

Recent Decisions: Insurance: Construction of the Uninsured Motorist Clause

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If by the terms of the instrument creating a trust mandatory powers are conferred upon the trustee, although by the instrument no legal estate is limited to him in specific words, he takes an estate and not merely powers, in the absence of a contrary intention.¹⁵

One would normally think that the exercise of a mere power of sale in trust should not require the effort and expertise in accounting required of the defendant in the *Martin* case. Indeed, all that one who exercises a power of sale should have to do, it seems, is account for the proceeds and show that he received a reasonable price. Nevertheless, the trustee in the *Martin* case undertook the broad administration of all the property. He supervised some of the assets and completely controlled the others. Although the reported case does not specifically list any other powers exercised by the trustee, it can be safely assumed that he did so (investing corpus and income, incurring expenses in preserving the estate, etc.). Such activities only served to increase his responsibilities to account, even though by exercising these other powers, he exceeded his authority as trustee. Because the trustee undertook to exercise these added powers and to determine, by himself, his own duties for ten years, the court in effect estopped him from denying that he had these added powers for the exercise of which he had to account. The court said: "If there were any question of the scope of his duties, the trustee should not have waited ten years before claiming his rights were less than those which, in fact, he exercised."¹⁶

DONALD J. BAUHS

Insurance: Construction of the Uninsured Motorist Clause: In *State Farm Mut. Auto. Ins. Co. v. Brower*,¹ a Virginia case, plaintiff sued his own insurance carrier. Brower, the insured, was injured when his automobile was struck by an automobile driven by one Mazza. Brower sued Mazza for damages and recovered a judgment. Because Mazza's insurance carrier, National Automobile Insurance Co., had gone into receivership four months before the action was instituted, it did not appear in the action, offered no defense, and paid no part of the judgment.

Plaintiff based his action against his own carrier on the Virginia uninsured motorist statute. This statute provides that, in all bodily injury and property damage insurance policies, the insurer shall undertake to pay the insured the amount he is entitled to recover as damages from the owner or operator of an uninsured motor vehicle.² The statutes define an uninsured motor vehicle as

¹⁵ RESTATEMENT, *supra* note 4, § 88, comment c.

¹⁶ Estate of Martin, *supra* note 1, at 341, 124 N.W. 2d at 301.

¹ 134 S.E. 2d 277 (Va. 1934).

² VA. CODE § 38.1-381(b) (1950).

a motor vehicle as to which there is no (i) bodily injury liability insurance and property damage liability insurance . . . or (ii) there is such insurance but the insurance company writing the same denies coverage thereunder. . . .³

The Virginia Supreme Court held that plaintiff could recover because there had been an implied denial of coverage by National. This denial consisted in the insurance company's failure to appear, defend the action, and pay the judgment. The court held that a denial of coverage need not be express to be effective.

In its opinion, the Virginia court mentioned a New York case, *Uline v. Motor Vehicle Acc. Indemn. Corp.*,⁴ which arrived at the opposite conclusion. The facts of the *Uline* case are almost identical to those of the *Brower* case. Here also plaintiff received injuries in an automobile accident. A similar uninsured motorist statute was in effect. As in *Brower*, the other party had been insured at the time of the accident, but his carrier had gone into receivership. The New York court held that he was not an uninsured motorist. It reasoned that the denial of coverage must be express. Failure to appear and defend because of insolvency is not the express denial contemplated by the statute.

Wisconsin does not have an uninsured motorist statute, but the same problem arises in defining "uninsured automobile" as the expression is used in a contract of insurance. The question to be discussed in this article is whether a Wisconsin court in construing an insurance contract and defining the term "uninsured automobile" would reach the result reached in Virginia or that reached in New York. In other words, would a Wisconsin court consider a motorist uninsured whose insurance carrier had become insolvent, although such insurance carrier had not expressly disclaimed liability?

In answering this question it must be remembered that it is a contract of insurance rather than a statute that is being considered. If an ambiguity can be found the rule that an insurance contract is to be construed against the insurer and in favor of the insured will apply. However, for this rule to apply, ambiguity must be present. As pointed out in *Bell v. American Ins. Co.* :

While insurance contracts should be construed most strictly against the insurer, yet they are subject to the same rules of construction applied to the language of any other contract, and the language used is to be accorded its popular and usual significance.⁵

The provisions of the standard contract seem unambiguous. After providing that the insurer will pay all sums which the insured shall be entitled to recover as damages from the owner or operator of an un-

³ VA. CODE § 38.1-381 (c) (1950).

⁴ 28 Misc. 2d 1002, 213 N.Y.S. 2d 871 (1961).

