Robinson and William C. Ward dba Crystal Palace Market and demanded of them damages in the sum of \$157,500 arising from personal injuries he received in an accident which allegedly occurred on November 26, 1962, at the premises of the Crystal Palace Market at 238 South Thirteenth East, Salt Lake City, Utah (R. 29). Appellants notified defendant Employers' Liability Corporation (hereinafter called Employers) of the suit and requested that it afford protection against Mr. Kodat's claim under the loading and unloading coverage on the automobile policy provided to Associated Foods, Inc. (R. 115). At the time Employers was notified of the suit, Crystal Palace Market also notified its general liability insurer, United Pacific Insurance Company (hereinafter called United), of the suit of Robert E. Kodat.

When the case was tendered to Employers, it refused to afford coverage, denying Associated Grocer's truck was being used in unloading (R. 15).

Thereafter, United and Crystal Palace advised Employers they deemed Employers coverage was primary under the automobile liability "loading and unloading" clause and that they would look to Employers for indemnity.

United employed Raymond M. Berry to appear and represent Crystal Palace in the defense in Civil

No. 160969. Ultimately, after considerable investigation and negotiation the claim of Robert E. Kodat was settled for the sum of \$15,000.

Plaintiffs and United are seeking to recover the sum of \$15,000 paid to Robert E. Kodat plus defense costs in the sum of \$139.95 incurred in preparation of Civil No. 160969 (R. 57). The appellants have waived any claim for an attorney's fee. Plaintiffs claim primary liability was on Employers under the automobile loading and unloading.

ACCIDENT

On November 26, 1962, Robert E. Kodat, employed as a truck driver by Associated Foods, Inc., made a delivery to the Crystal Palace Market (R. 29). On this morning he took a load of staple goods to Crystal Palace Market at 238 South Thirteenth East in Salt Lake City, Utah. He arrived at the Crystal Palace Market at about 7:00 a.m. (R. 30) before the Crystal Palace Market was open for business and before its employees had arrived at the place of business. Mr. Kodat backed his truck up to the loading dock at the rear of the store.

After backing up to the loading dock, Mr. Kodat got out of the truck with bills of lading in his left hand and started to go up the dock to start checking out his load for the delivery at this address (R. 30). He had to check the bills of lading against the goods to be delivered to the Crystal Pal-

ace Market because he had goods for more than one store upon the truck (R. 31).

To get on the dock, Mr. Kodat allegedly used the stairway at the north end of the dock. The loading dock is located to the rear or west end of the store. It is 5'8" high and has approximately eight steps leading from the ground to the top of the dock. There is a stairway along the north side of the dock running from west to east and there is a handrail along the north side of the stairway. This handrail is situated so that ordinarily a person walking up the stairway would have his left hand on the handrail.

In his deposition, Mr. Kodat stated that he had the bills of lading on a clipboard in his left hand and that he slipped as he was going onto the dock to check the load for unloading (R. 31). It was his recollection that he fell from about the fourth step. He was unable to grasp the handrail because of the clipboard in his left hand. There were no known eyewitnesses to the accident and the store was not scheduled to open until 7:45 a.m. when employees arrived at work (R. 2). Mr. Kodat's load was picked up at 6:00 a.m. at the Associated Grocer's warehouse and it was the practice for truck drivers to unload their trucks at the markets, including the Crystal Palace Market.

INJURY

In the accident Mr. Kodat claimed to have re-

ceived the following injuries: (1) a cracked wrist; and (2) a back injury (Page 8, Kodat Deposition).

For the back injury he required extensive surgical service. He was operated on by various doctors and the major operation involved a spinal fusion at L-4, L-5, S-1, and subsequently a second operation was required at this same site to repair the fusion.

MEDICAL SPECIALS

Mr. Kodat claimed the following medical specials:

L.D.S. Hospital	\$372.85
Dr. Madison Thomas, Psychiatrist	130.00
A. R. Reynolds	17.33
Dr. Burke Snow	364.00
Dr. Dalton	150.00
Dr. Capel	435.00
Pharmacy	6.80
Cottonwood Hospital (estimated) ..	350.00
	<u>\$1,843.98</u>
	(R. 59)

LOSS OF EARNINGS

Mr. Kodat claimed to have been making \$100 per week and estimated his loss of wages as approximately \$5,000 (R. 37).

