

and they say that Class I beneficiaries under both endorsements then are meaningless, they have no meaning. That's not true. The Class I beneficiaries under the UM endorsement are defined as you and any designated person and any family member of either. Now Texas is a part of its UM statute, embraces property damage. And it's not simply a question of bodily injury. The statute covers both: bodily injury and property damage. You in the context of the UM endorsement under the Class I beneficiaries is not meaningless. It does have meaning. It ensures the corporation as an owner of the property for property damage. Now in the context of the personal injury protection endorsement, that's a little different, because that covers bodily injury only. But if you look at the rules on interpretation of contracts, and this court has stated repeatedly that the primary concern of the court in interpreting a contract and for that matter an insurance contract is to ascertain and give effect to the intention of the parties as expressed in the writing. You have Canons of Construction or interpretation that aid the court in doing that. You look first at the written instrument.

ABBOTT: Are you saying that one argument that could be made to demonstrate that this contract is not ambiguous is that the reference to family members under the two endorsements was made solely because these were prescribed forms that the insurance company had to issue?

LAWYER: Exactly. And when you look at the Canons of Interpretation, §203 Restatement Second of Contracts, comments A and B thereunder, they talk about where it's preferable to give a construction to an instrument that doesn't render any part of it meaningless. But if you look at the comments, the comments recognize that when you use a standard form of agreement, there may be terms and provisions that are surpluses, that don't have application. And there is a distinction between a policy terming provision having meaning and effect, and having application. And it's Grain Dealer's position that all of the provisions of the policy including the Class I definitions in both endorsements have meaning and effect. Simply on these fact the have no application and the policy is not ambiguous.

ABBOTT: Would your position be different if on the first page of the insurance agreement instead of having corporation checked off, they checked off either partnership or individual; would you then take the position that family members of members of the partnership or family members of the individual would be covered?

LAWYER: It would depend on a number of circumstances. But if you simply check that one box, how is the named insured described? Is it described via a corporate name in addition to that. But if you're issuing a policy in a trade name or an assumed name which is simply an alias for an individual, then yes I think the construction would be different. When a policy issued to a named insured in that instance which is the same as the individual then a family member would constitute a family member of that person.

Now when you talk about a partnership, I think you have to put each of these stand on different bottoms, when you're talking about a partnership particularly in Texas where a partnership at times has been described as a combination of persons and yet in the partnership acts, the general

act, the limited act, you borrow the entity concept and the entity concept has to a great extent permeated the partnership acts it depends. But in this instance it was issued the named insured is the corporation, the policy terms are very explicit.

HECHT: It's your position that UM or UIM coverage issued to a corporation would provide coverage for property loss but not bodily injury?

LAWYER: Yes.

HECHT: And that PIP coverage issued to a corporation would provide no coverage at all?

LAWYER: No. You're talking about Class I beneficiaries. And under the PIP endorsement there is a Class II, and that would be anyone else occupying a covered automobile. Argument has been made in sister states that if you have an endorsement such as this where these terms are defined in this way, it provides illusory coverage. Well illusory coverage is not a part of this case because that wasn't made a basis for the summary judgment motion in the TC. But on its merits it doesn't apply anyway. When you look at who is an insured under both endorsements, you don't isolate a word, or a phrase, or a part, or a section, but you construe it within the 4 corners of the instrument. And both endorsements provide coverage. There is no illusory coverage.

ABBOTT: Under your position it matters not at all whether Mr. McKee was the sole shareholder of the company?

LAWYER: No. And I want to make this point, that if the CA was correct and this case was legitimately distinguishable from Webster, which involved an employee, and here you have a president and arguably we say there is no competent summary judgment proof of shareholder status, but assuming arguen do that there is, then the rational and the reasoning that underpins the CA's opinion provides unlimited coverage. Where do you draw the line? Do you draw the line as a sole shareholder? Or if its a small family held company where you have 3 shareholders, or you have 10 and each of those 10 shareholders has 5 children, or you have a key officer and or director who makes the company go but who doesn't have an equity position is not a shareholder, where do you draw the line. That rational which the CA used leads to unlimited exposure for an insurer in Texas. The argument that supports that would support extension of coverage to family members in any of those context contrary to the very plain and explicit language of the policy.

I want to talk about that meaningless argument. In C.C., which is the Connecticut opinion that the CA relied on very heavily, they talk about a clash of Canons. Do you give effect to the plain meaning of the contract or do you engage in a construction that would render a portion of it meaningless? And the concurring justice there said: Well in the event of a clash of Canons I am going to opt for the second. But are those Canons of equal dignity and equal stature and I think if you look you will find and cases from this court have said: No, one yields to the other. In fact in Strasener which is cited in the briefs where you talk about the doctrine of last antecedents this court

stated that if it's indicated that a Canon of Construction doesn't apply, you don't apply it. That and under the restatement where you don't employ a Canon to override the evident intent of the parties results in no clash of Canons.

