Affirmed and Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

———————

NO. 14-98-00234-CV

———————

UNITED STATES AUTOMOBILE ASSOCIATION, Appellant

V.

UNDERWRITERS AT INTEREST and STEVEN RICHARD BISHOP, REPRESENTATIVE OF LLOYD'S, LONDON COVER NOTE EE8800246, EACH SEVERALLY BUT NOT JOINTLY, Appellees

---

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Cause No. 93-27963

O P I N I O N

In this liability insurance coverage case, United States Automobile Association ("USAA") and Underwriters at Interest and Steven Richard Bishop, representative of Lloyd's, London cover note EE8800246, each severally but not jointly (collectively, "Underwriters"), each appeal the trial court's judgment on the ground that it erred by prorating the coverage of its policy and denying recovery of its attorney's fees. We affirm.

Background

This case arises from an automobile accident. The father of the minor driver at fault had: (1) a primary automobile insurance policy from USAA; (2) a personal umbrella policy from USAA; and (3) a personal comprehensive liability policy with Underwriters through his employer. When the lawsuit against the minor driver and his father was settled, USAA paid its primary policy limits and Underwriters paid the excess. Underwriters subsequently sued USAA for reimbursement of the funds it paid to settle the case. The trial court declared that the two non-primary policies applied pro rata, ordered USAA to pay a portion of the amount Underwriters had paid to settle the claim, and awarded neither party attorney's fees.

Proration of the Policies

Each party argues in its first point of error that the trial court erred in prorating its coverage, rather than allocating it entirely to the other party's policy, because its policy provides coverage which could not be reached until the other's policy had been exhausted.

The difficulty in resolving coverage issues between multiple policies which cover a particular loss at the same level, *i.e.*, primary or non-primary ("overlapping policies"), and which also contain "other insurance" clauses, has persisted in the courts for many years.[1] "Other insurance" clauses essentially provide that if the insured has other insurance against a loss covered by the subject policy, then the subject policy will either: (1) be liable for a proportion of the loss no greater than the ratio of the subject policy limit to the total limit of all applicable policies ("pro rata" clauses); (2) be excess insurance over and above such other insurance ("excess" clauses);[2] or (3) not apply at all ("escape" clauses). Because the

---

[1] *See generally* Gregory S. Bailey, Note, *Competing "Other Insurance" Clauses Under Iowa Law: A New Direction?*, 46 DRAKE L. REV. 835 (1998); R.J. Robertson, Jr., *"Other Insurance" Clauses in Illinois*, 20 S. ILL. U. L.J. 403 (1996); Douglas R. Richmond, *Issues and Problems in "Other Insurance," Multiple Insurance, and Self-Insurance*, 22 PEPP. L. REV. 1373 (1995); Mark C. Guthrie, Comment, *"Other Insurance" Conflicts: A Common Sense Approach*, 36 BAYLOR L. REV. 689 (1984).

[2] Policies containing "excess" clauses purport to not cover a loss until any other (unspecified) insurance coverage is exhausted whereas "true excess" policies become effective only upon the exhaustion of a specified limit of underlying coverage. *See* Guthrie, *supra* note 1, at 689 n.2, 712-

resolution of disputes involving "other insurance" clauses varies depending on the particular combination of clauses found in the overlapping policies, we must first identify the types of "other insurance" clauses contained in the respective USAA and Underwriters non-primary policies.

The USAA policy refers to itself as an "umbrella" policy, requires the insured to maintain specified levels of primary policies, and states that it provides liability coverage above that carried on the primary policies. It then contains the following "excess" clause: "If there is other valid and collectible insurance which covers a loss also covered by this policy, ours will be excess."

The Underwriters policy contains excess clauses and a similar schedule of required primary insurance coverage:

> If other valid and collectible insurance with any other insurer is available to the Assured covering a loss also covered by this Policy, other than insurance that is specifically stated to be in excess of this policy, the insurance afforded by this policy shall be in excess of and shall not contribute with such other insurance. . . .
>
> * * * *
>
> Underwriters liability as the result of any one occurrence shall be only for the ultimate net loss in excess of the Assured's retained limit defined as the greater of:
>
> A. With respect to Coverage (A):
>
> (1)the total of the applicable limits of the underlying Policies listed in Schedule A[3] hereof, and the applicable limits of any other underlying insurance available to the Assured; or

---

13. As discussed below, the two policies in issue in this case are "true excess" policies with regard to certain specified underlying policies and also contain excess clauses pertaining to other unspecified coverage.

3 Schedule A describes the minimum underlying policy limits for each employee, including $300,000 per occurrence and $100,000 per person automobile liability for personal injury.

(2) an amount as stated in Item B of Schedule A attached hereto as a result of any one occurrence not covered by the policies so listed or any other insurance.[4]

* * * *

If other collectible insurance with any other Underwriter is available to the Assured covering a loss also covered hereunder (except insurance purchased to apply in excess of the sum of the retained limit and the limit of liability hereunder) the insurance hereunder shall be in excess of, and not contribute with, such other insurance.

