IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY

Petitioner,

vs.

EXECUTIVE CAR & TRUCK LEASING INC., et al.,

Respondents.

CASE NO. 67,368

FILED
SID J. WHITE
MAR 25 1988
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

COMMERCIAL UNION INSURANCE COMPANY, et al.,

Petitioner,

vs.

EXECUTIVE CAR & TRUCK LEASING et al.,

Respondents.

CASE NO. 67,409

REPLY BRIEF OF PETITIONERS COMMERCIAL UNION INSURANCE COMPANY and ACTION BOLT & TOOL COMPANY

(TO BRIEF OF RESPONDENTS EXECUTIVE & INDUSTRIAL INDEMNITY)

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SUMMARY OF ARGUMENT

Executive's insurance policy with Industrial Indemnity also covers Action and Mendelsohn, the active tortfeasor, as additional insureds. Therefore, Industrial may not seek indemnification from Commercial Union, another insurer of Action and Mendelsohn, because this is contrary to Florida law, which precludes suits against one's own insured. Executive incorrectly relies upon exclusionary provisions in Industrial's policy to deny coverage for Mendelsohn. If the exclusionary clauses are given effect they would remove all the insurance coverage provided by the owner Executive, when one of its leased car is driven by a lessee or lessee's employer.

It is contrary to strong public policy and Florida law to allow an insurance policy to exclude coverage by the primarily responsible party, the car owner. At the very least these provisions in Industrial's policy are ambiguous, if they can be interpreted to remove all insurance coverage from a leased car. The exclusionary clauses are void for violating public policy and the law; and at the least are ambiguous and must be construed to provide coverage. Applying either principle, coverage is provided for Action and Mendelsohn as additional insureds under Industrial's policy.

Executive and Industrial may not seek indemnification

from Action and Commercial Union under theories of common law or contractual indemnification. Absent the exclusionary provisions, Executive does not challenge the fact that the active tortfeasor and the lessee are additional insureds, therefore there is no basis for common law indemnification. This conclusion is based on the principle that an insurer may not sue its own insured for indemnity. Fowler; Metropolitan Property, infra.

The same principle applies to bar any claim for contractual indemnity under the lease agreement, because to enforce the lease provision would also allow an insurer to sue its insured. As this is clearly contrary to the recent case law reaffirming this principle there is no basis for contractual indemnification in this case.

Executive continues to claim that the car that it owned and leased to Action, is also "owned" by Action. This contention is without merit and the clear language of Commercial Union's policy expressly states that it provided excess coverage for cars it does not own. Action does not "own" the car it leased from Executive and subsequently loaned to Mendelsohn.

Fowler, infra, requires, that in the absence of a right of indemnification, priority of insurance coverage must be based on policy language. Because the underlying and excess policies of both Commercial Union and Industrial Indemnity

contain mutually repugnant "other insurance" and escape clauses, the third level of insurance coverage in this case must be pro rata contribution by both insurers. The Fourth District erred in not applying the policy language to determine the third level of coverage and that decision must be reversed.

ARGUMENT

THE APPELLATE COURT ERRED IN DETERMINING THE THIRD LEVEL OF COVERAGE WHEN IT IGNORED THE PROVISIONS OF THE POLICIES, ALLOWED AN INSURER TO OBTAIN INDEMNITY FROM ITS OWN INSURED; AND FAILED TO LIMIT COMMERCIAL'S LIABILITY TO THE CONTRACTED FOR AMOUNT OF $100,000.

Respondents, Executive and Industrial and Petitioners, Action and Commercial Union, all insured Mendelsohn, the tortfeasor, as an additional insured under their policies. They also insured anyone vicariously liable for negligent acts of an insured. Under the recent Fowler line of cases a court may only ignore policy language if a vicariously liable party is entitled to indemnification. The Fourth District ignored the applicable policy language to determine the third level of coverage. It looked instead to an indemnity clause in the lease agreement between Action and Executive, and required Commercial Union to exhaust its policy limits prior to payment by Industrial Indemnity. This determination is clearly erroneous under the law and the court's decision on the third and fourth levels of coverage must be reversed.