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RESPONDENT

LAWYER: I think that the court in the last 3 cases in which they've determined interpretation and construction of insurance policies are: _____; National Union Fire Ins. Co. of Pittsburgh v. CBI; and Mebeston. In each one of those cases the court has said that intent is of primary important.

First, I am going to talk about the legislative intent in passing both the UIM, UM statute, as well as the PIP. Any policy in Texas that carries liability insurance has to have UM and UIM coverage. Now the legislature had as its intent the protection of conscientious motorist from negligent financially irresponsible drivers. It was for the protection of persons insured thereunder. And incidentally I am not going to say a lot about PIP because the arguments on UM apply equally to the PIP.

Now let's talk about Mr McKee's intent. I think Straesner pretty well put that to rest. Straesner said that his intent was manifested when he purchased that coverage - both UIM and PIP. I've had this policy blown up. I think the court has stated that 1) it's not the subjective intent of the parties because we wouldn't be here on the summary judgment. If it was subjective intent we would be back in the trial court with a fact question for the jury; and this court has made it very clear it's not the subjective intent, it's the objective intent as expressed in this policy.

I agree that this policy at the very first has and you all have the pages from the policy there show that throughout this policy "you" and "your" means named insured.

HECHT: How would your argument be affected if the corporation had more than 1 principal?

LAWYER: It would depend on 1) what the respective interests were that they possessed; and 2) whether they had family members?

HECHT: 50/50?

LAWYER: If they had that and the insurance company knew about it at the time that the policy was issued, it's not to be construed in a vacuum. I think if they both had family members and they met the definition of family members, then they would be covered.

HECHT: If there were 3?

LAWYER: I think it would be the same. But that's not the realities of life. It's like the Webster case. They are trying to say that Webster creates unlimited liability on an insurance company. Number 1, the Websters did not even come within the definition which is clear and unambiguous and clearly defined in the policy in that particular case. They were not family members. They were not residents of the household. They were not wards. They were not foster children.

HECHT: Would it make any difference if a stockholder owned a very small part of the company?

LAWYER: In my opinion it would.

HECHT: How small?

LAWYER: Let me explain to you why I believe it does make a difference. Mr. McKee in this case since he's the president and sole shareholder purchased this policy. He can reasonably expect to be covered under that policy by the definition of the terms used in that policy. Now the other side has said the reasonable expectations policy does not apply in Texas. There are two cases: Kelly Associates Ltd. v. Aetna Casualty and Surety Co., which is quoted in my brief whereby the court said: Furthermore, Kelly could reasonably expect that the bond coverage would extend through the winding-up phase of its business. This was a period in which its affairs were in a state of flux and in which it was susceptible to employee misappropriation as it was at any other time. Also the same wording were used in the Kublese(?) case. That's the co-insured arson case. The husband set fire to the house. The wife was an innocent party. And the SC held that she should have coverage at least for her _____.

ENOCH: Let's talk about Mr. McKee. The policy says the named insured is the corporation. What about the definitions of named insured indicated that Mr. McKee personally had a liability policy for him?

LAWYER: If you will look, named insured is used in small letters. I think it's on the conditions page. It also refers to, in bold face type, **other definitions have special meanings; please refer to Sec. 5, definitions.**

ENOCH: Do you agree that the coverage is for the named insured?

LAWYER: Right. And there are two specifics: the intent of this policy as shown on the face of the policy is not only to insure the named insured, but it's to insure additional insureds because they are defined in Sec. 5: DEFINITIONS, which is in bold face type, which is in bold face where it says: Insured is defined as any person or organization qualifying as an insured under "Who Is An Insured" portion of the policy. And I think that's word for word.

ENOCH: But it says a family member? I am trying to figure out what it is that says that, I'm not talking about the family member of Mr. McKee, I am talking about Mr. McKee what is it that says Mr. McKee is an insured that otherwise qualifies his family members as insureds?

LAWYER: Because of the "you."

ENOCH: But "you" refers to whom?

LAWYER: Well I think if you bear with me Judge, I can show you the reasoning. This is a personal injury protection endorsement. This endorsement modifies insurance provided under the policy: business/auto coverage _____, which is what the liability portion obviously is. This endorsement changes the policy. And when it comes down to here and says: Coverage; this is the insuring clause. The insuring clause does not say: Named insured. Throughout the insuring clause the one word insured is used. If you will look down here underinsured, uninsured motorist insurance, Texas Standard Automobile endorsement. Now when you go over here to the next page where it says: Who is an insured, not named insured: you and any designated person and any family member of either. This expresses their intent.

ENOCH: Yes. And who is the "you?" You is defined also isn't it?

