1977

National Farmers Union Property and Casualty Company v. Wesern Casualty and Surety Company : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

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NATIONAL FARMERS UNION
PROPERTY AND CASUALTY
COMPANY,

Appellant - Plaintiff,

vs.

WESTERN CASUALTY AND
SURETY COMPANY,

Respondent - Defendant

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BRIEF OF RESPONDENT

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Appeal from a Judgment of the District Court
of Salt Lake County
Honorable Dean E. Conder, Judge

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IN THE SUPREME COURT

OF THE STATE OF UTAH

NATIONAL FARMERS UNION PROPERTY AND CASUALTY COMPANY,	)	
Plaintiff-Appellant	)	
vs.	)	Case No. 15317
WESTERN CASUALTY AND SURETY COMPANY,	)	
Defendant-Respondent.	)	

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action by plaintiff-appellant, National Farmers Union Property and Casualty Company, against defendant-respondent, Western Casualty and Surety Company, whereby plaintiff is attempting to recover from defendant monies paid in settlement of a tort claim.

DISPOSITION IN THE LOWER COURT

Motions for summary judgment filed by both parties were heard by Judge Dean E. Conder on the 9th day of June, 1977. Based upon the written and oral arguments, the court ordered that plaintiff s motion for summary judgment be denied and that defendant s motion for summary judgment be granted.

RELIEF SOUGHT ON APPEAL

Defendant seeks to have the order granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment affirmed.

STATEMENT OF FACTS

Western agrees with the statement of facts as set forth in the plaintiff's brief, except in the following important particulars. First of all, it is implied in plaintiff's brief that Western or Story agreed to pay $12,500 which is not the case at all. Defendant denies that it has an obligation to pay what plaintiff classifies as Brent G. Story's proportionate share. Second, plaintiff represents in its brief that there is no dispute as to whether coverage is provided under either of the insurance policies involved in this case. As will be pointed out more thoroughly in Point III of this brief, defendant takes the position that coverage under its insurance policy was excluded by Specific Exclusion 1(e).

ARGUMENTS AND AUTHORITIES

POINT I.

PLAINTIFF IS NOT ENTITLED TO RECOVER ANY AMOUNT FROM DEFENDANT UNDER A THEORY OF SUBROGATION OR CONTRIBUTION BECAUSE AN INSURER MAY NOT RECOVER FROM ITS OWN INSURED OR CO-INSURED.

In the Declaration of plaintiff's insurance policy, the named insured, Weber County Sheriff's Mounted Posse, is identified as a corporation, and in light of that, Brent G. Story, as captain of the Sheriff's Posse, is an insured under plaintiff's policy, which reads as follows: Sec. 2, Persons Insured:

"Each of the following is an insured under this insurance to the extent set forth below:

. . .

"(c) If the named insured is designated in the Declarations as other than an individual, partnership or joint venture, the organization so designated and any executive officer, director or stockholder thereof while acting within the scope of his duties as such." (emphasis added)

In light of this language there is no question therefore, that both the Posse and Brent G. Story as an officer of the Posse were co-insureds under plaintiff's policy. Under the holding of a very recent Utah Supreme Court decision, it is now clear that in Utah an insurer may not bring an action against one of its co-insureds under a theory of subrogation.

In Board of Education of Jordan School District v. Hales, 566 P. 2d 1247 (Utah July 5, 1977), the plaintiff, Board of Education, had entered into a contractual arrangement with the general contractor, Paulsen and Christiansen (not parties to that action), for the construction of Bingham High School. Plaintiff then obtained a "builders risk" insurance policy insuring the interests of the Board of Education, the general contractor specifically named, and "subcontractors". The general contractor then entered into a subcontract with defendants in that action. Sometime later a fire broke out at the construction site and under the policy the plaintiff's insurance carriers paid claims amounting to $58,824.00, of which $720.00 was paid to defendants.

