

1962

National Farmers Union Property and Casualty Co. v. Farmers Insurance Group and Farmers Insurance Exchange : Brief of Respondent

Utah Supreme Court

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Hanson & Garrett; Don J. Hanson; Attorneys for Defendants and Respondents;

Kipp & Charlier; D. Gary Christian; Attorney for Plaintiff and Appellant;

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IN THE SUPREME COURT
of the

STATE OF UTAH

FILED
AUG 13 1962

NATIONAL FARMERS UNION
PROPERTY AND
CASUALTY COMPANY,
Plaintiff and Appellant,

vs.

FARMERS INSURANCE
GROUP and FARMERS
INSURANCE EXCHANGE,
Defendants and Respondents.

Clerk, Supreme Court, Utah

Case No. 9625

RESPONDENT'S BRIEF

Appeal from the Judgment of the Third Judicial
District Court, in and for Salt Lake County,
State of Utah, Honorable A. H. Ellett, District Judge

HANSON & GARRETT
DON J. HANSON
Attorneys for
Defendants and Respondents

KIPP & CHARLIER
D. GARY CHRISTIAN
Attorneys for
Plaintiff and Appellant

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RESPONDENT'S BRIEF

This is an action brought by the plaintiff, an insurance company, to recover from the defendant, another insurance company, attorney fees and court costs which the plaintiff incurred in defending an action brought against John H. Morgan, Jr., the named insured under a policy of liability insurance issued to him by the plaintiff. The plaintiff, who admittedly insured John H. Morgan, Jr., seeks to recover these attorney fees and costs from the defendant upon the theory that the defendant was the primary liability insurance carrier, a fact which is assumed in the Appellant's Brief (see page 1).

The defendant denies that it afforded any insurance coverage whatsoever under its policy to John H. Morgan, Jr. which was in force and effect at the time of and under the conditions of the accident out of which the above mentioned action arose.

DISPOSITION OF THE LOWER COURT

The case was tried to the Court, who found in favor of the defendant, concluding as set out on page 41 of the Record:

“3. The attorney fees and costs incurred by the plaintiff were incurred by the plaintiff and not by John H. Morgan, Jr. and were incurred by the plaintiff primarily for the benefit of the plaintiff, and John H. Morgan, Jr. is not obligated to reimburse the plaintiff for any attorney fees or costs incurred.

“4. The defendant Farmers Insurance Exchange has no obligation under its policy to reimburse the plaintiff for attorney fees or costs it incurred in the defense of the action against John H. Morgan, Jr.”

The Farmers Insurance Group is not a legal entity but is merely an association of insurance companies of which the Farmers Insurance Exchange is one. Said Group issues no policies of insurance and is not involved in this action. The case was dismissed as to said Group by the trial court, of which the plaintiff does not complain. The words “defendant”, “defendants”, “respondent” and “respon-

dents” are used in this brief to refer to the Farmers Insurance Exchange.

RELIEF SOUGHT

The defendant and respondent seeks to sustain the judgment of the trial court.

STATEMENT OF FACTS

The Statement of Facts is set out in the Appellant’s Brief herein (pages 2, 3, 4 and 5) and the following is intended merely to supplement that Statement.

Since the question as to whether the defendant and respondent afforded John H. Morgan, Jr. any coverage for the damages arising out of or the costs of defending a lawsuit arising out of the accident described in plaintiff’s and Appellant’s Brief depends upon an interpretation of the insurance policy, it is important that we have the pertinent provisions of the policy before us. The named insured under the defendant’s policy of insurance was Raymond Earl Thomas (R. 26-31). The policy, Exhibit D-2, provides:

“(2) the unqualified word ‘insured’ includes (a) the name insured . . . and (b) with respect to the described automobile, . . . and any other person or organizations legally responsible for its use, provided the actual use of the automobile is by the named insured or with his permission.

. . .

“(3) the term ‘the insured’ is used sev-

erally and not collectively, but the inclusion herein of more than one insured shall not increase the limits of the Exchange's liability."

