

FILED
MIAMI COUNTY
COMMON PLEAS COURT

IN THE COMMON PLEAS COURT
OF MIAMI COUNTY, OHIO
GENERAL DIVISION

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JAN A. MOTTINGER
CLERK OF COURTS

SUSAN E. CAYLOR, Guardian of the : CASE NO. 99-400
Person and the Estate of :
JAMES L. CAYLOR, et al. :

Plaintiff, : Judge Robert J. Lindeman

VS. :

PACIFIC EMPLOYERS INSURANCE : ENTRY
COMPANY, et al. :

Defendant.

This matter came on for consideration upon the motions of the Plaintiffs and Defendant CIGNA Property and Casualty (CIGNA) for summary judgment on the issues of whether Plaintiffs are insureds and whether they are entitled to underinsured motorist coverage on CIGNA's business automobile policy No. ISAH07127832.

Considered were the stipulations of fact, depositions and affidavits filed for record as well as supporting documents of record and memorandums of counsel.

BACKGROUND

James L. Caylor, while operating a motor vehicle he owned, was involved in a two car accident on October 26, 1997, resulting in permanent injury. His claim is presented via the guardian of his person and estate, although he is referred to hereafter in the first person.

The driver of the other vehicle was covered by a motorist liability policy in the amount of \$100,000/300,000.

At the time of the accident, Mr. Caylor was employed by Thermal Arc, which is a subsidiary of Thermadyne Holding Corp.

Thermadyne is a Delaware corporation with its principal place of business in the State of Missouri.

Mr. Caylor was not acting within the scope and course of his employment with Thermal Arc at the time of the accident.

Thermadyne was insured under five policies, one of which was CIGNA policy No. ISAH07127832, a business auto policy, which was negotiated, issued and delivered in the State of Missouri.

ANALYSIS

The case of *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, first directs the Court to determine if the Plaintiffs are insured under the CIGNA policy.

In the recent Ohio Supreme Court case of *Ohayon v. Safeco Ins. Co. of Illinois* (2001), 91 Ohio St.3d 474, the Supreme Court noted that when an insured commences an action against his or her own carrier for underinsured motorist benefits, the law to be applied in determining the parties' rights and duties shall be determined by the law of the state selected by applying the rules in Sections 187 and 188 of the Restatement of the Law 2d, Conflict of Laws (1971), *Ohayon* syllabus (unless it can be established the parties have chosen the state of the applicable law.). Emphasis added.

Of course, in *Pontzer* choice-of-law was not an issue and in *Ohayon* it had been established the Plaintiff was an insured.

In the present case, we have the reverse twist; choice-of-law is an issue and it has not been established the Plaintiffs are insureds under the CIGNA policy.

This Court concludes it must first determine which state law to apply to the construction of the CIGNA contract. This will either be Missouri law or Ohio law, and will be determined by analyzing which state has the most significant relationship to the transaction and the parties, since the CIGNA policy does not contain a clear choice-of-law selection by the parties to the contract.

The affidavit of Patricia Williams, Vice President General Counsel with Thermadyne establishes the CIGNA policy was negotiated, made and delivered in Missouri.

Clearly, to the contract itself, Missouri has the most significant relationship. However, it is noted that Thermadyne specifically rejected underinsured motorist coverage in Ohio in 1993 under policy ISA041609. (Is this the predecessor to ISAH07127832?) Exhibit 15, William deposition, filed March 28, 2001 with the Clerk of Courts.

This rejection specifically noted the applicable Ohio Revised Code Sections of 3937.18 and 3937.181 and purports to be a rejection under those sections.

It is clear to the Court that the parties were acknowledging by this rejection that Ohio law was applicable to the contract. But was Ohio law to be applied to a construction of the contract?

Although Ohio has a significant relationship to the accident and the witnesses to the accident, these involve more of the substantive tort issue, which issue is not the question. The question is what state law to apply to the contract.

In balancing the above, it appears clear to the Court that Thermadyne and CIGNA were aware that the business auto policy executed in Missouri would be applicable to automobiles garaged and used for business purposes in Ohio, and they attempted to limit any construction of the policy under Ohio law for underinsured purposes. Thus they implicitly chose Ohio law to apply to the policy.

