Wedemeyer v Safeco
3/13/08

Insurance Coverage; Breach of Contract; Exhaustion Rule; Judgment on the Pleadings

Plaintiff s car was insured by defendant Safeco for uninsured and underinsured coverage of $500,000 per person. Plaintiff was rear-ended by Groscost, a Coast National insured. Coast tendered its $15,000 limit to plaintiff conditioned on a release. Plaintiff notified defendant Safeco of the offer.

Prior to settling, plaintiff learned Groscost was employed by Skyline Management which was insured by a Hartford policy, including hired auto and non-owned auto liability coverage, in the amount of one million. Hartford refused to admit coverage. Plaintiff notified defendant of the Hartford coverage.

Plaintiff demanded that defendant Safeco pay him $485,000, the underinsured limits minus Groscost s $15,000 policy with Coast. Defendant refused, insisting plaintiff exhaust the Hartford policy first. Plaintiff then pursued his third party claim, settling ultimately with Groscost and Coast National for the $15,000 primary policy, and $500,000 from Hartford.

Plaintiff then sued defendant Safeco for breach of insurance contract, unjust enrichment, and tortious breach of the insurer s fiduciary duty. Defendant moved for judgment on the pleadings. The trial court found under Insurance Code section 11580.2(p)(3) plaintiff was required to exhaust all applicable policies covering Groscost by payment of judgment or settlement before seeking underinsured (UIM) coverage from defendant. The motion was granted without leave to amend.

Insurance Code section 11580.2 provides under subsection (p) that underinsured coverage does not apply until:

> ...the limits of bodily injury policies applicable to all insured motor vehicles causing the injury have been exhausted by payment of judgments or settlements....

On appeal, plaintiff contended that the exhaustion rule applies only to automobile liability policies, not other insurance policies. Thus, he was required to exhaust only Groscost s policy of $15,000, and after doing so, defendant was required to pay the additional $485,000 under his UIM coverage.

The Second Appellate District noted for purposes of a UM/UIM claim the terms of Insurance Code section 11580.2(p)(1) define an insured motor vehicle, as one insured under a motor vehicle liability policy...

In addition, Insurance Code section 11580.1(e) provides that other forms of insurance which include auto liability coverage are **not** motor vehicle liability policies. Skyline s Hartford policy was **not** a motor vehicle policy as defined.

Section 11580.2(p)(3) indicates that until the limits of bodily injury liability coverage applicable to all insured motor vehicles causing injury have been exhausted, UIM coverage does not apply. Plaintiff argued that subsection must be interpreted to refer to bodily injury provisions of a motor vehicle policy or an automobile liability policy only.

The Appellate Court agreed the term bodily injury liability policies is used to refer to the bodily injury provisions of motor vehicle or automobile liability policies. Additionally, the Court found under Insurance Code section 11580.2(p)(5) that an insurer paying a UM or UIM claim would be entitled to reimbursement or credit in the amount received by the insured from the ...insurer of the owner or the operator of the vehicle causing the damage.

Here, reimbursement would have occurred if plaintiff had been paid the $485,000 by defendant, and then had recovered against Skyline and its insurer, Hartford. Plaintiff would then be required to **reimburse** defendant Safeco the amount he recovered from Hartford, up to the amount of the UIM benefits. In other words, by providing for both credit and reimbursement, the Insurance Code assumes that not all applicable policies necessarily would be exhausted prior to payment of uninsured motorist coverage under section 11580.2(p)(3).

Accordingly, the Court found plaintiff was required only to exhaust the Groscost Coast National Policy before Safeco was required to pay the

balance of the UIM coverage. As such, plaintiff stated a cause of action for breach of contract. The trial court erred in granting judgment on the pleadings. The judgment is reversed.

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