

STATE OF MINNESOTA
IN COURT OF APPEALS

OFFICE OF
APPELLATE COURTS

A08-903

JUL - 8 2008

~~FILED~~

Charles R. Hornberger,

Respondent,

vs.

Erica L. Wendel, et al.,

Respondents,

Corey M. Seymour,

Appellant.

BRIEF OF AMICUS CURIAE

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LEGAL ISSUE

- I. When an insured enters into an agreement for insurance services, may an insurer appoint legal counsel to act with authority on behalf of the insured when the need arises under the agreement?

MOST APPOSITE CASES:

Home Ins. Co. v. Nat'l. Union Fire Ins. Of Pittsburgh, 658 N.W.2d 522 (Minn. 2003).

Pine Island Farmers Coop v. Erstad & Riemer, P.A., 636 N.W.2d 604 (Minn. Ct. App. 2001).

STATEMENT OF THE CASE AND FACTS

The facts and procedural history of this matter are set forth in Appellant's Brief. A full recitation of the facts and procedural history is not necessary for the purposes of this brief.¹

¹ In compliance with Minn. R. Civ. App. P. 129.03, counsel for the MDLA, Steven R. Schwegman, hereby certifies that he authored this Brief in whole, and that to his knowledge, no party made a monetary contribution to the preparation or submission of this Brief.

ARGUMENT

- I. AN INSURED HAS THE RIGHT TO LEGAL COUNSEL BASED ON THE CONTRACTUAL LANGUAGE WITHIN THEIR INSURANCE POLICY AND, AN INSURER HAS THE DUTY AND RIGHT TO APPOINT LEGAL COUNSEL, WITH AUTHORITY TO ACT ON AND PROTECT THE LEGAL INTERESTS OF AN INSURED

There are three guiding principles that are applicable herein to an insurer and insured relationship. In short, they provide as follows: 1.) an insured has a contractual right for counsel to represent them based solely on the terms of an insurance policy; 2.) an insurer has a right to appoint counsel to represent an insured in a lawsuit based solely on a contractual basis; 3.) appointed counsel for an insured has a right to control the litigation in order to protect the legal interests of their client.

First, with regard to an insured's right to contract for legal services, an insurance policy is a legal and binding contract and as such attorney-client relationships are formed based on the explicit or implicit language within that contract. Waseca Mut. Ins. Co. v. Noska, 331 N.W.2d 917, 926 (Minn.1983); Veit v. Anderson, 428 N.W.2d 429, 431-432 (Minn. Ct. App. 1988). An insurer, under the terms of the insurance policy is routinely allowed, and required, to appoint counsel based on its right and duty to defend an insured. Pine Island Farmers Coop v. Erstad & Riemer, P.A., 649 N.W.2d 444, 449-50 (Minn. Ct. App. 2001). Legal counsel for an insured are responsible for providing legal services unless an insured modifies the contract and explicitly alters the agreement to refuse legal services. See Home Ins. Co. v. Nat'l. Union Fire Ins. Of Pittsburgh, 658 N.W.2d

522, 533 (Minn. 2003) (duty to defend is present unless insured explicitly refuses). Furthermore, an insurer may not interpret an insured's silence for legal services as an intent to forgo representation and a defense of their legal rights under the contract. Id. (citations omitted). In the context of an insurer and insured contractual relationship, the insurer appoints counsel on behalf of the insured, and subsequently an attorney-client relationship is formed, but only between the appointed counsel and an insured. Pine Island Farmers Coop, 636 N.W.2d at 609. A failure to appoint counsel under the terms of an insurance policy may result in a breach of contract claim. See Home Ins. Co., 658 N.W.2d at 533.

