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URRUTIA V. DECKER

LAWYER: Tim Leonard and I represent Penske Truck Leasing Co., Doug Hammond represents Mr. Urrutia. The broad question before this court is this, whether a party in an adversary situation who hires an attorney, who settles a case, who signs a release, who swears in that release that he has not relied on the other side, and who accepts the benefit of a freely made bargain, whether that party can come back and undo the deal? Does that party, in this case Mr. Decker, get a second or a third or a fourth bite at the apple? In this case, under these facts, the answer is a resounding, no, for many different reasons.

I am going to address the issue that I think is foremost on this court's mind, which is the release issue. That's the issue that the 1st CA completely ignored in its analysis. It analyzed the insurance issue and then said at the very end of the opinion, we think there's a fact issue that's been made on mutual mistake. But mutual mistake does not apply in this case for several different reasons. First, there was no mutual mistake of fact.

ENOCH: Suppose the insurance policy is the only thing in question here, and it had $1 million limit on the policy, but the agent who was negotiating read that and saw a $20,000 figure and just thought that that's what it was, and told the plaintiff in the case that it's just $20,000 limit, and so they sign the release, and we come to this point. Would that be a mutual mistake of fact? He read the policy, but he saw the wrong number and assumed that was the number that applied, and gave that information, the other side relied on it, is that a mutual mistake of fact?

LAWYER: Under those circumstances, I agree that there has been a mistake. But I do not believe it is a mutual mistake of fact under these circumstances that would allow them to...

ENOCH: I'm not talking about these circumstances. I am just talking about the circumstance where you've got a policy that clearly has $1 million in it. The agent looks at it and just for some reason is mistaken, and thinks it's only $20,000. He tells the other side, and so they settle based that on the representation. Is that a mutual mistake of fact, the fact of what is in the insurance policy?

LAWYER: Yes, that's a mistake of fact of the fact of what is in the insurance policy under those circumstances. Whether it is a mutual mistake would depend on whether, in this case Mr. Decker and his attorneys had any obligation to look...

ENOCH: But that could be the basis of a mutual mistake issue?

LAWYER: That could be the basis of a mutual mistake issue.

ENOCH: If the lease agreement is void in Texas for having limited the amount of a _____

policy to the extent that the lease does not affect the amount in the policy, could that constitute a mutual mistake? I look at the lease, and I think the lease can do that, so that's what I represent that that's the amount of the policy. But in fact, Texas doesn't recognize that lease as having any affect on the policy. Could then the understanding of what the policy allows be a mutual mistake?

LAWYER: No, I do not agree that it could be under these facts. That is not a mutual mistake of fact. Because what the 1st CA had to do, in fact, was void this on public policy grounds. Public policy grounds are a matter of law grounds. The factual representation was entirely accurate from the adjuster. There were $20,000 in coverage to cover Mr. Urrutia. If they want to rely on that and don't dig any further, I don't believe that they can now be heard to say, Hey, we didn't know about this legal issue that was out there. \we might have been able to make a better settlement. We might have been able to negotiate different if we had snapped on the fact that we had some legal argument out there, ought to try and void the endorsement to the policy, and the rental agreement.

I also want to add that Penske does not agree that the policy provisions were properly voided in this case.

I've covered the mutual mistake issue with Justice Enoch. Under these facts there was no mutual mistake of fact. The mistake, as I said, is the idea - it's unilateral and it's the idea that Mr. Decker now has that if he had taken this case to judgement, as a judgment creditor he might then have had standing to claim that the endorsement and the rental agreement were void, or that he could have negotiated differently.

HANKINSON: What is the nature of the relationship between Penske and the man who rented the truck? We have insurance at issue here. What is the nature of the relationship though between Penske and the renter of the truck?

LAWYER: It's simply Penske rented the man a truck.

HANKINSON: Should be a contractual relationship?

LAWYER: Yes.

HANKINSON: There's not any kind of an insuring agreement as between them?

LAWYER: No. The rental agreement says that Penske will provide insurance coverage. But in my opinion, that does not make the rental agreement an insurance policy.

HANKINSON: And if Penske didn't have the insurance, Penske did this agreement with all of its renters of its vehicles, but didn't actually have the underlying insurance policy, then what would be Penske's obligation if something happened?