As to coverage, the Exchange agrees, within the limits of the policy

"To pay all damages which *the insured* becomes legally obliged to pay because of:

"(A) bodily injury to any person, and/or

"(B) damage to property, arising out of the ownership, maintenance or use of an automobile as hereinafter defined, and to defend at its expense any suit against the insured for such damages; but the Exchange may make such settlement of any claim or suit as it deems advisable."

In addition, under Supplementary Payments,

"The Exchange also agrees to pay, in addition to the applicable limit of liability:

. . .

"(b) all expenses *incurred by the Exchange, all costs taxed against the insured* in any such suit, and all interest accruing after entry of judgment until the Exchange has paid, tendered, or deposited in court that part of the judgment which does not exceed the limit of the Exchange's liability thereon; . . ."

Under Exclusions the policy provides:

"This policy does not apply under Part 1:

. . .

"6. while the described automobile is being used in the automobile business, but

this exclusion does not apply to the named insured or his relatives;
...”

In the section of the policy designated Conditions, paragraph (17), the policy provides

“Under Coverages A, B, (set out above) E and F, the Exchange shall not be liable for a greater proportion of any loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of all collectible insurance against such loss.” (Parenthesis ours)

The policy of National Farmers Union Property & Casualty Company, which insured the automobile belonging to John H. Morgan, Jr., Exhibit P-1, is similar to that of the defendant. Under its terms the plaintiff agrees, under the section entitled “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:

“(2) pay all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company’s liability thereon;
...”

Under the section applicable to other insurance, plaintiff’s policy also provides

“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 declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss, provided, however, under coverages A and B the insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance.”

It should be further pointed out that the attorney fees and costs which we are talking about in this case were not incurred by or are not owed by John H. Morgan, Jr. but were rather incurred by the plaintiff, National Farmers Union Property & Casualty Company (R. 28), and that the plaintiff does not assert any claim by or through John H. Morgan, Jr. against the defendant but rather asserts a claim in its own right against the defendant.

ARGUMENT

POINT I.

THE AUTOMOBILE DRIVEN BY JOHN H. MORGAN, JR. WAS BEING USED IN THE AUTOMOBILE BUSINESS AND, THEREFORE, WAS NOT COVERED BY THE DEFENDANT'S POLICY.

The defendant denied that it owed any coverage in this case by reason of the foregoing provi-

sions in its policy, which provided that claims arising while the described automobile was being used in the automobile business by someone other than the named insured or his relatives are not covered. The undisputed evidence shows that Raymond Earl Thomas, the named insured under the defendant's policy, was a salesman employed by the Bountiful Motor Sales (R. 27). Mr. Morgan had purchased the vehicle, which he was having repaired, from the Bountiful Motor Sales, then known as J. Golden Barton Motor Company (R. 26). While his automobile was being repaired he asked Kay Browning, service manager of the Bountiful Motor Sales, if he might use another automobile (R. 27). Mr. Browning had no such vehicle available and referred Mr. Morgan to Dean Roberts, who had sold Mr. Morgan's automobile to him (R. 27). Dean Roberts did not have a car, but in turn referred Mr. Morgan to Raymond Earl Thomas. Mr. Thomas let Mr. Morgan take his own automobile (R. 27). Mr. Morgan took the car to his own home and parked it in his driveway and went in the house. While he was in the house his little girl came out to the car in the driveway and in some way jarred the brake or let the brake off and the car rolled down the driveway into the building owned by Daniel T. Wolfe, who thereafter brought the aforementioned legal action against John H. Morgan, Jr.

