

1992

Jorgina Chambers and Farmers Insurance Exchange v. Agency Rent-A-Car, Inc., and Royal Indemnity Company : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

JORGINA CHAMBERS and FARMERS)
INSURANCE EXCHANGE,)
)
Plaintiffs/Appellees,)
)
v.)
)
AGENCY RENT-A-CAR, INC., and)
ROYAL INDEMNITY COMPANY,)
)
Defendant/Appellant.)

Case No. 92-0820 CA
Priority No. 15

REPLY BRIEF OF APPELLANT

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY
JUDGE JAMES S. SAWAYA, PRESIDING

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Attorneys for Plaintiffs/Appellees

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COURT OF APPEALS

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ARGUMENT

Introduction

In its opening Brief, Agency Rent-A-Car, Inc. (hereinafter "Agency"), raises three issues of dispute with the judgment of the trial court in the case below. These issues are:

1. Whether Agency's certificate of self-funded coverage obtained pursuant to Utah Code Ann. § 41-12a-401 was secondary to the Farmers Insurance Exchange policy of insurance covering Jorgina Chambers, the driver of the Agency automobile at the time of the accident;

2. Whether Agency should be primarily responsible for personal injury protection benefits; and

3. Whether the limits of any coverage afforded by Agency pursuant to its certificate of self-funded coverage for any one accident can exceed \$40,000.00.

Jorgina Chambers and Farmers Insurance Exchange (hereinafter "Farmers") response to Point I consists principally of an attempt to distort Agency's argument on appeal. Contrary to Farmers' assertions, Agency has never claimed that it is not responsible to make any payments to Morgan Chambers as a result of the accident. Rather, Agency's position is that Farmers' policy of insurance is primary to Agency's certificate of self-funded coverage. Farmers never really addresses this argument.

In its response to Point II, Farmers argues that Agency has already conceded that it is primary for paying personal injury benefits. Agency has never conceded this point.

Finally, in response to Point III, Farmers argues that Utah Code Ann. § 41-12a-407, as it existed at the time of the accident at issue, requires Agency to provide coverage of at least \$80,000. This argument flies in the face of the clear meaning of the statute. Agency addresses each of Farmers' arguments in the following sections:

POINT I

AGENCY'S CERTIFICATE OF SELF-FUNDED COVERAGE PROVIDES COVERAGE FOR THIS ACCIDENT. HOWEVER, THAT COVERAGE IS SECONDARY TO CHAMBERS' POLICY OF INSURANCE.

Farmers never addresses the central issue of whether a certificate of self funded coverage is equivalent to insurance. Instead, Farmers spends a great deal of time attempting to persuade this Court that Agency is claiming it does not have any obligation to pay for damages to the injured party under its policy of self-funded coverage and provides the Court with a lengthy argument as to why this position is not supported by law. For example, on page 15 of its brief, Farmers states:

Agency makes a distinction between the obligation to indemnify Ms. Chambers for her negligence and its obligation to indemnify third parties for injuries caused by Chambers to the same extent an insurer would be. This is a distinction without a difference since Agency has refused to participate in the settlement of the claims of Morgan Chambers. (Emphasis added.)

Farmers' statement here is simply not true. Agency has never disputed that it is obligated to respond to damages pursuant to its policy of self-funded coverage, nor has it refused to

participate in the settlement of any claims asserted by Morgan Chambers. Agency's position has always been that it is obligated to pay damages to Morgan Chambers after Farmers has tendered its policy limits.

On page 12 of its brief, Farmers argues that Agency is "required by statute to afford primary coverage on vehicles which it has elected to self-insure." Farmers cites no authority for this statement. Farmers' position appears to rely on a rather tortured reading of § 31A-22-309(4). Farmers claims this section requires the policy insuring the motor vehicle at the time of the accident to be primary for all purposes.

As Agency explained in its appellate brief, § 31A-22-309(4) is clear on its face that it only applies to personal injury protection. It does not speak to the other aspects of automobile insurance, nor has the Utah Supreme Court ever interpreted it to so apply. Therefore, it has no application to the issue being considered here.

On page 16 of its brief, Farmers again avoids the central issue by assuming its conclusion when it says:

Agency's contract with Chambers is not before the court nor does Agency offer any support for its claims that in the event this court determines that Agency's self-funded coverage is primary, Agency may recover whatever amount it is required to pay from Jorgina Chambers. Such a finding on the part of this court, however, would circumvent the determination that Agency's self-funded coverage is primary and render it meaningless.

