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No. 65924-3

WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

SAFECO INSURANCE COMPANY OF ILLINOIS, *Appellant*

v.

COUNTRY MUTUAL INSURANCE COMPANY, *Respondent*

**REPLY BRIEF OF APPELLANT
SAFECO INSURANCE COMPANY OF ILLINOIS**

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Nothing in Respondent Country's brief should prevent this Court from conducting a de novo review, reversing the Trial Court's Summary Judgment Order, and providing a decision (1) declaring that Safeco and Country are responsible for providing prorata coverage, (2) declaring that Country must provide prorata reimbursement to Safeco, and (3) ordering that Country must pay Safeco reasonable attorney fees.

In arguing to the contrary, Country's brief fails to recognize that both Safeco and Country provided primary automobile liability policies of a similar nature, incorrectly relies on Washington cases that do not support its position, and fails to recognize that the applicable case law compels a decision that each insurer is responsible for providing prorata coverage.

A. This Court Should Reverse And Rule In Favor Of Safeco Because, Contrary To The Incorrect Argument Made By Country, Safeco And Country Provided Primary Insurance Of A Similar Nature

Country's argument rests on the erroneous premise that the Safeco policy provided primary coverage while the Country's policy provided only excess coverage. This premise is erroneous because (1) it ignores the fact that both policies contain language providing for primary liability coverage, because (2) both policies also contain "other insurance" clauses

which purport to make each policy excess to the other, and because (3) both policies provided automobile liability coverage of a similar nature.

1. **The omnibus clauses in each policy provided primary coverage to Mr. Kooistra, and the other insurance clauses in both policies purport to make each policy excess.**

In arguing that its policy provided only “excess” coverage, Country ignored its policy’s omnibus clause which unequivocally provided Mr. Kooistra primary liability coverage when he was driving a non-owned vehicle. In particular Section 1- “Liability Insurance” provides “liability insurance” when the insured is legally obligated to pay damages because of bodily injury or property damage “caused by an accident resulting from the ownership maintenance or use of an **insured vehicle, ...or of any nonowned vehicle.**”¹

That omnibus clause language of the Country policy provided Mr. Kooistra with primary liability insurance when he was driving a nonowned vehicle. Country’s argument that its policy provides only excess coverage is flawed because that argument ignores the grant of coverage in that omnibus clause and instead only focuses on the exclusionary language in the “other insurance” clause.

¹ CP 31: Country Policy at page 2

Country's invitation to focus on only the exclusionary language in its policy should be declined because, under Washington law, insurance policies are considered as a whole.² And, as discussed pages 14-16 of Safeco's opening brief, the recent Texas Court of Appeals decision in *Safeco Lloyds Insurance Company v. Allstate Insurance Company*,³ rejected the same type of argument that Country makes now. In that case, the Texas Court criticized the driver's insurer Allstate for ignoring the language in its own policy that granted coverage and found that Allstate's policy did provide primary coverage:

In making this argument, Allstate ignores language in its own policy, concentrating only on the excess language in the "other insurance" clause while ignoring the express language that the Allstate policy provides primary liability coverage when any "covered person" becomes legally responsible because of an auto accident. ... **So, contrary to Allstate's contention, its policy does not simply provide excess coverage when a covered person is driving a non-owned vehicle; rather, it provides primary coverage for any covered person using any private passenger automobile.** If we accept Allstate's position, we would have to ignore the plain language of the Allstate policy in direct contravention of the admonition in *Don's Bldg. Supply, Inc.* that no section of an insurance policy should be considered apart from the other policy provisions. 267 S.W.3d at 23.⁴ (emphasis added)

The same logic applies in the present case. Just as Allstate's policy provided primary liability coverage because its omnibus clause provided for coverage for the use of any passenger vehicle, here Country's

² *Weyerhaeuser Co v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 666, 15 P.3d 115 (2000)

³ 308 S.W.3d 49 (2009)

⁴ *Safeco Lloyds*, 308 S.W.3d at 57-58

policy provided for primary coverage because it provided coverage for the use of any nonowned vehicle.

2. The policies provide coverage on a prorata basis because both policies contain conflicting “other insurance” clauses that would make each policy excess to the other.

As discussed in Safeco’s opening brief, the “other insurance” clause of Safeco’s policy makes the Safeco policy excess by stating “If there is other applicable liability insurance available any insurance we provide shall be excess over any other applicable liability insurance.”⁵ The Country policy, however, likewise contains language that would make it excess on the basis that Mr. Kooistra was driving a vehicle he did not own.

