

Insurance Company Plays “Gotch Ya” and Wins

by Ron Usem, Esq. Huffman, Usem, Crawford & Greenberg PA

Nancy Bartkowiak, et al vs. Underwriters at Lloyds London, Case No. 1-13-3549. 2015 IL App. (1st 133549) Ill. App. 2015.

This case involves an appeal concerning the interpretation of a contingent auto liability policy, one of the most important types of insurance protection a broker can purchase in order to deal with the risk of a catastrophic highway accident. The underlying facts are as follows:

In October 2009, a truck delivering road resurfacing materials struck and killed a road construction worker Joe Bartkowiak. The deceased’s wife sued the trucking company (DWT), the truck broker, Jack Gray Services.

The driver had a \$1 million dollar auto liability policy thru Northland Insurance Company. Jack Gray, the broker, was an additional insured on the Northland Insurance policy.

In addition to being as an additional insured under the Northland policy, Jack Gray had his own \$1 million dollar contingent auto liability policy (as a broker) which was in effect at the time of the accident. The defendant insurance company (Lloyds) agreed to pay “damages resulting from auto liability that may arise on a contingent basis.” Further, it agreed to pay all sums which Jack Gray shall become legally obligated as damages because of an individual’s bodily injury and death caused by an occurrence arising out of the transportation of merchandise and agreed to pay the cost and expenses to defend any lawsuit against Jack Gray alleging bodily injury.

Under the Lloyds policy with Jack Gray, Jack Gray was required to obtain primary automobile liability insurance for any job it assigned. On its face, the requirement appears to be routine since many contingent auto liability policies require the broker to make sure the carrier it hires has primary auto liability coverage.

According to the opinion, on the job involving this case, Jack Gray satisfied that requirement by being an additional insured on the Northland policy. It appears that to be insured, Lloyds was requiring Jack Gray to have primary auto liability coverage while at the same time it was selling contingent auto liability coverage. Under the facts of this case, Northland in effect was a primary insurer.

In Jack Gray’s policy, it stated, “Application

of Contingent Liability. It is expressly understood and agreed that the coverage provided under this Certificate of Insurance shall not apply if there is valid and collectible automobile liability insurance of any nature.”

When Jack Gray was sued, he tended defense to the insurance company (Lloyds) under the policy. Lloyds denied coverage citing the condition above, arguing Jack Gray had “valid and collectible liability insurance through Northland. The insurance company (Lloyds) argued that because it had not promised to cover anything over and above the primary

The Parties’ dispute centers on the condition in the policy that coverage will not apply if there is valid and collectible auto liability insurance of any nature.

insurance, it (the insurance coverage) only applied if Jack Gray effectively had no primary coverage due to some invalidity or complete failure of the primary insurance policy. On February 28, 2012, in a wrongful death suit, the Plaintiff recovered with \$7.8 million in damages including the full \$1 million from Northland. Northland apparently defended Jack Gray. Jack Gray remained exposed in the amount of \$4.2 million so it agreed to assign to the Plaintiff its rights under Jack Gray’s insurance policy. The opinion does not state whether Jack Gray obtained a release from the lawsuit in exchange for the assignment.

The insurance company (Lloyds) moved to dismiss this case citing the condition listed above, namely that because Jack Gray, in fact, did have valid and collectible auto liability insurance it had no duty to Jack Gray. The insurance company (Lloyds) emphasized that its policy was the contingent auto liability and that the specific contingency it covered, the complete failure of the primary coverage, never occurred.

The Parties’ dispute centers on the condition in the policy that coverage will not apply if there is valid and collectible auto liability insurance of any

nature. The insurance company (Lloyds) argued that the condition applied if any auto liability insurance of any kind in any amount was in effect as long as the insurance was valid and the insured was capable of collecting on it, even if the policy did not wholly cover the loss. The Plaintiff argued that to the extent that the underlying auto insurance failed to fully cover the insured loss the insurance was "uncollectible and that the Defendant remained obligated to cover the remaining portion of the loss."

The Defendant insurance company (Lloyds) continued to argue that only if a certain event does or does not happen and the insured has other valid and collectible auto liability insurance, the provision is known as an "escape clause."

The Court, analyzing the arguments and reviewing case law, to aid in interpretation, took the position that a condition in the policy did not provide excess coverage but was rather an "escape hatch." The Court stated in reviewing the policy as a whole that the parties' intentions were clear, that pursuant to the condition in the Defendant's (Lloyds) insurance company never undertook to provide primary coverage where, for some reason, the auto liability insurance for the trucks brokered by Jack Gray completely failed due to invalidity or insolvency. If Jack Gray could collect at all from the primary insurance (Northland), then the Defendant's (Lloyds) insurance

policy would not apply.

The Plaintiff argued that such an interpretation rendered the policy wholly illusory and that by requiring Jack Gray to obtain valid auto liability insurance and then denying coverage because it had valid auto liability insurance effectively made the policy cover nothing, and that Lloyds position constituted "bad faith" The court didn't buy the argument. It upheld the so-called "intention" of the parties and stated that their agreed terms were controlling.

In short, Lloyds won. Is there a takeaway here? The rule of "caveat emptor" (buyer beware) still lives. Watch out for traps in contingent auto liability policies! Read your policies carefully!

What was not discussed in this opinion was the relationship between Jack Gray and Lloyds (and its sales representative) prior to the purchase of the contingent auto liability policy. Depending on the facts of that relationship, one wonders whether the Lloyds agent might be responsible for fraud, or negligent misrepresentation in selling a policy, where this essential term was not disclosed or explained, and that on its face failed to provide critical coverage for Jack Gray.

Ronald H. Usem Esq., Huffman, Usem, Crawford & Greenberg PA Phone: 763-545-2720 Email: ron@usems.com.

MOBILE SOLUTIONS FOR A MOBILE INDUSTRY

Infinity Software Solutions Streamlines The Entire Transportation Management Process, Giving You Tools To Be More Productive.



Stay ahead of the pack with high speed technology and immediate communication with customers and carriers.



ISS is changing the face of Transportation Management Software by developing fast, flexible, and affordable TMS solutions.



Seeing ISS software solutions in action is believing. Schedule a live demo to learn why ISS offers the greatest value for your software investment.

Personal Customer Support
Sales Reports & Status Emails
Document Management
Quickbooks Pro Interface
Dashboard
Easy to Learn!



✉ sales@BrokerPro.com
🌐 www.BrokerPro.com
☎ 256.686.2931

BrokerPro

Visit www.BrokerPro.com for a Free Demo!