Plaintiffs insurance carriers, then instituted an action in subrogation against defendant whom they alleged was liable under a theory of negligence for the loss caused by the fire. They were attempting to collect from defendants

all of the money paid out by the insurance carriers except for the $720.00 p
to defendants. The trial court granted a summary judgment in favor of defe
dants and the Supreme Court affirmed on the basis that an insurance carrie
not maintain a subrogation action against a co-insured. In this decision,
court merely adopted a generally recognized legal principle and made the
following observations:

> "Yet courts have consistently held that where an insurance company attempts to recover, as a subrogee, from a co-insured generally covered under a fire insurance policy, the action must fail in the absence of design or fraud on the part of the co-insured.
>
> . . .
>
> "An insurer which accepts a premium based partially on the inclusion of a co-insured under a policy of insurance has assumed the risk of its negligence. We agree with the reasoning of Mr. Justice Guittard, in his dissenting opinion in the McBroome case, (515 S.W. 2d 32 Texas 1974): "The insurer, which has accepted one premium covering the entire property and has assumed the risk of the negligence of each insured party, ought not to be allowed to shift the risk to any one of them." [515 S.W. 2d, p. 44]
>
> "We hold that the District Court properly entered summary judgment on the ground that an insurance carrier may not maintain a subrogation action against a party insured under its policy. . . ."

One case that is often cited throughout the country for the princi
enunciated in Board of Education, is Home Insurance Co. v. Pinski Brother
Inc., 500 P.2d 945 (Montana 1972). In that case the insurers who had paid
off an extensive amount on property damage loss brought an action against
an architect firm whom they alleged was the negligent party. The architec
firm was insured through an indemnity firm which the court found was
really the same corporate entity as the plaintiff-insurer. In holding tha
the insurer in this case could not bring a subrogation action against the

architects, the court elaborated on some of the policy reasons for this general rule:

> "To permit the insurer to sue its own insured for a liability covered by the insurance policy would violate these basic equity principles, as well as violate sound public policy. Such action, if permitted, would (1) allow the insurer to expend premiums collected from its insured to secure a judgment against the same insured on a risk insured against: (2) give judicial sanciton to the breach of the insurance policy by the insurer; (3) permit the insurer to secure information from its insured under the guise of policy provisions available for later use in the insurer's subrogation action against its own insured; (4) allow the insurer to take advantage of its conduct and conflict of interest with its insured; and (5) constitute judicial approval of a breach of the insurer's relationship with its own insured." 500 P.2d at 949.

As in the Board of Education case, the court in Pinski Brothers affirmed the summary judgment granted to the defendant at the trial court level.

For further elaboration on the generally recognized principle that an insurer cannot bring an action against one of its co-insureds, see Bucoda Trailer Park, Inc. v. State, 561 P.2d 1100 (Wash. 1977); 16 Couch on Insurance 2d, §61:133; and, 6A Appleman, Insurance Law and Practice, §4055.

Although the Board of Education and the other cases cited above involved actions directly against the co-insured, it is of course a logical and rational extension of the holding of those cases that an action against an additional insurer of the co-insured would also be precluded. In United States Fire Ins. Co. v. Beach, 275 So.2d 473 (La. App. 1973), the Louisianna Court considered a case very similar to the facts of the Utah Board of Education case. Some $54,000.00 had apparently been paid out by United States Fire Insurance Company (USFIC) on a claim for fire loss on a policy

covering a building under construction. USF&G brought an action against the general contractor, the subcontractor and the general contractor's liability insurer under a theory of subrogation. The plaintiff-insurer alleged that the fire was caused by the negligence of both the general contractor and the subcontractor. The trial court granted a summary judgment in favor of the defendants under the theory that the defendants were co-insureds under the plaintiff's policy and therefore the plaintiff could not bring an action against them in subrogation. The principal issue on appeal was whether the defendants were in fact insureds under the policy. The Appellate Court sustained the trial court's finding that the defendants were co-insureds under the policy, and held that the insurer therefore had no right or cause of action against any of the defendants. This case is important to note because the court recognized that an action against the alleged negligent party's insurer cannot be brought unless an action could be brought against the negligent party itself.

