EFiled: Jun 18 2018 03:36PM EDT
Filing ID 62149884
Case Number 102,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARTHA IRENE GONZALEZ LANKFORD, and UNITED FARM FAMILY INSURANCE COMPANY	:	No.: 102, 2018
Defendants Below, Appellants,	:	Court Below: Superior Court of the State of Delaware
v.	:	
	:	C.A. No.: K16C-12-026 JJC
MARIE SAINT HILAIRE, Individually and as wife and Administratrix of the Estate of Therisson Augustin, and MARCEA AUGUSTIN, and EDNEST AUGUSTIN,	:	
Plaintiffs Below, Appellees.	:	

APPELLANTS' REPLY BRIEF

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Dated: June 18, 2018

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APPELLANT'S REPLY BRIEF

Appellant United Farm Family Insurance Company ("Farm Family") submits this Reply Brief in its appeal of the declaratory judgment entered by the Superior Court of the State of Delaware in and for Kent County.

SUMMARY OF ARGUMENT

1. The Appellees and the trial court have failed to read the umbrella policy as a whole in its requirement that the insured maintain collectible primary insurance of no less than $250,000.
2. The umbrella policy requires that $250,000 be actually paid by or on behalf of the insured before the umbrella policy has any obligation to pay damages.
3. The requirements of payment of the mandatory underlying insurance limits of an umbrella policy cannot be met by merely giving a “credit” to the umbrella insurer for the amount of primary insurance not actually maintained or paid.

ARGUMENT

Question 1

Does the Umbrella Policy require that the insured maintain $250,000 of collectible primary insurance coverage?

Merits of Argument

The Appellees' contention that the Umbrella Policy does not require the insured to maintain $250,000 of insurance patently contradicts the language of the policy. Their criticism and, hence, their interpretation of the Policy is found in Appellees' description that "there is no reference to a numeric value or required dollar figure amount in the actual language defining what constitutes primary insurance," (Answering Brief, p. 8), and "[a]ny reference to $250,000 of required underlying coverage exists outside the actual definition of primary insurance." (Answering Brief, p. 14) This assertion, rephrasing the trial court's erroneous interpretation, disregards the fundamental construct of the Policy.

As described on the Declarations page, the Policy is composed of several listed parts known as Forms or Endorsements: "THE DECLARATIONS AND THESE FORMS AND ENDORSEMENTS MAKE UP YOUR COMPLETE POLICY." (A13) [1] The definition of "primary insurance" is found in the Farm

[1] References are to the Amended Appendix submitted by Appellant.

Umbrella Form of the Policy. (A13, identifying the Forms and Endorsements included in the Policy; A15, reflecting the Form number shown in the Declarations) Both the trial court and the Appellees want the Definitions section of the Farm Umbrella Form to have a "definition of primary insurance that [includes] a defined, numerical amount of underlying coverage." (Answering Brief, p. 14) That is not the way insurance policies in general, and this Policy specifically, is structured. Rather, the Farm Umbrella Form provides, *inter alia*, definitions of specific terms that are then applied throughout the Policy and tailored through the Declarations to the particular insured and the contract that the insured purchased. Sections of the Farm Umbrella Form other than Definitions also refer back to the Declarations for terms of the specific agreement the insured has reached with Farm Family.

For instance, the Definitions section begins with: "In this policy, 'you' and 'your' means the entity and/or person in the declarations page . . ." (A15) The definition of the word "Insured" does not have a name inserted in the form but, instead, recognizes that the name of the insured will be found in the declarations. (A16) The definition of Retained Limit also refers to an amount stated in the declarations. (A20) There is an Exclusion for damages arising out of the insured's use of an employer's vehicle, unless that employer is identified as a Named

Insured in the declarations. (A21) Farm Family's Limit of Liability is described, in part, as "the amount stated in the declarations page." (A22)

The Declarations are an integral part of the Policy and must be considered to complete the definitions of certain words and to give specificity to the Policy's contractual agreement with the insured. Consequently, contrary to Appellees' assertion that "primary insurance" and "$250,000" are "not interchangeable," (Answering Brief, p. 14), by the unambiguous words of the Declarations: "**SCHEDULE OF PRIMARY INSURANCE REQUIREMENTS,**" the insured is required to have $250,000 in insurance "collectible by the INSURED which covers the INSURED'S liability for PERSONAL INJURY or PROPERTY DAMAGE."

Because the Definitions section specifically states that the definition of Primary Insurance is carried through the Policy, (A15), and the Declarations use the term Primary Insurance in all capital letters, the sole valid conclusion reading the Policy as a whole is that having $250,000 of collectible primary insurance is a requirement of the Policy. Accordingly, to meet the terms of the Policy, the insured must have a minimum of $250,000 underlying insurance that can be collected by the insured to pay any judgment for the insured's liability.

Question 2

Does the umbrella policy require that $250,000 be actually paid by or on behalf of the insured before the umbrella policy has any obligation to pay damages?

