2005

General Security Indemnity v. Tipton : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GENERAL SECURITY INDEMNITY CO. OF ARIZONA, f/k/a FULCRUM INSURANCE COMPANY, an Arizona corporation,

Plaintiff and Appellee,

v.

SUSAN RICE TIPTON, d/b/a THE AUTOMOBILE SOURCE,

Defendant and Appellant.

CASE NO. 20050486-CA
ORAL ARGUMENT REQUESTED

REPLY BRIEF OF APPELLANT

Appeal from a Judgment of Fifth Judicial District Court
of Washington County, State of Utah
Honorable Eric A. Ludlow

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

ARGUMENT

A.

IT ISN'T JUST ABOUT WAIVING UNINSURED MOTORIST COVERAGE ALTOGETHER, IT'S ABOUT WAIVING THE HIGHEST LIMITS THE INSURED COULD PURCHASE

U. C. A. §31A-22-302(1)(b)(2000) is crystal clear: "every policy" sold to comply with Utah law "shall include" uninsured motorist coverage, "unless affirmatively waived under Subsection 31A-22-305(4)". Fulcrum argues that the waiver issue is a red herring because Tipton did not "waive" UM coverage, but actually purchased it in the amount of $65,000.00. (Appellee's Brief, p. 6, "Tipton did not need a waiver waiving UM coverage because she DID purchase UM coverage").

This argument is the red herring; the statute at issue goes beyond the waiver of uninsured motorist coverage in its entirety. U.C.A. §31A-22-302(1)(b)(2000) and U.C.A. §31A-22-305(4)(a)(2000) cover the rejection of UM coverage in its entirety. Those statutes are not at issue, because, as Fulcrum points out, Tipton did get UM coverage, albeit at an amount less than 25% of the liability limits of her policy. The statute that is at issue, U.C.A. §31A-22-305(3)(b)(2000), goes beyond that, and addresses the waiver of limits of coverage. This is required by "an acknowledgment form provided by the insurer that: (i) **waives the higher coverage** . . .". This acknowledgment form is wholly missing from Tipton's case.

The difference is between waiving UM coverage entirely, and waiving the "higher coverage" which the insurer could sell the insurance consumer.

B.

THE MAXIMUM AMOUNT AVAILABLE FROM THE INSURER IS NOT THE AMOUNT THE INSURED IS ACTUALLY SOLD BY THE INSURER

Fulcrum argues that the "maximum available by the insurer" refers only to the amount actually purchased by the insured, and available under the existing policy. In other words, that Tipton got the maximum available under her policy, or $65,000.00. (Appellee's Brief, p. 15, "those words can mean only one thing, the UM coverage limits under the policy issued to Tipton, which were $65,000.00"). But the "maximum available under the insured's policy" phrase in the UM statute cannot just refer to the amount actually purchased. It has to refer to an amount that the insured potentially can purchase, apart from whatever is actually available under the existing policy. Otherwise, the statute is meaningless. The statute is looking at the insurance purchase transaction from a prospective standpoint; i.e., presenting the insured with options, not just referencing and enforcing what was actually purchased after the fact.

The UM coverage is either the policy liability limits or the maximum available by the insurer, unless the insured chooses some lesser amount. These are three separate amounts. What the insured actually chooses might be the liability limits, or it might be the maximum available from the insurer or it might be some lesser amount. The maximum available amount is not simply what the insurer offers the insured. The statute contemplates that the insured be presented with a maximum amount, and a lesser amount, and be allowed to choose between the two.

Consider Fulcrum's argument while looking at the entire statute:

> (3)(b) For new [automobile insurance] policies written on or after January 1, 2001, the limits of uninsured motorist coverage shall be equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum uninsured motorist coverage limits available by the insurer under the insured's motor vehicle policy, unless the insured purchases coverage in a lesser amount by signing an acknowledgment form provided by the insurer that:
> (i) waives the higher coverage;
> (ii) reasonably explains the purpose of uninsured motorist coverage; and
> (iii) discloses the additional premiums required to purchase uninsured motorist coverage with limits equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum uninsured motorist coverage limits available by the insurer under the insured's motor vehicle policy.

U.C.A. §31A-22-305(3)(b)(2000).