LAWYER: As I read the agreement, then Penske itself might be liable. So it would be sort of a self-insurance type of provision.

HANKINSON: It would be a breach of contract claim wouldn't it, and they would be liable for the amount of damage that resulted from their failure to provide the insurance?

LAWYER: Right. And only up to the amount of the minimum limits, I would believe under those circumstances. The other reason that mutual mistake does not apply here that is key is the release itself. And again, the CA didn't look at this issue. The release negates materiality of the representation as a matter of law. The release says, that no representation regarding the nature and the extent of financial responsibility induced Mr. Decker to sign the release. In *Schlumberger*, this court looked at a release, and this court said that release language in there disclaiming reliance was sufficient to bar a subsequent claim for fraudulent inducement. This is an even better case, a stronger case for two reasons: 1) there is a specific disclaimer of reliance; and 2) it's mutual mistake. There is no fraud here. This is simply mutual mistake is what they are arguing.

HANKINSON: They argued fraud in the TC though, right?

LAWYER: Yes.

HANKINSON: And that issue was not decided by the CA, because the CA decided the case based on the insurance issue?

LAWYER: That's correct.

HANKINSON: Was the fraud issue briefed in the CA?

LAWYER: Yes, it was. They raised the fraud issue. What I mean to say, and I may have misspoken was that under the facts of this case, I believe the reason the CA didn't address it is that there absolutely is no fraud issue under the facts of this case. I don't believe that the other side is seriously contending that at this point.

HANKINSON: But the CA didn't need to reach the fraud issue based on the way it decided the case.

LAWYER: That's right.

HANKINSON: If we were to agree with you that the CA was wrong in this case and reverse, do we have to send it back to the CA for a consideration of the issues relating to fraud?

LAWYER: No. Because 1) the release issue itself and the reliance issue negated whether on both the mutual mistake and the fraud grounds under the specific facts of this case. And 2) the parties here

have briefed fraud. I believe that this court can look at it and the facts are there before the _____, and it was very clear that fraud does not apply.

ABBOTT: With regard to the release, I'm having a problem fitting your argument in the language of the release. I'm looking at it on para. 2. It seems to me the issue that would have to be no reliance upon would be either the ability to pay, or the extent of coverage. Would you agree with that?

LAWYER: Yes.

ABBOTT: In looking at the language here, on line 2, "No representation about the nature and extent of injures", so that doesn't apply. "Disabilities or damages made by any physician, attorney or agent." So in other words, what you're talking about here doesn't involve nature and extent of injuries, disabilities or damages nor does it involve anything on that next line, "or any representations regarding the nature and extent of legal liability." Legal liability is different than ability to pay or extent of coverage or financial responsibility. Financial responsibility is who is responsible as opposed to the ability to pay or the extent of coverage.

LAWYER: Then, I would respectfully disagree. Because I think in the terms of the _____ personal injury release like this, the term 'financial responsibility' clearly encompasses both the insurance issue and the assets issue. And we may simply disagree about that. But the way this release is structured, I believe that that is what any reasonable attorney in the personal injury context would understand it to mean.

On the release issue, the legal bases the court could rely on there are several. On the one hand, Mr. Decker is claiming that he can come in here and rely on an oral representation that was factually accurate, but come up with some new legal theory that he claims makes it inaccurate, but that he was entitled to rely on. On the other hand, Mr. Decker is saying that this court, Penske, and Mr. Urrutia cannot rely on his solemn written representation. They didn't rely on anything. That he didn't rely on representations about financial responsibility. That's one way of getting to it. The other way is that by this language, Mr. Decker assumed the risk of the mistake and by the circumstances Mr. Decker assumed the risk of a mistake. The other analysis for getting to that on a legal basis is by using the analysis in this court's case of *Williams v. Glash(?)*, look at the surrounding circumstances and say is this the kind of case where a mutual mistake should undo what was done? If we look at that, we see that it's an adversary situation, we see that Mr. Decker is represented by attorneys. We see that this was not a release that was taken within a couple of days after the collision. We see that this was not a release that was taken within a couple of days after the collision. We see that this is a release that clearly reflects the bargain of the parties unlike *Williams v. Glash*. And we see that over the period of time the attorneys had the opportunity, could have asked for anything they wanted and evidently either failed to do so, or did ask and didn't catch this brand new legal claim that's now being brought up.