All of the foregoing cases are strong support for defendants' contention that plaintiff has no right to bring an action against its co-insured, Brent G. Story. It follows that, if an action against Story is precluded by this general principle, then the same action would be barred against Story's insurer, the defendant in this case. This last point is further illustrated in the case of Miller v. Kujak, 90 N.W.2d 137 (Wis. 1958), in which the plaintiff, while driving his automobile was struck from behind by a truck driven by Martin Kujak. The plaintiff had brought an action against Kujak and the owners of the truck of which Kujak was a partner. Also included as defendants were the lessee of

[illegible] and the insurer of the lessee. During the course of litigation the insurer of the lessee had paid a judgment entered against the lessee and was attempting subrogation or indemnity from the owners of the truck under the theory that they were liable for the negligence of Kujak. The partnership contended that they owed no liability to the lessee's insurer because the driver of the truck, Kujak, was a co-insured in the policy issued to the lessee. The Wisconsin court upheld the owners' contention holding that the right to proceed against the partnership owners is contingent upon the right to proceed against its employee and that such right was barred because the employee was a co-insured under the insurer's policy. The court stated:

> Since Dodson Insurer cannot recover from Martin Kujak individually, it follows that he cannot recover from Walske Transfer. Whether Walske Transfer be considered as Kujak's employer for whose torts it may be liable under the doctrine of respondent superior or as a partnership liable for the torts of a partner in the course of the partnership business, any liability of Walske is derived from liability on the part of Kujak. Kujak not being liable because of his status as an insured, Walske is not liable in the premises. [illegible] 80 N.W. 2d at 141.

Another important issue that is resolved by the Miller v. Kujak case is whether an insurer such as plaintiff in the instant case can recover from its co-insured under a theory of indemnity or contribution even though it could not recover under a theory of subrogation. The court held in essence that because the concept is the same, the result should be the same.

> Finally, it is suggested that even though Dodson Insured be barred from subrogation, he is entitled to recover from Walske Transfer on the theory of indemnity, the tort of Walske's employee or partner Kujak having caused Dodson's loss. We are satisfied, however, that the insurer cannot recover

> from his own insured on the theory of indemnity any more than that of subrogation, for the same considerations that lead to denial of recovery on the one theory apply to the other. Were it otherwise, the value of insurance against liability for negligent acts would be greatly impaired. . . "90 N.W. 2d at 142.

Plaintiff has taken the position that its action against defendant arises either under a theory of subrogation or contribution. If plaintiff's action arises under the theory of contribution, then it is based upon the same principles as an action for indemnity, i.e. reimbursement is sought against one primarily liable for the loss. Consequently, as was stated in Miller, the same considerations that lead to the denial of recovery against the co-insured in a subrogation action apply in an action under the theory of contribution or indemnity.

POINT II

PLAINTIFF ISSUED A POLICY TO COVER THE PARTICULAR RISK AND LOSS INVOLVED IN THIS CASE. DEFENDANT'S POLICY PROVIDED ONLY GENERAL OR BLANKET COVERAGE. PLAINTIFF'S POLICY COVERING THE SPECIFIC RISK IS PRIMARY AND DEFENDANT'S POLICY IS EXCESS.

Even if plaintiff was entitled to bring an action against defendant as an insurer of the co-insured under plaintiff's policy, the trial court's summary judgment in favor of defendant should still be affirmed because of the specific vs. general policy rule adopted by the Utah Supreme Court, and recognized in plaintiff's brief.

The problem as identified by plaintiff's brief on this particular point is a problem of the interpretation of two insurance policies both of which are, except for Exclusion 1(e) of defendants policy, to cover the same risk. Both policies provide for pro-rata sharing of liability when there are two or more policies which cover the same loss on the same basis. Plaintiff's policy reads as follows:

"If any of such other insurance does not provide for contribution by equal shares, this company shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss."

Defendants policy reads as follows:

"This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not."

Where both policies cover exactly the same risk on exactly the same basis, it is, of course, consistent with basic notions of fairness that each should be liable for a pro-rata share of the loss. This is, however, not the case where the coverage does not apply on the same basis. Where one insurer has undertaken to insure one particular risk and has issued its policy to specifically cover that one particular risk, it should be held to be primary and required to bear the entire loss.

