UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

K.L. Pattison and Pattison, Stanger & Company v. Employers Reinsurance Corp.

K.L. Pattison and Pattison, Stanger & Company v. Employers Reinsurance Corp., 900 F.2d 986 (6th Cir. 1990) · No. No. 89-1517 · Decided April 20, 1990

SUMMARY

Insurer's duty to defend under an errors and omissions policy with a "return of premiums" exclusion. The Sixth Circuit held that where an underlying complaint alleged negligence (e.g., negligent supervision) independent of any claim for actual receipt of premiums, the exclusion did not unambiguously bar coverage. Under Michigan law, an insurer must defend if any theory of recovery arguably falls within coverage; ambiguities are construed against the insurer. Distinguishing cases where premiums were actually received, the court found the exclusion inapplicable to claims based on constructive receipt or negligence.

CASE DETAILS

COURT	United States Court of Appeals for the Sixth Circuit
WRITING FOR THE COURT	William O. Bertelsman; David A. Nelson; Ralph B. Guy Jr.
JURISDICTION	Federal
DECIDED	April 20, 1990
DOCKET	No. 89-1517
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the grant of summary judgment for the insured in a declaratory judgment action regarding insurance coverage.
PRECEDENTIAL VALUE	Published
PARTIES	Employers Reinsurance Corp. v. K.L. Pattison and Pattison, Stanger & Company

TOPICS

insurance · civil procedure · summary judgment · appellate procedure

PRACTICE AREAS

Insurance law · Errors and omissions insurance · Duty to defend

QUESTIONS PRESENTED

1. Whether the insurer had a duty to defend the insured in the underlying action under the errors and omissions policy, given the 'return of premiums' exclusion.

HOLDINGS

1. The duty to defend existed because the underlying complaint arguably stated a claim for negligence independent of a claim for return of premiums. Under Michigan law, the insurer must defend when the allegations arguably come within the policy coverage, and ambiguities are construed against the insurer.

KEY QUOTATIONS

> *“Applying these principles to the present case, this Court concludes that plaintiffs were entitled to a defense by defendant. While the essence of the complaint in the underlying action is a claim for return of premiums, nevertheless, there appears to be a claim in the underlying lawsuit that these plaintiffs are liable because of, among other things 'a negligent breach of duty' (original complaint, 24(d)). The underlying complaint also charges these plaintiffs with vicarious liability for the 'negligent' acts of 'the agents of such Defendants taken in the scope and course of his duties and within the apparent authority of said agent, and as such Defendants are responsible to the plaintiff for the return of such unearned premiums entrusted to the agent and constructively received by such defendants.' (Paragraph 25 of original complaint). Such allegations, while inartfully drafted, appear to assert liability against these plaintiffs on a theory independent of these plaintiffs having actually received the premiums. In fact, these plaintiffs have always asserted that they never received the premiums. The underlying complaint asserts, against these plaintiffs, liability for the loss suffered by the underlying plaintiffs as a result of the present plaintiffs' negligent conduct. To prevail in such a theory, the plaintiffs in the underlying action would have to prove that the plaintiffs in this action were responsible for the premiums, actually received by someone else, and that negligence on the part of these plaintiffs or their agents, was a proximate cause of the loss.”* (38)

> *“Black's Law Dictionary defines an action for 'money had and received' as follows: 'Money had and received. In common law pleading, the technical designation of a form of declaration in assumpsit, wherein the plaintiff declares that the defendant had and received certain money, etc. Gist of action for 'money had and received' is that defendant has received money which, in equity and good conscience, should have been paid to plaintiff and under such circumstances that he ought to pay it over.'”* (30-33)

FACTUAL BACKGROUND

K.L. Pattison, an insurance broker, had a sub-agent, Evans, who operated as an independent contractor. Evans issued binders and collected premiums but absconded with the premiums. The insurance companies cancelled the policies, and the insureds filed an underlying action against Pattison for negligence and constructive receipt of the premiums. Pattison sought defense from its errors and omissions insurer, Employers Reinsurance Corp., which denied coverage based on a 'return of premiums' exclusion. The underlying action was later settled after an amended complaint omitted the return-of-premiums claim, but the issue of defense costs prior to the amendment remained.

PROCEDURAL HISTORY

The insureds filed a declaratory judgment action to resolve coverage issues after the insurer denied a defense in an underlying action. The district court granted summary judgment for the insureds, holding that the insurer had a duty to defend. The insurer appealed.

DISPOSITION

affirmed

CASES CITED

- Street v. J.C. Bradford & Co., 886 F.2d 1472 (6th Cir. 1989)
- Reurink Brothers Star Silo, Inc. v. Maryland Casualty Company, 131 Mich.App. 139, 345 N.W.2d 659 (1983)
- Meridian Mutual Insurance Company v. Hunt, 168 Mich.App. 672, 425 N.W.2d 111 (1988)
- Jonesville Products, Inc. v. Transamerica Insurance Group, 156 Mich.App. 508, 402 N.W.2d 46 (1986)
- Detroit Edison Company v. Michigan Mutual Insurance Company, 102 Mich.App. 136, 301 N.W.2d 832 (1980)
- Evanston Ins. Co. v. Fred A. Tucker & Co., Inc., 872 F.2d 278 (9th Cir. 1989)
- Fremont Indemnity Co. v. Lawton-Byrne-Bruner Ins. Agency Co., 701 S.W.2d 737 (Mo.App. 1985)
- Utica Mutual Insurance Co. v. Impallaria, 892 F.2d 1107 (1st Cir. 1989)
- Otteman v. Interstate Fire & Cas. Co., 172 Neb. 574, 111 N.W.2d 97 (1961)