But under any of those circumstances, when you take all those circumstances together this is not the kind of case where mutual mistake should void it. Mr. Decker had attorneys, he

had attorneys to rely on, they could have simply asked for the deck(?) page. If they got the deck page, and they had more questions they could have asked for the policy, and then the rental agreement. They evidently did none of this, or if they did do it, we haven't been told because there is no evidence about it one way or the other. There's also no evidence about the financial ability of the parties to pay, which should be part of the mutual mistake analysis. In this case, Mr. Decker didn't have a claim against an insurance company. He had a lawsuit against Mr. Urrutia and Penske. And in looking at the lawsuit it's not simply what insurance limits do you have, but in determining whether or not how to proceed with the lawsuit, you also look at the assets. And it's really the assets of the opposing parties that a party has to look to. So this is not an issue where he can come in here and claim empty-head, clean-hands, I win. He cannot say that I've simply relied on the insurance representations.

I will briefly address the fraud issue in this case. Based on the sequencing there was no fraud here. The fraud issue comes up based on a claim that one of Mr. Decker's earlier attorneys may have been told that Penske had $20,000 in coverage. That was not the attorney who represented Mr. Decker when he settled. And the affidavit from the attorney who represented Mr. Decker when he settled clearly said that what he was relying on was the statement that Mr. Urrutia had $20,000 in coverage. And any kind of representation that the earlier attorney claims he heard about Penske would be immaterial given the size of Penske's assets.

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RESPONDENTS

HENNIGAN: This case isn't about setting aside the release because of fraudulent misrepresentations or mistake in obtaining a release. It's settled law. If an insurance adjuster comes out and makes a misrepresentation and induces the party to execute a release, and those misrepresentations are material, it can be set aside. That's settled law. Likewise, if the parties are mutually mistaken as to a material fact in executing a release it can be set aside. That's settled law in this state.

The issue in this case and what's before the court is whether or not an insurance company can come in this state and write an insurance contract and not play by the rules. And the rules are very clear. In 5.06 of the insurance code, you can't issue an insurance contract in this state unless it's on an approved form promulgated by the insurance commissioner. Likewise, you can't have an endorsement unless it's approved or promulgated by the insurance commissioner.

HANKINSON: What insurance policy was issued in this state?

HENNIGAN: The insurance contract between Urrutia and Old Republic.

HANKINSON: What insurance policy did Old Republic issue to Mr. Urrutia?

HENNIGAN: The $1 million coverage that was issued in Pennsylvania. When they issued that policy they knew that their agent, Penske, was going to go in this state or any other state and execute

releases and bind them to that policy.

HANKINSON: They were going to execute releases to bind them to the policy?

HENNIGAN: I'm sorry. Execute leases, rental agreements and...

HANKINSON: Well the rental agreement is not an insurance policy, is it?

HENNIGAN: Well it contains insurance provisions. It's a rental contract.

HANKINSON: Is Penske acting as an insurer in the rental agreements with its rentees?

HENNIGAN: Penske in my opinion was acting as an insurance agent when it executed the rental agreement with Urrutia. When it attempted to create policy limits, when it attempted to define the extent of liability in that rental agreement which vary the terms of the actual policy, Penske was acting as an insurance agent.

HANKINSON: In what way did it vary the terms of the policy with Old Republic?

HENNIGAN: One, it varied the limits of liability. Two, it says...

HANKINSON: But doesn't the policy in the endorsement that talks about who are insureds in the Old Republic policy say, that lessees and rentees are insured but only to the extent and for the limits of liability agreed to under contractual agreement with the named insured?

HENNIGAN: That's correct.

HANKINSON: And so if the agreement between Penske, the named insured, and its rentees says, $20,000 in coverage, how does that alter, or contradict or in some way vary what the Old Republic insurance policy says? The Old Republic policy does not say that all the rentees always get $1 million in coverage does it?

HENNIGAN: Well that's true. But you've got an additional problem, because this is an agreement that's not written into the policy.

HANKINSON: Then answer my earlier question then about how the Penske rental contract varies or contradicts the Old Republic insuring agreement?