Agency's ability to subrogate against Jorgina Chambers for any amounts it pays to third parties injured by her negligence arises

from the common law principal that one who is obligated to indemnify rather than insure is entitled to subrogate against the indemnitee. Agency cited the case of Home Indemnity Co. v. Humble Oil & Refining Co., 314 S.W.2d 861 (Tex. 1958), in support of this proposition. Agency's whole purpose in pointing this out is to demonstrate why Agency's policy of insurance is not primary. Chambers' response to this point actually reinforces Agency's stance. That is, unless the Court rejects decades of common law permitting subrogation in the indemnity context, it is meaningless, and illogical to rule that Agency's self-funded coverage is primary.

Farmers also criticizes Agency's citation to Hearty v. Harris, 574 So.2d 123 (La. 1991). Hearty supports the central issue in this case. The Hearty court pointed out that self-funded coverage cannot be insurance. The court's reasoning was that insurance must be provided by a company that is certified and regulated by the many laws regulating the insurance business. Because self-funded coverage does not originate with an insurance carrier, it cannot be considered insurance.

Agency's response to Southern Home Insurance Company v. Burdette's Leasing Service, Inc., 234 S.E.2d 870 (S.C. 1977), cited by Farmers in its brief, is that that case is wrongly decided and is against the weight of authority. For the reasons identified by courts in other jurisdictions, which decisions are cited in Agency's brief on appeal, self-insurance does not possess enough similar qualities to insurance to be considered the equivalent of

insurance. Because Farmers fails to address the central issue of whether a certificate of self-funded coverage constitutes insurance as that term is used in the Farmers' policy, Farmers presents no reason why this Court should not conclude that Agency's certificate of self-funded coverage is not insurance as that term is used in the Farmers' policy and therefore, Agency's policy of insurance should not be primary.

POINT II

AGENCY DISPUTES THAT IT SHOULD BE CONSIDERED
PRIMARY TO PAY PIP BENEFITS.

In the proceedings below, Agency stipulated it would pay PIP benefits. However, Agency has always maintained, as it maintains now, that it should not be held to be primary for those benefits. Therefore, for the reasons set forth in Agency's brief on appeal, this Court should hold that Farmers' obligation to pay PIP benefits is primary.

POINT III

AGENCY'S LIABILITY LIMITS CANNOT EXCEED STATUTORY
MINIMUMS.

Agency has addressed this issue at length in its Appellate Brief. The clear import of the statute, and its successor, is that they were intended to ensure the availability of minimum limits. Neither statute was intended to increase those limits.

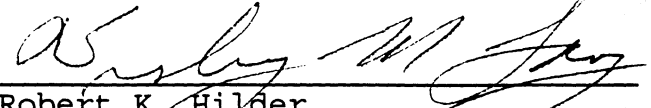
CONCLUSION

Based on the foregoing, Agency respectfully requests that this Court overturn the trial court's decision with respect to each issue on appeal.

Dated this 21 day of July, 1993.

CHRISTENSEN, JENSEN & POWELL, P.C.

By


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Attorneys for Defendant/Appellant
Agency Rent-A-Car

ADDENDUM

The appellant hereby provides copies of the pertinent statutes cited in its reply brief. These are as follows:

Section 31A-22-309(4)
Section 41-12a-401
Section 41-12a-407

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Mary T. Noonan
Clerk of the Court

its not to exceed a total of \$1,500

of a person, payable to his heirs,

of the medical expenses provided in 31A-22-309(1)(e), the commission of services and accommodation or rehabilitation of an injured person state to assign a unit value and each type of service and accommodation for any other year. In conducting the contract with appropriate public accountants or other technical experts. The commission, maintaining, and administering by the tax created under the study, the department shall conduct a study which sets forth the unit value for each type of service and accom-

modation or accommodation is determined by the 75th percentile charge assigned in the relative value study. If a service is not included in the relative value study, the value of the service or accommodation shall be the same as the value of the same or similar service or accommodation in this state.