LAWYER: You is the person being addressed. Ordinary common person out on the street even they know that a corporation cannot read a policy. "You" as used in the plain ordinary commonly inceptive meaning as put out in my brief, and taken out of Webster, means the one being addressed.

HECHT: Do you agree with opposing counsel that these forms are prescribed by the state agency?

LAWYER: I guess I do agree.

HECHT: Opposing counsel's brief cites a number of out-of-state cases as does your brief. And the CA relied as has already been noted heavily on a Connecticut SC case. The opposing counsel's brief claims that majority rule in the jurisdictions that have considered this issue is against you. Do you agree with that or not?

LAWYER: No, I do not agree with that because the policy conditions are different. And I've pointed that out in my brief. There is a difference. They have insured; principal insured as first named in the declaration. They don't have you and any designated person and any family member of either. Now they say something about designated persons. They don't even write the designated person policy. Haven't for years.

PHILLIPS: Who's they?

LAWYER: Grain Dealers.

ABBOTT: Let's assume hypothetically that instead of the corporation being listed as the insured, that Mr. McKee was listed as the insured for this policy. And assume also that instead of having his family that Mr. McKee is single, has never been, never will be married and his parents and siblings are all deceased. The same endorsement would still be issued with the family member language in there. But in that situation that family member language would have no effect.

LAWYER: I agree. But I think there is one Canon that y'all are forgetting. Number 1, Mr. McKee did not create this mischief.

ABBOTT: Would that mischief not also be in there though if this had been issued to him individually? Meaning that this is a prefabricated form that the insurance company was required to use. And they can neither add to nor delete from it. Do you disagree with that proposition?

LAWYER: If he didn't have family members, the family member provision would not apply? Yes, that is correct.

ABBOTT: And what about the second proposition and that is that when this insurance policy was brought to the company it was prefabricated and the insurance company can neither add to nor delete from the endorsement?

LAWYER: Oh, I don't think that that's true because this court has held that even though the state board of insurance may prescribe the form, if it doesn't comply with the legislative intent, then it's void. They did that in Ranzau; they did it again in Briggs. They have not been hesitant to do that.

OWEN: If a large corporation came into Texas today to get a business/auto policy, what form would they be buying insurance and would it be this same form?

LAWYER: I'm not a sophisticated underwriter. But I know that they do have sophisticated underwriters looking at these policies, they are paid a considerable amount of money to foresee this type of coverage. And you know they could have cured it very easily by 1) deleting this altogether, or 2) to confer part of the endorsement portion in the policyholder that this refers only to the named insured.

PHILLIPS: Let's assume they couldn't have changed; they could not make a deletion and they could not make an addition. I would you like to address your strongest argument without saying if only they had changed this language and take it just on the language that is before us. In the event that your opposing counsel is right and my understanding is right, that these forms are prescribed and can't be changed.

LAWYER: There is no summary judgment evidence that I know of before this court that substantiates that.

PHILLIPS: Well if the state law prescribes that the insurance commissioner approves the form I think that the SC of Texas is free to look at that?

LAWYER: And I agree. And the SC has also been free on past occasions to void it when it's wrong.

PHILLIPS: I don't question that. But you're not asking us to void any language out of here as I understand it. You're just saying the policy is unclear.

LAWYER: Yeah, I am. And also have a strong public policy argument I believe in this case in that this is about as deceiving as it could come. The average person on the street, not the sophisticated underwriters, not the 9 SC justices that are hearing this case, the average person out there does not know and would reasonably expect to be covered where this thing has a Texas standard automobile policy _____ endorsement, number 1. Number 2, it talks about you and family members.

OWEN: I'm not sure I got your answer to Justice Hecht's question earlier. You said that let's assume that there were 3 shareholders, but one of them owned a very small interest. You said that would make a difference. Can you tell me how and why that would make a difference?

LAWYER: Okay. There is an old case, Commonwealth Bonding & Casualty Ins. v. Bryant, 240 SW, Tex. 1922. And in that case it says: Who can doubt that the insured actually believed that he had at least the stated degree of indemnity under the policy or that the insured actually intended him to so believe. We are certain that any construction of the language of the policy more favorable to the insured would not accomplish but would defeat the real intent and purpose of the contracting party. I think their intent which this court has said in the last 3 cases is objectively on this policy that they had the intention to insure family members.

OWEN: Let's say I am a minority shareholder. I am one of the three shareholders. I own 2%. And the named insured is my corporation, Future Investment, Inc. Am I covered, are my family members covered?

LAWYER: I don't think so.

OWEN: And why not?

LAWYER: Because you couldn't reasonably expect coverage. You didn't purchase it for that purpose.

