ORAL ARGUMENT – 02/11/04
02-0843
OLD AMERICAN V. SANCHEZ

LAWYER: Appellee chose to save money in two ways, which have given rise to the issues in this case. First, he and his wife, rejected UM and PIP coverage in their policy; and second...

PHILLIPS: Do we know that he rejected it?

LAWYER: Of course it's our position that he authorized among other things her. She was acting on his behalf.

PHILLIPS: So does it matter whether he actually knew about this or not?

LAWYER: Whether he had actual knowledge, we do not believe it matters. Although in the record there is evidence that he must have known because the declaration sent to him, declaration page indicated that he did not have those coverages. Regardless of how this court holds on that rejection issue, however, if this court narrowly defines the term "occupying" in the Texas Standard Auto Policy and thus holds that Mr. Sanchez was not occupying his vehicle at the time of the accident, paradoxically the court will be effectively denying coverage under the UM coverage and PIP, the thousands of Texans injured while occupying vehicles which are covered.

Court after court in this state and in every other state which has looked at this occupying issue has broadly defined that term specifically so that UM and PIP coverage would be broadly available. And that's why all the decisions focus on whether the activity is vehicle oriented.

Mr. Sanchez's problem in this case among others is that he was occupying or vehicle oriented or working on a vehicle which he owned but had not listed as being covered. Thus the policy does not extend the UM protection or PIP coverage to him or his wife, or if this court holds that they had not rejected the coverage.

O'NEILL: What if an adult child living with them had gone and done the same thing - purchased it say for his parents?

LAWYER: We believe that on the authority argument we would get there also. But there are some arguments which we have which would not apply to the adult child.

O'NEILL: Just in terms of the first issue that you were speaking of, the ability to waive the UM/PIP coverage. Could an adult child in the household who purchased the policy for the family affect a waiver?

LAWYER: On the authority argument, yes. The appellees in their brief say they do not

dispute that an attorney in fact or someone with authority...

O'NEILL: Not authority so much as just the plain language. Would you consider them a named insured?

LAWYER: The adult child no.

O'NEILL: So they could not then affect a waiver?

LAWYER: They could if they were acting as an agent for someone who was a named insured. If they had authority from someone who wasn't an insured. And there are a number of cases in other states which have looked at this issue and have come to that conclusion.

O'NEILL: You're not urging us to go that far. My understanding of your briefing was that as long as it's the first class of people insured, which would be within the definition of "you" and "your", "named insured" and the "spouse", you would take it a step further under this policy language and under my hypothetical?

LAWYER: If necessary to win, yes. But we don't think it's necessary to get that far. But if we do, we think that is an argument which also supports it.

HECHT: I'm not clear who a named insured is in your view. Your brief on the merits say it's the wife and nobody else, or the spouse. And then the reply brief seems to pull back from that.

LAWYER: First of all, the named insured which is a term of art is the husband. But any insured named in the policy, which is what the statute says, we say concludes the wife.

HECHT: Your reply brief says at 11, "as a result respondent's wife is in effect a named insured."

LAWYER: That's right. In effect a named insured. And I believe at that point in the brief we're talking about the way the policy was worded at the time the legislature passed the statute. And at the time the legislature passed the statute, "spouse living in a house" was a named insured as well, so clearly covered. Then we had the easy read policy change, which the Dept. of Ins. says we're not changing any coverages. So what we're saying there is that if you take that, that they weren't changing any coverages and the way the legislature looked at it, named insured includes the wife, then they would have been intending to include the wife as effectively a named insured.

HECHT: The statute uses two phrases: "any insured named in the policy", and "named insured." Do you think those are different?

LAWYER: If you look at the legislative history there was a change. Early in the bill it

was "named insured", and then there was a change to "any insured named in the policy." As the CA said, they must have been doing something and it appears to be a broader term. The legislative history does not say precisely why that change was made.

HECHT: It doesn't make sense that it can be a broader term. You track through the statute, and you come up with the crazy idea that if the coverage was originally rejected by the spouse, the renewal policy must include the coverage. But if the coverage was originally rejected by a person listed in the declarations, the renewal policy doesn't have to include coverage. That doesn't make any sense does it?

LAWYER: It does not seem to make sense. The only thing that seems to make sense is that the legislature had in mind that the husband or wife, or the spouses could reject and that the rejection remained valid through the continuation of it unless they affirmatively state they want the coverage.