It is the contention of the defendant, Farmers Insurance Exchange, that the automobile belonging to Raymond Earl Thomas was being used in the automobile business at the time of the accident in the same manner that a demonstrator or other vehicle which may have belonged to the garage may be used. Mr. Morgan was a customer of Bountiful Motor Sales; he had brought his own car to that company for repair; he had previously purchased the same car from the Motor Company; and it does not appear unreasonable to infer that the Bountiful Motor Sales was interested in keeping his good-will in the hope that it might continue to receive his patronage. There is nothing in the record to the effect that Raymond Earl Thomas even knew John H. Morgan, Jr. prior to his letting Mr. Morgan take his automobile. It should, therefore, be obvious that this is not a case of one person doing a favor for another or of a friend accommodating a friend. It is rather a man, who is interested in selling automobiles, letting a potential customer drive an automobile in the hope that he might thereby retain a customer's good-will and continued patronage.

The provision of the policy eliminating automobiles used "in the automobile business" is new and there is a scarcity of cases construing this provision.

"The usual omnibus clause in an auto-

mobile liability policy excludes coverage of accidents arising out of use of an automobile by persons operating an automobile repair shop, public garage, sales agency, service station, or public parking place. This annotation considers what constitutes use of a vehicle 'in the automobile business,' another way of phrasing such an exclusion in a liability policy. . . .

"A diligent search has revealed only one case interpreting the phrase 'in the automobile business,' as used in an exclusionary clause in an automobile liability policy.

"In *Cherot v. United States Fidelity & Guaranty Co.* (1959, CA 10 Okla.) 264 F. 2d 767, 17 ALR 2d 959, the court reversed a judgment declaring that two insurance companies which had issued conventional liability policies, one to the owner and the other to the repairer of an automobile involved in an accident while driven by the repairman, were not required to defend an action for damages from the accident because of exclusionary clauses in each of the policies, the owner's policy excluding coverage of 'an owned automobile while used in the automobile business,' and the repairman's excluding 'a non-owned automobile while used (1) in the automobile business by the insured,' and also providing that 'automobile business means the business of selling, repairing, servicing, storing or parking of automobiles.' . . ." 71 A.L.R. (2d) 964

In another case, *McCree v. Jennings* (Washington), 349 Pac. (2d) 1071, in which it was decided

that the exclusion did not apply, the Court defined the phrase to mean

“It would appear evident, therefore, that an automobile ‘used in the automobile business,’ would be one which was employed for some purpose in connection with that business. For example, a tow truck, an automobile used for demonstration purposes, or a vehicle used for securing or delivering equipment and supplies would be ‘used in the business.’ But the Jennings automobile was not turned over to Miller to be used by him for his business purposes. It was simply brought to him to be repaired.”

The underlying principle excluding automobiles used in the automobile business, except in the case of the named insured or his relatives, from coverage under a liability policy is as stated in an annotation in 47 *A.L.R. (2d)* 556, wherein the omnibus clause exception relating to public garages, sales agencies, service stations and the like is discussed:

“It has been said that the reason for restriction of liability as to automobile repair shops, garages, etc., in automobile liability insurance policies is clear, there being so many more occasions when some irresponsible person would be apt to be driving the car in question in the operation of such an establishment. *Buxton v. Randel* (1944) 159 Kan. 245, 154 P. 2d 129.”

While the cases included in the foregoing annotation at 47 *A.L.R. (2d)* 556 are not strictly in

point since they discuss cases in which the omnibus clause contains an exception or proviso, the effect of which is to declare the clause inapplicable to a public garage, automobile repair shop, automobile sales agency, automobile service station and agents or employees thereof, or some similar provision, an examination of some of the cases included in the annotation will serve to illustrate the purpose of the exclusion and the philosophy behind it. On page 558 of the annotation it is said:

“An automobile repair shop owner to whom the named assured has entrusted his car for purposes of sale, the means and methods of accomplishing which are left wholly discretionary, acts, while demonstrating the car to a prospective purchaser, not as the servant or agent of the named assured, but as an independent contractor, and so, as regards an accident occurring while he is so demonstrating the car, comes within the operation of a proviso in an omnibus clause containing an exception whereby such clause is made inapplicable to a public automobile garage, automobile repair shop, automobile sales agency, automobile service station, and the agents or employees thereof. *State, use of Tondi v. Fidelity & Casualty Co.* (1929) 156 Md. 684, 145 A 182, in which the court said that the proviso in the policy would have but little meaning if the owner of an automobile repair shop could step outside, disassociate himself temporarily from his business, proceed to sell a car which for days had been left at his place of business to be sold, and then successfully

claim that he was not excluded by the proviso . . .”