The statute contemplates that the "maximum uninsured motorist coverage limits available by the insurer under the insured's motor vehicle policy" is some amount greater than the "lesser amount" that the insured purchases after being advised of the "higher coverage" including disclosure of the "additional premiums required to purchase uninsured motorist coverage . . . with limits equal to . . . the maximum uninsured motorist coverage limits available . . .". The "maximum" insurance "available by the insurer" requires "additional premiums", over and above the lesser amount that the insured actually might purchase. Thus, the "maximum" insurance "available by the insurer" is some higher amount than that actually stated in the policy. Otherwise, what "additional premium" is the statute referring to? What "higher coverage" is referred to? Stated another way, the statute requires disclosure of the cost of purchasing something other than the amount stated in the policy. Stated another way, the statute allows the insured to purchase a lesser amount than the "maximum . . . available by the insurer . . .", after the required disclosure. If the maximum available is not something higher than the actual amount offered to the insured, then what is the meaning of the

reference to a "lesser amount"? The statute understands the "maximum available" to be something that the insured can choose or reject. It is not a tautological reference to the amount the insured actually purchases.

This is even made more clear by considering the next section of the statute, which applies to renewal of existing policies:

> (3)(e)(i) In conjunction with the first two renewal notices sent after January 1, 2001, for policies existing on that date, the insurer shall disclose in the same medium as the premium renewal notice, an explanation of the purpose of uninsured motorist coverage and the costs associated with increasing the coverage in amounts up to and including the maximum amount available by the insurer under the insured's motor vehicle policy.
> (ii) The disclosure shall be sent to all insureds that carry uninsured motorist coverage limits in an amount less than the insured's motor vehicle liability policy limits or the maximum uninsured motorist coverage limits available by the insurer under the insured's motor vehicle policy.

U.C.A. §31A-22-305(3)(e)(i) and (ii)(2000).

The statute applies to existing UM policies, and requires that the notice the purpose of UM coverage and its costs be sent to all insureds with UM coverage less than the liability limits or the maximum uninsured motorist coverage limits available by the insurer under the insured's motor vehicle policy. Clearly, the amount of UM coverage actually carried, the liability limits, and the maximum UM coverage available by the insurer are three separate amounts. Otherwise, it is meaningless to require a notice to be sent to existing UM policyholders, who, by definition, already have the maximum available under their existing policies. Fulcrum's interpretation of the phrase "maximum UM coverage limits available by the insurer" would make this whole section pointless. But the court must interpret the statute in a way that makes sense for all portions.

C.

THE UNINSURED MOTORIST COVERAGE DISCLOSURE IS REQUIRED EVEN WHEN UNINSURED MOTORIST COVERAGE IS PURCHASED

Fulcrum now argues that the statutory waiver was not required because Tipton actually purchased UM coverage. (Appellee's Brief, p. 15, "only requires a waiver if the named insured is rejecting UM coverage"). But the UM coverage disclosure form is not just required when UM is completely rejected. The statute is not so limited. The statute is not just about buying or rejecting UM coverage. The prior version of the statute already did that. It required a minimum amount of UM coverage unless rejected by the insured. If that were all the Legislature had in mind, it would not have enacted the detailed current version of the statute. The current statute is all about advising the insured of the value of purchasing a substantial amount of uninsured motorist coverage, above the required minimum. This presupposes that UM coverage is being selected; it is obviously intended to help the insured make a choice as the amount of coverage to purchase, not just whether to purchase it or not.

This point is clear when one looks beyond the portion of the statute that covers purchase of new policies, to the portion that covers renewal of existing policies, which is U.C.A. §31A-22-305(3)(e)(i) and (ii)(2000). This requires the disclosure to be sent also to existing policyholders who have already purchased UM coverage. In contrast, the statute from the prior year, 1999, only stated that "the named insured may reject uninsured motorist coverage by an express writing to the insurer . . .". U.C.A. §31A-22-305(4)(a)(1999). No disclosure of limit amounts, premiums, the purposes and

advantages of coverage, etc., was required, because all that the statute covered was the acceptance or rejection of coverage.

D.

THE TRIAL COURT SHOULD NOT HAVE DECIDED THE AMBIGUITY AS A MATTER OF LAW, BASED UPON THE EVIDENCE IN FRONT OF IT

If the insurance contract is ambiguous because it does not state the terms and limits of UM coverage, and assuming that the trial court should have looked to extrinsic evidence rather than just construing the contract against the insurer, the trial court erred in concluding as a matter of law what the contract was intended to provide. Curiously, neither the deposition of the insurance agent nor Tipton was in front of the trial court. In the absence of that evidence, all the trial court had was the policy Tipton purchased during a prior policy year. That was insufficient evidence to make a determination as a matter of law as to the intent of the parties. The matter should have been set for an evidentiary hearing instead, so that the trial court could hear the testimony of the parties to the contract as to their intentions and actions.