The department from adopting a rate shall be prepared by persons outside the department of this subsection. The commissioner of Insurance may not take any action, or other improper actions, if the insurer has knowledge of

on motion or on the motion of the medical panel of not more than three persons, the claimant and testify on the issue of medical services or expenses. Subsection (1)(a) and in Subsection (2)(a) and in Subsection (2)(b) on medical remedial care and authorized religious method of heal-

ce of policies of insurance provided coverage required under this section those minimum coverages from

act to the insurance coverages

History: C. 1953, 31A-22-307, enacted by L. 1985, ch. 242, § 27; 1986, ch. 204, § 159; 1989, ch. 261, § 13; 1990, ch. 327, § 8; 1991, ch. 74, § 7.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, inserted "maintaining, and administering" in the next-to-last

sentence in Subsection (2)(a), added present Subsection (2)(d) and redesignated former Subsection (2)(d) as present Subsection (2)(e) and made minor stylistic changes in Subsection (1)(a) and in the second sentence in Subsection (2)(a)

NOTES TO DECISIONS

ANALYSIS

Allowable benefits.

—Loss of earnings.

Allowable benefits.

—Loss of earnings.

A claimant who was unemployed at the time of his or her accident can collect disability ben-

efits for lost wages from prospective employment only if the claimant establishes that a job was available for which the claimant was qualified and that the claimant would have taken that job. The legislature did not intend to provide compensation for "loss of earning capacity" unless a claimant has suffered a direct and specific monetary loss. *Versluis v. Guaranty Nat'l Cos.*, 199 Utah Adv. Rep. 6 (1992).

31A-22-309. Limitations, exclusions, and conditions to personal injury protection.

(1) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

- (a) death;
- (b) dismemberment;
- (c) permanent disability;
- (d) permanent disfigurement; or
- (e) medical expenses to a person in excess of \$3,000.

(2) (a) Any insurer issuing personal injury protection coverage under this part may only exclude from this coverage benefits:

- (i) for any injury sustained by the insured while occupying another motor vehicle owned by or furnished for the regular use of the insured or a resident family member of the insured and not insured under the policy;
- (ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle;
- (iii) to any injured person, if the person's conduct contributed to his injury:
 - (A) by intentionally causing injury to himself; or
 - (B) while committing a felony;
- (iv) for any injury sustained by any person arising out of the use of any motor vehicle while located for use as a residence or premises;
- (v) for any injury due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing; or
- (vi) for any injury resulting from the radioactive, toxic, explosive, or other hazardous properties of nuclear materials.

(b) The provisions of this subsection do not limit the exclusions which may be contained in other types of coverage.

(3) The benefits payable to any injured person under Section 31A-22-307 are reduced by:

(a) any benefits which that person receives or is entitled to receive as a result of an accident covered in this code under any workers' compensation or similar statutory plan; and

(b) any amounts which that person receives or is entitled to receive from the United States or any of its agencies because he is on active duty in the military service.

(4) When a person injured is also an insured party under any other policy, including those policies complying with this part, primary coverage is given by the policy insuring the motor vehicle in use during the accident.

(5) Payment of the benefits provided for in Section 31A-22-307 shall be made on a monthly basis as expenses are incurred. Benefits for any period are overdue if they are not paid within 30 days after the insurer receives reasonable proof of the fact and amount of expenses incurred during the period. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after that proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is also overdue if not paid within 30 days after the proof is received by the insurer. If the insurer fails to pay the expenses when due, these expenses shall bear interest at the rate of 1½% per month after the due date. The person entitled to the benefits may bring an action in contract to recover the expenses plus the applicable interest. If the insurer is required by the action to pay any overdue benefits and interest, the insurer is also required to pay a reasonable attorney's fee to the claimant.

(6) Every policy providing personal injury protection coverage is subject to the following:

(a) that where the insured under the policy is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under personal injury protection have been paid by another insurer, including the Workers' Compensation Fund of Utah, the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and

(b) that the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers.

History: C. 1953, 31A-22-309, enacted by L. 1985, ch. 242, § 27; 1986, ch. 204, § 160; 1988 (2nd S.S.), ch. 10, § 10; 1991, ch. 74, § 8; 1992, ch. 230, § 9.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, made minor stylistic changes in Subsection (1) and rewrote

Subsection (2)(a)(i), which read: "for any injuries sustained by the injured while occupying another motor vehicle owned by the insured and not insured under the policy."

The 1992 amendment, effective April 27, 1992, inserted "or is required to have" near the beginning of Subsection (1).

31A-22-401

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PART III**OWNER'S OR OPERATOR'S SECURITY
REQUIREMENT****41-12a-301. Requirement of owner's or operator's security
— Exceptions for off-highway vehicles and off-
highway implements of husbandry.**

NOTES TO DECISIONS

Federal government.

Even if the federal government could be characterized as an insurer because it provided financial security for its employees in regard to vehicle operation claims, it could not be subjected to mandatory arbitration under

§ 31A-22-309(6), since this would conflict with the administrative arrangement established in the Federal Tort Claims Act. *United States Fid. & Guar. Co. v. United States*, 728 F. Supp. 651 (D. Utah 1989).

