RECENT COURT DECISIONS

Contributed by
Patrick F. Maroney
The Florida State University

Requirement that Claimant Exhaust Other Insurance Coverage Before Recovery for Tort-Feasor Whose Insurer Is Insolvent or from Oregon Guaranty Fund

Carrier v. Hicks, 851 P.2d. 581 (Or. 1993)

Carrier, the plaintiff, was injured by a customer of the defendant Tavern. The customer, Morgan, left the defendant's bar allegedly having been served by the defendant after he was visibly intoxicated. Oregon law provides, "No person shall sell, give or otherwise make available any alcoholic liquor to any person who is visibly intoxicated."

Morgan had $50,000 in liability insurance. Because multiple parties were injured, plaintiff Carrier only received $23,000 of the $50,000 by way of settlement. The plaintiff then filed suit against the defendant Tavern owners. However, during the course of that proceeding, the Tavern owner's insurer became insolvent and the Oregon Insurance Guarantee Association (OIGA) assumed defense of the defendant pursuant to Oregon law.

The plaintiff then filed an uninsured motorist claim against his own insurance company, Farmers. The claim went to arbitration and Carrier was awarded $100,000 in damages. Carrier's limit of underinsured motorist coverage was $250,000.

In the lawsuit against the Tavern owner, the trial court entered a summary judgment for the defendant. The court of appeals reversed. The Supreme Court of Oregon upheld summary judgment entered by the trial court and reversed the appellate court. The Supreme Court's decision rests upon Oregon law, which provides that the claimant must first exhaust remedies of any other applicable policy or policies before the claimant can assert a claim to recover damages against the OIGA plan. The court reviewed various possible interpretations of the term "must first exhaust the remedies under the policy" and wrote that the language had three possible meanings: 1) the underinsured motorist's policy limits must be exhausted before plaintiff can proceed against defendants or OIGA, 2) the claim against the policy, whatever its outcome, must be exhausted by completion, or 3) the claimant simply cannot collect from OIGA

until the other claim is in process. The court found the construction of the provision that is most consistent with the OIGA law is the first one, and that the other insurance policy limits must be exhausted before the plaintiff can proceed against the insured of an insolvent insurer or against OIGA to recover damage that is covered by the OIGA plan.

The plaintiff also argued that the arbitration proceedings impinged upon his right under the Oregon constitution to a trial by jury. However, the court found that the arbitration was conducted by agreement of the parties and not under a statutory compulsion, thus, the state had not deprived the plaintiff of a jury trial because he had voluntarily agreed to forego one.

Liability of Excess Insurer for Insolvency of Underlying Insurers

Federal Insurance Company v. Srivastava, 2 F.3d 98 (5th Cir. 1993)

Dr. Sudhir Srivastava won a $31,600,000 judgment for defamation and invasion of privacy against Harte-Hanks Television and its parent company. Harte-Hanks had several layers of insurance coverage; $2 million with Continental, $5 million with Mission, $5 million with Western Insurance Company, and $10 million with Columbia-Hudson Insurance. The final layer of excess coverage was a $30 million layer with Federal. The problem arose because of the insolvencies of Mission and Western, which caused a $10 million gap in coverage.

After the judgment, the insurers agreed to pursue an appeal. Srivastava initiated settlement negotiations and agreed that he would receive $8.5 million from Harte-Hanks, Continental, and Columbia-Hudson. In exchange, Srivastava agreed to release Harte-Hanks from liability for the first $22 million of the judgment. Srivastava retained a right to collect the remainder of the judgment of more than $9 million from Federal. Harte-Hanks then dismissed its appeal of the $31.6 million judgment.

Federal filed a declaratory action. The District (trial court) held that Federal was not liable to pay the judgment because the partial settlement agreement did not exhaust the underlying insurance coverage as required by Federal's excess policy and that Federal was not bound by the settlement because Harte-Hanks did not act as a prudent uninsured by settling on the terms it did. Harte-Hanks appealed.

The fifth circuit court of appeals affirmed the trial court and held that an excess policy's coverage begins when all the underlying insurers have exhausted their policies by paying to their policy limits. The court wrote, "Under Texas law, their insolvencies (Mission and Western) cannot cause Federal to assume coverage for the resulting gap in coverage. Texas courts do not require excess insurers to 'drop down' in place of insolvent primary carriers." The fifth circuit noted that the seventh circuit, in *New Process Baking Co. v. Federal Insurance,* 923 F.2d. 62,63 (7th Cir. 1991), had

considered similar language in a Federal Insurance Company policy and concluded that the policy unambiguously denied any obligation to drop down. The seventh circuit held that the insolvency of an underlying carrier, by itself, had no effect on where the layer of excess coverage begins.

The fifth circuit found that, since Federal had no duty to drop down in place of the insolvent insurers, its coverage would begin when the loss exceeds the policy limits of all underlying policies. Thus, Federal's layer of coverage would begin when the loss exceeded $22 million. The court then indicated that it needed to determine whether the loss, as defined by the policy, reached that layer of coverage. Srivastava argued that the loss occurred when the trial court entered judgment for $31.6 million, and, since this exceeded the threshold of Federal's layer of coverage, they should have to pay. However, the court found that the reading of the policy was not correct. The court found that the policy required Federal to pay "upon final determination of loss" and the court concluded that the loss occurred when the court of appeals issued a mandate following dismissal of the appeal after the partial settlement. "Since the insured's loss does not reach the layer of Federal's coverage, Federal has no liability." The court also upheld the trial court's finding that Federal did not violate its duty of good faith and fair dealing under Texas law.