E.

THE ARGUMENT ABOUT AMBIGUITY IS BASICALLY IRRELEVANT

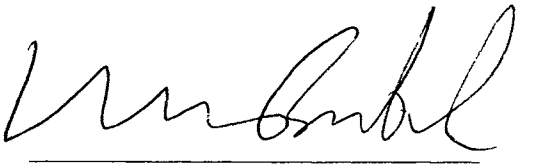
There are no terms in the contract that are ambiguous. The only ambiguity claimed by Fulcrum is the fact that there is no UM endorsement attached. Whether or not Tipton, or Fulcrum, or the trial court feel the contract is ambiguous is beside the point. The question of whether an insurance contract is ambiguous is a matter of law, and the parties and the trial court do not bind the appellate court in its determination of a matter of law. Whether the trial court should have looked

beyond the four corners of the insurance policy or not, whether the policy was ambiguous or not, it is undisputed that there was no disclosure made as required by U.C.A. §31A-22-305(3)(b)(2000). The real question is the effect of that non-compliance by the insurer.

CONCLUSION

The statutory waiver at issue is not the waiver of UM coverage generally, but that statute that requires waiver of "the higher coverage" that the insurance consumer could purchase. The "higher coverage" in the statute is not just the amount inserted into the policy by the insurer. It refers to either the liability limits, or the maximum coverage available to the consumer. Tipton did not get the benefit of the acknowledgment form outlining the purposes of UM coverage and the costs of the available coverages. Tipton should get what the Legislature intended: the maximum amount, measured by her bodily injury limits of $300,000, in the complete absence of evidence that only a lesser amount could have been purchased.

DATED THIS 10th day of March, 2006.



Daniel F. Bertch
Kevin K. Robson

CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of March, 2006, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, and by deposit in first class mail, postage prepaid to the following counsel of record:

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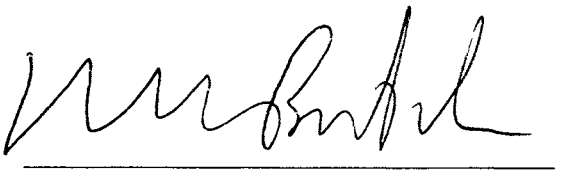

ADDENDUM

U.C.A. §31A-22-305(2000)

(6) (a) If a policy containing motor vehicle liability coverage provides an insurer with the defense of lack of cooperation on the part of the insured, that defense is not effective against a third person making a claim against the insurer, unless there was collusion between the third person and the insured.

(b) If the defense of lack of cooperation is not effective against the claimant, after payment, the insurer is subrogated to the injured person's claim against the insured to the extent of the payment and is entitled to reimbursement by the insured after the injured third person has been made whole with respect to the claim against the insured.

(7) A policy of motor vehicle liability coverage under Subsection 31A-22-302(1) may specifically exclude from coverage a person who is a resident of the named insured's household, including a person who usually makes his home in the same household but temporarily lives elsewhere, if:

(a) at the time of the proposed exclusion, each person excluded from coverage satisfies the owner's or operator's security requirement of Section 41-12a-301, independently of the named insured's proof of owner's or operator's security;

(b) the named insured and the person excluded from coverage each provide written consent to the exclusion; and

(c) the insurer includes the name of each person excluded from coverage in the evidence of insurance provided to an additional insured or loss payee.

(8) A policy of motor vehicle liability coverage may limit coverage to the policy minimum limits under Section 31A-22-304 if the insured motor vehicle is operated by a person who has consumed any alcohol or any illegal drug or illegal substance if the policy or a specifically reduced premium was extended to the insured upon express written declaration executed by the insured that the insured motor vehicle would not be so operated. **2000**

31A-22-304. Motor vehicle liability policy minimum limits.