On page 560 it is said:

“A casualty insurance company was held in *Macbeth v. Lacey* (1944, Pa.) 92 Pittsb. Leg. J. 1, not liable under a policy excluding from coverage public garages, automobile repair shops, sales agencies, and service stations, and agents and employees thereof, and a compulsory nonsuit was entered in favor of the insurance company, as garnishee, where fatal injuries had been sustained by the plaintiff's decedent while a passenger in the insured automobile, which was being operated by the service-sales manager of an automobile dealer, a prospective customer of a tire and service agency to which the owner had loaned his car for demonstration of a new make of tires.”

Under cases containing an exception relating to public garages, sales agencies, service stations and the like the fact that an automobile is being operated in such business, either as a personal accommodation or without consideration, has been held not to take the case outside of the exception.

In *Canadian Indemnity Company v. Western National Insurance Company*, (1955), 134 Cal. App. (2d) 512, 286 Pac. (2d) 532 the Canadian Indemnity Company issued its comprehensive liability policy to Burnett covering his Auto Repair Shop and Service Station including liability arising out of the use of any automobile in connection with the

operations of such station. The Western National Insurance Company issued to Mercer a basic standard automobile policy covering his Lincoln automobile. Mercer was an employee of Burnett. On occasion, Burnett used Mercer's Lincoln to pick up spare parts needed in Burnett's repair business.

On June 2, 1953, Mercer arrived at the garage at 4:30 P.M. Mercer informed Burnett that he needed certain repair parts for a customer's car which Mercer had ordered from Richmond Motors, but which had not been delivered by Richmond Motors' salesman, Williams. When Burnett ordered parts, if he could not go after them, Williams, who was a personal as well as a business friend of Burnett, would deliver them. Mercer asked Burnett to pick up the order. Burnett borrowed Mercer's Lincoln for that purpose. Burnett learned that Williams was ill. He took the parts order with him, intending principally to pick up the repair parts, but was on his way first to see Williams before going on to Richmond Motors. Williams' home and Richmond Motors were in the same general direction. An accident occurred 14 blocks from Williams' home and 10 blocks from Richmond Motors.

The Canadian Indemnity Company brought this action for a declaratory judgment against the Western National Insurance Company contending that the policies pro rated Burnett's liability and ap-

pealed from a judgment decreeing that the Canadian Indemnity Company was responsible and that the Western Insurance Company was not.

The District Court of Appeal affirmed, holding that the evidence clearly supported the holding (1) that the Lincoln was being used by the garage owner for a purpose connected with the garage business, (2) that Burnett had not departed from or abandoned his purpose of obtaining repair parts by driving toward Williams' home en route, and (3) that coverage for Burnett was therefore excluded under the Garage Exception to the omnibus clause of Mercer's policy with the Western Insurance Company.

In the case of *Ocean Accident & Guaranty Corporation v. Blackstock* (1935), 165 Va. 98, 181 S.E. 364 the insurer issued its policy to Wynn covering her automobile. Taylor operated a filling station, Wynn was a customer of long standing. Wynn's automobile developed a frozen radiator while being operated by a brother of Wynn. The brother called Taylor and asked him to come for the automobile and take it to his service station to thaw it out or do whatever was necessary to the radiator. The brother knew that Taylor's service station contained a heated wash pit in which an automobile could be thawed out.

Taylor got the automobile and on the way to

the service station had an accident. Blackstock was injured. Blackstock recovered a judgment against Taylor and then brought this action against the insurer. The insurer appealed from an adverse judgment.

