

FILED
MIAMI COUNTY
COMMON PLEAS COURT

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JAN A. NOTTINGER
CLERK OF COURTS

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

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 cross-motions for summary judgment filed by the Plaintiffs and Liberty Mutual Insurance Company (Liberty).

Considered were the stipulations of fact, depositions and affidavits filed with the Clerk of Courts, supporting documents filed of record and the memorandums of counsel.

At issue is whether or not the Plaintiffs are insureds and entitled to coverage under any one or all of three insurance policies issued by Liberty to the Boy Scouts of America (BSA).

BACKGROUND

Plaintiff James L. Caylor was injured in an automobile accident on October 26, 1997 while returning from a weekend camping trip. Mr. Caylor was a volunteer assistant troop leader for BSA Troop 82, sponsored by the First United Methodist Church. He was not an employee of BSA or any of its councils or subsidiaries. The weekend trip was approved by the Miami Valley Council of BSA, of which Troop 82 was part.

The Miami Valley Council is supported by the BSA Central Region. BSA is divided into four geographic regions, of which the headquarters are in Texas.

Plaintiff Ralph T. Caylor is the son of James L. Caylor and is a member of Troop 82.

At the time of the accident, BSA was insured through Liberty on three separate policies;

- (1) a business automobile policy, being No. AS7-191-409751-057;
- (2) a commercial general liability policy, being No. TB1-191-409751-127; and
- (3) an umbrella excess policy, being No. TH1-191-409751-117.

The Plaintiffs have asserted claims against each of the policies; (A) by Susan E. Caylor for loss of consortium, as the spouse of James L. Caylor; (B) by Susan E. Caylor as the guardian of James L. Caylor; and (C) by Ralph T. Caylor for loss of parental consortium and emotional distress.

BUSINESS AUTOMOBILE POLICY

The Liberty Business Automobile Policy (BAP) is appended to the Plaintiffs' amended complaint as Exhibit 9. It specifically contains an uninsured motorists endorsement for Ohio (Bates Stamp 92), in an amount less than the policy limits.

In determining who are insureds under the policy, reference is made to the definition contained in the endorsement:

- .B. Who is an insured.
 - .1. You * * *.

2. If you are an individual, any family member * * *

The Court will apply the *Scott-Pontzer v. Liberty Mut. Fire. Ins. Co.* (1999), 85 Ohio St.3d 660 case to Exhibit 9 and conclude that the definition of "you" as applied to a corporation is ambiguous. Accordingly, the BAP policy (in Ohio) extends to all employees of the BSA.

In the present case, however, the underinsured motorist coverage (UIM) mandated by O.R.C. 2937.18 does not arise by operation of law (and hence exclusion free).

The policy specifically provided for UIM coverage albeit in an amount far less than the policy limits.

Application of *Linko v. Indemnity Ins. Co. of N.A.* (2000), 90 Ohio St.3d 445, results in the conclusion that Liberty has failed to demonstrate proof of a valid acceptance of a reduced limit of UIM, hence an amount equivalent to the liability limit arises by operation of law. (Although the Griffith affidavit opines otherwise, the affidavit is conclusory and does not establish the *Linko* requirements were met.)

Therefore, all employees of BSA and family members of employees of BSA have UM/UIM coverage in Ohio in an amount of \$1,000,000.00 under the Liberty BAP policy.

But neither James T. Caylor, Susan E. Caylor nor Ralph T. Caylor are employees or family members of employees of BSA.

Hence they are not insureds under the BAP policy. If they are not employees of BSA then they are not eligible for coverage under the expanded limits of the UIM portion of the Liberty BAP policy.

Accordingly, and as to the BAP policy, Liberty's motion for summary judgment is found well taken and is granted. The Plaintiffs' motion is overruled.

COMMERCIAL GENERAL LIABILITY POLICY

The Liberty Commercial General Liability Policy (CGL) is appended to the Plaintiffs' amended complaint as Exhibit 8. The CGL policy does not contain any reference or endorsement purporting or relating to UIM coverage in Ohio.

Specifically, the policy defines insureds to include:

"(b) Scout professionals and employees; units; chartered organizations or certified organizations; and all volunteer workers participating in an official scouting activity and in the scope of their duties as such* * *." (Bates Stamp 9 of Exhibit 8.)

This Court has already concluded in this case that James L. Caylor was a volunteer participating in an official scouting activity at the time of the accident. The scouting trip was approved by the Miami Valley Council of BSA which is part of the Miami Valley District of BSA, which is a part of the BSA Central Region.

In addition, the coverage includes "units" of the BSA. Units by definition mean any chartered troop, such as Troop 82. (Bates Stamp 14, Exhibit 8.)

Accordingly, James L. Caylor and Ralph T. Caylor are insureds under the CGL policy.