Applied to the instant case, the insurance under plaintiff's policy was obtained by Weber County Sheriff's Mounted Posse for the specific purpose of insuring against liability of the Posse and its officers, directors and stockholders while acting within the scope of their duties as such and upon the specific property mentioned in the policy plaintiff issued to the Posse. On the other hand, the insurance obtained by Brent G. Story from defendant is under a standard homeowner's policy covering fire, theft, natural disaster, and the general liability coverage for the insured and his family. In other words, defendant's policy of insurance provides what is commonly known as blanket or general insurance, and the policy of plaintiff provides specific insurance.

Plaintiff articulates very thoroughly in its brief that there is a great deal of diversity in the cases regarding the proper treatment of insurance policies, both technically covering the same risk, but the one providing blanket insurance and the other specific insurance. Many jurisdictions throughout the country refuse to recognize the distinction of specific vs. general or blanket, and instead examine the "Other Insurance" clauses of the policies and decide whether the language reveals an excess and a primary insurer or whether the language simply provides for a proration of liability.

Plaintiff argues that it favors what it classifies as a minority position, and that the Utah court should break loose of the precedents of the past and adopt the minority view. That view stated by plaintiff is that where there is concurrent insurance coverage and the "Other Insurance" clause of one liability policy conflicts with a similar clause of the other liability policy, the clauses are mutually repugnant and the insurers should be required to share the loss in proportion to the limits of their respective policies.

Apparently, plaintiff conglomerates a lot of other plans handed down by the courts into what it calls the "majority rule". The important point with regard to plaintiff's total discussion, is that the better reasoned rule and the one apparently adopted by the Utah Supreme Court is the one commonly known as the "Pennsylvania Rule", irrespective of where it fits in to the majority vs. minority discussion. Simply put, the Pennsylvania Rule would treat all specific insurance policies as primary insurance and blanket insurance policies as excess or secondary insurance. As the

Pennsylvania courts have stated it, under such facts there is no longer any "double insurance". Under this treatment then, plaintiff would not be entitled to come against defendant on the theory of subrogation because where the primary insurance carrier rightfully undertakes its obligation and pays all or part of the policy coverage, it has no right to be subrogated to the rights of the insured or an injured party and to recover from a secondary insurer of the same insured and the same risk. National Farmers Union Property & Cas. Co. v. Farmers Ins. Group, 14 Utah 2d 89, 377 P.2d 786 (1963). Secondly, defendant being found an excess insurer, would not be liable to the insured under its policy as it has not obligated itself to pay anything. The insured would have no right against defendant-insurer and, therefore, it does not make sense to speak of subrogation to any right of the insured against defendant. Consequently, under the Pennsylvania Rule, plaintiff in the instant case would have no right under a theory of subrogation since it is primarily liable having covered the risk specifically, and under the theory of contribution defendant would still be immune from liability or responsibility until plaintiff's policy limit was exhausted.

The opinion in Blue Anchor Overall Co., Inc. v. Pennsylvania Lumberman's Mut. Ins. Co., 123 A. 2d 413 (Pa. 1956) explains the reasoning and application of the Pennsylvania Rule, although it deals with two fire insurance policies. In discussing the problem of apportioning the loss between the two insurers, the court said:

> "For example, suppose there is a loss on one item alone, which is covered by both specific and blanket fire insurance

policies. The question arises as to whether the full amount of the blanket policy pro-rates with the specific policy to pay the loss. Or suppose there is a fire loss on two items, and the blanket policy covers both items while the specific policy covers only one. How is the loss to be apportioned between the two policies? Although different courts have applied various solutions to the above described problems, in Pennsylvania the rule is clear that where there are specific and blanket polices covering the damaged property, the specific policy must pay in full, and if they are not sufficient to cover the loss, the blanket policies pay the difference up to the amount of the policies."