COLLATERAL REFERENCES

A.L.R. — State regulation of motor vehicle rental ("you-drive") business, 60 A.L.R.4th 784.

41-12a-304. No-fault tort immunity ineffective.

NOTES TO DECISIONS

Cited in *United States Fid. & Guar. Co. v. United States*, 728 F. Supp. 651 (D. Utah 1989).

PART IV**PROOF OF OWNER'S OR OPERATOR'S SECURITY****41-12a-401. Means of providing proof of owner's or operator's security.**

(1) Whenever proof of owner's or operator's security is required under this chapter, it may be provided by filing with the department any of the following:

- (a) a certificate of insurance under Section 41-12a-402 or 41-12a-403;
- (b) a copy of a surety bond under Section 41-12a-405;
- (c) a certificate of deposit of money or securities issued by the state treasurer under Section 41-12a-406; or
- (d) a certificate of self-funded coverage under Section 41-12a-407.

(2) Whenever the term "proof of financial responsibility" is used in this title, it shall be read as "proof of owner's or operator's security."

History: C. 1953, 41-12a-401, enacted by L. 1985, ch. 242, § 48; 1991, ch. 203, § 2. **Amendment Notes.** — The 1991 amendment, effective April 29, 1991, made no apparent change in this section.

41-12a-404. Limitation on cancellation of coverage specified in certificate.

COLLATERAL REFERENCES

A.L.R. — Validity and construction of automobile insurance provision or statute automatically terminating coverage when insured obtains another policy providing similar coverage, 61 A.L.R.4th 1130.

41-12a-405. Surety bond as proof of owner's or operator's security.

(1) Proof of owner's or operator's security may be furnished by filing with the department a copy of a surety bond, certified by the surety, which conforms to Subsection 41-12a-103(9)(b). The bond may not be canceled except after ten days' written notice to the department.

(2) If a judgment rendered against the principal within the coverage of the bond is not satisfied within 60 days after judgment becomes final, the judgment creditor may, for his own use and benefit and at his sole expense, bring an action in the name of the department against the surety executing the bond.

History: C. 1953, 41-12a-405, enacted by L. 1985, ch. 242, § 48; 1991, ch. 203, § 3. **Amendment Notes.** — The 1991 amendment, effective April 29, 1991, substituted "41-12a-103" for "41-12a-104" in the first sentence of Subsection (1).

41-12a-407. Certificate of self-funded coverage as proof of owner's or operator's security.

(1) The department may, upon the application of any person, issue a certificate of self-funded coverage when it is satisfied that the person has:

- (a) more than 24 motor vehicles; and
- (b) deposits, in a form approved by the department, securities in an amount of \$200,000 plus \$100 for each motor vehicle up to and including 1,000 motor vehicles and \$50 for every motor vehicle over 1,000 motor vehicles.

(2) Persons holding a certificate of self-funded coverage under this chapter shall pay benefits to persons injured from the self-funded person's operation, maintenance, and use of motor vehicles as would an insurer issuing a policy to the self-funded person containing the coverages under Section 31A-22-302.

(3) In accordance with Title 63, Chapter 46b, Administrative Procedures Act, the department may, upon reasonable grounds, cancel the certificate. Failure to pay any judgment up to the limit under Subsection 31A-22-304(2) within 30 days after the judgment is final is a reasonable ground to cancel the certificate.

(4) Any government entity with self-funded coverage for government-owned motor vehicles under Title 63, Chapter 30, Utah Governmental Immunity Act, meets the requirements of this section.

History: C. 1953, 41-12a-401, enacted by L. 1985, ch. 242, § 48; 1991, ch. 203, § 2. **Amendment Notes.** — The 1991 amendment, effective April 29, 1991, made no apparent change in this section.

41-12a-404. Limitation on cancellation of coverage specified in certificate.

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ments in an amount equal to twice the single limit amount under Subsection 31A-22-304(2)” following “has” in Subsection (1); substituted “chapter” for “subsection” in Subsection (2); and substituted “In accordance with Chapter 46b, Title 63, Administrative Procedures Act” for “Upon not less than five days’ notice and a hearing pursuant to notice” in Subsection (3).

record” near the middle of that subsection, substituted all of the present language of Subsection (2)(b) before “if the person” for “The department may not suspend the person’s motor vehicle registration unless otherwise required by law,” and made stylistic changes throughout the section.