HECHT: But if it doesn't make sense, then it looks to me like "insured named" in the policy, that phrase has to either be nothing more than named insured, the person listed in the declarations, or else named insured which you say is a term of art, has to include the spouse. It won't work any other way.

LAWYER: I think that there is - the only thing that indicates that it means something different is the apparent conscious decision by the legislature to change the term as they tract through the bill from named insured to any insured named in the policy.

PHILLIPS: They didn't change it everywhere. And so should we assume that there was a method to that?

LAWYER: In trying to track through it is not clear. We found no cases. We found nothing in the legislative history. I don't want to mislead you into thinking there is something there that is not. It appears that they were thinking of something when they changed it. But it also appears when looking at it that they thought "named insured" meant the husband and the spouse. Why they made that particular change in the language it appears to be making it broader and why they did not enlighten us anymore as to their thinking.

PHILLIPS: You concede that from any kind of logical sense, Mr. Sanchez was not upon this car. But you say that cases go else wise and that's good public policy, and Old American is willing to pay a whole bunch of PIP claims out there for the greater good?

LAWYER: They are an insurance company which will pay those claims, which they should pay, and they are not going to take a position to save money which they think is counter to what is clearly the intent. And to narrow this definition cuts a lot of people out of coverage which they understand the TX Dept. of Ins. wants covered.

We cite in our brief Transport Ins., 1994. It in turn relies upon a Kentucky SC case, the Kentucky Farm Bureau case, which is cited in our brief. That's a pregnant daughter-in-law who gets out of her father-in-law's car, goes to flag for help and is struck and killed. And she is some many yards away from the car at the time. And they had to look at how broadly one defines occupying to see if she was going to have coverage. And they string cite a number of states, the states that have gone to the broad definition of occupying. And they go the broad definition of occupying as being what is in the public interest. And they set forth a four part test for occupying in that Kentucky SC case, and we believe that this court should consider that test or some other to give clarity to occupying and to go the way that the vast majority of other states are going on this issue, and to provide PIP and UM to the broadest spectrum of citizens.

On the rejection, we believe that she rejected it, therefore, we have a number of arguments as to that. Among others not highlighted in our brief that are of importance, the authority argument we think this case has a lot of...

HECHT: There is no evidence of authority is there, or is there?

LAWYER: We believe there is. We believe this case has a lot of similarities. We think there would be a logical disconnect to say she doesn't have the authority. She has the authority to sign the application which obtains the insurance but not the authority to reject the coverages. Urrutia is a case involving a truck rental agreement where the issue was whether the agreement was valid when the agreement was not attached to the insurance policy. And writing for a unanimous court the CJ said the CA did not explain why the rental contract was void for the purpose of defining Urrutia's coverage, but valid for the purpose of making Urrutia an insured in the first place. We have exactly the same situation here, that there's a logical disconnect between saying that she had the authority to get the application, therefore, bind the insurance company to provide the coverage, but not the authority to reject the coverage.

HECHT: But I'm curious when those arguments were made. Do you mean she could have had the authority, or she actually did have - he said to her "go do this."

LAWYER: There is not evidence in the record that he said to her "go do this". But she represented in signing the application - there are three places where she signs. One is just giving authority, a proxy authority. But the other three specifically with those relating to this statute, she says "I am rejecting these coverages under the terms of 5.061 and 5.06, Tab 3. And she is charged with knowledge of what she's signing and of the law. And so she's saying I know, but I'm rejecting this as an insured name under the policy. And she also says I recognize that if misrepresent something, the policy is void.

HECHT: Do you know if I could just go buy an auto insurance policy for a friend as a gift?

LAWYER: You probably don't have an insurable interest there.

HECHT: But I'm not claiming any. My friend needs insurance, and so I say, Well I will buy you a policy. And so I go in to the agent and I say, I want a policy for Joe Smith.

LAWYER: I think you could do that. In terms of whether you could reject the coverages which we're talking about here, you are a lawyer and if you were his attorney in fact for purchasing it, even the appellee would agree that you could reject those coverages.

HECHT: But if I was just a friend or somebody at church says You know. Poor ole Joe needs insurance. So I think well I can do that. So I go down and buy a policy and I don't claim any interest in it, don't want any interest in it. But I don't want to pay anymore than I have to, so I figure well I will buy the minimum coverage and I will reject this. Can I do that or not?