STATE INSURANCE FUND

At the time of the accident, Mr. Kodat was covered by workmen's compensation insurance with the State Insurance Fund. The State Insurance Fund

spent \$10,269.84 on his behalf for compensation and medical. Thereafter, the State Insurance Fund joined with the plaintiff in instituting Civil No. 160969 against Harold Robinson and William C. Ward dba Crystal Palace Market (R. 59).

RESPONDENT'S LIABILITY COVERAGE

Employers was the carrier for the automobile liability insurance on the trucks owned, operated and used by Associated Foods, Inc. Their policy afforded coverage in the sum of \$300,000 for injuries to any one person in any one accident on the date of the injury to Mr. Kodat. The pertinent provisions of defendant's insurance policy other than the limits are as follows:

Insuring agreement 1 provided:

"I. Coverage A — Bodily Injury Liability
To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or *use* of the automobile.

II. Defense, Settlement, Supplementary Payments

With respect to such insurance as is afforded by this policy for bodily injury liability and

for property damage liability, the company shall

(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient.

III. Definition of Insured

(a) With respect to the insurance for bodily injury liability and for property damage liability, the unqualified word 'insured' includes the names insured, and, if the named insured is an individual, his spouse, if a resident of the same household, *and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or such spouse or with the permission of either.* The insurance with respect to any person or organization other than the named insured or such spouse does not apply:

(1) to any person or organization or to any agent or employee thereof, operating an automobile sales agency, repair shop, service station, storage garage or public parking place, with respect to any accident arising out of the operation thereof, but this provision does not apply to a resident of the same household as the named insured, to a partnership in which such resident or the named insured is a partner, or to any partner, agent or employee of

such resident or partnership.

(2) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer, injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer."

With respect to the conditions, Section 26, Purposes of Use defines:

"(c) Use of the automobile for the purposes stated includes the loading and unloading thereof."

Condition 6 reads:

"Severability of Interests. Coverages A and B. The term 'the insured' is used severally and not collectively, but the inclusion herein of more than one insured shall not operate to increase the limits of the company's liability." (R. 16-18).

GENERAL LIABILITY POLICY

United, under policy No. CLP 52602, effective from 9-10-62 to 1-10-63, under Coverage A, afforded Crystal Palace Market \$50,000 coverage for injuries to any one person arising from any one accident. This policy, like the policy of Employers, provides for supplementary defense costs.

The other insurance clause of the general liability policy of United is as follows:

"14. Other Insurance — Coverages A and B.

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 stated in the declaration bears to the total applicable limit of liability of all valid and collectible insurance against such loss, provided, however, *that the insurance shall (a) not apply, Division 2, to the extent that any valid and collectible insurance, whether on a primary, excess of contingent basis, is available to the insured with respect to loss arising out of the ownership, maintenance, operation, use, loading or unloading of (1) any automobile at the premises or the ways immediately adjoining, or (2) watercraft, and (b) be excess insurance (1) over any other valid and collectible insurance with respect to temporary substitute, hired or non-owned automobiles, or * * *.*" (R. 25).

ARGUMENT

POINT I.

THE INJURY TO ROBERT E. KODAT AROSE
FROM THE LOADING AND UNLOADING OF
THE TRUCK INSURED BY RESPONDENT.

Loading and unloading are words of expansion. They were intended by the underwriters to cover liability when the truck was stationary, otherwise the phrase is meaningless in the policy.

Loading begins when the truck crew receives the merchandise at the Associated Grocer's warehouse and the unloading operation is not completed until the merchandise is removed from the truck

by the driver of the truck or employees of the consignee.

Any use of the truck between the time loading is starting and prior to the completion of unloading is covered.