In sum, neither of the policies specifically lists the other as part of the required underlying or subordinate coverage, neither contains a pro rata clause or escape clause, and both have one or more excess clauses which are contrary to the excess clauses in the other policy. In such a situation, where an insured has coverage from either of two policies but for the other, and each contains a provision which is reasonably construed to conflict with a provision of the other, the repugnancy is resolved by ignoring the conflicting provisions and prorating the coverage in proportion to the policy limits of each policy. *See Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583, 589-90 (Tex. 1969).[5] We therefore agree with the trial court that coverage under the two non-primary policies should have been prorated and overrule each party's first point of error.

Attorney's Fees

The parties' second points of error each contend that the trial court erred in failing to award that party its attorney's fees. In a declaratory judgment action, a court *may* award reasonable and necessary attorney's fees as are equitable and just. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1997). However, the Declaratory Judgments Act (the

---

4 Item B of Schedule A provides "$2,500 any once occurrence where no underlying coverages but warranted valid auto and personal liability carried and maintained."

5 Although the two policies in *Hardware Dealers* were both primary insurance policies, the same analysis applies to any overlapping policies which provide coverage at the same level, including true excess policies. *See, e.g., Mission Ins. Co. v. U.S. Fire Ins. Co.*, 517 N.E.2d 463, 464, 467 (Mass. 1988) (addressing factually similar policies).

"Act") does not require an award of attorney's fees to the prevailing party. *See Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998). Nor, would it follow, does the Act require attorney's fees to be awarded to a non-prevailing party. Rather, a trial court may conclude that it is not equitable or just to award even reasonable and necessary fees. *See id*. at 21. In light of the latitude afforded the trial court under the Act, we have no basis to conclude that its decision not to award attorney's fees in this case was error.

Apart from a claim for attorney's fees under the Act, Underwriters argues that it was entitled to recover *contractual* attorney's fees[6] because its claim against USAA arose from the subrogation provision of its policy:

> Underwriters shall upon payment of any loss, damage or expense hereunder be subrogated to all of the Assured's rights of recovery against any other person, firm or corporation who may be legally or contractually liable for such loss, damage or expense paid by Underwriters . . . .

We first observe that Underwriters's claim against USAA in this case was not for subrogation because it did not seek recovery from a party primarily responsible for the insured's loss or a responsible party's insurer; but was instead for contribution, *i.e.*, reimbursement from a co-obligor of the amount Underwriters paid over its proportionate share of the obligation. *See, e.g., Reliance Nat'l Indem. Co. v. General Star Indem. Co.*, 85 Cal. Rptr.2d 627, 635 (Cal. Ct. App. 1999); *Truck Ins. Exch. v. Maryland Cas. Co.*, 167 N.W.2d 163, 163 (Iowa 1969). In any event, however, Underwriters's claim for contractual attorney's fees is not properly before us, as explained below.

At trial, USAA stipulated that Underwriter had incurred reasonable and necessary attorney's fees of $75,000. Before judgment was entered, Underwriters filed proposed findings of fact stating, among other things, that it had sustained reasonable and necessary attorney's fees of $135,000 through the time of trial. However, the trial court's judgment

---

[6] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8)(Vernon 1997) (a person "may recover" reasonable attorney's fees if the claim is for an oral or written contract). Unlike the permissive attorney's fee provision of the Declaratory Judgment Act, statutes providing that a party "may recover" attorney's fees are not discretionary. *See Bocquet*, 972 S.W.2d at 20.

states that attorney's fees were to be taxed against the party incurring them. The trial court's findings of fact make no finding regarding the amount of reasonable attorney's fees for either party, and its conclusions of law state that the court declined to award attorney's fees to either party. A footnote to this conclusion of law states that a request for attorney's fees *under the Act* is subject to the trial court's discretion. Neither the findings of fact nor conclusions of law refer to a *contractual* claim for attorney's fees, and the record does not reflect whether such a claim was presented to or otherwise considered by the trial court.

A few days after the trial court signed its findings of fact and conclusions of law, Underwriters filed another request for findings of fact and conclusions of law which stated, among other things that: (1) the insured suffered no damage as a result of USAA's dispute over the priority of coverage; (2) the insured has no claims against USAA for breach of contract; (3) "Neither UTP [the insured's employer] nor Lloyds have standing to sue USAA for breach of contract . . . because such causes of action can only arise through contract or subrogation. UTP and Lloyds have no contract with USAA, and [the insured] has no claims against USAA, and thus, there are no claims against USAA by [Underwriters] or Intervenor via subrogation"; and (4) neither party is equitably entitled to attorney's fees incurred in prosecuting or defending this action. The record reflects no further action by the trial court in response to this request.

To the extent that a claim for contractual attorney's fees was never presented to the trial court, no complaint for the trial court's failure to award contractual attorney's fees has been preserved for our review. *See* TEX. R. APP. P. 33.1(a)(1)(A) (for a complaint to be preserved for appellate review, it must generally be made to the trial court by a timely request, objection, or motion specifically stating the grounds for the ruling sought). Conversely, to the extent that a claim for contractual attorney's fees was presented to the trial court and denied, either for the reasons set forth in Underwriters's second request for findings of fact and conclusions of law or otherwise, Underwriters has provided no authority, facts, or analysis to demonstrate that any such reasons were erroneous. Lacking any basis,

therefore, to conclude that the trial court erred in failing to award contractual attorney's fees, we overrule the parties' second points of error and affirm the judgment of the trial court.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed January 13, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).