⁵ 173 Wis. 533, 536, 181 N.W. 733, 734 (1921).

insured automobile because of bodily injury, the contract defines "uninsured automobile" as

an automobile with respect to the ownership, maintenance or use of which there is . . . no bodily injury liability bond or insurance policy *applicable* at the time of the accident . . . or with respect to which there is a bodily injury liability bond or insurance policy *applicable* at the time of the accident but the company writing the same denies coverage thereunder . . .⁶ (Emphasis added.)

In short, an automobile is uninsured if it is not covered by insurance, or even if it is so covered, if the carrier denies coverage. As stated in the *Bell* case, language used in a contract should be accorded its usual significance. It does not seem that the usual significance of "disclaim liability" includes a mere failure to appear and defend because of insolvency. "To deny coverage" contemplates affirmative action. A failure to appear is obviously not an act at all.

A grammatical analysis of the contract only supports the conclusion that ambiguity is not present. In defining an uninsured automobile, the standard policy states that it is an automobile with respect to which there is no insurance *applicable* at the time of the accident. It does not say that an uninsured automobile is one as to which there is no insurance *collectible* or *payable*. Under the contract, to be insured, an automobile need only have insurance *applicable* to it.

In discussing limits of liability, the same contract provides that any amount payable under the terms of this endorsement (uninsured motorist provision) because of bodily injury sustained in an accident by a person who is an insured under this coverage shall be reduced by . . . (2) the amount *paid* and the present value of all amounts *payable* on account of such bodily injury under any workmen's compensation law, disability benefits law or any similar law.⁷ (Emphasis added.)

Coverage is not be reduced by the amount of insurance *applicable* from any source. It must be actually *payable*. In attempting to determine whether a Wisconsin court would ascribe the same meaning to the words "applicable" and "payable," the case of *Merrill v. Travelers' Ins. Co.*⁸ is useful. In this case, the court was concerned with the meaning to be ascribed to a single word in the contract. The court stated:

Policies of insurance are framed probably with greater care and stricter attention to the language employed than almost any other kind of contracts, and each sentence, phrase, and word has an appropriate office and definite meaning. The rule of construction is that some particular operation, effect, and meaning must be assigned to each sentence, phrase, and word used, and when

⁶ Insurance contract issued by the Continental National Insurance Group.

⁷ *Ibid.*

⁸ 91 Wis. 329, 64 N.W. 1039 (1895).

this may fairly and properly be done no part of the language used can be superfluous or unmeaning.⁹

Applying this reasoning to the contract, one might well ask why the scrivener used the word *applicable* when he meant payable. If *applicable* is to have a meaning of its own, it cannot mean the same thing as *payable*.

It may be concluded that Wisconsin would not reach the result of the Virginia case that a motorist who is insured, but whose carrier has become insolvent, is uninsured. The uninsured motorist provision of the standard contract does not on its face provide for such a result. Since the language is not ambiguous, there is no room for the application of the rule that a contract of insurance must be construed against the insurer.

MARY C. CAHILL

Judgments: Mutuality as an Element of Collateral Estoppel: *Zdanok v. Glidden Co.*¹ and its companion case, *Alexander v. Glidden Co.*² both arose out of a collective-bargaining agreement between defendant and a local of the General Warehousemen's Union which represented employees at defendant's food processing plant in Elmhurst, New York. After the contract had expired, defendant moved its plant to Bethlehem, Pennsylvania.

Zdanok and four other former Elmhurst employees³ brought an action in the Supreme Court of New York for New York County, which was removed by the defendant Glidden on the basis of diversity of citizenship to the United States District Court for the Southern District of New York. There, judgment was had against the plaintiffs on the merits. On appeal, the Second Circuit construed the contract as entitling plaintiffs to be employed at the defendant's Bethlehem plant, retaining seniority and reemployment rights acquired at the Elmhurst plant, and remanded the case to the district court for determination of plaintiffs' damages.

Alexander and a large number of other Elmhurst employees⁴ commenced an action in the same federal district court substantially identical in issue with the *Zdanok* case. The two actions (*Zdanok* and *Alexander*) were consolidated for trial.

Defendant attempted, in the *Alexander* case, to offer evidence relating to the intent of the parties in negotiating the contract, seeking a "de novo" construction for purposes of that case. Although admit-

⁹ *Id.* at 333.

¹ 327 F. 2d 944 (2d Cir. 1964).

² *Ibid.*

³ These were the plaintiffs in the original action, *Zdanok v. Glidden Co.*, 216 F. Supp. 476 (S.D. N.Y. 1963).

⁴ These plaintiffs joined with the original action on remand to the district court, *Alexander v. Glidden Co.*, 216 F. Supp. 476 (S.D.N.Y. 1963).