The Supreme Court of Appeals reversed, holding that the accident arose out of the operation of the service station rather than as a part of an individual accommodation to the brother, whether Taylor expected to charge for the service or merely general service to valuable customers.

POINT II.

THE DEFENDANT AND RESPONDENT IS NOT OBLIGATED TO REIMBURSE THE PLAINTIFF FOR ANY ATTORNEY FEES OR COSTS INCURRED IN THE DEFENSE OF THE ACTION AGAINST JOHN H. MORGAN, JR.

While the defendant and respondent relied primarily upon the defense set out in Point I above, the court below actually decided this case in the defendant's favor upon the ground set out in its Conclusions Of Law (R. 41), to the effect that the attorney fees and costs incurred by the plaintiff were incurred by the plaintiff and not by John H. Morgan, Jr., were incurred by the plaintiff primarily for its own benefit and not the benefit of John H. Morgan, Jr. and that, therefore, the defendant was not obligated to reimburse the plaintiff for the attorney fees or costs which it had expended. In

discussing this point we must assume that the trial court was correct in holding that the defendant and respondent did afford John H. Morgan, Jr. coverage under its policy of insurance, although by so doing we do not intend to concede this issue. It should also be noted that the question involved here is not which of the two carriers should pay any judgment which may have been entered against John H. Morgan, Jr., there being none, but whether the plaintiff is entitled to recover its costs in defending an action brought against John H. Morgan, Jr., an obligation which it assumed under its own policy of insurance.

This very question was involved in the case of *United States Fidelity and Guaranty Company v. Tri-State Insurance Company*, decided in the United States Court of Appeals (10th Circuit), 285 Fed. (2d) 579. This was an action brought by a carrier of excess automobile liability insurance to obtain contribution from a primary insurer with respect to the amount expended in the successful defense of liability claims presented in the state courts against the insured. In the words of the Court:

“The incident giving rise to the state court liability claims made against the common insured, Kerr Glass Company (Kerr), was an automobile accident involving a non-owned truck being used by Kerr for a shipment of that company’s product in interstate

commerce. The U.S.F & G. policy was issued directly to Kerr as a named insured and is referred to as a comprehensive general automobile liability policy. The Tri-State policy was issued to the owner-operator of the truck, one Barsh, as the named insured but defined 'insured' as including 'any person or organization legally responsible for the use (of the truck), provided the actual use (of the truck) is by the named insured or with his permission . . .' It is not disputed that Kerr was an additional insured as defined in the Tri-State policy and as applied to the circumstance of the accident premising the claims made against Kerr.

"Both policies contained standard indemnification provisions, the policy limit of U.S.F. & G. being \$100,000 - \$200,000 and Tri-State being \$10,000 - \$20,000. Other applicable provisions of both policies provided:

" 'Insuring Agreements

" 'II. Defense, Settlement, Supplementary Payments.

" 'As respects the insurance afforded by the other terms of this policy 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; * * *.

" 'The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the Company in addition to the applicable limit of liability of this policy.

“ ‘Conditions

* * *

“13. Other Insurance. 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 declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under this policy with respect to loss arising out of the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance available to the Insured, either as an Insured under a policy applicable with respect to such automobile or otherwise.’”

A lawsuit was filed against Kerr which Tri-State refused to defend, and thereupon U.S.F. & G. undertook the sole defense in behalf of Kerr. A judgment was obtained against Kerr in the lower court, which was set aside upon appeal to the Supreme Court of Oklahoma. The amount sought in the action was the reasonable cost, including attorney fees, of the defense made by U.S.F. & G. The Court said:

