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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*

BRIEF OF RESPONDENT

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COURT OF APPEALS
DIVISION ONE
CLERK'S OFFICE

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I. STATEMENT OF THE CASE

COUNTRY Mutual Insurance Company is in agreement with the statement of facts as set forth in **APPELLANT’S BRIEF**. However, in addition, there is one other clause and an explanatory section from the Safeco policy which are relevant to the present analysis. The first is found in **PART A – LIABILITY COVERAGE**, (CP 76) and states as follows:

INSURING AGREEMENT

A. We will pay damages for **bodily injury** or **property damage** for which any **insured** becomes legally responsible because of an auto accident. . . .

B. **“Insured”** as used in this Part means:

...

2. Any person using your **covered auto** with your express or implied permission. The actual use must be within the scope of that permission.

The second relevant part is found at the beginning of Safeco’s Policy, where it explains recent **“Changes To Your Auto Policy,”** on Form SA-2696/WAEP 8/06. (CP 69) On this page, Safeco explains its change in the **Other Insurance** clause of the policy as follows:

- The provision was revised to state that if there is **other similar insurance** available, any coverage we provide will be excess over other applicable insurance. (emphasis added)

The language in Clause A is the general coverage grant, insuring against liability arising out of the operation of the Parish vehicle by any insured. Under the Safeco policy, Jonathan Kooistra was an insured due to the operation of the language in Clause B 2., which creates what is commonly known as “omnibus coverage” for persons using the covered vehicle with the permission of the owner. Thus, when Jonathan Kooistra operated the Parish vehicle, the Safeco policy provided primary liability coverage. At the same time, when Jonathan Kooistra operated the Parish vehicle, he was covered by his own policy of liability insurance issued by COUNTRY. However, under that policy, when Mr. Kooistra operates a non-owned vehicle, the **Other Insurance** clause of the COUNTRY policy makes that insurance excess over any other collectible insurance.

Other Insurance

If there is other applicable liability insurance for a loss covered by this policy, **we** will pay only our share of the loss. Our share is determined by totaling the limits of this insurance and all other collectible insurance and finding the percentage of the total which **our** limits represent. **However, any insurance we provide with respect to a vehicle you do not own will be excess over any other collectible insurance.** (emphasis added) (CP 34)

Finally, Safeco’s policy also contains an “**Other Insurance**” clause, which states:

OTHER INSURANCE

If there is **other applicable liability insurance** available any insurance we provide shall be excess over any other applicable liability insurance. If more than one policy applies on an excess basis, we will bear our proportionate share with other collectible liability insurance. (emphasis added) (CP 79)

Safeco's "other insurance" clause converts Mr. Kooistra's primary liability coverage to excess coverage only on the condition that there is "other applicable liability insurance available."

II. ISSUE PRESENTED

Was the trial court correct when it found that the purely excess coverage afforded by Mr. Kooistra's COUNTRY policy was not "other applicable liability insurance" such that the Safeco coverage remained primary on the loss?

III. AUTHORITY AND ARGUMENT

A. The Court Must Affirm The Trial Court's Dismissal Because The Excess Coverage Afforded Under The COUNTRY Policy Is Not "Other Applicable Liability Insurance" Such That Safeco's Coverage Loses Its Status As Primary Liability Insurance.

COUNTRY does not rely upon the erroneous rule that "coverage follows the vehicle." Rather, in order to determine the order of coverage where two insurance policies potentially cover the same loss, our courts perform an analysis of the competing insurance clauses to determine the intent of the insuring parties, and to discern the order of coverage created

by the language in the respective insurance policies; *New Hampshire Indem. Co. Inc. v. Budget Rent-A-Car Systems, Inc.* 148 Wn. 2d. 929, 64 P.3d. 1239 (2003).