LAWYER: I believe you cannot if you are not acting as his attorney in fact, or if you don't have the authority to reject on his behalf the state would say...

HECHT: So I could buy coverage for him but I just can't reject that?

LAWYER: It is different than other coverages. We think Urrutia helps us on another point in terms of the question as to whether there was authority. Urrutia also talks about the application being part of the policy because the application refers to terms of the policy and as a necessary part of it. And the application says I'm applying for the policy based upon the statements in here. There are other things she agreed in writing. And she is named. Her name appears in the application. If it is part of the policy, then she is an insured named in the policy.

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RESPONDENT

TURQUAND: I will be addressing the two exclusionary provisions, and Mr. Sanders will address the PIP and UM rejection. I think it's noteworthy that CJ attempted to ask Old American whether we have in fact addressed the issue of occupying merely by virtue of the fact that there was a stipulation that Mr. Sanchez was under his vehicle, lying under his vehicle.

The distinction I believe that Old American fails to make is one of inclusion, affording coverage, or exclusion, whether it's an exclusionary provision. And this court, long tradition in public policy, has strictly addressed the exclusionary provisions. And this is where Mr. Sanchez is seeking coverage.

HECHT: Do you think the same word can be read differently for inclusion and exclusion?

TURQUAND: I think it has been in this sense, where an insured is attempting to get coverage. The term "occupying" is read as broadly as possible in order to afford coverage for that individual. We have some cases where the individual has just left to repair the wheel on the car, or

it's just going around to the side to push the vehicle. And in affording coverage, courts have read occupying very broadly. However, in an exclusionary provision, which we have in this case, we have to read that strictly, and we have to look to occupying, see if occupying is in fact defined within the policy. It is. And by all accounts we've agreed upon is the operative word. The antonym of a upon would be under beneath. And that's our situation.

HECHT: We don't know anything about the facts accept what we have in the stipulations.

TURQUAND: That's correct. Plus what's available to us in the policies that were attached to the stipulations and before the TC as well as this court.

HECHT: But we don't know whether Mr. Sanchez got out of the truck and crawled under it, or if he went away for 2 days and came back or any of that.

TURQUAND: This court is not afforded that luxury of the facts because it was tried to the bench. But the CA found itself bound by the stipulations. And the stipulations were unequivocally that he was lying under his vehicle at the time.

The court hasn't asked and didn't address the standby provisions and the exclusionary provisions. I do not think that there is any dispute but they've raised it certainly in their argument before this court. This court has addressed the standby provisions and we ask that you simply affirm that in this case. The causative force of this unfortunate situation was an uninsured motorist who crashed into Mr. Sanchez's vehicle.

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SANDERS: My issue is rejection of the PIP and UM coverage. And in order to understand that issue, I think it's necessary to look in to the policy and see a little bit more about the concept behind the phrase "named insured", or "any insured named" in the policy. I do not concede and do not believe that the policy, an insurance contract, should govern and control legislative intent in the statute.

HECHT: Do you think the phrase "any insured named in the policy" and the phrase "named insured" in the statute have to be read to be equivalent one way or the other?

SANDERS: I believe that both phrases are the same in that each phrase requires that the name actually appear in the policy. Now what the legislature intended...

HECHT: Because otherwise it's not going to make any sense.

SANDERS: My personal opinion is the phrases are the same.

OWEN: If that's so, how do you respond to his argument that at the time these statutes were enacted, the legislature had before it the Texas Family Auto policy, which said that named insured also included a spouse if the spouse was a resident of the same household?

SANDERS: Again, I don't know that the legislature is looking at the family auto policy to determine its intent in setting up a methodology for rejecting PIP and UM coverage.

OWEN: They were debating PIP coverage specifically. They were worried about fault verses no fault and what the federal government might do. So they clearly were talking about the auto policy in Texas. Shouldn't we presume that they knew what the policy said and when they chose the words "named insured" that they were looking at that policy?

SANDERS: I would point you to Howard v. INA, where J. Hankinson writes that intent of the contracting parties is not a factor in looking at the UM and PIP statute to see if there was valid waiver.

OWEN: I was asking you about the legislature's intent.