“An insurance carrier has the duty to use the utmost good faith in the disposition of claims made against its insured. *National Mutual Casualty Co. v. Britt*, 203 Okl. 175, 200 P. 2d 407, 218 P. 2d 1039; *American Fidelity & Casualty Co. v. All American Bus Lines*, 10 Cir., 190 F. 2d 234. And this duty is not lessened by the existence of excess in-

surance but is extended to include the excess carrier within the shelter of the obligation. *St. Paul-Mercury Indemnity Co. v. Martin*, 10 Cir., 190 F. 2d 455. The obligation to the excess carrier is not contractual and is based only upon the duty of the primary carrier to perform the obligation which it alone has assumed, that is, provide primary coverage. Lack of good faith in this regard may extend the primary carrier's obligation beyond the stated policy limit, *St. Paul-Mercury Indemnity Co. v. Martin*, *supra*, and extend the point at which the secondary liability of the excess carrier attaches. But contrary to the contentions of U.S.F. & G. these rules are not applicable to the instant case. That company did not pay out any sum under its excess insurance provision. As we have earlier indicated, the claim against Kerr was ultimately held to be without merit and the conduct of Tri-State has not damaged U.S.F. & G. by way of indemnification to its insured.

. . .

"Tri-State did breach its contract with Kerr by refusing to defend. This obligation existed regardless of the merit or lack of merit of the claim. But again, no contractual relationship existed between Tri-State and U.S.F. & G. and the latter does not claim by subrogation. U.S.F. & G. also had a policy obligation to defend Kerr and this obligation, unlike the secondary liability as an excess carrier for indemnification, was a primary obligation co-existent with that of Tri-State. The agreement to furnish such service, several with the two companies, is distinct from and in addition to the insuring agreement per-

taining to liability. The question here thus narrows to whether contribution will lie between two insurance companies when each has a policy containing a defense agreement. The question has been answered in the negative, and we believe, properly so, in a number of cases. The duty to defend is personal to each insurer. The obligation is several and the carrier is not entitled to divide the duty nor require contribution from another absent a specific contractual right . . .”

To the same effect see the case of *Financial Indemnity Company v. Colonial Insurance Company* (California), 281 Pac. (2d) 883. In this action plaintiff sued for declaratory relief to determine the rights and obligations of the parties arising from two public liability policies issued respectively by the parties to one Charles Tamagri, a trucking service operator, and particularly to recover half of the amount expended by plaintiff for attorney fees and investigation expense in defense of an action against the insured. Plaintiff appealed on an agreed Statement Of Facts from a judgment denying recovery. The plaintiff had defended the insured successfully in a personal injury action. A considerable portion of the briefs was devoted to the question of whether or not one insurance company would be required to contribute to the other insurance company had a judgment been secured against the insured. The Supreme Court of the State of California said:

“The issue of defendant’s indemnity li-

ability is immaterial. Each policy provided for defense of the assured in the event of suit. Plaintiff's policy provided for pro rata payment of a loss in the event there was other insurance. Defendant's policy provided, in case of other insurance, that it would pay only the excess of the loss over the amount of the other insurance. Attached to each policy was a 'Standard Form of Endorsement Prescribed by the Public Utilities Commission of the State of California' known as 'Form T & S 391' which apparently reduced the liability under each policy to \$5,000 for personal injury. Most of the trial and a large portion of the briefs were devoted to the question of whether under the policies and the endorsement defendant's liability in the event Ortiz had recovered damages against Tamagri, would not have accrued until plaintiff had paid the full face value of its policy as limited by the rider, \$5,000 or when it had paid only \$2,500. The trial court found that the insured's policy with plaintiff constituted 'other insurance' and that defendant's policy was excess over and above the limits of plaintiff's policy and not pro-rata insurance. Plaintiff attacks this finding. However, we fail to understand how this question is relevant or important to the real issues in this case. Tamagri won the personal injury action, so neither insurer was called upon to pay any amount of indemnity. Ortiz sued Tamagri for \$100,680.58. Until the action was fully tried and judgment rendered, neither insurer would know what its indemnity liability was. Obviously the amount sued for was in excess of the total liability of both insurers under any theory. Each party was re-

quired by its own policy to defend Tamagri in that suit.

. . .