Accordingly, the Court would determine that Ohio law is applicable in determining if the Plaintiffs are insureds under the CIGNA policy.

THE INSURED

The Court will apply Ohio law in determining if the Plaintiffs are insured under the CIGNA policy, and will commence such application with the *Pontzer* case.

The CIGNA policy defines the insured as “You for any covered auto” (amended complaint, Exhibit 5, Bates Stamp 222).

In *Pontzer*, the Ohio Supreme Court held that an inherent ambiguity exists where bodily injury coverage is extended to a corporate named insured, when the corporation cannot sustain bodily injury.

Thus, the coverage extends to the company’s employees of which Plaintiff James L. Caylor is one.

Ergo, James L. Caylor is insured under the policy.

Pursuant to O.R.C. 3937.18, insurance carriers must offer UM/UIM coverage to those they insure under a motor vehicle liability policy.

Unless the insured expressly rejects the underinsured motorist coverage, it arises by operation of law. *Linko v. Indemnity Ins. Co. of NA* (2000), 90 Ohio St.3d 445.

CIGNA presents two arguments in this regard. Number one is that the UIM coverage was expressly (in writing) rejected by Thermadyne in 1993, which extended to the renewal policy in 1997, and, second, even if the rejection did not conform to the *Linko* standards, *Linko* cannot operate retroactively since to do so would violate the parties' due process rights and vested contractual rights, all in violation of the Ohio and United States Constitution.

The Court would conclude that the 1993 written rejection executed by Thermadyne was effective for the policy renewed in 1997.

Hence, Thermadyne did attempt a UIM rejection for the policy in question.

The rejection, of course, is not compliant with the standards set forth in the *Linko* case and does not constitute an effective and valid rejection of UIM coverage.

CIGNA argues that a retroactive application of these standards is a denial of the contracting parties' constitutional rights.

O.R.C. 3937.18 requires motorist insurance companies to offer their insureds the option of purchasing uninsured/underinsured motorist coverage. By statute, this must be in writing.

Applying Ohio law, the Court cannot find in the CIGNA policy where underinsured motorist coverage was offered in writing, nor was the premium for such coverage disclosed.¹ *Gyori v. Johnstone Coca-Cola Bottling Corp., Inc.* (1996), 76 Ohio St.3d 565.

¹ Although the 9/3/97 amendment to O.R.C. 3937.18(C) provided that a written, signed rejection of UM/UIM coverage "creates a presumption of an offer of coverages consistent with division (A) of this section: this amendment was not in effect at the time of the contracting and thus not applicable.

When the statute is not followed, the mandatory provisions of R.C. 3937.18 arise by operation of law.

Hence, the Court's requirement that such coverage arise by operation of law does not violate any constitutional standards. The contracting parties do not have the right to contract in contravention of Ohio law. That would be against the public policy of the state.

Accordingly, the Court concludes that there does not exist an Ohio or United States constitutional violation by virtue of the imposition of underinsured motorist coverage via operation of law.

It is also argued by CIGNA that this is a business policy which requires Mr. Caylor to be acting within the scope of his employment, which, by stipulation, he was not at the time of the accident.

Since the UIM coverage arises by operation of law, it is not limited by exclusions contained in the principal liability coverage. *Pontzer, supra*. (However, conditions in the liability policy are still applicable. See, *Luckenbill v. Midwestern Indemnity Cov.* (Jun. 1, 2001), Darke App. No 01CA1536, unreported.

Accordingly, the exclusions contained in the liability policy are not applicable and Mr. Caylor is an insured under the CIGNA policy.

Because the claims of Mrs. Caylor for loss of consortium are derivative, she too is an insured under the CIGNA policy.

IT IS SO ORDERED.



ROBERT J. LINDEMAN, JUDGE

cc: Paul O. Scott
James R. Livingston
John G. Farnan
Thomas Pyper
Brian N. Ramm/Amy K. Schermer
Nancy Manougian
John F. McLaughlin
Fredric L. Young
John F. Brockman
Bradley L. Snyder
D. John Travis/Joy Clinton Rice
Steven G. Janik/J. Colin Knisely
Gordon D. Arnold/Robert W. Young