SANDERS: That means that the legislature in setting up this UM and PIP waiver methodology did not necessarily intend that to rest on contract principles and contract foundation. In other words, that methodology anticipates that a certain person, a named insured, will waive coverage a certain way in writing. Once that occurs, then the policy issues and is delivered to the insured. That policy then is the contract. So in setting up the methodology, the legislature is looking for a way to be guarded of giving away UIM and PIP coverages and restricting that and not making it so easy.

OWEN: If this case arose under the Family Auto policy would your position be the same?

SANDERS: Yes.

OWEN: Even though the definition of named insured specifically included the spouse?

SANDERS: Absolutely. The personal auto policy defines "you" and "your" as including the named insured named in the declarations and also a spouse of resident of the household. And petitioner said, therefore, they are the same or interchangeable for purposes of the policy. But that's not correct. If you will look at the personal auto policy under the section styled Termination, you will see (that's on page 11 of the policy) that only the named insured is in the declaration and not the nonnamed spouse can terminate the policy.

O'NEILL: But it also says shown in the declarations, which is omitted from the statute. It doesn't say any named insured shown in the declarations. In the termination clause it says the named insured shown in the declarations. And the statute just says any named insured. It doesn't

say any named insured shown in the declarations. So that argument can cut both ways couldn't it?

SANDERS: Well it says the policy may be canceled during the policy period as follows: A) the named insured shown in the declarations may cancel by returning this policy to us. Now what that doesn't say is this policy may be canceled by you. You, is defined to include named insured and spouse. The spouse cannot cancel the policy. The spouse isn't given that right under this policy nor in the statute on cancellation in the insurance code.

Let's say the spouse and her husband want to cancel the policy. They find cheaper insurance with another carrier. Who has the right under statute, and in this policy to terminate the present policy and purchase the insurance? If the insurance company wants to cancel the policy, there's a 10-day notice requirement. Who is entitled to receive that 10 day written notice? The named insured only, not the spouse. We may cancel by mailing at least 10 days notice to the named insured shown in the declarations at the address shown in this policy. You see the spouse isn't entitled to this important statutory notice.

What about nonrenewal? At the end of the policy, the statute requires a 30 day notice to nonrenew so that the insured can make other arrangements. Who is entitled statutorily to that notice?

O'NEILL: The briefing it seems like both sides say that case law supports their position in other states. Do you have any cases from other states that directly support your position? It seems like you distinguish their cases but there aren't any that actually go your way.

SANDERS: I cited secondary authorities. In the ALR article that I cited there are cases cited, and also in Appleman on Insurance, he cites two cases. A Florida case, Alabama and a California case.

O'NEILL: So you agree the case law has gone the other way in other jurisdictions?

SANDERS: Only in one case. The reason for that is our situation is unique. Our personal auto policy is somewhat unique. Our concept of the named insured is somewhat unique. The spouse of the named insured is not entitled to statutory notice of noncancellation of the policy.

HECHT: And that's unique to Texas you think?

SANDERS: I don't know if that's unique to Texas, because I don't know the laws of every state. The only time in the personal auto policy of Texas - you see the insurance company needs someone to be the spokesman for the policy. Someone has to be in charge of the policy.

HECHT: Do you know if its routine to just list one spouse?

SANDERS: I don't know this for sure. Because people don't know what different

insurance companies do, but many insurance companies do the rating based on the man or the titleholder of the vehicle, and it only names one named insured. So that if you want to be a named insured also, the insurance company could put your name on the declaration page along with your wife, or they could do it by endorsement as an additional named insured.

OWEN: Would you have to pay an additional premium for the endorsement?

SANDERS: Sometimes you do.

OWEN: Even though you are already covered?

SANDERS: You do in a CGL If the spouse becomes a named insured and it's a she, her coverage is increased. You see the spouse is subject to lose her coverage if she leaves the household. The spouse is subject to lose her coverage in the event of divorce. We have the Wallace case, where a spouse complains, Look I was married to him when we bought this policy. I was married to him when we paid for the policy out of community funds. Just because he's the named insured and here we get divorced, 5 days later after the divorce I've got no coverage. She has no coverage.

You see the spouse's right to coverage are even contingent upon these things. If you have two households, say my wife finds a job of opportunity in Houston and she goes to Houston and establishes a household there I'm the named insured on the policy. She is no longer a spouse resident of my household. And she's not contemplating divorce. She just lost her coverage or a big part of her coverage. Now some of the coverage will run with the automobiles, but I'm talking about that first class of coverage.

