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Prime Long-distance services, Inc., an Arizona Corporation, dba Long-distance for less v. Northwestern National Insurance Company :
Reply Brief

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

PRIME LONG-DISTANCE SERVICES, INC., an Arizona Corporation, dba LONG-DISTANCE FOR LESS,	930599 CA
Plaintiff and Appellant,	No. 930196
vs.	
NORTHWESTERN NATIONAL INSURANCE COMPANY,	Priority No. 15
Defendant and Appellee.	

REPLY BRIEF OF APPELLANT PRIME LONG-DISTANCE SERVICES, INC.

Appeal from Summary Decision and Order entered March 23, 1993
and Order entered April 19, 1993
Honorable Michael R. Murphy, District Judge,
Third Judicial District Court

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UTAH COURT OF APPEALS
BRIEF

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ARGUMENT

POINT I

RECENT UTAH SUPREME COURT DECISIONS REAFFIRM THE PRINCIPLE THAT AN INSURED IS ENTITLED TO THE BROADEST POSSIBLE PROTECTION THAT HE COULD REASONABLY HAVE UNDERSTOOD FROM THE POLICY.

In its responsive brief, Northwestern National Insurance Company suggests that the Court should take a restrictive view of its insurance policy and interpret the language in a manner which avoids coverage. The insurer seeks to find technical reasons to deny coverage and ignore reasonable interpretations of its policy language to the detriment of its insured.

The Utah Supreme Court recently reaffirmed and clarified the rule that an insurance policy is to be interpreted in favor of coverage in the case of *USF&G v. Sandt*, 854 P.2d 519 (Utah 1993). In the *Sandt* case, the Utah Supreme Court invalidated an insurer's attempt to limit UIM recovery for its insured finding that the policy at issue was ambiguous and must be construed in favor of the insured. In expanding on the rules for interpreting insurance policies, the Court quoted earlier Utah case law with emphasis as follows:

. . . The rule of *strictissimi juris* has been applied almost universally to insurance contracts, and this jurisdiction, like many others, has declared in favor of a liberal construction in favor of the insured to accomplish the purpose for which the insurance was taken out and for which the premium was paid.

The Court went on to point out that "an insured is entitled to the broadest coverage he could reasonably understand from the policy" and that "insurance terms should be understood in their plain, ordinary, and popular sense." 854 P.2d at p. 523.

The Court set out the test for ambiguity in a policy as follows:

An ambiguity in a contract may arise (1) because of vague or ambiguous language in a particular provision or (2) because two or more contract provisions, when read together, give rise to different or inconsistent meanings even though each provision is clear when read alone.

854 P.2d at 523.

In the instant case, as in the *Sandt* case, ambiguity arises in the policy when the usual and customary meanings of the words of the policy are used and as a result of inconsistencies between provisions from different sections of the insurance contract. The policy must be interpreted liberally to the benefit of the insured.

POINT II

COVERAGE FOR PRIME'S LOSSES IS FOUND UNDER EITHER THE DEFINITION OF "MONEY" OR THE DEFINITION OF "SECURITIES" OF THE POLICY OR UNDER BOTH PROVISIONS.

A. Prime's Losses Resulted "Directly" from the Actions of Its Dishonest Employee.

The insurer's brief attempts to characterize the losses suffered by Prime as "indirect" losses. The insurer claims that, therefore, the losses are not subject to coverage notwithstanding the fact that they resulted in a loss of money. The insurer's creative argument cannot stand up to the rule of law that an insurance policy must be interpreted in favor of the insured if any reasonable interpretation of its language could provide for coverage.

The insurer directs the Court's attention to Section A-3 of the Crime General Provisions form. This section deals with indirect losses. However, it does not define what a direct loss is as opposed to an indirect loss. The section simply states:

Indirect loss: Loss that is an indirect result of any act or occurrence covered by this insurance including, but not limited to, loss resulting from:

a. Your inability to realize income that you would have realized had there been no loss of or property damage to covered property.

b. Payment of damages of any type for which you are legally liable. But, we will pay compensatory damages arising directly from a loss covered under this insurance.

c. Payment of costs, fees, or other expenses you incur in establishing either the existence or the amount of loss under this insurance.

The insurer points to Subsection b in claiming that the loss in this case is indirect. Subsection b is self-contradictory. The first sentence states that it will not cover payment of damages. The second sentence says that it will cover payment of "compensatory" damages. At best, the subsection gives no definition of the words "direct" and "indirect." At worst, it is self-contradictory and a nullity.

In this case, it is agreed that the damages occurred as a consequence of Prime's employee's dissemination of secret access codes and business information regarding Prime. The employee's purpose of obtaining free long distance telephone service for her husband and cohorts is readily apparent and implicit from her actions. A reasonable policy holder could certainly believe that such losses were a "direct" result of the employee's act.