As noted by plaintiff, the Utah Supreme Court has apparently adopted the specific vs. general theory, without specifically calling it the Pennsylvania Rule. In Prudential Federal Savings & Loan Assoc. v. St. Paul Ins. Companies, 20 Utah 2d 95, 433 P.2d 602 (1967), the rule was specifically adopted in a dispute as to whether the insurance company of the title company or the blanket insurance coverage to Prudential Federal Savings constituted the primary insurer. The facts of this case are quoted directly from the court's opinion in plaintiffs brief, and it need only be repeated that Prudential felt that its loan officer's embezzlement was the cause of the loss of the first lien on property which they held a second mortgage on, and therefore St. Paul, Prudential's insurer, was obligated to pay for the loss under its policy provisions. On the other hand, St. Paul argued that the title insurance was the primary insurer because the failure of Prudential to obtain a first lien came about as the result of the negligence of the title company. As is noted by appellant, the court adopted the position of St. Paul and clearly applied it to the specific vs. general rule articulated as the Pennsylvania Rule in other jurisdictions:

"The rule having wide applicability provides that where a blan-

policy contains a provision limiting its liability to an excess over specific insurance, the blanket policy must respond, only if the specific fails to satisfy the loss." 433 P. 2d at 603.

The Utah Supreme Court has on at least two occasions adopted the specific vs. general theory with respectto automobile liability policies. The first of these cases is National Farmers Union Property & Cas. Co. v. Farmers Ins. Group, 14 Utah 2d 89, 377 P.2d 786 (1963). In that case, National Farmers was the liability insurer under an automobile insurance policy with one Morgan. Farmers Insurance Group was the automobile liability insurer of one Thomas, a car salesman. Morgan took his automobile to the automobile business where Thomas worked to have it repaired. The repair required the car to be left there overnight and Thomas, who worked there, offered his own automobile to Morgan to take home. After Morgan arrived at his home, for some unexplained reason the car rolled out of the driveway and crashed into the building of a Mr. Wolfe. Wolfe brought an action against Morgan to recover for damages to his building. Farmers Insurance Group, covering the owner of the car, Thomas, denied coverage and refused to defend, and subsequently, National Farmers took on the defense of the action wherein it prevailed. Then, National Farmers brought a suit against Farmers Insurance Group under the subrogation theory to recover the costs of the defense of the action brought by Wolfe. The Supreme Court upheld the lower court ruling that Farmers' policy with Thomas, the owner of the automobile involved, was primary insurance while the policy of National Farmers with Morgan, the operator of the automobile involved, was secondary insurance.

Because Farmers' policy was primary insurance, it had the obligation to defend and therefore the expenses incurred by National Farmers were the primary obligation of Farmers Group and therefore National Farmers was entitled to be subrogated and to recover the costs and expenses of the litigation.

The National Farmers case was cited as controlling authority in a subsequent case, Christensen v. Farmers Ins. Exchange, 21 Utah 2d 194, 443 P.2d 385 (1968). In that case, Western Casualty and Surety Company was the automobile liability insurer of Christensen who was an automobile repairman. Farmers Insurance was the automobile liability insurer one of Dr. Stevenson. Dr. Stevenson took his car to Christensen to have it repaired, but the repair necessitated moving the car to another garage. Enroute to the other garage, Christensen was involved in an accident wherein a third party lost his life. As in the National Farmers case, the Supreme Court found that the owner's policy was primary insurance and the operator's policy was secondary insurance. The primary insurer thereby had the first obligation to defend the action.

In Underwriters Ins. Co. v. Allstate Ins. Co., 21 Utah 2d 358, 445 P.2d 772 (1968), the court dealt with a fact situation almost identical to that in Christensen. The main opinion of Justice Henroid discusses only the automobile business exclusion also discussed in the National Farmers and Christensen cases, but made no mention of the primary-secondary question. However, Chief Justice Ellett, in a concurring opinion, said that the holding in National Farmers Union and Christensen required that the court hold that the insurance issued to the owner of the car was primary

insurance and that of the driver, secondary insurance.