You see the spouse is more of a beneficiary under the policy. That's the concept. The contracting party and the party that has the right to make the important decisions on the policy is the named insured. That's our system. That's our concept of named insured in Texas.

HECHT: But in this case you agree that the wife could go in and buy the policy for the husband and pick every coverage and the amount of coverage except the PIP/UMUIM.

SANDERS: So can a girlfriend. It's because in contract formation for insurance policies the application...

HECHT: It seems to me under your theory the only person who can reject the coverage has to be the person who is named in the declarations. Or you've got a theory about actual authority, but no insurance company is going to check to make sure somebody filed an attorney in fact or something.

SANDERS: Or named in the endorsement. That's what the legislature said. Yes.

If you will look at page 12 where it says transfer of your interest in the policy.

What happens when the spouse dies? If the spouse dies nothing happens to the insurance of the named insured. It's just like when there's a divorce. If it's a him, his insurance marches right along. She's got to go get other insurance because she's no longer married. Because he's the named insurer. He's not a spouse. However, if a named insured shown in the declarations dies, coverage will be provided for 1) the surviving spouse if resident in the same household at the time of death, coverage applies to the spouse as if a named insured shown in the declarations. That's the only time I know in the personal auto policy where the spouse actually has the same rights as a named insured. As if he dies, she is elevated to that status. Two, that's also true of a legal representative of the deceased person. And he or she would exceed to the rights of the named insured

This is the concept of named insured. Now when the legislature was figuring out this methodology for waiving PIP and UM coverages, and it had to select some person's got to do this, it selected named insured. And that's in keeping with the authority and the special position that a named insured has in the insurance policy that we have.

OWEN: But named insured was defined differently in the policy the legislature was looking at at the time. That was my point. I still haven't heard your response to that.

SANDERS: First of all I would note under the definition section it says under Part 1 named insured means an individual named in item 1 of the declaration, and also includes his spouse. So the policy itself is making a distinction between the two. Named insured includes the individual named and the spouse. Now it says definitions, and this definition is controlling under Part 1. Part 1 is the liability section of this insurance policy. Our commissioner of Insurance is at that time putting out a form that uses this terminology to be more efficient actually in describing the liability coverages.

For this to leap into the legislative enactment, again I think we have contracts controlling statutes and not vice versa.

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REBUTTAL

LAWYER: On this issue of whether a term can be defined different ways in the same contract, I would refer the court to this court's decision in Gonzales v. American Ins. Co., where you said it could not be. The policy we're talking about, terms "occupying" appear in the inclusion and exclusions on page 6 of the policy about 1 to 1-1/2 inch of each other and counsel would have us define it two different ways on the same page of the contract.

The court's already addressed that issue. You cannot do it.

The question was asked about citations. The answer is, these other citations to cases that go the other way when you dig into them aren't there. For example, Appleman. Appleman cites two cases. It's true that go the other way. Two Florida cases. The principles

reversed later by the Florida SC in subsequent decisions.

Then counsel argues that there was only one case that went the other way. In their brief they refer to that as the SC of Arkansas case, Daniels v. Colonia Ins. First of all, we say there are a number of cases that go the other way and the distinctions drawn don't go to the substance of the issue. But the way they distinguish this Daniels case is not valid. The CA just said well it doesn't refer to the statutory language. I'm not sure why that is a distinction.

Appellee goes further in his brief and says that the statute in effect at the time of that decision allowed rejection "by the named insured or by an application," and, therefore it's a different case than our. In fact though although there had been a statute passed that year in Arkansas that said that in 1993, the fact is that the statute in effect at the time of the accident in question is like ours. It just refers to the named insured. So you have to look into those cases and go beyond them. The fact is the Arkansas SC case is on all fours with this one.

HECHT: Is it typical to name one spouse in the declarations and not the other one?

LAWYER: Most companies tend to do that. Reference was made to the struck by provision. The CA and respondent rely on the Kahn case and the causative force aspect of the Kahn case. This court 12 years later in Gallup said in essence when we talked about causative force in Kahn, it was an impermissible amplification of the policy language and we should just look at what the policy means. So this court looked specifically at what they are relying on - the Kahn case, causative force and said we ought to go with the common meaning of struck by and not go through these amplifications. And that's the 1974 decision of Gallup.

In our case it appears to be no question of that. He was struck by his car. He was hit by his car. It was not a stationary object at the time of the incident.