HENNIGAN: It says that before the lessee, in this case Urrutia is insured, he has to be using that vehicle in a manner consistent with the rental agreement. And it says, You are not authorized to use this vehicle to violate any traffic laws, commit any offenses, etc. If so, theoretically then you're not an insured. So if you go out and you have an accident while you are speeding, you run a red light, you drive

on the wrong side of the road, you commit many traffic violations, you're not insured. And that's the problem in the rental agreement. And that specific authority to vary the terms of the policy is given by Penske in the rental agreement. And that's where you have a problem in this case.

HANKINSON: So the specific authority that varies is not with respect to the amount of coverage, it's with respect to when the policy would pay?

HENNIGAN: I would say it's overall.

HANKINSON: But you're not modifying in any way the language in the policy that sets the limits that would go to the rentees as insureds under the policy?

HENNIGAN: You're defining what the limits are.

HANKINSON: But you're not altering it or varying it?

HENNIGAN: That's correct.

HANKINSON: So there really is no issue then related to the amount of insurance and any question about whether or not the amount of insurance has been varied or altered from the underlying insurance policy?

HENNIGAN: If you look at the rental agreement, and the contractual provision in there as to the limits of liability, if you consider that a valid agreement, which may alter or change the policy limits in the policy.

HANKINSON: I'm not talking about all these other conditions that you have referred to. I am just talking about the amount. And that's what's at issue in this case is the amount?

HENNIGAN: That's correct.

HANKINSON: And the rental agreement does not vary or alter or contradict in any way the underlying policy with respect to the terms and the amount?

HENNIGAN: It merely defines the amounts applicable to the lessee.

HANKINSON: So that means the answer to my question is that no, that it doesn't vary or alter the underlying agreement?

HENNIGAN: That's true.

HANKINSON: So there is no dispute then about the amount of coverage available here?

HENNIGAN: Oh, yes, there is a dispute.

HANKINSON: And what is the basis for that dispute?

HENNIGAN: The basis of the dispute is, that the rental agreement is an agreement that's not written into the policy. And 5.06 is very clear about that. You can't have a side agreement that's not written into the policy and is void.

HANKINSON: So if it's void, you don't have any coverage at all?

HENNIGAN: You have coverage because he is a consent driver.

HANKINSON: If you have a void policy where does the coverage come from?

HENNIGAN: It's not a void policy. It's a void rental agreement as to the insurance coverage in the rental agreement. Now you can still look at the rental agreement to determine who the consent rather...

HANKINSON: Well if the rental agreement is void, then I guess he's not a rentee under the policy, so he's not an insured under...

HENNIGAN: The whole rental agreement isn't void. Just the insurance provisions in the rental agreement. Now you can still look to the rental agreement to determine who the consent driver is, and that was Mr. Urrutia. They agreed to that. And that doesn't contradict any of the terms of the policy. So if Mr. Urrutia is driving with a consent of the main lessee in the policy, then he's covered up to $1 million.

HANKINSON: But you've just voided the terms of the rental agreement relating to insurance?

HENNIGAN: That's correct.

HANKINSON: Because, I, as someone who rents a car, I can choose not to take advantage of the insurance provided by my lessor, correct?

HENNIGAN: That's right.

HANKINSON: I can say, No, I don't want to pay for it; I don't want it; thank you very much; I will take your car and I will worry about it myself?

HENNIGAN: That's correct. Now Penske could do what it wanted to do. You just have to do it the way the insurance commissioner said to do it.

HECHT: Which was to?

HENNIGAN: To use their forms.

HECHT: Every time they rent a truck?

HENNIGAN: I've attached as exhibits and filed with the court, three documents. The first one is the endorsement which was used by Old Republic in their policy; Who is an insured? This is the endorsement they used. Now the second, page 2 and 3, is the endorsements promulgated by the insurance commissioner. And if the CA did anything wrong they attached the wrong form to its opinion. It should have attached the bottom part of page 2 and all of page 3. This talks about excess coverage situations where you want to insure the owner for $1 million, but you only want to insure the lessees for $20,000 or some lesser amount. So they have to use these forms, fill out what the limits are and attach it to the policy.

GONZALES: To the rental agreement or the policy?

HENNIGAN: To the policy. These are forms to be used with the policy when they issue a policy.

OWEN: So the policy ought to have 50 different endorsements for 50 different states?