Excess clauses are a type of other insurance clause which provide that an insurer will pay a loss only after other available primary insurance is exhausted; 15 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* §219:4, at 219-12 (3rd ed. 1999). Here, when Jonathan Kooistra began operating the Parrish vehicle, the Safeco policy was primary by virtue of its omnibus coverage. At the same time, the non-ownership clause in the COUNTRY policy made COUNTRY'S coverage excess. The only circumstance under which the Safeco policy becomes excess is if there "is other applicable liability insurance available." Under a plain reading of the policies and the legal authorities on the subject, the Safeco policy retains its status as primary liability coverage because COUNTRY's non-ownership excess policy is not such "other available liability insurance" that is required to convert Safeco's primary coverage to excess.

It thus has been held that where the owner of an automobile or truck has a policy with an omnibus clause, and the additional insured also has a non-ownership policy which provides that it shall only constitute excess coverage over and above any other valid, collectible insurance, the owner's insurer has the primary liability. In such case, the liability of the excess insurer does not arise until the limits of the collectible insurance under the primary policy have been exceeded. It should be

noted that under this rule, the courts give no application to the other insurance clause in the primary policy, which provides that if the additional insured has other valid and collectible insurance, he shall not be covered by the primary policy. That is because the insurance under the excess coverage policy is not regarded as other collectible insurance, as it is not available to the insured until the primary policy has been exhausted. **Or, to put it another way, a non-ownership clause, with an excess coverage provision, does not constitute other valid and collectible insurance within the meaning of a primary policy with an omnibus clause.** (emphasis added)

8A, Appleman, Insurance Law and Practice, § 4909.45 (1981).

This authority recognizes the rule that excess coverage created through a non-ownership clause is not “other applicable liability insurance” which would operate to convert Safeco’s primary coverage to excess. This has been quoted verbatim by the Washington Supreme Court in *Safeco Ins. Co. of America v. Pac. Indemn. Co.*, 66 Wn.2d 338, at 346, 401 P.2d 205 (1965). There, Safeco carried a liability insurance policy on the driver of a non-owned vehicle, and Pacific Indemnity carried liability on the vehicle itself. Both Safeco and Pacific had other insurance clauses which purported to make their coverage pro rata if there were “other insurance against a loss.” However, the Safeco policy contained the following language:

[P]rovided, however, the insurance hereunder with respect to temporary substitute automobiles or non-

owned automobiles shall be excess insurance over any other valid and collectible insurance.

Id., at 66 Wn.2d 45.

Our Supreme Court reviewed numerous authorities, beginning with the quote from *Appleman, supra*, and ultimately gave effect to the non-ownership/excess clause in the Safeco policy. In doing so, our Supreme Court recognized that non-ownership excess coverage is not “other insurance to which liability could be applied,” *id.* at 66 Wn.2d 48 vis-à-vis Pacific Indemnity’s primary policy, and thus, the primary liability coverage remained in force and ahead of the Safeco policy in the order of coverage.

Another example of this reasoning is found in *Safeco Ins. Co. of Illinois v. Automobile Club Ins. Co.*, 108 Wn. App. 468, 31 P.3d 52 (2001). Here, the court was asked to determine the order of coverage between Safeco, the insurer of the owner of the vehicle with a primary auto policy and personal liability umbrella policy, and Automobile Club Insurance Company (ACIC), who insured the non-owning driver with both a liability policy and an umbrella policy. All parties agreed that Safeco would first pay its primary liability limits. However, ACIC argued that the “other insurance” clause in its primary policy rendered its coverage excess to Safeco’s umbrella policy, and demanded that Safeco exhaust

those limits before ACIC's coverage became effective. The other insurance clauses in the two policies stated:

ACIC's "other insurance" clause states in relevant part:

Any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance....

The "other insurance" clause of Safeco of America's umbrella policy states:

If other valid and collectible insurance is available to the insured covering a loss also covered by this policy, other than insurance that is in excess of the insurance afforded by this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance.

Safeco v. ACIC, supra at 108 Wn. App. 478.

In this case, ACIC's primary insurance became excess only on the condition that there was "other collectible insurance." The court ruled that in order for the other insurance to be "collectible," it had to operate at the same level of coverage, i.e., primary-primary, excess-excess, umbrella-umbrella.

... Instead, we adopt the majority view that we cannot interpret the competing clauses of these policies in a vacuum, but must instead consider them in light of the total insuring intent of all the parties. On that basis, we consider the nature and purpose of primary and excess insurance policies as well as the function of "other insurance" clauses.