Each case must be considered with respect to the facts involved. Utah has adopted the modern liberal view in interpreting the loading and unloading phrase.

In *Pacific Auto Insurance Co. vs. Commercial Casualty Insurance Co.*, (1945), 108 Utah 500, 161 P.2d 423, coverage was afforded under the automobile liability coverage for claims being made by a blind man who had walked into an open manhole. In this case employees of a brewing company were delivering regularly to a restaurant. They parked the truck at the curb, took some kegs of beer off the truck and placed them on the sidewalk. Thereafter, the truck crewman went into the building and opened the manhole or trapdoor in the sidewalk to which the kegs of beer were loaded into the basement of the building by means of an elevator. While the beer kegs were being taken into the basement, the blind man fell into the open manhole. The question for determination was whether under the policy of insurance the lowering of kegs into the basement constituted a part of the process of unloading the truck. Answering the question in the affirmative the court said:

“The policy of the plaintiff was written, not to cover the trucks, not to protect the trucks, but to protect and cover the risks of the Brewing Company’s business in the operation of its trucks. The policy specifies that the truck is to be used only in the business of the Brewing Company, including loading and unloading of the trucks in making commercial deliveries. Commercial delivery as a matter of common knowledge includes taking the articles from their usual place of storage or assembly to the place of destination and turning them over to the control or possession of the purchaser or receiver. Sometimes delivery may be made by depositing things on the sidewalk or on a platform or other convenient place. That, however, is usually indicated by the custom of the business or agreement of the parties. Normally a delivery is not completed until the deliveror has finished his handling of the article, has completed his assignment or task of putting the articles into the possession of the receiving party.”

The foregoing case also holds there must be some causal relationship between the use of the insured vehicle and the accident for which recovery is sought. The case does show that the injury or damage need not be directly caused by the truck or automobile and that the requirement is satisfied, as to causal relationship, if there is some connection with the injury and the use of the vehicle.

Since the words loading and unloading are words of expansion in a liability policy, most courts correctly find coverage for omnibus insureds for acci-

dents arising out of loading and unloading hazards, without regard to whether or not the injury arose from being struck or injured by the truck.

Wagman vs. American Fidelity & Casualty Co., (1952), 304 N.Y. 490, 109 N.E. 2d 592, is a leading case which has attracted a lot of comment. In this case a stranger claimed coverage under the automobile liability policy issued to the owner of the truck for injury caused to him by another stranger. Wagman, the stranger seeking coverage, was an employee of Bond Stores in New York and Bond Stores were insured under a general liability policy which did not cover as an insured, their employees. A trucking concern was insured for automobile liability coverage with American Fidelity & Casualty Co. and this policy covered as an insured any person using (loading and unloading) the automobile and any person legally responsible for such use. The truck insured was employed by Bond Stores to transport garments from one of its stores to another. The truck was parked at the curb in front of a store at the time of the accident. Two of Bond's employees rolled a rack of clothing across the sidewalk to the curb line and garments from the rack were handed to a helper inside the truck who arranged them on a rack in the truck. The driver and the helper were employees of the trucker and did not leave the truck. None of Bonds employees entered the truck or brought garments further than the curb line. Bond's store manager, Mr. Wagman, the stranger who

sought coverage, was on the sidewalk counting and checking garments and supervising the pickup but did not participate in the actual movement of garments. While the manager, Wagman, was on his way back to the store to check for further goods to be shipped, he bumped into a pedestrian, causing her to fall on the sidewalk and sustain serious personal injuries. A declaratory judgment action was instituted by Wagman and he was held to be an insured under the omnibus clause of the truck policy because of the loading and unloading clause of the policy. The court said loading and unloading embraces not only immediate transfer of goods to and from the vehicle but the complete operation of transferring the garments between the vehicle and the place to or from which they are to be moved and such coverage was not precluded because of the fact that no employee of the trucker was involved because the omnibus clause extends coverage to anyone using the truck and the manager was so using it at the time of the accident.