Policies containing motor vehicle liability coverage may not limit the insurer's liability under that coverage below the following:

(1) (a) $25,000 because of liability for bodily injury to or death of one person, arising out of the use of a motor vehicle in any one accident;

(b) subject to the limit for one person in Subsection (a), in the amount of $50,000 because of liability for bodily injury to or death of two or more persons arising out of the use of a motor vehicle in any one accident; and

(c) in the amount of $15,000 because of liability for injury to, or destruction of, property of others arising out of the use of a motor vehicle in any one accident; or

(2) $65,000 in any one accident whether arising from bodily injury to or the death of others, or from destruction of, or damage to, the property of others. **1993**

31A-22-305. Uninsured and underinsured motorist coverage.

(1) As used in this section, "covered persons" includes:

(a) the named insured;

(b) persons related to the named insured by blood, marriage, adoption, or guardianship, who are residents of the named insured's household, including those who usually make their home in the same household but temporarily live elsewhere;

(c) any person occupying or using a motor vehicle referred to in the policy or owned by a self-insurer; and

(d) any person who is entitled to recover damages against the owner or operator of the uninsured or underinsured motor vehicle because of bodily injury to or death of persons under Subsection (1)(a), (b), or (c).

(2) As used in this section, "uninsured motor vehicle" includes:

(a) (i) a vehicle, the operation, maintenance, or use of which is not covered under a liability policy at the time of an injury-causing occurrence; or

(ii) (A) a vehicle covered with lower liability limits than required by Section 31A-22-304;

(B) the vehicle described in Subsection (2)(a)(ii)(A) is uninsured to the extent of the deficiency;

(b) an unidentified vehicle that left the scene of an accident proximately caused by the vehicle operator;

(c) a vehicle covered by a liability policy, but coverage for an accident is disputed by the liability insurer for more than 60 days or, beginning with the effective date of this act, continues to be disputed for more than 60 days; or

(d) (i) an insured vehicle if, before or after the accident, the liability insurer of the vehicle is declared insolvent by a court of competent jurisdiction;

(ii) the vehicle described in Subsection (2)(d)(i) is uninsured only to the extent that the claim against the insolvent insurer is not paid by a guaranty association or fund.

(3) (a) Uninsured motorist coverage under Subsection 31A-22-302(1)(b) provides coverage for covered persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, disease, or death.

(b) For new policies written on or after January 1, 2001, the limits of uninsured motorist coverage shall be equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum uninsured motorist coverage limits available by the insurer under the insured's motor vehicle policy, unless the insured purchases coverage in a lesser amount by signing an acknowledgment form provided by the insurer that:

(i) waives the higher coverage;

(ii) reasonably explains the purpose of uninsured motorist coverage; and

(iii) discloses the additional premiums required to purchase uninsured motorist coverage with limits equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum uninsured motorist coverage limits available by the insurer under the insured's motor vehicle policy.

(c) Uninsured motorist coverage may not be sold with limits that are less than the minimum bodily injury limits for motor vehicle liability policies under Section 31A-22-304.

(d) The acknowledgment under Subsection (3)(b) continues for that issuer of the uninsured motorist coverage until the insured, in writing, requests different uninsured motorist coverage from the insurer.

(e) (i) In conjunction with the first two renewal notices sent after January 1, 2001, for policies existing on that date, the insurer shall disclose in the same medium as the premium renewal notice, an explanation of the purpose of uninsured motorist coverage and the costs associated with increasing the coverage in amounts up to and including the maximum amount available by the insurer under the insured's motor vehicle policy.

(ii) The disclosure shall be sent to all insureds that carry uninsured motorist coverage limits in an amount less than the insured's motor vehicle liability

policy limits or the maximum uninsured motorist coverage limits available by the insurer under the insured's motor vehicle policy.

(4) (a) (i) Except as provided in Subsection (4)(b), the named insured may reject uninsured motorist coverage by an express writing to the insurer that provides liability coverage under Subsection 31A-22-302(1)(a).

(ii) This rejection shall be on a form provided by the insurer that includes a reasonable explanation of the purpose of uninsured motorist coverage.

(iii) This rejection continues for that issuer of the liability coverage until the insured in writing requests uninsured motorist coverage from that liability insurer.

(b) (i) All persons, including governmental entities, that are engaged in the business of, or that accept payment for, transporting natural persons by motor vehicle, and all school districts that provide transportation services for their students, shall provide coverage for all vehicles used for that purpose, by purchase of a policy of insurance or by self-insurance, uninsured motorist coverage of at least $25,000 per person and $500,000 per accident.

(ii) This coverage is secondary to any other insurance covering an injured covered person.