The foregoing Utah cases provide strong support for defendant s position that the specific vs. general rule should be applied to the facts of the instant case, and therefore plaintiff must assume primary liability up to the face amount of its policy. Not only does the case law support an adoption of the rule but it should be emphasized strongly that the specific vs. general concept is the better reasoned rule among all of those available, including the minority rule that is favored by plaintiff. Some of the important policy reasons for adopting the specific vs. general concept are elaborated by the Louisiana court which is the latest jurisdiction to adopt the Pennsylvania Rule. Fasullo v. American Druggist Ins. Co., 262 So. 2d 810 (La. App. 1972), dealt with some fire insurance policies, the defendant's policy insuring only that portion of the building designated as the retail drug store and other personal property therein, and the other policies covering the entire building including the personal property owned by Fasullo and the J. P. Wholesale Drug Company. The court, after considering the arguments on both sides with regard to apportioning the damages, said:

> "However, after a careful review of the various alternatives about policy pro-ration, we are convinced that the proper formula to be used is that which has commonly been designated as the Pennsylvania Rule, which provides that in a case such as the one now posed for our consideration the specific policy must bear the entire loss on the portion of the premises which it covers up to its face amount, with the blanket policy or policies affording residual or excess coverage to the extent of their respective limits of liability. "262 So. 2d at 815.

The Louisiana court in Fasullo, goes on in the course of its opinion to mention several public policy reasons or advantages to the

adoption and administration of the Pennsylvania Rule as opposed to other rules of pro-ration. The first and most important of those advantages is the simplicity and ease of administration of the Pennsylvania Rule which w in the opinion of the Louisiana court result in far less litigation than other rules. In subsequent cases, the principle is forever made clear that where one insurer has insured against one specific risk, it will be held to payme of the full amount of the policy and resulting litigation of the kind involved in the instant case over questions of pro-ration among two or even three or four insurers would be eliminated. A second advantage mentioned by the Louisiana court is that the Pennsylvania Rule tends to grant more coverage to the insured in a multi-carrier situation. This is particularly true with fire insurance policies where different policies cover different pieces of pr belonging to the same insured.

It is important to note when one talks about important policy rea for the adoption of the Pennsylvania Rule, that all of the advantages listed on page 12 and 13 in plaintiff's brief for the adoption of the minority rule are equally attainable by the "Pennsylvania Rule". The important difference is that the Utah court has specifically chosen to adopt the "specific vs. general" concept, and as noted by plaintiff the court has categorically re-jected the minority position in the case of Russell v. Paulson, 18 Utah 2d 417 P.2d 658 (1966). Also contrary to plaintiff's statement, the rule is the most practical and logical of the two rules to apply, while still maintaini the concept that one insurer is primarily liable for the loss. Under the minority pro-rata rule it very often is the case that all of the insurers re

quired to pro-rate sit off in the wings and wait for the other companies to move forward and make the first payment. The Pennsylvania rule identifies the primary insurer and there is no question then which company has the duty to move forward.

Plaintiff takes the position in its brief that even if the "majority rule", (whatever that may actually be), is applied to the instant case defendant would still be liable because of defendants pro-rata provision in its policy. Plaintiff claims essentially that in order for the specific vs. general rule to apply, the policy must state that it will provide excess insurance only should there be concurrent coverage by a specific policy. The argument goes on that since there is nothing of that nature in Western's policy, the insurance should be presumed to be primary. However, in Fasullo v. American Druggist Ins. Co., supra, all of the policies in that case, whether they were ultimately determined to be specific or general, contained the same pro-rata clause that is contained in defendants policy. The clause reads:

> "This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Simply put, the Louisiana court did not require that the insurance company which they found to be an excess insurer because of its blanket or general policy, specifically mention in its insurance policy that it will be excess only if there is other insurance covering a specific risk. The true purpose of the pro-rata clause and why it did not automatically provide for an action for contribution or subrogation is covered in the courts opinion:

> "Moreover, the statutory pro-rata clause merely states that the company shall not be liable for a greater percentage of a loss than the proportion which its face value bears to the total amount of insurance coverage on the property damaged. This clause merely establishes a negative limitation of liability and does not set forth an affirmative right to obtain contribution from other companies having coverage on the damaged property." 262 So. 2d at 814.

