Buffalo Law Review

Volume 8 | Number 1 Article 90

10-1-1958

Insurance—Policy Construction—Policies Covering Lessor and Lessee Respectively

Buffalo Law Review

INSURANCE

Policy Construction—Policies Covering Lessor and Lessee Respectively

In *General Accident Fire and Life Ins. Co. v. Piazza*,[1] plaintiff, General Accident, brought a declaratory judgment action to determine its liability upon a liability insurance policy issued to Ben Franklin Lines, the lessee of a truck involved in a pending negligence action, as against Globe Indemnity Co., the insurer of the owner and lessor of the truck involved in the negligence action. Both the General and Globe policies contained omnibus clauses extending coverage to persons using the truck with consent of the insured, and to organizations legally responsible for its use. Both policies had exclusion clauses, however. The General policy expressly limited coverage to excess over other collectible insurance, in the case of a hired vehicle. The Globe policy contained two such clauses, the first excluding from coverage any person or organization required by law to carry liability insurance, the second limiting liability to a pro rata share with other collectible insurance.

Upon appeal from affirmance by the Appellate Division of judgment that the obligation to defend and indemnify was General's, the Court was faced with the problem of reconciling these policies in the given fact situation. In a unanimous opinion, the Court reversed the courts below, holding (1) that Franklin Lines was not required to carry liability insurance and therefore the first of Globe's exclusionary clauses did not apply, and (2) that General's policy, being excess and secondary by its terms, was not other collectible insurance within the meaning of the latter of Globe's exclusionary clauses, and that therefore only Globe was liable as insurer in the pending negligence action.

As to the first of Globe's clauses, excluding persons required to carry insurance, the Court pointed out that section 59 of the Vehicle and Traffic Law does not require all policies of liability insurance to contain an omnibus clause extending coverage.[2] What is required is coverage of the owner of a vehicle for the acts of his employee, licensee, or lessee.[3] Therefore, Franklin was not required to carry liability insurance under New York law. He was, however, licensed to transport goods in interstate commerce. To qualify as such a carrier, a certificate of public convenience and necessity must be obtained.[4] And in order to obtain this certificate, a minimum amount of liability insurance is required to be carried by the motor carrier.[5] At the time of the alleged negligence, however, Franklin

1. 4 N.Y.2d 659, 176 N.Y.S.2d 976 (1958).
2. N. Y. VEHICLE AND TRAFFIC LAW, §59; N. Y. INSURANCE LAW, §167(2).
3. Kuhn v. Auto Cab Mut. Indemnity Co., 244 App.Div. 272, 279 N.Y. Supp. 60 (2d Dep't 1935), *aff'd* 270 N.Y. 587, 1 N.E.2d 343 (1936); see Switzer v. Merchants Casualty Co., 2 N.Y.2d 575, 141 N.E.2d 940 (1957).
4. 49 U.S.C. §306 (1952), as amended, 49 U.S.C. §306 (Supp. V, 1957).
5. 49 U.S.C. §315 (1952), as amended, 49 U.S.C. §315 (Supp. V. 1957).

was not carrying goods in interstate commerce.[6] Nor were the goods being carried under a "common control for continuous carriage," which the United States Supreme Court has held to be carriage for interstate commerce.[7] Franklin was therefore not required to carry liability insurance under any law at the time of the accident, and thus did not fall within the terms of the first of Globe's exclusion clauses.

As to Globe's "other insurance" clause, the Court, purportedly applying the intention of the policies, held that the Globe clause required prorating only with respect to other "primary" insurance and therefore did not apply to policies such as General's which by its terms is excess and "secondary". The basis for this primary-secondary distinction is not made clear. It seems difficult to escape the conclusion that the terms of these clauses make the policies mutually dependent in respect to the extent of their liability. In order to determine Globe's liability one must look to the General policy to see whether it represents collectible insurance. But the collectibility of the General policy, depending upon whether there is an "excess", requires a determination of Globe's liability. The Court's distinction, however, may have been based upon a resort to a general, over-all intent found in the fact that an "excess" clause restricts liability to a greater degree than does a prorata "other insurance" clause.

The present case is in line with the result reached by the Second Circuit[8] in a case involving similar clauses. The court there stated that an excess coverage policy is not considered "other collectible insurance," as it is not available to the insured until the "primary" policy has been exhausted. (The court held further, that under Section 59 of the Vehicle and Traffic Law there was no tortfeasor whose liability could be considered secondary; therefore, the insurer of the owner of the vehicle involved could not avoid liability on the ground that the lessee was the primary tortfeasor.[9])

Recently, in *Ins. Co. of Texas v. Employers Liability Co.*,[10] a federal District Court in California decided that an "other collectible" insurance clause in one policy and an "excess over other" clause in the other policy were "mutually repugnant," neither policy being "excess over other" collectible insurance, and that the loss should be prorated between the policies. Since the mutual dependency of the policies makes it impossible to impose liability in terms of intent, and since the equities favor neither insurer over the other, this resolution of the problem seems the more desirable.

6. 49 U.S.C. §303 (1952), as amended, 49 U.S.C. §303 (Supp. V, 1957).
7. U.S. v. Munson S.S. Lines, 283 U.S. 43 (1930); Baer Bros. v. Denver & Rio Grande R.R., 233 U.S. 479 (1914).
8 Michigan Alkali Co. v. Bankers Indemnity Co., 103 F.2d 345 (2d Cir. 1939). (Declaratory judgment action involving an "other collectible" clause versus an "excess over other" collectible insurance clause).
9. *Supra*, note 8.
10. 163 F.Supp. 143 (S.D. Cal. 1958).