HENNIGAN: I don't think so. Because under the contract it defines what type of policy is to be provided in this case. A standard policy that's required in the state where the vehicle is used is what they agreed to furnish. So we are talking about a Texas policy here. Now probably if they are doing business in 50 different states and they have that language in all their rental agreements, then they are going to have to provide 50 different policies. So for purposes of this case, we're only talking about a Texas policy.

PHILLIPS: If I go into Hertz or Avis and am stupid enough to check one of those boxes to buy their insurance at $7.50 a day, whatever the limits are, if Hertz has a master policy that's greater than those limits, then that's void assuming they don't attach a whole bunch of Texas forms to the back of my one-page agreement? Unless they use this type of endorsement, then when I check that little box that I want this insurance or whatever it is, I have to be getting whatever the maximum amount of insurance that they have bought for anybody, is that correct?

HENNIGAN: Unless they use this endorsement.

O'NEAL: But aren't we engaged in a legal analysis?

HENNIGAN: Yes.

O'NEAL: And if that's the case, then why would this not be a mutual mistake of law?

HENNIGAN: Well it's a mixed question of fact and law. As far as Decker is concerned, this was a mistake of fact. He never made this analysis when they told him that there was $20,000 coverage. That's a representation of fact as to him. Now if they are mistaken, I don't know what their mistake was. I don't know whether the insurance adjuster made that analysis, whether he read the policy and he is just mistaken.

O'NEAL: If it were a mistake of law would we even reach these questions about the effectiveness of the various policies?

HENNIGAN: If it's a purely mistake of law, you still may. Because I think in some of the old cases - one of the cases we cited in our brief, the mistake of law situation is where you're talking about - it's my opinion - mistake of like criminal laws, or laws that are on the books for persons and their charge of notice of what these laws are. Not specifically knowledge of what your legal rights are. We're talking about a person's legal rights in a contract and in an insurance policy. There's a case before the court that we've cited in our brief that the parties were mutually mistaken as to how many insurance companies were liable to contribute towards a personal injury claim. And the parties were mistaken as to 1) there was no liability; and this court specifically held that the determination as to how many companies were liable was a mixed question of fact and law. And the release could be set aside if there was a mistake. So if you've got a pure mistake of law, I think you're probably right, you couldn't set it aside. But here you clearly have a mixed question of fact and law.

One thing I want to point out on this excess coverage form is it alters the definition of insured. In other words, it says, lessees in effect are insureds up to the minimum amount in the lease or as designated in these forms, but they are not insureds for any amount in excess of the minimum required by law or up to the amounts in the policy, which would be $20,000 to $1 million. So if these forms were used, we wouldn't be standing here today and we wouldn't try to set aside that release.

I think it's clear that there is no duty on the part of Mr. Decker to go out and investigate. The law favors settlements. And many times a person is seriously injured in an automobile accident and there's only $20,000 coverage and the parties have no choice but to settle. Why should a party not believe a representation by the other side that said, well we don't think you've got $20,000, we are going to go ahead and file a lawsuit, we're going to do all our discovery, we're going to do a judgment, and then we are going to see if that's true.

OWEN: You could ask for a copy of the policy couldn't you as part of the settlement negotiations?

HENNIGAN: Could have. But I think once the parties started doing their investigation they would have lost their reliance on any misrepresentation.

HANKINSON: Why wouldn't the law expect people to do their own investigation and be responsible for their own actions?

HENNIGAN: Well they are responsible for their own actions.

HANKINSON: So if I'm injured in a car accident why am I not responsible for getting all the information I need, including looking at the policy so I can determine how much and when is it appropriate for me to settle my case ?

HENNIGAN: Well I think the law would require people to be honest more than they would impose on them a duty to investigate to see whether or not the other party is telling the truth. And I think that's what we have here. If somebody makes a misrepresentation and you rely on it, you innocently rely on it and you enter a settlement agreement, and that representation turns out to be false, then I think you have a remedy.

HECHT: He said he didn't rely on it?

HENNIGAN: No, he did rely on the representation that there was only $20,000 coverage.

HECHT: It said in the release, No representation regarding the nature and extent of legal liability or financial responsibility of and the parties released have induced us to make this settlement.

HENNIGAN: I have a problem with that language just like Judge Abbott does. That doesn't say he's not relying on the amount of coverage. He may be liable. A person may be financially liable, but he may have $20,000 coverage or he may have $1 million coverage.