McCloskey and Co. vs. Allstate Insurance Co., (1966), U.S. Cir. Ct. App., Dist. of Col., 358 F.2d 544, discloses the argument generally made against affording coverage. A favorite argument of the automobile liability insurer for not affording coverage for loading and unloading is that the accident was not caused by the truck. In this case Allstate argued the general contractor was not entitled to coverage under the auto liability clause for loading and un-

loading because Mawyer, the foreman for the subcontractor who was injured, was charged by the contractor with unloading steel at the time he was struck. Mawyer was struck by a clamshell bucket of a crane owned by McCloskey at a time Mawyer was supervising the placing of timbers on the ground to form a platform for the steel to be placed upon once actual unloading was started. The lower court ruled against McCloskey and Company, but on appeal it was reversed and the court said that where all major preparatory acts, except the attachment of a sling to a crane, were under way or completed, that loading and unloading had commenced within the meaning of the standard loading and unloading clause even though no steel had been moved.

Continental Casualty Co. vs. Duffy et al., (1966) 26 A.D. 2d 60, 272 NYS 2d 470, shows that it is causally connected if the accident arises because the truck is on the premises to be unloaded without regard to whether or not the truck is a tool or piece of equipment causing the accident. In this case use of the truck did not cause the accident. However, the court held there was coverage for the owner of the tavern under the truck owner's liability policy. In this case the seller of whiskey had a driver making a delivery at a tavern at a time when wind blew doors over striking the driver. Prior to starting the unloading the driver had opened the doors of the tavern and there was no bar to brace them so they would not blow over. The court had no difficulty

in finding a direct causal connection between the accident and unloading and noted that if the driver had not been on the premises, the doors would not have struck him.

Float-Away Door Co. vs. Continental Casualty Co., (1967) 5th Cir. 372 F.2d 701, supports the view that the words loading and unloading are words of expansion. In this case Float-Away loaded a trailer owned by Dance at a factory in Georgia. Continental had the auto liability coverage on Dance. The trailer was delivered to Universal Manufacturing Co. in Ohio. At the time it was being unloaded, an employee of Universal was seriously injured. The employee sued Dance and Float-Away for negligence. Continental admitted coverage for Dance but declined to defend Float-Away. Action was commenced by Float-Away for declaratory judgment and the court held that Float-Away was using the truck and entitled to coverage under Dance's automobile liability policy even though the accident occurred in Ohio many miles and many hours from the time Float-Away did the loading.

In *Hertz Corp. vs. Bellin*, (1967), 280 A.D. 2d 1101, 284 NYS 2d 140, an employee was returning to the truck with an empty dolly and struck a person injuring him. The court held there was coverage for injury under the loading and unloading and that the phrase "loading and unloading" covered *the entire operation of making pickups and deliveries*.

Washington Insurance Corp. vs. Maher, (PA 1942), 31 Del. Co. 755, 160 ALR 1272, involves the movement of beer. In this case a truck driver parked his vehicle in front of a restaurant so he might remove beer kegs from the basement. He went into the basement, rolled the kegs along the floor to a point near the sidewalk pavement where he left the kegs at the foot of the stairs which led from the basement to the sidewalk. He went up the stairs and pushed the sidewalk door open and as the door was pushed open it struck a pedestrian causing injury. This was held covered because the truck driver was on the premises to make a delivery and that this was sufficient causal connection without the injured party being struck by the truck.

Thompson Heating Corp. vs. Hardware Indemnity Insurance Co., (1944) 74 Ohio App. 350, 58 NE2d 809, involved injuries to a pedestrian who tripped over a hose over a parked truck across the sidewalk into a building into which granulated rock wool insulation was being blown. At the time of the accident the blower was unattached to the truck, but nevertheless, the provision for loading and unloading was held to cover the claims being made.