OWEN: Well when the president of the company goes and buys a policy for my corporation, which I own a piece of, and it's the insured and it says: you and your family members, why wouldn't I reasonably expect to be covered?

LAWYER: Because what I am saying is this case is necessarily fact oriented. This concerns the present and sole shareholder. I don't want to get into the can of worms of 2, 3, 4 people.

PHILLIPS: Well you may not want to but that may be the case we hear next year.

LAWYER: If they know that they are writing a policy for that group of people, then they should bear the law.

OWEN: So it is a subjective test, not necessarily an objective one?

LAWYER: Well it would be a question of law. From my understanding it has to be objective. To be subjective it would have to be a fact question. Am I correct?

OWEN: So we couldn't look at the face of the policy and decide the issue. We would have to know what the insurance company knew or what they reasonably should have known?

LAWYER: That would be fine with me to go back on intent. That would be perfectly fine with me.

BAKER: Do I understand your position is because in this particular fact situation Mr. McKee is the sole stockholder, therefore, he should ignore the corporate entity in its entirety and conclude that he's the one that's buying the policy, therefore, he has family members and they are covered; is that right?

LAWYER: That's partially right. What I am telling this court is that this policy ought to be viewed from the viewpoint of the insured as an average person untrained in law and insurance who would understand this policy and the _____ endorsement. Because they have taken just one part out of this policy and not considered all parts together.

CORNYN: I think in many cases when an insurance company sells a policy there are different coverages that are offered the insured at an additional premium. Is there any evidence in this case of any discernable premium allocated to this disputed coverage? Is that in the record?

LAWYER: I was wondering who was going to ask me that, because that was the first question that Chief Justice Al Chapa asked at the 4th Court. He candidly admitted the premium would have been no different.

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REBUTTAL

LAWYER: I did not state in the CA that there would be no premium on a differential; and there is no summary judgment proof as to how the premium was arrived at or wrote comparison of the premiums.

CORNYN: Would it make any difference if Grain Dealers charged an additional premium for this disputed coverage?

LAWYER: There was not an additional insured endorsement to the policy that included additional insureds. There was a designated person blank in the UM endorsement and there could have been an individual and in that case a designated person had the same coverage as you and was a defined term.

SPECTOR: Going back to Justice Enoch's question of opposing counsel. Is McKee himself covered? I don't understand.

LAWYER: No. And the argument has been that McKee and the corp. are one in the same. If you look at the brief both in the CA and in the response to the application, which is not Texas law at all, the corporate entity is separate and distinct.

SPECTOR: If McKee was driving a car that was not covered, the car he owned, is he covered?

LAWYER: No. There's no liability coverage here. There's no UM coverage. There's no PIP coverage. There's no coverage at all of any kind because of the facts and circumstances of this particular accident.

SPECTOR: Well who's covered under this policy?

LAWYER: For which purpose? For liability purposes? If it had been a permissive user under the liability section of the policy, yes, but the automobile in question, the 1982 automobile was not a covered automobile.

SPECTOR: There's a section here that says...

LAWYER: Mr. McKee's stepdaughter was driving at the time. She was not an employee. They were not on a pursuit of corporate business. It was a personal outing. And in these particular facts there's no coverage at all. Going back to a question that was asked earlier...

SPECTOR: Well I'm still not clear on that. If Mr. McKee was driving his own car, not one of the covered automobiles, is he covered by this policy?

LAWYER: No.

SPECTOR: Who is covered? Only persons that are driving covered automobiles?

LAWYER: It depends on which coverage you're talking about. There's 3 different coverages. There's a liability section that's bodily injury and property damage, which is under the business/auto coverage part. And they have definition of who is insured for that. Then there is a definition of who is an insured with each of the endorsements, the UM and the PIP. But if Mr. McKee was not a new, he was not the named insured, and if he was driving his own automobile...

SPECTOR: He's not insured at all under this policy?

LAWYER: Not this policy, but he had a personal auto policy. There were two other policies. There was a liability policy of the driver, the stepdaughter who was driving which paid limits; liability limits. And he had his own personal auto policy and UIM limits of \$300,000 were paid in that. And this is the 3rd policy that they say clearly provided coverage...

ENOCH: If I understand Mr. Hoverdeer's argument, the basic policy defines "you" as the named insured. The endorsements don't refer to the definition of you in the main policy. These endorsements start out saying this is a separate insuring arrangement, it has separate provisions, it modifies policy, and the "you" in that endorsement is not tied to the definition of you in the main policy. That's what I understand his argument to be.

LAWYER: But it is. And that's a distinction between this case and C.C. In C.C. there was no language in the "you" and "your" throughout this policy. And this policy at the very beginning of the policy it says: Throughout this policy which includes the endorsements "you" and "your" mean the named corporate entity, period. And that includes the endorsements. So "you" is defined for purposes of the endorsement.