Weight as a Handicap or Disability

Cassista v. Community Foods, Inc., 856 P.2d. 1143 (Cal. 1993)

The plaintiff, who weighed approximately 305 pounds, was denied employment at Community Foods. She sued, alleging that she was a handicapped individual within the meaning of the Fair Employment and Housing Act of California and had been denied the job based upon her weight. The trial court entered a judgment on a jury verdict in favor of the employer, which was reversed by the intermediate appellate court. The Supreme Court reversed the appellate court.

The California Supreme Court reviewed the legislative history of the California Fair Employment and Housing Act (FEHA), which was enacted in 1980 and amended by the legislature in 1992. Despite different wordings, the court found the old and new laws were remarkably consistent. The court wrote that the legislature "had decreed in effect that the current and former versions of the law should be harmonized." The court noted that the similarities between the 1980 law and the 1992 amendments were not coincidental since both derive from the Federal Rehabilitation Act of 1973.

The court reviewed decisions dealing with weight as a physical handicap under the Federal Rehabilitation Act and cited *Cook v. State of RI Department of MHRH*, 783F.2d. 1569, which addressed the question of whether obesity, not accompanied by other physiological disorders, constituted a handicap within the meaning of the rehabilitation act. In Cook, the plaintiff weighed over 300 pounds. The court wrote, "To constitute a physiological disorder qualifying as

a handicap, the claimant was required to induce evidence of some related physiological disorder (e.g., heart disease or diabetes) or some medical evidence that the claimant's obesity itself is caused by systemic or metabolic factors...thus, to the extent that obesity...is caused by systemic or metabolic factors and constitutes an immutable condition that she is powerless to control, it may be a physiological disorder qualifying as a handicap. Conversely to the extent that obesity is transitory or self-imposed condition resulting from an individual's voluntary action or inaction, it would be neither a physiological disorder nor a handicap."

The California Supreme Court also reviewed administrative interpretations of the federal statute and concluded that both the judicial and administrative interpretations uniformly reject the argument that weight unrelated to a physiological, systemic disorder constituted a handicap or disability. The court concluded that the individual must show such a physiological, systemic basis for the condition.

Because there was nothing in the record to indicate that the plaintiff's weight was a result of a physiological condition or disorder affecting one or more of the body's systems and because, in fact, the plaintiff alleged and maintained that despite her weight she was healthy and fit, she had failed to demonstrate an actual handicap in the meaning of the FEHA.

The plaintiff also argued that even if weight did not qualify as an actual handicap or disability within the meaning of the law, she would qualify as a handicapped individual if she was regarded as being handicapped. However, the court found that the argument was unpersuasive. The court wrote, "It is not enough to show that an employer's decision is based on a perception that an applicant is disqualified by his or her weight. The applicant must be regarded as having or having had a physiological disease or disorder affecting one or more of the body systems....In other words, the condition, as perceived by the employer, still must be in the nature of a physiological disorder within the meaning of the FEHA, even if it is not, in fact, disabling."

The California Supreme Court reversed the decision of the Court of Appeals.

Workers' Compensation Immunity of Co-Employees for Torts

Eller v. Shova, Supreme Court of Florida Case No. 80,776 December 9, 1993, 18 Fla. L. Weekly S626

In *Shova,* the plaintiff was the husband of a convenience store clerk who had been killed while on the job. The complaint alleged that the defendants knew the store was located in a high crime area and had been the subject of numerous robberies. Despite that knowledge, defendants did not equip the store with adequate security. The trial court dismissed the complaint, finding the exclusive remedy was workers' compensation. The second district court of appeals reversed, finding provisions of the workers' compensation law unconstitutional.

The Florida Supreme Court upheld the constitutionality of provisions of the Florida Workers' Compensation Act, which provide immunity from civil tort actions to policy making employees unless the degree of negligence is culpable negligence (the maximum penalty for which could be imprisonment for more than 60 days).

Florida law grants co-employees immunity from liability for torts when their actions result in an injury to a co-employee. However, co-employees remain liable for acts of gross negligence. Additionally, in 1988, the Florida legislature amended the Workers' Compensation Law to provide that supervisory/ managerial/ policy making employees would be liable only when their acts constituted culpable negligence. The legislative enactment was in response to the Florida case which had held that corporate officers, executives, and supervisors could be sued as co-employees for acts of gross negligence.

In this case, the Florida Supreme Court held that the heightened negligence standard applicable to supervisory personnel did not violate the right to redress provision of the Florida constitution. That provision provides that, where a right of access to courts has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida or where such right has become a part of the common law of the state, the legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the state to redress for injuries, unless the legislature can show an overpowering public necessity for the abolishment of such rights and no alternative method of meeting such public necessity can be shown.

The intermediate court found that the statute violated the right to redress the provision. The court wrote that, by raising the standard for supervisory employees to culpable negligence, the legislature had taken away the right without providing a reasonable alternative.

The Supreme Court reversed, holding that merely raising the degree of negligence necessary to maintain a tort action does not abolish the right to redress. The court also found that the Workers' Compensation Law provides a reasonable alternative and therefore the amendment did not violate the Access to Court's provision of the Florida Constitution.