Bobier vs. National Casualty Co., (1944), 143 Ohio St. 215, 54 NE2d 798, is another Ohio case showing that in an expansion clause of this type you endeavor to interpret the policy to afford coverage. In this case the insured's employees were carrying a stove from the furniture store of the third

party preparing to load it into one of the insured's trucks and in doing so damaged a davenport, the property of the store owner. The court said there was coverage and stated:

"From a consideration of the entire policy, it seems clear that it was the intention of the parties to cover liability arising in some incidences when the truck was stationary. Unless this be true, the provision as to loading and unloading is meaningless as it could hardly be claimed that loading or unloading would take place while the truck was in motion. . . . We think that the loading begins when the employees of the plaintiff connected with the truck receive the article as part of the continuing operation, place it on the truck. . . ."

Raffel vs. Travelers Indemnity Co., (1954), 141 Conn. 389, 106 A.2d. 716, involved a situation where a store sent a roll of linoleum which would contain more than the amount needed to do a job with the understanding that it would call back and pick up the remainder. The roll, about six feet long and weighing two to three hundred pounds, was delivered to an enclosed porch and stood on end near the front door of the house. Some hours later it fell and seriously injured a ten year old girl. This was a case of first impression in Connecticut, and the court held there was coverage in adopting the completed operations rule.

The causal connection was that the truck brought the linoleum to the premises.

Industrial Indemnity Co. vs. General Insurance Co. of America, (1962), 26 Cal. Rptr. 2d 568, holds there is coverage where the accident was not caused by the truck. In this case a truck insured under an automobile liability policy was delivering a load of concrete pipe to the job site. The truck driver requested and received the assistance of a crane owned by the contractor which was operated by the contractor's employee to effect the unloading. The truck driver affixed a pipe hook to a section of pipe and then signaled the crane operator to lift the pipe. While the section of pipe was being removed, the truck driver, standing on the bed of the truck, was injured when struck by a section of pipe being lifted by the crane. Thereafter, the truck driver brought action against the crane operator and the contractor, and they in turn sought coverage from the liability carrier on the truck.

In the declaratory judgment suit which followed, the District Court of Appeals in California held:

“1. That a person loading or unloading the truck is using the truck within the meaning of the automobile liability policy covering the truck and is, therefore, an additional insured under the policy.

2. That while the truck here did not form a legal basis of liability to the truck driver, the truck insurer was obligated to defend and indemnify the crane operator and its owners as additional insureds because their liability

to the truck driver was incurred while using the truck.

3. That while the contractor's liability policy covered the contractor, the negligent crane operator was not covered by the policy as an additional insured and, therefore, that the truck policy under which the crane operator was covered was primary since the only insurance company covering a negligent employee is deemed primary over a policy covering a person vicariously liable so that the truck insurer was obligated to furnish a defense to the action against the crane operator and its owners."

Travelers Insurance Co. vs. W. F. Saunders Sons, Inc., (1963), 18 A.D. 2d 162, 238 NYS 2d 495, shows the injury did not have to be caused by the truck for coverage to be effective for loading and unloading. In this case a workman was injured when a crane owned by a subcontractor tipped over while being used to convey concrete in a bucket from a transit truck to the place of pour. The court applied the completed operations test and stated that since the truck had to necessarily remain at the place it was until the unloading was completed, it was necessarily being used in the unloading process. The case is significant because it shows coverage exists when the truck is at the premises of the consignee awaiting for work to be done that is customarily a part of the unloading process.

Drew Chemical Corp. vs. American Fore Loyalty Group, (1966), 90 N.J. Supp. 582, 218 A.2d 875,

is another case where the truck is in the unloading process even though actual unloading has not started. In this case Byford, an employee of Nappi, the owner of the tank truck company, drove the truck to the premises of Drew Chemical for the purpose of delivering a fatty acid liquid. Byford was injured while steam under pressure was being run through Drew's 18 foot hose to dislodge an impediment so that the unloading of the acid could begin. Byford was covered by workmen's compensation from his employer, Nappi. Byford instituted suit against Drew, alleging Evans, an employee of Drew, was negligent in causing the accident. The policy involved defined use of the automobile to include the loading and unloading thereof. The court construed the meaning and scope of the words loading and unloading using the completed operations test as used by this court in *Pacific Auto Insurance Co. vs. Commercial Casualty Insurance Co.*, *supra*, and said that all that was necessary to establish coverage was that the act or omission resulted in an injury which was necessary to carry out the unloading of the truck.