The vicariously liable parties in this case, Executive and Action are not entitled to indemnification since their policies covered the tortfeasor as an additional insured. Metropolitan Property and Life Ins. Co. v. Chicago Ins. Co.,

479 So.2d 114 (Fla. 1985). By using the indemnity clause in the lease the Fourth District allowed Executive and Industrial to obtain indemnification against its owned insured. Florida law is now well established that an insurer may not sue its insured. Allstate Ins. Co. v. Fowler, 480 So.2d 1287, 1290 (Fla. 1985); Metropolitan Property, supra, 116; Marina Del Americana, Inc. v. Miller, 330 So.2d 164, 165 (Fla. 4th DCA 1976). Both Action and Mendelsohn were insured by Executive. Giving effect to the indemnity provision is contrary to the public policy and case law of Florida and the provision which must be voided.

A. EXECUTIVE'S POLICY WITH INDUSTRIAL INDEMNITY COVERS TORTFEASOR AS ADDITIONAL INSURED

Executive and Industrial claim that the exclusions contained in the Industrial policy restrict coverage to just Executive, the car owner/lessor and excludes coverage for Action or Mendelsohn. This argument is without merit as an examination of the exclusionary clauses shows that they are void because they remove all insurance coverage on the car, if it is being driven by the lessee or the lessee's permittee. Not only are these attempted exclusions contrary to Florida law, at the very least the clauses are ambiguous since the owner's insurer is excluding coverage for the cars which are owned and leased. Executive is in the business of leasing cars and it intends to have its cars driven by

lessees, therefore it must provide insurance coverage for these cars and cannot have a policy removing all insurance coverage from its cars.

Applying established rules of contract construction the exclusions must be strictly construed against the insurer that drafted the contract and in favor of the insureds. Therefore, the exclusions are void and under the express language of Industrial's policy the tortfeasor Mendelsohn is an additional insured.

It is well established that a forfeiture of rights under an insurance policy is not favored by the law, and courts will interpret the insurance policy to avoid such a forfeiture. Johnson v. Life Ins. Co., 52 So.2d 813 (Fla. 1951). The law in Florida is that insurance coverage must be construed broadly and its exclusions narrowly. Demshar v. Aaacon Auto Transport, Inc., 337 So.2d 963, 965 (Fla. 1976); National Merchandise Co. v. United Service Automobile Ass'n., 400 So.2d 532 (Fla. 1st DCA 1981); Hudson v. Prudential Property and Casualty Ins. Co., 450 So.2d 565 (Fla. 2d DCA 1984).

> The rule of liberal construction is particularly applied to avoid forfeiture or to limit the effect of exception to or limitations upon coverage. J. Appleman, Insurance Law & Practice Section 7438 (1976).
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> Hulse v. Blue Cross/Blue Shield of Fla., Inc., 424 So.2d 191, 192 (Fla. 5th DCA 1983).

Not only are exclusionary provisions construed narrowly, but additionally if the provisions are in any way ambiguous they will be interpreted most strongly against the party who selected the language. Hurt v. Leatherby Ins. Co., 380 So.2d 432 (Fla. 1980); Finberg v. Herald Fire Ins. Co., 455 So.2d 462 (Fla. 3d DCA 1984).

> We also note that if there is any ambiguity in the exclusionary provisions as they apply to the stipulated facts, those provisions must be construed in favor of the insured, and against the insurer who chose the specific language in drafting the policy. Fireman's Fund Ins. Co. of San Francisco v. Boyd, supra. Applying this rule of construction supports our conclusion that the exclusionary clause does not apply.
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> Collins v. Royal Globe Ins. Co., 368 So. 2d 941, 942 (Fla. 4th DCA 1979).

Applying the principles to the attempted exclusions by Industrial Indemnity it is apparent that at the very least the provisions of Industrial's policy are ambiguous and must be construed in favor of the insureds.

Executive and Industrial do not dispute the fact that Action and Mendelsohn are insured under the policy. They only assert that the coverage is removed by the effect of the exclusionary provisions. The exclusions remove all insurance coverage from Executive's owned cars if the lessee or it's employee is driving. This is unquestionably a violation of Florida's strong public policy requiring a car

owner to insure the vehicle, since the owner is liable for its negligent use.