Reference still must be made to any exclusions or exceptions in the CGL policy which would prevent coverage for the Caylors.

The Defendant argues BSA is self-insured under the CGL policy because it is a fronting policy. Self-insured fronting policies are not governed by R.C. 3937.18, hence no UIM coverage will arise by operation of law, Liberty argues.

Liberty argues that the CGL policy is the equivalent of self-insurance, because BSA has a matching deductible for every dollar of coverage. If Liberty is obligated to pay a party \$250,000 upon a loss, then BSA is obligated to pay Liberty \$250,000 for the same loss.

This arrangement, Liberty argues, creates a self-insured status which obviates the application of R.C. 3937.18. (See affidavit of Debra C. Griffith filed April 30, 2001.)

However, there are scenarios under which Liberty would be at risk for a loss. If BSA became insolvent or filed bankruptcy, Liberty would still be obligated to pay a valid loss during the term of the policy to a third party.

The Court would accept the premise that if BSA is self-insured, and no motor vehicle liability policy exists, then O.R.C. 3937.18 would not apply. *Jennings v. The City of Dayton* (1996), 114 Ohio App.3d 144.

Clearly BSA has not complied with R.C. 4509.72.

Clearly BSA has not used a financial responsibility bond as contemplated by R.C. 4509.59.

Nevertheless the fronting policy employed is not a typical risk-shifting arrangement. A policy of insurance generally shifts the risk of loss from the insured to the insurer. The only risk Liberty runs is the risk every creditor faces, insolvency by the debtor.

The Court concludes that the focus is not whether an entity acts as a self-insured, but rather it depends on whether the parties have framed a motor vehicle liability policy. Where motor vehicle liability coverage is provided by policy, even in a limited form, UM/UIM coverage must be provided. *Selander v. Erie Insurance Group* (1999), 85 Ohio St.3d 541.

The case of *Grange Mut. Cas. Co. v. Refiners Transport & Terminal Corp.*(1986), 21 Ohio St.3d 47, cited by the Defendant is distinguished by the fact that *Refiners* specifically complied with R.C. 4509.59 then covered itself with excess coverage policies (above and beyond its bond).

The *Grange* case noted in dicta, that the excess insurers would have to show proof of a valid rejection for the excess coverage if they did not contain UM/UIM coverage, since they were motor vehicle liability policies.

Curiously, the premium paid by BSA in this case for the BAP is nearly the same as paid for the CGL policy (55,643-52,511). Yet it is argued Liberty has no risk under the CGL policy.

The conclusion drawn by this Court is that notwithstanding BSA's claim as a self-insured, if Liberty issued a motor vehicle liability policy, compliance with O.R.C. 3739.18 must occur. Since the policy did not contain UM/UIM coverage or a valid rejection of such coverage, coverage would arise by operation of law.

Does the CGL policy provide any motor vehicle liability coverage, even if in limited form?

The definition of insured includes:

.d. Any scout professional and any unit with respect to the use of a non-owned automobile in the scout activities of the named insured or any unit; the donors, loaners or owners of non-owned automobiles while being used in the scout activities of the named insured or any unit; * * *. (Bates Stamp 10, Exhibit 8.)

Once any motor vehicle liability coverage is offered, O.R.C. 3937.18 is implicated.

Since it was offered in the CGL policy, UM/UIM should have been offered or rejected.

Accordingly, it must arise by operation of law, and contains no exclusions.

The Court would conclude the Plaintiffs are insureds under the Liberty CGL policy and are entitled to UIM coverage in an amount equal to the policy limits.

Plaintiffs' motion for summary judgment in this regard is found well taken and granted. Defendant's motion for summary judgment is overruled.

UMBRELLA EXCESS LIABILITY POLICY

The Liberty umbrella policy is attached as Exhibit 10 to the Plaintiff's amended complaint. The umbrella policy does not contain any reference to UM/UIM coverage nor does it reference a valid rejection of the same.

The policy is a follow form umbrella policy, referencing the Liberty BAP and CGL policies mentioned herein.

The umbrella policy covers loss the insured suffers under any of the policies of underlying insurance set forth in the schedule attached to the policy.

The underlying policy in question is the Liberty CGL policy which the Court has determined insured James L. Caylor and the derivative claim of his spouse and son, and provides UIM coverage arising by operation of law for the accident occurring March 26, 1997.

Since the CGL policy provided automobile liability coverage, the umbrella policy is also required to provide such coverage or obtain a valid waiver.

Accordingly, on the issue of coverage under the Liberty umbrella policy, the Court would find the Plaintiff's motion for summary judgment well taken and granted. The Defendant's motion for summary judgment is overruled.

IT IS SO ORDERED.

ROBERT J. LINDEMAN, JUDGE

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cc: Paul O. Scott
James R. Livingston
John G. Farnan
Thomas Pyper
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