SUPREME COURT OF NEW HAMPSHIRE

Old Republic Insurance Company v. Stratford Insurance Company

168 N.H. 548 (2016) · No. 2015-0123 · Decided January 26, 2016

SUMMARY

The Supreme Court of New Hampshire answered certified questions from the First Circuit concerning when an excess insurer's duty to defend is triggered. The court held that an excess insurer has no duty to defend until the primary insurer's coverage limits are exhausted. It distinguished its prior decision in Universal Underwriters, explaining that the earlier case involved co-primary insurers with mutually repugnant excess clauses.

CASE DETAILS

COURT	Supreme Court of New Hampshire
WRITING FOR THE COURT	Bassett, J.; Dalianis, C.J.; Hicks, J.; Conboy, J.; Lynn, J.
JURISDICTION	New Hampshire
DECIDED	January 26, 2016
DOCKET	2015-0123
DISPOSITION	remanded
PROCEDURAL POSTURE	The United States Court of Appeals for the First Circuit certified questions of New Hampshire insurance law concerning when an excess insurer's duty to defend is triggered and the allocation of defense costs between primary and excess insurers.
STANDARD OF REVIEW	The opinion answers certified questions of state law; no separate standard of review is stated.
PRECEDENTIAL VALUE	published and precedential

TOPICS

duty to defend · excess insurance · insurance coverage · appellate procedure

PRACTICE AREAS

insurance law · insurance coverage · civil appellate procedure

QUESTIONS PRESENTED

1. Under New Hampshire law, when is an excess insurer's duty to defend triggered?
2. Does an excess insurer's duty to defend arise only after the primary insurer's coverage is exhausted?
3. If the excess insurer's duty to defend is not limited to exhaustion of the primary policy, what rule governs allocation and timing of defense costs?

HOLDINGS

1. Under New Hampshire law, an excess insurer's duty to defend a claim is triggered only when the primary insurer's coverage has been exhausted.
2. Universal Underwriters does not require a true excess insurer to share defense costs with a primary insurer before exhaustion of the primary policy because Universal Underwriters concerned two co-primary insurers.

KEY QUOTATIONS

> *"We respond that, under New Hampshire law, the excess insurer's duty to defend is triggered only when the primary's insurer's coverage is exhausted."* (168 N.H. at 548)

> *"Where an insured is covered by both a primary policy and an excess policy . . . the excess liability carrier is not obligated to participate in the defense until the primary policy limits are exhausted."* (168 N.H. at 550)

> *"Accordingly, we join those courts that have held that an excess insurer has no duty to defend a claim until the primary insurer's coverage has been exhausted."* (168 N.H. at 551)

> *"Thus, our statement in Universal Underwriters regarding the respective defense duties of primary and excess insurers was dicta, and does not control the resolution of the questions before us."* (168 N.H. at 552)

FACTUAL BACKGROUND

Old Republic insured a tractor-trailer owned by Ryder Truck Rentals, while Stratford separately insured DAM Express, which leased the tractor from Ryder. After the tractor-trailer collided with a passenger vehicle, the injured persons sued the driver, DAM, Ryder, and Coca-Cola. Old Republic undertook the defense and sought contribution from Stratford, which contended that its coverage was excess to Old Republic's coverage.

PROCEDURAL HISTORY

Old Republic sought a declaratory judgment that Stratford was a co-primary insurer obligated to provide coverage and share defense costs. The United States District Court for the District of New Hampshire ruled that Old Republic provided primary coverage and Stratford provided excess coverage, but ordered the insurers to share defense costs equally based on Universal Underwriters Insurance Co. v. Allstate Insurance Co. Both parties appealed. The First Circuit affirmed the primary-versus-excess coverage determination, identified the duty-to-defend issue as unsettled under New Hampshire law, and certified questions to the New Hampshire Supreme Court.

DISPOSITION

remanded

REMAND INSTRUCTIONS

The certified questions were answered in accordance with the rule that an excess insurer's duty to defend is triggered only when the primary insurer's coverage is exhausted. The matter was remanded to the First Circuit.

CASES CITED

- Universal Underwriters Insurance Co. v. Allstate Insurance Co., 134 N.H. 315 (1991)
- Progressive Northern Insurance Co. v. Argonaut Insurance Co., 161 N.H. 778, 784 (2011)
- Calabraro v. Metropolitan Property & Casualty Insurance Co., 142 N.H. 308, 311 (1997)
- Travelers Casualty v. American International Surplus Lines, 465 F. Supp. 2d 1005, 1028 (S.D. Cal. 2006)
- Texas Employers Insurance v. Underwriting Members, 836 F. Supp. 398, 404-05 (S.D. Tex. 1993)
- Contrans, Inc. v. Ryder Truck Rental, Inc., 836 F.2d 163, 173 (3d Cir. 1987)
- Sport Rock International, Inc. v. American Casualty Co. of Reading, PA, 65 A.D.3d 12, 13 (N.Y. App. Div. 2009)
- Holmes Group, Inc. v. Federal Insurance Co., Civil Action No. 03-11671-NG, 2005 WL 4134556, at *8 (D. Mass. Oct. 5, 2005)
- Signal Companies v. Harbor Insurance Co., 612 P.2d 889, 894 (Cal. 1980) (en banc)
- Schneider National Transport v. Ford Motor Co., 280 F.3d 532, 538 (5th Cir. 2002)
- Bartlett v. Commerce Insurance Co., 167 N.H. 521, 530 (2015)
- AU Electronics, Inc. v. Harleysville Group, Inc., 82 F. Supp. 3d 805, 814 (N.D. Ill.), appeal dismissed (7th Cir. 2015)
- R.C. Wegman Construction Co. v. Admiral Insurance Co., 629 F.3d 724, 728 (7th Cir. 2011)
- Padilla Construction Co. v. Transportation Insurance Co., 58 Cal. Rptr. 3d 807, 821 (Ct. App. 2007)
- Associated Wholesale Grocers v. Americold, 934 P.2d 65, 81 (Kan. 1997)
- Aetna Insurance Co. of Hartford v. Kent, 540 P.2d 1383, 1387 (Wash. 1975) (en banc)
- Universal Underwriters v. Travelers Insurance, 669 A.2d 45, 49 (Del. 1995)
- Peerless Insurance v. Vermont Mutual Insurance Co., 151 N.H. 71, 74 (2004)
- Baker v. Allied Property and Casualty Insurance Co., 939 F. Supp. 2d 1091, 1098 (D. Colo. 2013)
- Owners Insurance Co. v. State Auto Property & Casualty Co., 977 F. Supp. 2d 708, 714 (W.D. Ky. 2013)