Loading begins when the truck which receives the merchandise to place aboard. The unloading operation does not end until the merchandise is removed from the truck. In this case the loading began when Mr. Kodat received the merchandise at the Associated Grocers warehouse on the morning of the accident. It was not ended until all merchandise from

the truck had been unloaded. Any use of the truck prior to the completion of the unloading process is within defendant's coverage.

Parking the truck and taking the bill of lading up to check out the load were preparatory acts necessary to complete in the unloading process. The backing of the truck up to the dock and the parking of it was a start of the preparatory act of unloading. The injury to Mr. Kodat was causally connected to the unloading. Except for being on the premises to unload the truck the accident would not have happened.

Kodat's injury in this case was casually connected with the unloading in the same manner as Mawyer's injury was casually connected in *McCloskey and Co. vs. Allstate Insurance Co., supra*, when Mawyer was placing timber to unload steel upon. It is causally connected just as Duffy's injury was in the case of *Continental Casualty Co. vs. Duffy, supra*, when he was struck by the tavern doors.

If Kodat had not been carrying the bill of lading in his left hand he could have used the hand rail and the accident would not have happened. As such, for this reason it is not reasonable to think unloading was not causally connected to the accident.

Some courts have taken the view that under the facts as stated in *Pacific Auto Insurance Co. vs. Commercial Security Insurance Co., supra*; *Wagman vs. American Fidelity and Casualty Co., supra*; *Mc-*

Closkey and Co. vs. Allstate Insurance Co., supra; Continental Casualty Co. vs. Duffy, supra, and this case, there would be no casual connection to the accident with unloading. The courts that have taken this narrow view of loading and unloading have erred in that they are considering coverage only afforded if the injury is proximately caused by the loading or unloading process. This narrow view is not necessary as the words loading and unloading are words of expansion, and it is only necessary to find some causal connection with loading and unloading to afford coverage. Nothing in the automobile liability policy requires the accident be proximately caused by use of the truck.

POINT II.

THE AUTOMOBILE LIABILITY POLICY AFFORDS PRIMARY COVERAGE FOR LOADING AND UNLOADING.

The other insurance clause in United's general liability policy provides that its policy will be excess coverage over any other valid and collectible auto liability insurance. United's general liability policy provided that any insurance afforded by its policy should not apply to the extent there was any valid and collectible insurance available to the insured with respect to loss arising out of the ownership, maintenance, operation, use, loading or unloading of any automobile at the premises or the ways immediately adjoining.

Russell vs. Poulson, (1966), 18 Utah 2d 157,

417 P.2d 658, discusses the effect of an excess other insurance clause. In this case the court sustained the effect of the excess other insurance clause holding that the policy on the vehicle in which the injured plaintiff was riding was primary.

POINT III.

EMPLOYERS HAS WAIVED ITS RIGHT TO QUESTION THE REASONABLENESS OF THE SETTLEMENT.

The law does not look with favor upon insurers who breach their duty to their insureds. Defending an insured is an obligation that insurance companies should be encouraged to accept and discouraged from avoiding. Good faith requires that an insurance company not be given two opportunities to avoid an obligation. To permit an insurer to question the reasonableness of a settlement made by an insured after the insured has had to defend because of a breach of duty is not reasonable.

The question of reasonableness of the settlement made only relates to the question of indemnification. Once a duty to defend is breached the insurer becomes liable to indemnify the insured for the entire loss resulting from the breach. The insurer cannot rely upon the policy provisions it has breached to limit its obligation, duty, or liability.

This is a case involving a breach of contract. Damages for breach of contract are based upon the concept of what damages were reasonably foreseeable and what loss would naturally and usually follow.