“Plaintiff contends that as to the obligation to defend the two insurance companies were cosureties and not coinsurers, and that therefore the rule set forth in *Fidelity & Casualty Co. of New York v. Fireman’s F. I. Co.*, 38 Cal. App. 2d 1, 5, 100 P. 2d 364, should apply. It was there held as to indemnity that where two insurance companies fully insure the same risk and one company pays the total loss, that company may force contribution from the other, but that if both policies contain a pro-rata or coinsurer clause, the insurers are deemed to be coinsurers and not cosureties and neither can recover from the other any amount it may have paid in excess of its pro rata share of the entire loss. While the fact that here both companies in their policies agreed to defend the assured bears some analogy to the situation where both companies have agreed to indemnify the assured against the total loss, nevertheless the agreement to defend is not only completely independent of and severable from the indemnity provisions of the policy, but is completely different. Indemnity contemplates merely the payment of money. The agreement to defend contemplates the rendering of services. The insurer must investigate, and conduct the defense, and may if it deems it expedient, negotiate and make a settlement of the suit. These matters each insurer is required to do regardless of what the other insurer is doing. While both may join together in the services and share experiences, there is no requirement

that they do so. Conceivably, one might disagree with the other as to the strategy of the investigation and defense. It could act independently of the other. Thus the relationship is more that of coinsurer than cosurety. As to the assured, neither one is excused to any extent from its full duty to defend, no matter what the other does. The duty to defend is personal to the particular insurer. It is not entitled to divide that duty with or require contribution from the other."

In *Traveler's Indemnity Company v. American Indemnity Company* (Texas), 315 S.D. (2d) 677 an action was brought by the plaintiff insurer against the defendant insurer to recover a pro rata share of a settlement it had made with an injured third person and for attorney fees. The trial court rendered a judgment for the plaintiff for a share of the settlement and attorney fees, but the judgment was modified by the Court of Civil Appeals by eliminating attorney fees from the judgment. The Court held that unless provided for by contract or statute attorney fees may not be recovered.

In a case decided in the United States District Court in Minnesota, *Traveler's Insurance Company v. American Fidelity & Guaranty Company*, 154 Fed. Supp. 393, the court, while holding that the plaintiff insurer was entitled to recover from the defendant insurer the amount of a judgment against its insured, refused to allow the recovery of attorney fees, saying:

“With regard to costs of defense and attorney fees both insurers were obligated to defend Schneider’s suit. This obligation was several and not joint; consequently Travelers, having paid these costs, is not entitled to recover for them against American.”

Some of the authorities cited by the plaintiff concern only the question as to whether or not an excess insurance carrier can recover from a primary insurance carrier the amount of a settlement or judgment which the excess insurance carrier has paid on behalf of the insured, and are not directed toward the question as to whether one insurer can recover attorney fees from another.

In the case of *Aetna Casualty & Surety Company v. Buckeye Union Casualty Company*, 157 Ohio St. 385, 105 N.E. (2d) 568, cited on page 6 of the plaintiff’s and Appellant’s Brief, the only question involved was whether or not one insurance company could recover from another insurance company the amount of the settlement which the first insurance company had made on behalf of an insured. The case does not discuss the question of costs of defense or attorney fees.

Nor was this question discussed in *Kenner v. Century Indemnity Company*, 320 Mass. 6, 67 N.E. (2d) 769, 165 A.L.R. 1463.

CONCLUSION

An insurance policy is a contract between an insurer and the named insured or those persons falling within the definition of an "insured" under the omnibus clause of such policy, whereby the insurer agrees within certain limits to answer for damages which the insured may become legally obligated to pay because of certain events or conditions outlined in the policy of insurance; and the insured agrees to pay a premium commensurate with the amount of protection afforded. The premium charged for the policy will, of course, vary with the risk to which the insurer exposes itself. Where there is greater risk involved in insuring those people who fall within a certain class than is usual and ordinary, then a different premium is charged for those policies which insure that particular class and special policies are written. Exclusions are written into the usual and ordinary policy which would exclude coverage for such persons or individuals at the rates charged for the usual and ordinary policy. An alternative might be to leave these exclusions out of a policy and increase the premium charged for all policies, but this would only penalize the whole for the hazards connected with insuring a certain group. One group which has been found to be more hazardous is that group of persons engaged in the automobile business such as automobile repair shops, sales agencies, garages and the like.

