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Uninsured Motorist Coverage - Scope of the Term - "Uninsured Motorist"; Porter v. Empire Fire and Marine Insurance Co.

Dennis J. Fox

RECENT CASES

INSURANCE LAW—UNINSURED MOTORIST COVERAGE—SCOPE OF THE TERM—"UNINSURED MOTORIST"

Porter v. Empire Fire and Marine Insurance Co., 12 Ariz. App. 2, 467 P. 2d 77 (1970).

The appellant, James T. Porter, was involved in an automobile accident in which he and four other persons were injured. The tortfeasor was insured to the extent of the statutory minimum ($10,000-$20,000) as provided for by the Arizona Financial Responsibility Act.[1] The appellant subsequently obtained a judgment against the tortfeasor for $10,000. He then entered into a proposed settlement with the tortfeasor's insurer under which he was to receive $2,500 of the $20,000 of insurance proceeds available for allocation among the injured parties. Mr. Porter notified his insurer (the appellee) of the proposed settlement and requested the appellee satisfy the balance of damages under the uninsured motorist provision of his policy. The appellee denied coverage and refused to approve or disapprove the proposed settlement. Subsequently, the appellant settled with the tortfeasor's insurer as agreed, and brought an action against the appellee for the $7,500 balance under his uninsured motorist coverage.

The trial court dismissed the suit on motion, and on appeal, the judgment of dismissal was reversed. The appellee denied liability on three separate grounds. The first two, violation of the arbitration provision of the policy and violation of the provision prohibiting the insured from settling without written consent of the carrier, were summarily dismissed by the Arizona Court of Appeals. The court stated:

> When appellee denied coverage, it was precluded from subsequently invoking the policy provisions which were inserted for its benefit.[2]

This rationale seems to be in line with generally accepted case law and contract principles. Either one of two arguments may be advanced. The insurer, having denied coverage may be

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[1] Ariz. Rev. Stat. 20-259.01.

[2] Porter v. Empire Fire and Marine Insurance Co., 12 Ariz. App. 2, 467 P. 2d 77, 81 (1970).

said to have waived the provision as to arbitration or settlement.[3] Alternatively, it may be argued that under general contract law, such a denial of coverage by the insurer prior to the settlement constituted a breach and as such relieved the other party from performing any conditions on his part.[4]

The third ground for denial of liability alleged by the insurer-appellee was that the tortfeasor was not an "uninsured-motorist" under the uninsured motorist provision of the appellant's policy with the appellee. It is the court's treatment of this argument which makes this case unique.

As a basic premise, the court conceded that if the tortfeasor had available the full statutory minimum of liability insurance, meeting the minimum limits of the Financial Responsibility Act, he would not be an uninsured motorist. However, the court rationalized that,

> Where the negligent party's insurance is insufficient to compensate a victim to the minimum limits of our Financial Responsibility Act, in reality the tortfeasor is "partially uninsured" as to that victim. In keeping with the strong purpose of the Financial Responsibility Act, we are of the opinion that Porter must be permitted to proceed against his uninsured motorist carrier for his unsatisfied damages, at least until he has received the minimum protection afforded by statute . . . . *Whether or not involved in an accident with multiple injured parties, all victims of automobile accidents should be assured of at least the statutory minimum level of protection.* For the injured party to fare better financially if injured by one with no insurance, rather than an "underinsured," reaches an inequitable and anomalous result antipathetic to the manifest legislative purpose.[5] (Emphasis added).

Elsewhere in the case, the court states that the principal purpose of the Arizona Financial Responsibility Act is:

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[3] Vanguard Ins. Co. v. Polchlopek, 18 N.Y. 2d 376, 222 N.E. 2d 383 (1966).

[4] In Calhoun v. State Farm Mutual Auto. Ins. Co., 254 Cal. App. 2d 407, 62 Cal. Rptr. 177, 180 (1967), the court stated that:

> Where a party to an obligation gives notice to another, before the latter is in default, that he will not perform the contract such other party is entitled to enforce the obligation without previously performing any conditions on his part in favor of the other party.

[5] Porter v. Empire Fire and Marine Insurance Co., 12 Ariz. App. 2, 467 P.2d 77, 80 (1970). But see Detrich v. Aetna Casualty and Surety Co., 158 N.W. 2d 99 (1968 Iowa) wherein the court said the policy was intended to provide protection against "uninsured" motorists and not "under-insured motorists."

> the protection of the public using the highways from financial hardship which may result from the use of automobiles by financially irresponsible persons.[6]

It can be readily seen that this court has greatlly extended the seemingly boilerplate definition of 'uninsured automobile' as defined in the standard Uninsured Motorist Endorsement.[7] The question now becomes on what grounds can it do so.

It is well settled that, a policy or contract of insurance is to be construed liberally in favor of the insured and strictly as against the insurer.[8]

However, it is equally well established that this rule applies only where the language of the contract or policy, after applying the usual rules of construction, is ambiguous or doubtful and reasonably susceptible of more than one construction.[9] In this instance, the language of the policy seems definite and unambiguous.