HECHT: Extent of legal liability or financial responsibility doesn't mean coverage?

HENNIGAN: I would say absolutely not. I think that's boiler-plate language. It's found in any release. Now they could have specifically put it in there that you're not relying on our representation as to the amount of coverage in this case. If they put that in there it may be a different story. But that's not in there.

HANKINSON: If we do not accept your argument that parts of these agreements are void, that in fact they do stand up under the law, and if you read the rental agreement with the insurance policy, do you agree that the amount of coverage is $20,0000?

HENNIGAN: In other words, if the court finds that the rental agreement is not invalid under 5.06?

HANKINSON: Yes.

HENNIGAN: Then there's no question.

HANKINSON: Then the coverage is $20,000?

HENNIGAN: It would be $20,000.

BAKER: Is the next thing then if that's correct when the agent said the coverage is $20,000 that was not a misrepresentation?

HENNIGAN: If that rental agreement is valid and holds up, that's true.

BAKER: Because of the way the CA decided this, is this a rendition or remand type situation depending on which the way the court goes? Because the fraud issue was not discussed at all, is that correct?

HENNIGAN: But there is no fraud. If the rental agreement was valid...

BAKER: Well can we decide that here and dispose of the entire case if we go through the analysis that Justice Hankinson just did?

HENNIGAN: Right, then it's immaterial whether the CA would make that analysis if the court found that rental agreement was valid.

PHILLIPS: If the rental agreement is void, and we believe the mutual mistake was one only of law, then do we have to remand for the CA to look at your fraud issue?

HENNIGAN: I don't think so because it could be remanded to the TC either setting aside the release because of mistake of fact, or setting aside the release for misrepresentation Either way it would go back to the TC.

PHILLIPS: If we agree with you that the release is void, but we disagree with you on mutual mistake, we think it's one only of law isn't there still a fraud issue and where does it go?

HENNIGAN: It would have to go back to the CA.

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REBUTTAL

LAWYER: I will point out if the court said that the rental agreement was void, which I do not think is the law, this case should still not go down on the fraud issue, because there has been no justifiable reliance. There's a difference between a duty to investigate and justifiable reliance.

BAKER: But I think the question really is, Can we decide that in the procedural basis that the case is here, because it's on summary judgement isn't it?

LAWYER: Yes, it is.

BAKER: Is that our function or is it the CA's function?

LAWYER: I hear what you're asking. I believe that the court can look at the release issue and say that either on the mutual mistake or fraud issues it just doesn't go back down because there's nothing else to analyze there.

OWEN: What about his argument that the rental agreement obligated Penske to provide a Texas insurance policy? Does it provide that?

LAWYER: My understanding of the rental agreement is that it obligated Penske to provide minimum limits of insurance under the appropriate _____. And that's exactly what happened.

OWEN: There's no other provision in there says you will comply with Texas insurance laws or provide a Texas policy?

LAWYER: Not in the rental agreement itself. The agreement in there is that Penske will provide a policy that gets up to the minimum limits of whatever the applicable state is.

HANKINSON: Will you respond to Mr. Hennigan's argument that the language in the rental agreement that talks about various uses of the vehicle and how that alters the insurance coverage constitutes a variance or alteration of the underlying insurance policy?

LAWYER: I disagree that the language that he is citing varies the policy. There is one section that talks about providing insurance. This other section is clearly in there to cover Penske in the event of an accident. Penske's got language in there so nobody can come back and say that this is anything other than a contractual relationship among them. You know: don't drive drunk. Those kinds of things. It's the kind of thing that a national company puts in there to protect itself on the sort of negligent entrustment claims they are liable to get in these case. I think he's mixing apples and oranges. And interestingly enough, the only case that he cited to this court was a Massachusetts case on that. There is a later appellate decision out of the same Massachusetts court that was cited in the appellate briefs where the insurance company didn't come in and claim the policy was void. They said, yeah there is minimum limits coverage. And the court said, that's fine, we don't have a problem with that in this case. In the case he cited to you, the insurance company had the audacity to come in and claim that the whole thing was void. And that's how they got themselves into trouble in the first place.

The issue here is, Mr. Urrutia is the person who entered into this rental agreement. He got exactly what he bargained for - $20,000 minimum limits coverage. This didn't violate the public policy of this state. The public policy of this state was well-served in this agreement.