> "The principles of the common law do not permit the owner of an instrumentality that is * * * peculiarly dangerous in its operation, to authorize another to use such instrumentality on the public highways without imposing upon such owner liability for negligent use. The liability grows out of the obligation of the owner to have the vehicle * * * properly operated when it is by his authority on the public highway."

Susco Car Rental System of Florida v. Leonard, 112 So.2d 832, 836 (Fla. 1959), quoting from Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975 (Fla. 1920). Fla.Stat. Section 324.021(7) setting the minimum financial responsibility for car owners, was enacted in furtherance of this public policy.

If the provisions do not remove all coverage under Industrial's policy when the leased car is being driven as intended, by the lessee or the lessee's employee, then at the very least the clauses are ambiguous, being susceptible to two interpretations. The law is clear, that when ambiguous, exclusionary provisions must be construed against the insurer to provide coverage.

To give effect to Industrial's exclusionary provisions would result in Executive not providing any insurance on its cars, when they are being used with its permission. This

violation of Florida's public policy and statutes voids the exclusionary clauses in Industrial Indemnity's policy. Whether the provisions are viewed as clear or ambiguous the end result is the same. The exclusions must be read to provide coverage; or voided, which also results in coverage being provided under the policy.

Executive and Industrial do not dispute that there is coverage for tortfeasor Mendelsohn as an additional insured under the policy. Instead, they mistakenly rely upon the void or ambiguous exclusionary provisions to remove this coverage. Florida law will not permit the owner, Executive, to lease cars without insuring them. Therefore, the exclusions may not eliminate coverage for the lessee or the lessee' employee, Mendelsohn and he is an additional insured under the policy. Industrial is barred from seeking common law indemnity from Commercial Union as an insurer may not sue its own insured for indemnity.

> Further, the insurer of a vicariously liable party is not entitled to indemnity when its policy covers the active tortfeasor as an additional insured. This is based upon the premise that an insurance company cannot sue its own insured for indemnity. Fowler, at ___, citing Marina Del Americana, Inc. v. Miller, 330 So.2d 164 (Fla. 4th DCA 1976).
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> Metropolitan Property, at 116.

Without the right of common law indemnification, policy language may not be ignored and must be used to determine the third level of insurance coverage in this case. Fowler, supra, 1290.

B. LEASE AGREEMENT DOES NOT CHANGE APPLICATION OF POLICY LANGUAGE

Executive and Action were parties to a lease agreement which contained an indemnity provision. Executive does not take issue with the fact that giving effect to this indemnification clause would violate both Florida law and public policy.

Executive's policy insured the active tortfeasor as an additional insured. Thus, the Fourth District's decision requiring Commercial Union's policy be exhausted before Industrial's, based on the indemnity provision, violates the principle that an insurer may not sue its own insured for indemnification. To hold that Executive has the right of indemnification against one of its insureds is clearly contrary to public policy and case law. Ray v. Earl, 277 So.2d 73 (Fla. 3d DCA 1973), cert. denied 280 So.2d 685 (Fla. 1973); Marina Del Americana, Inc. v. Miller, 330 So.2d 164 (Fla. 4th DCA 1976).

Moreover, Action is also an additional insured under the Industrial policy, as it is undisputed that Industrial's policy covers those vicariously liable for the negligent

acts of its insured, Mendelsohn. Again, if Executive sues Action for indemnification it would mean that Executive and Industrial would be suing an insured for indemnification, which is totally improper.

The indemnity provision clearly contravenes established public policy and law of this state and is void and unenforceable. Wechsler v. Novak, 26 So.2d 884, 157 Fla. 703 (1946); Bond v. Koscot Interplanetary, Inc., 246 So.2d 631, (Fla. 4th DCA 1971); Davis v. Ebsco Industries, Inc., 150 So.2d 460 (Fla. 3d DCA 1963). The Fourth District erred in applying this provision to find Commercial Union liable for its policy limits, because the indemnity agreement is void. Executive is not a vicarious liable party entitled to indemnification, therefore under the criteria in Fowler the third level of coverage must be decided by examining the policy language.