(c) Uninsured motorist coverage:

(i) is secondary to the benefits provided by Title 34A, Chapter 2, Workers' Compensation Act;

(ii) may not be subrogated by the Workers' Compensation insurance carrier;

(iii) may not be reduced by any benefits provided by Workers' Compensation insurance; and

(iv) may be reduced by health insurance subrogation only after the covered person has been made whole.

(d) As used in this Subsection (4):

(i) "Governmental entity" has the same meaning as under Section 63-30-2.

(ii) "Motor vehicle" has the same meaning as under Section 41-1a-102.

(5) When a covered person alleges that an uninsured motor vehicle under Subsection (2)(b) proximately caused an accident without touching the covered person or the vehicle occupied by the covered person, the covered person must show the existence of the uninsured motor vehicle by clear and convincing evidence consisting of more than the covered person's testimony.

(6) (a) The limit of liability for uninsured motorist coverage for two or more motor vehicles may not be added together, combined, or stacked to determine the limit of insurance coverage available to an injured person for any one accident.

(b) (i) Subsection (6)(a) applies to all persons except a covered person as defined under Subsection (7)(b)(ii).

(ii) A covered person as defined under Subsection (7)(b)(ii) is entitled to the highest limits of uninsured motorist coverage afforded for any one vehicle that the covered person is the named insured or an insured family member.

(iii) This coverage shall be in addition to the coverage on the vehicle the covered person is occupying.

(iv) Neither the primary nor the secondary coverage may be set off against the other.

(c) Coverage on a motor vehicle occupied at the time of an accident shall be primary coverage, and the coverage elected by a person described under Subsections (1)(a) and (b) shall be secondary coverage.

(7) (a) Uninsured motorist coverage under this section applies to bodily injury, sickness, disease, or death of covered persons while occupying or using a motor vehicle only if the motor vehicle is described in the policy under which a claim is made, or if the motor vehicle is a newly acquired or replacement vehicle covered under the terms of the policy. Except as provided in Subsection (6) or (7), a covered person injured in a vehicle described in a policy that includes uninsured motorist benefits may not elect to collect uninsured motorist coverage benefits from any other motor vehicle insurance policy under which he is a covered person.

(b) Each of the following persons may also recover uninsured motorist benefits under any other policy in which they are described as a "covered person" as defined in Subsection (1):

(i) a covered person injured as a pedestrian by an uninsured motor vehicle; and

(ii) a covered person injured while occupying or using a motor vehicle that is not owned by, furnished, or available for the regular use of the covered person, the covered person's resident spouse, or the covered person's resident relative.

(c) A covered person in Subsection (7)(b) is not barred against making subsequent elections if recovery is unavailable under previous elections.

(8) (a) As used in this section, "underinsured motor vehicle" includes a vehicle, the operation, maintenance, or use of which is covered under a liability policy at the time of an injury-causing occurrence, but which has insufficient liability coverage to compensate fully the injured party for all special and general damages.

(b) The term "underinsured motor vehicle" does not include:

(i) a motor vehicle that is covered under the liability coverage of the same policy that also contains the underinsured motorist coverage; or

(ii) an uninsured motor vehicle as defined in Subsection (2).

(9) (a) Underinsured motorist coverage under Subsection 31A-22-302(1)(c) provides coverage for covered persons who are legally entitled to recover damages from owners or operators of underinsured motor vehicles because of bodily injury, sickness, disease, or death.

(b) For new policies written on or after January 1, 2001, the limits of underinsured motorist coverage shall be equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum underinsured motorist coverage limits available by the insurer under the insured's motor vehicle policy, unless the insured purchases coverage in a lesser amount by signing an acknowledgment form provided by the insurer that:

(i) waives the higher coverage;

(ii) reasonably explains the purpose of underinsured motorist coverage; and

(iii) discloses the additional premiums required to purchase underinsured motorist coverage with limits equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum underinsured motorist coverage limits available by the insurer under the insured's motor vehicle policy.

(c) Underinsured motorist coverage may not be sold with limits that are less than $10,000 for one person in any one accident and at least $20,000 for two or more persons in any one accident.

(d) The acknowledgment under Subsection (9)(b) continues for that issuer of the underinsured motorist coverage until the insured, in writing, requests different underinsured motorist coverage from the insurer.

(e) The named insured's underinsured motorist coverage, as described in Subsection (9)(a), is secondary to the