It is defendant's position the court was correct in its reasoning that the ins need not indicate that it be excess over other specific insurance, because o that obvious result where the specific vs. general rule has been adopted, an that the pro-rata clause contained in respondent's policy does not set forth an affirmative right to obtain contribution from other companies having cove

The specific vs. general concept, cometimes known as the Pennsylvania Rule, has been adopted by the Utah Supreme Court and should agai be applied by the court to the facts of the instant case for all of the reasons referred to above.

POINT III.

COVERAGE OF THE PARTICULAR RISK INVOLVED IN THIS CASE IS EXCLUDED BY SPECIFIC EXCLUSION 1(e) OF RESPONDENT'S POLICY.

Plaintiff contends in its statement of facts that coverage under either insurance policy is not in dispute. However, in defendants memorandum in support of its motion for summary judgment, in Western's policy, exclusion 1(e) was specifically relied on as a basis for granting the summar judgment. It is defendant's position that this particular exclusion was mea apply to this very type of fact situation. The specific language of the exclusion is as follows:

> "This policy does not apply:

. . .

"e. To bodily injury or property damage arising out of any premises, other than an insured premises, owned, rented or controlled by any insured. . ."

The injury involved in the instant case was the result or occurred because of a condition of the property involved -- an open gate. It is undisputed that the drill grounds property where the accident occurred is not an insured premises under Story's homeowners policy with Western. Defendant takes the position that the exclusion is applicable and operates to remove defendant from any liability for the damages incurred by Haggen.

If there is any dispute as to the applicability of this particular exclusion, it would originate in the meaning of the phrase "arising out of any premises". There is apparently very little case law throughout the country defining or applying this term as it relates to uninsured premises owned or controlled by the insured. The cases which have most often construed the phrase "arising out of" involve a question of coverage for injuries arising out of the ownership, maintenance, operation, use etc. of any motor vehicle owned or operated or rented by the insured. Generally, these cases indicate that the term "arising out of" simply requires that there be some causal connection between the ownership, maintenance, operation, etc. of the automobile and the injury.

In McDonald v. Great American Ins. Co., 224 F. Supp. 369, (D.C. R.I.), the insured brought a declaratory judgment action to determine whether the insurers were required to conduct the defense of actions brought against the insured by persons claiming injuries as a result of the insured having thrown a cherry bomb from an automobile. The court held that a specific

exclusion in Great American Insurance Company's policy, preventing coverage for injuries arising out of the use of automobiles away from the insured premises, was applicable and therefore the company had no defense obligation.

The court in McDonald gave some guidance on the definition of the term "arising out of":

> "In most jurisdictions it is held that for an injury to arise out of the use of an automobile within the meaning of an insurance policy, it is not necessary that the injury be produced by the force of the insured vehicle itself. It is sufficient tha the use of the automobile be 'connected with the accident or the creation of the condition that caused the accident'. (Omit citations)" 224 F. Supp. at 372.

In Carter v. Bergeron, 160 A. 2d 348 (N.H. 1960), the court construed the term "arising out of" to mean:

> "It is sufficient that the use was 'connected with the accident or the creation of a condition that caused the accident. . .'" 160 A. 2d at 354.

It is generally recognized that whatever causal connection is required between the condition of the premises and the accident or the injuries, it need not amount to proximate legal cause. See Manufacturers Casualty Ins. Co. v. Goodville Mut. Casualty Co., 170 A.2d 571 (Pa. 1961); Brenner v. Aetna Ins. Co., 445 P.2d 474 (Ariz. 1968); 12 Couch on Insurance 2d, §45:56.

A case that is much more factually helpful than the automobile cases referred to above is Jackson v. Lajuanie, 253 So. 2d 540 (La. App. 1971). The exclusion in that case was almost identical to the language in respondent's policy in the instant case. The exclusion read:

> "To any act or omission in connection with premises, other than as defined, which are owned, rented or controlled by an insured. . . ."

As discussed above, the term "arising out of" and the term "connected with", are treated by many of the cases as being synonymous. In Jackson where the injury involved an accidental shooting, the issue was whether the shooting was "an act or omission in connection with premises". Apparently the insured, while working at a service station, pointed a gun at the plaintiff which he thought was loaded with blanks. The gun discharged and injured the plaintiff.