Primary policies are exactly that, the first line of defense in the event of accident or injury. Because

multiple insurance policies often apply to the same accident, insurance companies insert "other insurance" clauses into their policies in an effort to limit or extinguish liability so as to prevent a victim's double recovery. At a different level of insurance are umbrella policies, which do not activate until a primary policy has been exhausted. 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. (emphasis added)

Safeco v. ACIC, supra at 108 Wn. App. 479-80.

Finally, as a practical matter, if Safeco wanted to change the nature of their primary coverage to excess simply upon the existence of insurance of any type, including excess, umbrella, etc., covering non-owned drivers, they could have easily so stated. On the other hand, there is a clear indication in the policy that Safeco did not intend that result. At the very beginning of Safeco's Certified Policy they have a page entitled "**Changes To Your Auto Policy,**" on Form SA-2696/WAEP 8/06. On this page, Safeco explains that it had been 10 years since Safeco had made any major updates to their insured's auto policy contracts. In this document, Safeco provided a "summary of the changes we've made to your policy to assist

you in understanding the new terms and conditions of the policy.” The explanation for the change in the **Other Insurance** clause of the policy is as follows:

- The provision was revised to state that if there is other similar insurance available, any coverage we provide will be excess over other applicable insurance. (CP 69)

Thus, in its attempt to explain the meaning of its policy to its insureds, Safeco equates “similar insurance” with “other applicable insurance.” Very simply, primary insurance is not similar in nature or effect to excess coverage. Thus Safeco’s expressed intent with respect to their “other insurance” clause was to convert their primary coverage to excess only when other primary coverage was available.

B. The Analysis Offered By Both Safeco and the Texas Court Of Appeals is Flawed and Leads to Inconsistent Results.

In *Safeco Lloyds Ins. Co. v. Allstate Ins. Co.*, 308 SW3d 49 (2009), Safeco has cited a case which dealt with the same facts and language as exist in this case. However, the Texas Court of Appeals’ analysis falls victim to the same flaw as Safeco’s, i.e., neither one reads the policy language from both policies in context to determine the intent of the drafters of the policies.

The Texas Court of Appeals adopts a two-part test, the first part of which requires a determination “if the insured has coverage from either one of the two policies, but for the other.” *Safeco Lloyds Ins .Co.*, 308 SW3d at 56. In both the Texas case and in the present case, the Safeco policy provides primary liability coverage to permissive users through the omnibus clause. Therefore, in Texas, just as in our case, when the non-owning driver gets in the car and turns the key, primary liability coverage exists. This is most clearly seen in the situation where the non-owning driver has no other liability insurance. It is only when that driver possesses coverage through a personal policy that a potential conflict arises.

Similarly, if the non-owning driver has a personal policy, but there is no policy on the vehicle, the personal policy will provide primary liability coverage, and again, a conflict only arises if two policies exist. However, the possibility that both policies might provide primary coverage, in absence of the other, is not legally sufficient to simply ignore any further language contained in the “other insurance clause” offered by an insurer, especially language concerning the effect of operating a non-owned vehicle. Those clauses are put in to define the order of coverage where a conflict might exist. In order to define that order of coverage, the policies must be read together, and in context.

Just as in *Safeco v. Allstate, supra*, both policies in the present case potentially provide primary liability coverage, but due to the operation of the COUNTRY non-ownership clause, those primary coverages cannot exist simultaneously, they are mutually exclusive. The concurrent existence of two primary coverages seems to be a prerequisite for the holding of the Texas Court of Appeals, because it threw out both “other insurance clauses” and relied on the supposed existence of two primary coverages to contribute on a pro-rata basis. In order to reach this result, the Texas Court of Appeals had to create primary coverage where none could exist, despite the clear language of the non-ownership/excess clause in the Allstate policy. The point of coverage construction is to “effectuate the language of the policies;” *New Hampshire Indemnity Co. Inc. v. Budget Rent-A-Car Systems, Inc.*, 148 Wn.2d. 929 at 935, 64 P.3d. 1239 (2003), not to reconstruct coverage where it does not exist.