Second, it is well established that an insurer has the duty to defend its insureds against any suit alleging bodily injury or property damage resulting from an occurrence that is within the scope of the contract; the insurance policy. Meadowbrook, Inc. v. Tower Ins. Co., 559 N.W.2d 411, 415 (Minn. 1997); Home Ins. Co., 658 N.W.2d 522 (Minn. 2003); Kissoondath v. US Fire Ins. Co., 620 N.W.2d 909, 914-15 (Minn. Ct. App. 2001). Insureds do not need to expressly request a defense in order to trigger the duty to defend. Home Ins. Co., 658 N.W.2d at 532. The courts are cognizant of the fact that an insured may not be aware of its contractual right to a defense in their insurance coverage and when and how to invoke it. Id. at 533 (citations omitted).

In addition to a duty to defend, insurance policies commonly incorporate language expressing, not only a duty, but also a right to defend an insured's legal

interests. See i.e. Krawczewski v. Western Cas. and Sur. Co., 506 N.W.2d 656, 657 (Minn. Ct. App. 1993) (policy language states an insurer shall have the right and duty to defend any suit against the insured seeking damages); Atlantic Mut. Ins. Co. v. Judd Co., 367 N.W.2d 604, 606 (Minn. Ct. App. 1985). Equally true then must be that an insured has the right under an insurance policy to be represented by counsel pursuant to the contractual agreement because the “insured paid for the insurer’s promise to defend...” Home Ins. Co., 658 N.W.2d at 533.

Third, given an insurer’s right and duty to defend an insured, appointed counsel have certain duties with respect to exercising control over and defending an action on behalf of an insured. Hooper v. Zurich American Ins. Co., 552 N.W.2d 31, 36-37 (Minn. Ct. App. 1996). “Liability insurance contracts grant the insurer rights to participate in and, in some areas, control the defense of claims against the insured...” and “...both obligate the insurer to provide the insured with a defense and entitle the insurer to control the defense.” Pine Island Farmers Coop, 649 N.W.2d at 450. (citing Keeton & Widiss, Insurance Law § 7.6(b), at 822). See Parker v. Agricultural Insurance Company, 440 N.Y.Supp.2d 964, 967 (N.Y. County, 1981) (“Giv[ing] the insurer exclusive control over litigation against the insured safeguards the orderly and proper disbursement of the large sums of money involved in the insurance business.”)

II. IF THE COURTS FIND THAT INSURANCE POLICIES LACK THE INDEPENDENT CONTRACTUAL AUTHORITY TO ALLOW COUNSEL TO REPRESENT AN INSURED THERE COULD BE SIGNIFICANT AND ADVERSE CONSEQUENCES TO INSUREDS

An individual purchases insurance services for piece of mind that if an accident occurs their financial well-being will remain intact and, as such, their insurer is responsible to protect the insured's legal rights in pursuing that interest. An insured must be able to rely on a contractual agreement (i.e. the insurance policy) with their insurer if a need for legal services arises to ensure their legal rights will be protected as outlined in the contract. In addition, trial attorneys, on behalf of their clients, should be granted the authority to represent an insured based on the contractual agreement between the insurer and insured. An insurer has both the duty and right, based on the insurance policy, to appoint counsel on behalf of the insured to protect the insured's legal rights. The October 5, 2007, District Court Order in the underlying action conflicts with the rights of an insured by concluding, in part, that counsel appointed by an insurer to defend an insured, did not have the authority to act on behalf of an insured without the informed consent of the insured and thus no attorney-client relationship existed. See Appellant's App., p. 97.

Minnesota law is clear that an insurance policy is a contract and contractual agreements instill certain duties and rights. A key principle incorporated into an insurance contract is the agreement that an insurer will defend an insured's legal interests and, these provisions are routinely

incorporated into insurance policies and triggered when a lawsuit arises. Insurance policies explicitly spell out the obligations of both parties to the contract. For example, under a Minnesota Motor Vehicle Policy an insured must “attend hearings and trials as required” and “send legal papers to insurer” as well as “cooperate with any matter concerning a lawsuit” and, an insurer will “pay all expenses incurred in defense of any lawsuit.” Appellant’s App., pp. 53, 55. It is undisputable that insurance policies outline agreements for legal services. Even under circumstances when an insurer does not have a “duty to defend” and appoint counsel on behalf of an insured, the contract provides for the right of counsel to represent an insured when a legal claim arises under the policy. This right to represent an insured remains in effect even if an insured remains silent as to their decision to invoke legal services. The right of an insurer to deny counsel is only appropriate when an insured expressly refuses the legal services of an insurer. This policy is effectuated to place the burden on the insurer to provide an insured the legal representation that they have paid for and agreed to under contract.