In *Pacific Coast Title Insurance Co. vs. Hartford Accident & Indemnity Co.*, (1958), 7 Utah 2d 377, 325 P.2d 906, this court said following *Hadley vs. Baxendale*, 9 Exch. 41, 157 Eng. Rep. (1854) and *Restatement of Contracts*, Section 330 stated:

“The rule as to what damages are recoverable for breach of contract is based upon the concept of reasonable foreseeability that loss of such general character would result from the breach. Therefore, to be compensable, the loss must result in the breach in the natural and usual course of events, so that it can fairly and reasonably be said that if the minds of parties had adverted to breach when the contract was made, the loss of such character would have been within their contemplation.”

Ninety-five per cent of all personal injury lawsuits are settled. It seems as a matter of law it must have been within the contemplation of the parties that the insured would settle a \$157,500 lawsuit for \$15,000 rather than run the expense of trial and the possibility or probability of a higher judgment being rendered.

Recent cases support the proposition that an insurance company is liable for all damages that follow from a consequence of a breach.

In California in 1955 in *Richie vs. Anchor Casualty Co.*, (1955), 286 P.2d 1000, the District Court of Appeals held the insured was entitled to make a compromise settlement after the duty to defend was breached by the insurer.

Richie vs. Anchor Casualty Co., supra, is authority an insured does not have to risk trial.

Since 1955, the law regarding the duty to indemnify and make the insured whole has advanced in many jurisdictions.

In *Theodore vs. Zurich General Accident & Liability Insurance Co.*, (1961), Alas. 364 P.2d 51, an insured was faced with a \$1,000,000 lawsuit on a claim ostensibly from facts known to be within the terms of the policy coverage. However, the insurer refused to take part in litigation and the insured reached a settlement by way of confession of a judgment in the amount of \$20,000 without trial. The court said that since Zurich had the obligation to defend and refused to do so, the amount of the settlement made by entry of judgment became binding against Zurich both as to the extent and existence of liability. Therefore, Zurich did not have the right to show the settlement was unreasonable because Theodore was not covered by the employer's liability section of the policy.

On October 25, 1966, the Supreme Court of the State of California decided two cases of importance. In *Lowell vs. Maryland Casualty Co.*, (1966), 54 Cal. Rptr. 116, 419 P.2d 180, the insured refused to defend as the pleadings asserted an assault and battery. However, there was a defense of self defense and if true, this would make the claim of the plaintiff groundless. The Supreme Court in revers-

ing a judgment in favor of the insurer stated the sole issue should be on damages. There was an issue of fact because attorneys' fees were being claimed.

In the other California case, *Gray vs. Zurich*, (1966), 54 Cal. Rptr. 104, 419 P.2d 168, Zurich Insurance Co. presented the insured with a dilemma. In this case Dr. Gray, the insured, was charged with willfully, maliciously, brutally and intentionally assaulting a Mr. Jones in Missouri. Dr. Gray notified Zurich of the case and requested that it defend him. Zurich refused to defend on the ground the complaint alleged an intentional tort outside the coverage. Dr. Gray claimed that he did not intentionally, willfully or maliciously injure Jones. He claimed self defense for his acts. The Supreme Court of California, sitting in bank, held there was a duty to defend and that Zurich had breached its duty. The court said:

“Since modern procedural rules focus on facts of the case rather than theory of recovery in the complaint, the duty to defend should be fixed by facts the insurer learns from the complaint, the insured or other sources. An insurer, therefore, bears a duty to defend an insured whenever it ascertains facts which give rise to the potential liability under the policy. In the instant case the complaint itself, as well as the facts known to the insurer, sufficiently apprised the insurer of these possibilities hence we need not set out when and upon what other occasions the duty of an insured to ascertain such possibilities otherwise arising.”

Dr. Gray was unsuccessful in his claim of self defense. Thereafter, Zurich Insurance Co. claimed that it had no duty to indemnify Dr. Gray for the sum owed Mr. Jones inasmuch the defense of self defense was not accepted. The court said that Zurich could not whittle down its obligation to the plaintiff on the theory that the plaintiff himself was of such limited financial ability that he could not afford to employ able counsel or present every reasonable defense or to carry his cause to the highest court having jurisdiction. The court reversed the judgment in favor of Zurich in the intermediate court and instructed damages to be fixed by including the amount of the judgment in the Jones suit against Gray, the costs, expenses and attorney's fees incurred defending such suit without regard to the question of reasonableness. The court was told to take evidence on damages only as to the amount of the judgment in Jones' suit, the costs, the expenses and attorney's fees incurred in defending such suit.