There is no valid reason to exalt the exclusionary language of Country’s “other insurance” clause and ignore the exclusionary language in Safeco’s “other insurance” clause. By contrast, as held by the Washington Supreme Court in *Pacific Indemnity Company. v. Federated American Insurance Company*⁶, when both policies have clauses that would make each policy excess, then each of those clauses is disregarded as being mutually repugnant and each insurer is liable for a prorata share

⁵ CP 79: Safeco Policy at Page 5

⁶ 76 Wn.2d 249, 456 P.2d 331 (1969)

of the loss.⁷ Given that rule, the Trial Court erred by refusing to find prorata coverage in this case.

3. Contrary to Country's assertions, both policies provided automobile liability coverage of a similar nature.

Country attempts to escape the rule that mutually repugnant excess clauses must be disregarded by arguing that the Safeco and Country policies are not of a similar nature. But that argument is untenable. The policies are of a similar nature. Neither policy is an umbrella or excess policy. Both policies provide automobile liability insurance. The Country policy is, in fact, titled "AUTO INSURANCE POLICY."⁸

B. This Court Should Reverse And Rule In Favor Of Safeco Because Country Incorrectly Relies On Washington Cases That Do Not Support Its Position.

Country's brief cites *New Hampshire Indemnity Co. Inc. v. Budget Rent-A-Car Systems, Inc.*,⁹ *Safeco Ins. Co. of Illinois v. Automobile Club Ins. Co.*,¹⁰ and *Safeco Ins. Co. of America v. Pac Indemn Co.*,¹¹ But none of cases support Country's position.

1. *New Hampshire Indemnity Co. Inc. v. Budget Rent-A-Car Systems* does not support Country's position.

⁷ *Pacific Indemn.*, 76 Wn.2d at 251

⁸ CP 29

⁹ 148 Wn.2d 929, 64 P.3d 1239 (2003)

¹⁰ 108 Wn. App. 468, 31 P.2d 205 (2001)

¹¹ 66 Wn.2d 338, 401 P.2d 205 (1965)

New Hampshire Indemnity is supportive of Safeco's position and counter to Country's position in at least three ways. That case involved a situation where New Hampshire Indemnity (the driver's insurer) was relying on policy language that made the policy excess with respect to a non-owned car,¹² where Budget (the car owner's insurer) was relying on a super escape clause,¹³ and where the Court enforced the super escape clause even though it made the driver's insurer primary.¹⁴

First, *New Hampshire Indemnity* rejected the contention that, as a rule, the insurer of the vehicle is always primary and instead held that coverage order depends on the language found in the insurance policies:

Specifically, the question is whether the insurer of a vehicle is always primary, or whether the terms of the insurance contracts themselves are determinative. We hold that the conditions of coverage depend on the terms of the insurance contracts and that no per se rule requires the insurer of a vehicle to provide primary coverage.¹⁵

Second, in holding that a super escape clause prevailed over an excess clause, *New Hampshire Indemnity* rejected as "troubling" and "circular" the contention, similar to that made here by Country, that the driver's policy was not available insurance:"

Some courts give effect to the excess insurance clause and not to the super escape clause, sometimes reasoning that

¹² *New Hampshire Indemn.*, 148 Wn.2d at 934 (with clause providing that "with respect to a ...non-owned automobile shall be excess insurance over any other valid and collectible insurance)

¹³ *New Hampshire Indemn.*, 148 Wn.2d at 934

¹⁴ *New Hampshire Indemn.*, 148 Wn.2d at 936

¹⁵ *New Hampshire Indemn.*, 148 Wn.2d at 932

excess insurance does not trigger the escape clause because excess insurance is not available insurance. See, e.g., *U.S. Fid. & Guar. Co. v. Hanover Ins. Co.*, 417 Mass. 651, 655, 632 N.E.2d 402 (1994); *Ins. Co. of N. Am. v. Cont'l Cas. Co.*, 575 F.2d 1070, 1073 (3d Cir.1978). This reasoning is troubling because it does not effectuate the language of the policies. The reasoning is also circular; whether it makes sense depends on which policy you read first.¹⁶

Third, the result in *New Hampshire Indemnity* is consistent with Safeco's position in this case. There, the terms of a super escape clause were enforced over an excess clause because the super escape clause was written to always avoid primary coverage.¹⁷ Here, by contrast, there are two excess clauses which would cancel each other out such that each insurer owes prorata coverage.

2. *Safeco Ins. Co. of Illinois v. Automobile Club Ins. Co.* does not support Country's position.

*Safeco Ins. Co. of Illinois v. Automobile Club Ins. Co.*¹⁸ is likewise not supportive of Country's position because it involved a coverage order dispute between an auto liability policy and an umbrella policy, and not, as here, coverage issues between two auto liability policies.