The parties to a contract have expectations that each will fulfill their end of the bargain. In the scenario of an insured and insurer, an insured pays the premium for insurance services in part for the legal service component of the agreement. An insured has a right to expect legal representation upon commencement of a lawsuit because the insured has entered into a pre-paid contract for legal services. This pre-paid contract for legal services gives an

insured piece of mind that their legal interests will be protected even if they are unavailable. For example, if an insured is absent on an extended vacation, or out-of-town business obligations, the insured through their insurance policy has the ease of mind to know that should a lawsuit arise under the policy, the insurer through appropriate counsel will protect the insured's interests. If the insured is served by publication and unaware of a pending lawsuit, but the insurer gains knowledge of the legal action, counsel will then be able to assist the client under the provisions of the contract for legal services. The insured can be relieved that he or she need not be immediately available to take any action to protect their legal interests under the policy as counsel will provide that service under the contract. An insurer thus has the right and duty under contract to represent and control the litigation on behalf of the insured.

The Pine Island decision holds that the attorney-client relationship is between the insured and the insured's appointed legal counsel. If counsel for an insured were required to enter into an independent contractual agreement for each insured client outside of the already agreed upon representation in the insurance policy, it would have far reaching adverse impacts on defendants and their counsel. Counsel must routinely make immediate decisions in managing the litigation process for their insured clients. If an insured is absent when a suit is initiated it is difficult, if not impossible, for counsel to obtain informed consent from an insured before the litigation process commences and may result in adverse consequences to the insured. When an insured enters into an agreement

are they just arguing consent? not independent agreement?

for insurance services, they are knowingly granting authority to appoint legal counsel on their behalf. If an insured is absent upon a suit being commenced, the insured can rest assured that counsel will address the legal needs of their client to avoid adverse consequences.

If the court were to require informed consent from each and every insured prior to representation it essentially ignores the contractual agreement between the insured and insurer. If the insured must give informed consent the immediate and sometimes severe consequences of litigation will most certainly have lasting effects on an insured. Furthermore, if the court required each insurer to obtain informed consent prior to representation, such a rule would encourage insurers to avoid defending lawsuits based upon the non-cooperation of the insured. The result would be an increase in default judgment actions brought by plaintiff, as insurers have no choice but to abandon their insureds because they have no authority to represent an insured and can not perform their contractually mandated duties.

In the case before this Court, the insured was not only unavailable, he could not be found and was served with the complaint by publication. The trial court's order, if not reversed, provides (a) proof of the non-cooperation; (b) proof of the prejudice suffered by the carrier; and (c) proof that the non-cooperation is a material breach of the insuring agreement. See, Steen v. Those Underwriters at Lloyds, 442 N.W.2d 158, 162 (Minn. Ct. App. 1989) (breach of an insurance policy cooperation clause which is material and prejudices the insurer can void

coverage under the policy); see also Juvland v. Plaisance, 255 Minn. 262, 268-69, 96 N.W.2d 537, 541-42 (1959). An insured has the right, through counsel, to be given an opportunity to defend a lawsuit under the terms of the insurance policy.

CONCLUSION

This Court should enforce insurance contracts as they are written.

The insurer has the right, the duty and the obligation to appoint counsel for the insured. The insured has the right to have counsel appointed and the duty and the obligation to cooperate with the insurer and counsel retained by the insurer to represent the insured. Defense counsel retained by an insurer has the duty and the obligation to manage the litigation and to protect the interests of the insured.

The trial court has impermissibly interfered in the contractual relationship between the insurer, the insured and counsel retained by the insurer to represent the insured.

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