Quoting from *Arenson vs. National Auto & Casualty Insurance Co.*, (1957), 48 Cal. 2d 528, 539, 310 P.2d 961, 968, the court said:

“Having defaulted such agreement the company is manifestly bound to reimburse its insured for the full amount of any obligation reasonably incurred by him. It will not be allowed to defeat or whittle down its obligation on the theory that the plaintiff himself was of such limited financial ability that he could not afford to employ able counsel or to

present every reasonable defense, or to carry his cause to the highest court having jurisdiction, * * *. Sustaining such a theory * * * would tend * * * to encourage insurance companies to similar disavowals of responsibility with everything to gain and nothing to lose."

In *Missionaries of the Company of Mary, Inc. vs. Aetna Casualty & Surety Co.*, (1967), Conn., 230 A.2d 21, the insurer breached its contract by an unqualified refusal to defend an action against its insured claiming the claim was within an exclusion of the policy. The case was settled and an action was brought for the amount of this settlement plus expenses and attorney's fees. The court said that where a breach to defend existed the insurance company could not thereafter question the settlement or seek to show that it had no duty to indemnify as the loss was excluded and allowed recovery in full for the amount of the settlement from the insurer.

In *Kong Yick Investment Co. vs. Maryland Casualty Co.*, (1967), Wash., 423 P.2d 935, a claim was made against Kong Yick arising from a pedestrian being struck by a pane of glass which fell from Kong Yick's building. Maryland Casualty Co. refused to accept the defense claiming its policy did not cover the sidewalk at the location where the accident occurred. The Washington Court held that the policy was ambiguous and that in such a situation the insured was entitled to coverage. Kong Yick's attorney settled the claim of the pedestrian, Somerville, and brought suit to recover the amount

of the settlement. The court held it was the defendant Maryland Casualty's duty to defend the Somerville action and that having failed to do so it was liable to the plaintiff to make the plaintiff whole and directed judgment for the plaintiff be entered in accordance with the prayer of the complaint.

In this case it is admitted that the sum of \$15,000 was paid to Kodat and that the legal costs were expended. In the lower court appellants withdrew their claim for attorney's fees to eliminate the factual question on reasonableness of attorney's fees.

Settlement of the lawsuit of *Kodat vs. Crystal Palace Market* was a consequence that Employers could reasonably contemplate as arising from its breach to defend. Therefore, as a matter of law Employers should be barred from trying to profit from the breach of failing to defend by claiming the amount of the settlement was unreasonable.

If Employers is allowed to question the amount of the settlement, it and other insurance companies will have reason to believe nothing is to be lost and something may be gained by refusing a defense.

CONCLUSION

If an insured has both an automobile liability policy and a general liability policy which will afford defenses, the insured has a right to expect both companies will be anxious and willing to defend. An insurance company should never be given an oppor-

tunity to gain as a result of breaching an obligation to an insured.

The lower court should be reversed and directed as a matter of law to enter judgment in favor of the appellants for the amount of the settlement and legal costs incurred because:

1. The accident occurred during the preparatory process for unloading.
2. The accident was causally connected with unloading.
3. The entire operation of delivery of goods is part of unloading of the unloading process.
4. Employers coverage was primary.
5. Employers breached its duty to defend.

Respectfully submitted,

WORSLEY, SNOW &
CHRISTENSEN

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NOTICE

Raymond M. Berry, being first duly sworn, states that he served two copies of the Appellants' Brief upon the defendant by mailing same to Shirley P. Jones, Jr., Attorney at Law, 510 American Oil Building, Salt Lake City, Utah, by United States mail, postage prepaid, this day of, 1968.