In *Safeco Ins. Co. of Illinois v. Automobile Club Ins. Co.*, the Court of Appeals held that language making an auto policy excess to

¹⁶ *New Hampshire Indemn.*, 148 Wn.2d at 934-935

¹⁷ *New Hampshire Indemn.*, 148 Wn.2d at 936

¹⁸ *Safeco v. ACIC*, 108 Wn. App 468

“other collectible insurance” did not apply as to make the auto policy excess to an umbrella policy:

The purpose of an umbrella policy is to protect the insured in the event of a catastrophic loss in which liability damages exceed available primary coverage. In light of the different purposes of primary and excess coverage policies, we hold that the “other collectible insurance” referenced in ACIC's primary automobile liability policy was intended to refer to other primary automobile liability policies, not to umbrella policies such as Safeco of America's. Therefore, ACIC's primary automobile liability policy must next apply to the settlement amount.¹⁹

Safeco Ins. Co. of Illinois v. Automobile Club Ins. Co. is not supportive of Country's position because the Country policy **is not** an umbrella policy. Rather, it is a automobile liability policy. As such, the Country policy is precisely the type of policy to which the excess language in Safeco's “other insurance” clause applies.

3. *Safeco Ins. Co. of America v. Pac Indemn. Co.* does not support Country's position.

Safeco Ins. Co. of America v. Pac Indemn. Co.,²⁰ is also distinguishable and not supportive of Country's position because the result in that case turned on a conflict between a “prorata” clause and an “excess” clause, and not, as here, a conflict between two excess clauses.

Safeco Ins. Co. of America v. Pac Indemn. Co involved a situation where the court was determining the order of coverage between a Safeco

¹⁹ *Safeco v. ACIC*, 108 Wn. App. at 479-480

²⁰ *Safeco v. Pacific Indemn.*, 66 Wn.2d 38

policy that had an excess clause and a Pacific policy that had a prorata clause.²¹ In particular, Safeco insured the car's driver and the Safeco policy contained language that made the policy excess as to nonowned vehicles:

however, the insurance hereunder with respect to temporary substitute automobiles or to non-owned automobiles shall be excess insurance over any other valid and collectible insurance.²²

Pacific insured the car owner and the Pacific policy contained a prorata clause but not an excess clause:

Other Insurance. If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss.²³

The Washington Supreme Court enforced the Safeco excess clause but not the Pacific prorata clause. Three years later, in *Pacific Indem. Co. v. Federated Am. Ins. Co.*,²⁴ the Washington Supreme Court looked back and explained that the prior decision in *Safeco Ins. Co. of America v. Pac Indemn. Co.* was decided on the basis that “the dispute was between a ‘pro rata’ clause and an ‘excess clause.’”²⁵

²¹ *Safeco v. Pacific Indemn.*, 66 Wn.2d at 45

²² *Id.*

²³ *Id.*

²⁴ *Pacific Indem.*, 76 Wn.2d 249

²⁵ *Pacific Indem.*, 76 Wn.2d at 251

Safeco v. Pacific Indemn. Co. thus does not support Country's position because the present case does not concern a situation where an excess provision is pitted against a prorata provision. Instead, as discussed above, both the Safeco policy and Country policy contain excess provisions which negate each other.

C. This Court Should Reverse And Rule In Favor Of Safeco Because That Result Is Compelled By The Washington Supreme Court Decision In *Pacific Indemnity Company v. Federated Insurance Company* And Is Confirmed By The Recent Texas Court Of Appeals Decision in *Safeco Lloyds v. Allstate Insurance*.

Pacific Indemnity Company v. Federated Insurance Company case not only provides a basis for distinguishing *Safeco v. Pacific Indemn. Co.* from the present case, but a careful reading of the *Pacific Indemnity Company v. Federated Insurance Company* case also shows that the facts in *Pacific Indemnity Company v. Federated Insurance Company* are very similar to those in the present case, and that the decision in *Pacific Indemnity Company v. Federated Insurance Company* requires a holding that Safeco and Country are obligated to provide prorata coverage here.

As in the present case, *Pacific Indemnity Company v. Federated Insurance Company* involved a situation where there was a coverage dispute between a driver's insurer which issued a policy that contained a clause making the driver's coverage excess when operating a non-owned

car, and an owner's policy which provided coverage was in excess to other insurance:

Plaintiff-appellant, Pacific Indemnity Company (hereafter referred to as Pacific) had insured Miss Bundt against liability arising from her use and operation of an automobile; but, if she was operating a car not owned by her, the policy provided that the company's coverage was only to be excess, after the exhaustion of any other coverage of valid and collectible insurance.