As set forth earlier, the Washington Supreme Court has dealt with this issue, and determined that in order for one policy to be “other applicable liability insurance coverage,” it must be on the same level of coverage as the policy which employed that language. In *Safeco Ins. Co. v. Pac. Indem., supra*, the Safeco policy had a non-ownership excess provision which was analyzed against Pacific Indemnity’s pro rata provision. In all of the authorities and cases cited, the courts were faced

with primary liability coverage provided through an omnibus provision, set against a non-ownership clause that provided various types of coverage: excess, umbrella, etc. In the end, our Supreme Court found that the non-ownership coverage, if on a different level, was not the type of other insurance that would trigger a change in the primary policy.

In *Mountain States Mut. Cas. Co. v. American Cas. Co.*, 135 Mont. 475, 342 P.2d 748, the court cited Appleman, *supra*, in holding that even though a garage policy provided that its coverage applied only pro rata that excess coverage provided by a non-ownership policy was not other insurance as to which liability could be applied.

We have examined numerous authorities dealing with this problem and find that the overwhelming majority view supports the finding of the trial court that Pacific has the primary liability under the provisions of the two policies.

Safeco Ins. Co., *supra* at 66 Wn.2d 48.

Finally, *Safeco Ins. Co. of Illinois v. Automobile Club Ins. Co.*, *supra*, simply expresses the same rule, i.e., that in order for a non-ownership policy to be “other applicable liability insurance,” it must be on the same level of coverage as the underlying policy. In other words, “other applicable liability insurance” is other applicable primary insurance when a primary policy is involved; excess insurance when an excess policy is involved; umbrella coverage when an umbrella policy is involved, etc. Otherwise, under the reading offered by Safeco and the Texas Court of

Appeals, if there is “other insurance” of any type or description, their excess provision is triggered and everyone shares pro rata. That is not what the policies say.

In the end, the Court must divine the intent of the parties in drafting their insurance policies. Here, that is made much easier because Safeco has told us what “other applicable liability insurance” means: it means “**other similar insurance.**” This language is taken directly from the letter Safeco used to explain the meaning of its other insurance clause to its insureds. Very simply stated, primary insurance is not similar to excess, nor is excess insurance similar to umbrella, nor is umbrella coverage similar to coverage subject to a super escape clause.

VI. CONCLUSION

This is not a situation where both insurance policies provide excess coverage. Rather, the Safeco policy, by its terms, provides primary coverage and, the COUNTRY policy, by its terms, only provides excess coverage because Mr. Kooistra was driving a vehicle he did not own. The Safeco coverage only becomes excess if there is “other applicable liability insurance” to cover the loss. Safeco’s argument simply puts the cart before the horse; it assumes that COUNTRY’s non-ownership excess coverage is “other applicable liability insurance,” which converts Safeco’s primary coverage to excess coverage. A common sense reading of the

policies does not lead to that conclusion, nor does a review of the authorities on the subject. Safeco itself has told its insureds that only coverage “similar” to its primary coverage will trigger its “other insurance” clause.

The Court must rule that Safeco’s policy was primary, that COUNTRY’s coverage was excess, and that the Trial Court was correct in so holding.

Respectfully submitted this 6th day of December, 2010.

By 

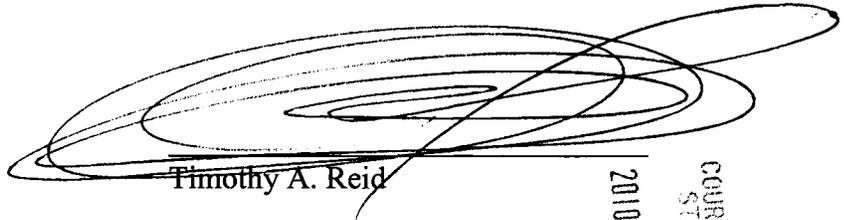
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DECLARATION OF SERVICE

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 Brief of Respondents to be served via the methods below on the 6th day of December, 2010, on the following counsel/party of record:

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