Subject only to the limitations prescribed by the laws of the various states as a condition to an insurance company's writing insurance in a particular state, which laws are designed to afford the public ample protection, an insured and an insurer should be free to enter into whatever contracts they desire and an insurer should be free to select that group of persons which it desires to insure for a specified rate. One of the provisions contained in insurance policies and contained in the policy issued by the defendant Farmers Insurance Exchange in this case is that insurance afforded under the policy does not apply while the automobile described in the policy is being used in the automobile business where it is not being used by the named insured or his relatives. The cases cited herein evidence the courts do give effect to these exclusions in insurance policies.

The particular phraseology of the exclusion in this case, "while the described automobile is being used in the automobile business", is somewhat new but has been defined as the business of selling, repairing, servicing or parking of automobiles; and an automobile used in the automobile business has been held to be one which was employed for some purpose in connection with that business, such as a tow truck or an automobile used for demonstration purposes.

The evidence in this case shows that the named insured under the defendant's and respondent's policy, Raymond Earl Thomas, permitted John H. Morgan, Jr. to take his automobile while the automobile of John H. Morgan, Jr. was being repaired by the garage which employed Mr. Thomas. Mr. Thomas was not even acquainted with Mr. Morgan. The only possible benefit which Mr. Thomas could have hoped to secure was the future good-will and patronage of Mr. Morgan. Moreover, the automobile of Mr. Thomas was being used in exactly the same manner as an automobile provided by the garage for the same purpose had one been available. It is, therefore, apparent that this automobile was being used in the automobile business at the time and that coverage was not, therefore, afforded under the defendant's and respondent's policy.

Even assuming, however, that John H. Morgan, Jr. was an insured under the defendant's and respondent's policy, this does not entitle the plaintiff and appellant to recover from the defendant the attorney fees and costs which it incurred in defending an action brought against Mr. Morgan as a result of an accident which occurred when he was using Mr. Thomas' car. The evidence is undisputed that John H. Morgan, Jr. was also insured by an insurance policy issued by the plaintiff and that by its policy it agreed to pay all expenses incurred by it

and all costs arising out of an action brought against its insured falling within the coverage provided by the policy. In defending John H. Morgan, Jr. it did nothing which it was not already obligated to do by its policy of insurance. To say that it is entitled to recover these attorney fees and costs from this defendant is merely to say that it should be paid for doing what it was already obligated to do.

The fact that one insurer may breach its contract with the insured does not justify another insurer from breaching its contract; nor should the fact that one breaches its contract give the other any right against the one guilty of such breach. To say that the plaintiff is subrogated to the rights of John H. Morgan, Jr. begs the question. In the first instance, he was paid no attorney fees or costs nor has any judgment been rendered against him and he, therefore, has no rights. In the second instance, we might ask what rights — those which he had against the defendant under its policy or those which he had against the plaintiff under its policy?

The cases which have dealt with the right of one insurer to recover attorney fees and costs from another insurer have recognized that the duty to defend the insured is personal to each insurer and is a several and not a joint obligation. The fact that one insurer, acting in good faith upon grounds which

appear to it to be justified at the time, may escape its obligation to the insured may not justify another insurer from escaping its obligation.

It is, therefore, respectfully submitted that the judgment of the trial court should be affirmed either upon the theory that the defendant and respondent did not afford insurance coverage under this case or that, affording it, the plaintiff insurer is not entitled to recover attorney fees and costs paid out under its policy of insurance from the defendant insurer.

Respectfully submitted,

HANSON & GARRETT

DON J. HANSON

Attorneys for

Defendants and Respondents