Mr. Farrimond, the owner of the car driven by Miss Bundt, was insured by Federated American Insurance Company (hereinafter designated Federated). The policy provided that the insurance extended to one driving Mr. Farrimond's car only to the extent that the coverage was in excess of any other valid and collectible insurance available.²⁶

In that case, the driver's insurer, appellant Pacific, took the same position that Country takes here: that the car owner's insurance (there Federated) was "primary" and must be exhausted before the purportedly "excess" insurance offered by the driver's policy became available:

Second: Federated's insurance for Mr. Farrimond, being on his automobile, was 'primary insurance' and must be exhausted before other 'excess insurance' became liable. In support of this contention, appellant cites and discusses our decisions in Safeco Ins. Co. of America, Inc. v. Pac. Indem. Co., 66 Wash.2d 38, 401 P.2d 205 (1965), and Western Pac. Ins. Co. v. Farmers Ins. Exch., 69 Wash.2d 11, 416 P.2d 468 (1966).

But the *Pacific Indemnity Company v. Federated Insurance Company* Court rejected the driver's insurer's argument on the grounds that there was no reason to give effect to the excess provision in the driver's policy while ignoring the excess provision in the owner's policy:

²⁶ *Pacific Indem.*, 76 Wn.2d at 250

It is true that in all three cases we designated certain policies of insurance to be 'primary insurance,' not because they were on the specific automobile, but because each case was based upon a difference between policies. In Safeco, Western, and General, the dispute was between a 'pro rata' clause and an 'excess clause.' Our designation of a pro rata clause insurance policy as being 'primary insurance' when compared with an 'excess insurance' clause, was not made for the purpose of designating all policies upon the automobile as 'primary insurance'; but was designated 'primary' because it became effective prior to the policy of 'excess insurance.' **If we should accept the contention that the owner's policy (Mr. Farrimond's) is primary, we would be compelled to completely disregard the excess clause of that policy. There is no reason to give absolute effect to a provision in one policy while ignoring a similar provision in the other. Both clauses should occupy the same legal status.** (emphasis added)

We find no merit in appellant's second argument.²⁷

The Pacific Indemnity Company v. Federated Insurance Company

Court then went on to reach the result sought by Safeco in the present case: that both the driver's and owner's auto policies must provide coverage on a prorata basis:

The third possibility is, of course, the one adopted by the trial court; namely, that Pacific and Federated are legally obligated to the limits of liability of their respective policies on a pro rata basis; and if

the limit of liability coverage of said two insurance companies are equal, then the two companies shall share equally the cost of defense and discharge of the legal responsibility of the said Wendy J. Bundt arising out of said automobile accident on February 12, 1966, up to the limits of liability of each policy.

We find that the decision of the trial court-which we affirm-is in accordance with the general rule and weight of

²⁷ *Pacific Indem.*, 76 Wn.2d at 251

authority expressed in 7 Am.Jur.2d Automobile Insurance s 202, p. 545.²⁸

The decision in *Pacific Indemnity Company v. Federated Insurance Company* provides controlling authority in the present case and mandates that the excess language in the “other insurance” clauses of the Safeco and Country policies be deemed mutually repugnant and that, accordingly, both insurers are obligated to provide coverage a prorata basis.

Further, that result is confirmed by the reasoning of Texas Court of Appeals in the 2009 case *Safeco Lloyds Insurance Company v. Allstate Insurance Company*.²⁹ As discussed in Safeco’s opening brief,³⁰ and as not refuted by Country, (1) the *Safeco Lloyds* decision concerns substantially the same facts as those here, (2) the *Safeco Lloyds* decision concerns substantially the same policy language at issue here, (3) the argument made by Country here was made by Allstate in the *Safeco Lloyds* case, because (4) the *Safeco Lloyds* decision expressly rejected the argument now made by Country, and (5) consistent with *Pacific Indemnity Company v. Federated Insurance Company*, the *Safeco Lloyds* Court accepted the argument now made by Safeco that the excess language in

²⁸ *Pacific Indem.*, 76 Wn.2d 251

²⁹ 308 S.W.3d 49 (2009)

³⁰ See pages 12-17

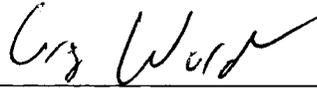
the policies conflicted such that both insurers were required to provide coverage on a prorata basis.

Country's brief criticizes the reasoning of the *Safeco Lloyds* Court, but that reasoning is fully consistent with the binding Washington precedent set out in *Pacific Indemnity Company v. Federated Insurance Company*.

Accordingly, the Trial Court erred in denying Safeco's motion for summary judgment and erred in granting Country's cross motion for summary judgment. That decision should be reversed.

Respectfully submitted this 3rd day of January, 2011.

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DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that I caused a true and correct copy of the Reply Brief of Appellant Safeco Insurance Company of Illinois to be served via the methods below on the 4th day of January, 2011 on the following counsel/party of record:

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