The insurer, Continental Insurance Company, relied upon the exclusion quoted above for avoiding liability, and the Louisianna court upheld Continental's position. The court explains that the basic intention of a comprehensive liability policy like the homeowner's policy which was involved is to cover the insured for all sums which he may become legally obligated to pay as damages because of bodily injury or property damage. But, the policies contain several exclusions which the court says are of two different kinds. The one type of exclusion is concerned with activities of the insured as they relate directly to other persons. The court explains that such exclusions involve the person to person activities which would include intentional torts and business pursuits. The other type of exclusion is concerned with premises of the insured as the condition of such premises might relate to other persons. That type of exclusion is exactly the type that Exclusion 1(e) of Western's policy fits under. The court in Jackson went on to explain that such exclusionary clauses and the clause involved in that case particularly:

"Restrict coverage where liability is incurred because of the

condition of the premises owned, rented or controlled by the insured, other than those defined, where the condition is attributable to the act or omission of the insured." 253 S.2d at 545.

The Jackson case is very strong support for Western s position that the bodily injury in the instant case arose out of premises other than an insured premises, owned, rented or controlled by the insured. Because the instant facts involve a gate being left open on the premises, it is probably an easier case to find a causal connection between the premises and the injury than is true with Jackson where a gun accidentally discharged at the uninsured premises.

Again, all that seems to be required by Jackson and the other cited cases for the exclusion to apply is some causal connection between the condition of the uninsured premises and the injury or damages involved and ownership or control by the insured. In light of this, an argument that it was the negligence of Story and not the condition of the premises that caused the accident is an argument that cannot stand.

The meaning of the exclusion in the instant case could be more accurately and clearly stated thus: To bodily injury or property damage arising out of the rental, ownership or control by any insured of any premises other than the insured premises. That is, if the injury arose out of the premises it must have arisen because of some negligent act or omission on the part of someone in control of or responsible for the property. In this case, it was an open gate that was the cause of the injury. Exclusion 1(e) clearly applies in this case and Western is not liable either under its personal

liability coverage or the medical payments coverage.

CONCLUSION

The judgment of the lower court should be affirmed because:

1. Brent G. Story was a co-insured under the policy issued by plaintiff and therefore plaintiff is not entitled to recover any amount from defendant because an insurer may not bring an action and recover against its own co-insured or the co-insured's additional insurer, under either a theory of subrogation or contribution.

2. Furthermore, even if plaintiff was allowed to bring an action against its co-insured and thereby an action against the co-insured's additional insurance company, defendant is not liable in this case because of the specific vs. general theory or the "Pennsylvania Rule" which has been adopted in Utah and which is the better reasoned rule to apply. Because plaintiff has issued a policy to specifically cover the particular risk and loss involved in the instant case, and defendant's policy provided only general or blanket coverage, plaintiff's coverage is primary and defendant's coverage is excess and plaintiff must bear the entire loss up to the face amount of its policy.

3. Finally, contrary to plaintiff's contention, there is a dispute as to whether coverage is provided for the particular risk involved in this case by defendant s policy. It is defendant's position that the coverage is excluded by specific Exclusion 1(e) of its policy which states the policy does not apply to bodily injury or property damage arising out of any premises, other than an insured premises, owned, rented or controlled by any insured.

The term "arising out of" means a "causal connection with", and the better reasoned cases would find that Story s negligence in leaving the gate open at the drill grounds or uninsured premises, resulted in injury arising out of the uninsured premises.

Respectfully submitted this 30th day of September, 1977.

STRONG AND HANNI

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MAILING CERTIFICATE

I hereby certify that I mailed three (3) copies of BRIEF OF RESPONDENT to D. Gary Christian and James R. Blakesley of Kipp and Christian for plaintiff and apellant, Farmers Union Property and Casualty Company, 604 Commercial Club Building, Salt Lake City, Utah 84111, this 29th day of September, 1977.

R. Scott Williams

R. SCOTT WILLIAMS
Attorney for Respondent and
Defendant
Western Casualty and
Surety Company