C. POLICY LANGUAGE REQUIRE THIRD LEVEL OF COVERAGE TO BE ON A PRO RATA BASIS.

In its final attempt to avoid liability, Executive once again makes the incredible argument that not only does it own the car leased to Action, but that Action owns it too. In this manner Executive attempts to make Action's insurance primary and Executive's excess only.

The plain language of the Commercial Union policy states that it is primary for cars owned and excess for cars

not owned:

> B. OTHER INSURANCE
>
> 1. For any covered auto you own this policy provides primary insurance. For any covered auto you don't own, the insurance provided by this policy is excess over any other collectible insurance.
>
> (R 333-363)

Because the cars that Action leased are listed with the cars that it owned on the "schedule of automobiles," the Respondents contend this means that Action "owned" its leased cars.

It is unbelievable that the owner and lessor of the car is claiming that someone else owns the car. Commercial's policy contains an endorsement that names Executive as loss payee for damage to the two leased cars, as it would for paying any owner for damage to their leased car. (R 333-363) Making someone a loss payee does not mean they own that car, and that argument defies common experience and common sense.

There is nothing in the insurance policy that suggests that all of the cars listed on the automobile schedule are "owned" by Action. The policy simply states that the owned cars are listed on that schedule, not that all the cars on the schedule are owned. The scheduling of a car is required by Commercial if a leased car is used regularly by the

company for over thirty days. By looking at the plain meaning of the Commercial policy and the undisputed fact that Action did not own the car, there is no doubt that the Commercial policy provides excess coverage for cars owned by Executive.

The amount of coverage available under Commercial's policy is still only the $100,000 as stated in the lease agreement. That was the contractual amount of coverage the parties agreed upon and there is no theory under which Action and Commercial would be liable for an amount greater than what the lease provided. Any contrary assertion certainly is not clear and unequivocal, to say the least, which is required to uphold an indemnity agreement. Charles Poe Masonary v. Springlock Scaffold, 374 So.2d 487, 498 (Fla. 1979).

Because Industrial and Commercial Union insured the active tortfeasor and are not entitled to indemnification, the third level of coverage can only be determined by examining the policy language.

> Therefore, we emphasize the narrow range of situations in which a court may disregard specific language contained in an insurance policy. An "other insurance" clause in an insurance policy will only be disregarded if the insurer of the vicariously liable party is also entitled to indemnity. (emphasis added), Fowler, at 1290.

The underlying policies of Industrial Indemnity and Commercial Union both have the standard type "other insurance" clauses, while both excess or umbrella policies contain "escape clauses" stating they will not contribute with other insurance. Since the provisions are virtually identical in both sets of policies, they cancel each other out. When there are mutually repugnant other insurance and/or escape clauses in policies they are rendered nugatory and do not apply. World Rent-A-Car Inc. v. Stauffer, 306 So.2d 131 (Fla. 2d DCA 1974).

When the policy provisions cancel each other, the insurers are then liable pro rata in the respective proportion which the amount of each policy bares to the combined total amount of both policies for the liability in the third level of coverage. Rouse v. Greyhound Rent-A-Car, Inc., 506 F.2d 410 (5th Cir. 1975).

Commercial Union is limited to contributing a pro rata share of $100,000 since this is the amount of coverage Action agreed to obtain for the car in its lease with Executive (R 310-314). The Appellate Court erred in determining the third level of coverage, based on the indemnity clause in the lease agreement, as the policy provisions must control the priority of coverage in this level. Moreover, the Fourth District's opinion allows an insured to obtain indemnification from its insured which is

contrary to Florida law. The Decision of the Appellate Court on the third level of coverage must be reversed and remanded for a proper determination under the current Florida law.

CONCLUSION

The Appellate Court erred in determining the third level of coverage and this portion of the decision must be reversed and remanded. The levels of coverage under the recent decisions of this Court are as follows:

1) Industrial Indemnity in the statutory amount of $10,000;

2) Allstate, insurer of the active tortfeasor, in the amount of $100,000;

3) Industrial Indemnity and Commercial Union pro rata based on the available coverage:

Industrial Indemnity underlying policy - $500,000

Industrial Indemnity excess policy - $5,000,000

Commercial Union underlying policy - $100,000

The first two levels of coverage were correctly decided and these portions of the decision must be affirmed.

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CERTIFICATE OF SERVICE

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