Merits of Argument

Appellees' proposed interpretation – that the Umbrella Policy is triggered solely by damages exceeding $250,000 - is inconsistent with the Policy language. Under Appellees' analysis, an insured can wholly ignore the requirement that she purchase a minimum level of underlying insurance. The insured can acquire the protection of $1,000,000 of coverage without protecting herself and Farm Family from exposures up to the required primary limits. That result thwarts both the terms of the contract and the nature of umbrella insurance. The contract requires that two conditions must exist before Farm Family's obligations attach: 1) there must be damages in excess of $250,000 and 2) $250,000 of those damages must have been paid by primary insurance collectible by the insured. Appellees' dispute of the second condition, that the policy does not "require that $250,000 actually be paid by or on behalf of the insured," (Answering Brief, p. 13), is a baffling disregard of the Policy's express statement that:

Part IV – Limit of Liability

> This policy pays only after the limits of the PRIMARY INSURANCE . . ., *have been paid by you or on your behalf.* (emphasis supplied) (A27)

Appellees' position can hold only by ignoring the unequivocal requirement that the insured have $250,000 in primary insurance and, instead, allows that the insured can have as little primary insurance as she cares to buy, or none at all, and that the Farm Family Umbrella Policy will nonetheless be called to cover the insured's liability. That result does not comport with the nature of umbrella insurance, the policy language before the court, or Maryland law. "Although primary insurance attaches upon the happening of the occurrence that gives rise to liability ... [e]xcess insurance [,] [by contrast,] attaches only after a predetermined amount of primary coverage has been exhausted." *Empire Fire & Marine Insurance Co.,* 117 Md.App. 72, 117, 699 A.2d 482, 504 (1997). The repeated, unambiguous policy terms unequivocally require Martha Lankford to have primary insurance in a minimum amount of $250,000 and to have that amount <u>paid by her or on her behalf</u> before the Umbrella Policy is required to pay any amount in damages.

Question 3

Can the requirement of payment of the minimum underlying insurance be met by merely giving a "credit" to the umbrella insurer for the amount of primary insurance not actually paid?

Merits of Argument

Appellees do not cite any law for their curious pronouncement that "[e]xhaustion is distinct from actual payment," which contradicts the very concept of exhaustion within the insurance context and is contrary to Maryland law. In a decision addressing the obligations of umbrella and excess insurers, the Court of Special Appeals stated:

> With respect to the horizontal exhaustion issue, the City as a party that steps into the place of the insured, must exhaust all primary insurance before seeking indemnity from excess insurers. Excess insurance will come into play if and only if the underlying policies have been exhausted, i.e., only after the primary carriers, or self-insurers, have fulfilled their respective obligations.

Mayor and City Council of Baltimore v. Utica Mutual Insurance Co., 145 Md.App. 256, 309, 802 A.2d 1070, 1102 (2002). See, also, *U. S. Fire Insurance Co. v. Maryland Casualty Co.*, 52 Md.App. 269, 271, 447 A.2d 896, 898 (1982), in which the court was examining "the construction of a catastrophe liability insurance policy which, in essence, is umbrella coverage which becomes operative after, and only after, all primary insurance and/or excess insurance funds have been

exhausted." The reference to "funds" being "exhausted" can only mean that the funds provided by the primary insurance have been actually paid. In *Mayor and City Council v. Utica*, the court held that an insured "who elects not to carry liability insurance for a period of time, either by electing to be self-insured, or by purchasing a policy which withholds coverage pursuant to a particular exclusion, . . . will be liable for the prorated share that corresponds to periods of self-insurance or no coverage." 145 Md.App. 256, 309, 802 A.2d 1070, 1101–02.

This Court must determine how Maryland law leads to the correct ruling. The two cases above, along with the highly analogous law on exhaustion of underinsured motorist insurance cite in Appellant's Opening Brief, indisputably confirm that under Maryland law an umbrella policy is required to respond only when the terms of the required primary insurance or self-insurance have been fulfilled. Here, the insured did not meet the Umbrella Policy requirements to have $250,000 of collectible insurance and so she became self-insured for the difference between her $100,000 policy and the required $250,000 that must be paid before Farm Family's policy becomes operative. As a self-insured for that gap, Lankford is required by the law above and by the Policy to pay the missing $150,000:

Part IV – Limit of Liability

1. This policy pays only after the limits of the Primary Insurance . . . *have been paid by you or on your behalf.* (A20),

and

Part V – Primary Insurance Requirements

This policy requires that all insureds have and maintain the Primary Insurance coverage at or above the limits of liability shown on the declaration page. . . . If the Primary Insurance does not provide at least the limits indicated, *you will be responsible for the loss up to the required limits.* (A21)

These terms and the law support solely that Farm Family will pay "only after" the insured meets her responsibility to pay the total $250,000 or have it paid on her behalf. Nothing in the Policy or in Maryland law allow for the trial court's conclusion that Farm Family merely gets credit for the primary insurance that the insured failed to maintain.

CONCLUSION

Appellees have not provided law or a valid interpretation of the Policy to require Farm Family to pay any indemnification under the Umbrella Policy until and unless Martha Lankford or someone on her behalf pays the $150,000 necessary to have full payment of the underlying primary insurance limits required by the Umbrella Policy. Neither the Policy language nor the law support the trial court's conclusion that Farm Family must indemnify Lankford after receiving credit for the amount of underlying insurance Lankford failed to maintain. Instead, absent full exhaustion of the underlying limits by actual payment, Farm Family has no indemnity obligation.

WHEREFORE, Defendants Martha Irene Gonzalez Lankford and United Farm Family Insurance Company respectfully request that the declaratory judgment entered be reversed and that judgment be entered in favor of United Farm Family Insurance Company, together with costs and such other relief as the Court deems appropriate.