The insurer's argument that because the secret information was passed to a third party, the loss is indirect, is illogical and certainly not what an ordinary individual would understand from the insurance policy. The loss in this case is no different than if the dishonest employee had given a combination to the company's safe to a third party who then used that information to steal money or securities. There is nothing

in the insurance policy to suggest that the passing of secret information which leads to losses of money and securities is not a direct loss.

B. The Insurer's Attempts to Distinguish Case Law are Unavailing.

The insurer's Brief attempts to distinguish the cases cited by Prime which interpret similar policy language and provide for coverage. The insurer has been unable to cite any similar case where coverage was denied by the court. All similar cases cited uphold coverage.

The only case cited by the insurer which supports its restrictive interpretation of the "money" definition of the policy goes on to find coverage under the "securities" definition of the policy. *Portland Federal Employees Credit Union v. Cumis Insurance*, 894 F.2d 1101 (9th Cir. 1990). The insurer attempts to distinguish the *Portland* case by speculating that "the coverage clause was probably inherently different." (Insurer's Brief, p. 22.) The insurer further attempts to distinguish the case by reverting to its claim of direct versus indirect loss and then suggests that checks which were found to be "securities" in the *Portland* case would not be found to be "securities" under the policy at issue. The insurer's analysis is self-contradictory. The *Portland* case stands for the proposition that checks for the payment of money are "securities" and consequently are included

in the property covered under both the *Portland* case and in the instant case.

The insurer's attempts to distinguish the other cases cited for their interpretation of the definition of "money" are similarly flawed. The insurer argues that the definition of "money" should be restricted to only physical cash. The policy contains no such specific statement. Each of the cases cited by Prime in its initial brief involve circumstances in which the "money" taken was not in physical form or physically taken from the insured. See *Northwest Airlines v. Globe Indemnity Co.*, 225 N.W.2d 831 (Minn. 1975), where the "money" loss was a reduction in a bank account balance; *Southside Motor Co. v. Transamerica Insurance*, 350 S.2d 470 (Fla. App. 1980), where the "money" loss was an amount paid to settle a third party claim; *Empire of Carolina v. Continental Casualty Company*, 414 S.E.2d 389 (N.C. App. 1992), where the "money" loss was a kickback scheme of credits and improper payments; *Northbrook National Insurance v. Nehoc Advertising Service, Inc.*, 554 N.E.2d 251 (Illinois App. 1989), where the "money" loss was an amount paid to settle a third party claim.

Each of the above-referenced cases involve an interpretation of the definition of "money" in an insurance policy. Most involve definitions very similar to that in the instant case. In each case, the courts applied a standard of

interpreting the policy language to the benefit of the insured and found coverage.

The insurer has not questioned Prime's argument that the word "money" is one of common usage which normally would include the type of losses involved in this case. As a consequence, in the event the insurer wished to restrict its policy to something substantially different than the common man would understand from the simple word "money", it is necessary that that coverage restriction be absolutely clear and unmistakable. In this case, as in the above cited cases, that restriction is simply not sufficiently clear. An ordinary person, reading the insurance policy in its entirety, could certainly understand that coverage for "money" would include the kind of out-of-pocket losses involved in this case even though physical cash was not carried out of Prime's offices.

The insurer's attempt to restrict coverage to physical cash runs directly counter to the fundamental purpose of Prime and its agent in purchasing employee dishonesty coverage. As the Utah Supreme Court has stated, the policy should be interpreted "in accordance with the usual and natural meaning of words, and in the light of existing circumstances including the purpose of the policy. *Nielsen v. O'Riley*, 848 P.2d 644 (Utah 1992) at p. 666. Emphasis added. The insurer's brief asks the Court to ignore these basic principles of policy construction.

CONCLUSION

Although the insurer has suggested several new sections of its policy, the fundamental problem remains. A reasonable person standing in the shoes of Prime could certainly have understood that its out-of-pocket losses due to the dishonesty of its employee would be covered. Contrary to the insurer's argument, the insurance policy does not specifically restrict losses of "money" and "securities" to physical cash.

This Court should issue its opinion determining that the policy in question covered Prime's out-of-pocket losses that resulted as a consequence of Michelle Davis's distribution of Prime's secret information to her cohorts. The case should be remanded to the trial court for a determination of the dollar amount of those out-of-pocket losses.

DATED this 16th day of December, 1993.

RICHARDS, BRANDT, MILLER & NELSON

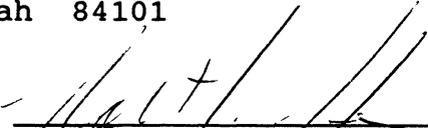


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served four true and correct copies of the foregoing instrument by mailing the same by first-class mail, postage prepaid, on this 16th day of June, 1993, to the following:

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