Therefore, it is submitted that this court determined that the legislative policy of the uninsured motorist statute outweighed the Standard Insurance Policy provisions. Indeed, the court spoke in terms of public policy when it cited the following rationale from two previous court decisions:

> In other words, the legislative purpose in creating compulsory uninsured motorist coverage was to place the injured policyholder in the same position he would have been in if the tortfeasor had had liability insurance. . . .[10]

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6 Porter v. Empire Fire and Marine Insurance Co., 12 Ariz. App. 2, 467 P.2d 77, 79 (1970).

7 The Standard Uninsured Motorist Endorsement defines "uninsured automobile" as:

> 1. An automobile with respect to the ownership, maintenance or use of which there is, in at least amounts specified by the financial responsibility law of the state in which the insured automobile is principally garaged, no bodily injury liability bond or insurance policy applicable at the time of the accident with respect to any person or organization legally responsible for the use of such automobile, 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; or,
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> 2. a hit-and-run automobile.

8 43 Am. Jur. 2d Insurance § 271 (1969). This principle was applied to uninsured motorist coverage in Mills v. Farmers Ins. Exchange, 231 Cal. App. 2d 124, 41 Cal. Rptr. 650 (1964).

9 43 Am. Jur. 2d Insurance § 273 (1969).

10 Porter v. Empire Fire and Marine Insurance Co., 467 P. 2d 77, 80 (1970), quoted from Peterson v. State Farm Mutual Automobile Insurance Company, 238 Or. 106, 393 P. 2d 651, 653 (1964).

> The provision defining an uninsured motorist in the policy and excluding from the category any motorist carrying the statutory minimum, intrudes into the Act and entrenches upon the legislative purpose and is, therefore, null and void.[11]

If this case stands, it is submitted that the term "uninsured motorist" has been redefined to add another class of insureds to the growing list, which roughly would incorporate the following instances where the insured was injured:

(1) by a hit-and-run driver;

(2) by a tortfeasor having absolutely no bodily injury liability bond or insurance;

(3) by a tortfeasor having a bodily injury liability bond or insurance, but not sufficient to satisfy the statutory minimum as set forth under the Financial Responsibility Act;

(4) by a tortfeasor having a bodily injury liability bond or insurance in an amount satisfying his own state's Financial Responsibility Act, but not sufficient to satisfy the Financial Responsibility Act of the state wherein the accident occurred and in which the claim was brought;[12]

(5) by a tortfeasor having insurance which satisfies the requirements of all applicable Financial Responsibility statutes concerned, but by virtue of multiple injuries is unable to provide insurance coverage sufficient to indemnify each injured party to the statutory minimum required for a single injured party.

In addition to the foregoing, the court made another policy decision regarding the $2,500 recovered under the settlement. In citing case authority it declared that:

> Since a recovery under one's liability coverage will not deny recovery under his uninsured motorist provision, we do not believe a recovery from the tortfeasor's insurance below the $10,000 minimum should prevent one, in a proper case, from recovering under his uninsured motorist provision.[13]

It also noted language from the *Geyer* case[14]

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[11] Porter v. Empire Fire and Marine Insurance Co., 467 P. 2d 77, 81 (1970), paraphrasing Geyer v. Reserve Insurance Co., 8 Ariz. App. 464, 447 P. 2d 556, 558-559 (1968).

[12] Buglione v. Motor Vehicle Acci. Indemnification Corp., 32 App. Div. 2d 525, 299 N.Y.S. 2d 661.

[13] *Supra*, note 2.

[14] Geyer v. Reserve Insurance Co., 8 Ariz. App. 464, 447 P. 2d 556, 559 (1968).

> . . . that the prescribed limits of our uninsured motorist legislation are a part of every policy issued containing such coverage, and that the prescribed limits cannot be reduced by offsetting policy provisions.

Following this rationale, the court would award the total coverage of $7,500 (assuming this to be the policy limits) rather than $5,000 ($7,500 less $2,500 recovered), where the judgment was $10,000 or greater. A number of jurisdictions would take a contrary position with regards to set-offs.[15] They would argue that if the insurer is to pay under the uninsured motorist provision, then it should be entitled to all amounts recovered outside the policy. Although there is a split of authority as to "other insurance" provisions, there is some support for the instant court's analogy to be found in cases in addition to the Arizona case cited. In *White vs. Nationwide Mutual Ins. Co.*,[16] the court in answering the question whether such amounts paid on behalf of an "uninsured motorist" should be applied first to reduce the liability of the insurance carrier or to reduce the loss of the injured party, decided that the policy behind the uninsured motorist statute was not to limit recovery to the amount available to the injured party had he been injured by an insured driver, but to provide a limit of recovery in the amount of the judgment against the tortfeasor, subject to the policy limit of the uninsured motorist endorsement.

Absent a statutory definition of "uninsured motorist," the court under its powers of construction must, in a functional sense, legislate the gap-filling language. The outcome elsewhere on facts similar to those in *Porter* will depend, in part, on whether the legislature in adopting uninsured motorist statutes, have incorporated a definition of its terms.

DENNIS J. FOX

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[15] For a good treatment of this subject including case citations see 28 A.L.R. 3rd 551.

[16] White v. Nationwide Mutual Ins. Co. (C.A. 4 Va.), 361 F. 2d 785 (1966).