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Two Insurers Battle Coverage in Case of Automobile Accident Involving Tow Truck

By Jennifer L. Smith

An Illinois appellate court was recently called upon to decide a coverage dispute between two insurers arising out of a motor vehicle accident involving a delivery van that was being towed. *Pekin Insurance Company v. Fidelity & Guaranty Insurance Company*, 357 Ill. App. 3d 891 (2005). The issue was whether the accident was covered by the insurer of the tow truck or the insurer of the van that was being towed. The court held that coverage for the towing business was primary and that coverage for the delivery van was secondary.

In February 1999, a business delivery van insured by Fidelity and Guaranty Insurance Company ("Fidelity") broke down. Upon request, Brown's Vehicle Inspection ("Brown's") showed up with a tow truck, insured by Pekin Insurance Company ("Pekin"). After the van was hitched to the back of the tow truck, the delivery van driver hopped in the tow truck beside the tow truck driver and the two headed to their final destination. On route, the van broke loose from the tow truck, crossed into the lane of opposing traffic, and struck a vehicle injuring its driver and passenger. The driver and passenger sued Brown's, its owner, as well as the tow truck driver, the delivery van owner and the delivery van driver, claiming various acts of negligence.

Brown's owned a Pekin insurance policy on the tow truck. The delivery van owner had an insurance policy from Fidelity consisting of commercial liability insurance, employee benefits liability insurance, business auto insurance, as well as commercial umbrella liability insurance. In February 2003, Brown's and its driver "deselected" their coverage under the Pekin policy and targeted Fidelity by filing a declaratory judgment action seeking a declaration that (1) Brown's and its driver were insured under the towed delivery van's policy; (2) Fidelity was Brown's and its driver's sole and exclusive insurer for the underlying actions; and (3) Fidelity breached its duty to defend by denying Brown's tender of defense. Fidelity filed a counterclaim alleging, among other things, that (1) the delivery van and its driver were insured by the tow truck owner's Pekin policy; (2) Brown's was not a "user" of the delivery van; and (3) Brown's was not insured under the delivery van's Fidelity policy.

After cross motions for judgment on the pleadings, the trial court found in favor of Fidelity, and held that Brown's and its driver were not covered by Fidelity as omnibus users of the delivery van because the act of towing it was not considered "use" of the vehicle, and Fidelity did not breach its duty to defend. The court did hold that Pekin had a duty to defend the delivery van owner and its driver, which it had breached. An

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In a case of first impression, an Illinois appellate court decided who owed coverage in an accident involving a towed car that broke loose and hit a vehicle in oncoming traffic. Finding that coverage could potentially exist under both the tow truck and towed vehicle's respective policies, the court, based upon public policy, mandated that primary coverage existed with the insurer of the tow truck. In this context, it is important to note that the court preempted the common rule of assigning primary coverage to the insurer of the vehicle's owner. It is also important to note that the court expanded the permissive user, or omnibus insured, clause to include the towing of the insured vehicle.

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appeal followed.

The first major issue to be decided by the appellate court, and one of first impression in Illinois, was whether or not a tow truck “uses” or “operates” the vehicle it tows so as to bring its owner under the ambit of the towed vehicle’s coverage. In this case, the business-auto portion of the delivery van’s Fidelity policy covered permissive users, who are also referred to as omnibus insureds. If Brown’s or its driver were considered permissive users of the delivery van, then they would be afforded coverage under its coverage with Fidelity. Upon review of case law for other jurisdictions, the court concluded that a tow truck owner “uses” the towed vehicle with the permission of the named insured, resulting in coverage under the towed vehicle’s policy. The court also found that the facts pled in the underlying complaint were sufficient to potentially fall within the delivery van owner’s Fidelity policy coverage, and therefore Fidelity had a duty to defend.

The court went on to find that the facts as pled against the delivery van owner and its driver were sufficient to find that they could potentially fall within the tow truck’s Pekin coverage. Although the delivery van driver did not drive the tow truck so as to “operate” it in a normal fashion, the complaint alleges he did hitch the van to the tow truck. Operating the tow truck’s equipment to attach a vehicle for tow could constitute “operation.” As potential coverage was found as to both insurers, the court then had to distinguish which provided primary coverage under these facts.

Where two insurance policies each purport to offer only secondary coverage, the normal rule is that the insurance of the vehicle’s owner is primary while that of the driver is secondary. This would allow Pekin to hold secondary coverage. But the court found that allowing Pekin to become secondary coverage would violate public policy of mandating liability insurance for tow trucks. Based on this policy, and the fact that Brown’s was engaged in the business of towing automobiles (a business that is based on the use of vehicles it does not own), the court found that Pekin was the primary insurer. Fidelity’s coverage was therefore secondary and excess over that of Pekin. Similarly, it was not possible for Brown’s to “deselect” their statutory coverage under Pekin’s policy, or for Fidelity to claim that its business exclusion precluded coverage, because doing both would also violate public policy.

Finally, the court held that neither Fidelity nor Pekin breached any duties to defend. Since Fidelity’s coverage to Brown’s and its driver were secondary, it could not breach any duty to defend. Although Pekin did have a duty to defend the delivery van driver, proper notice was not given to trigger this duty. The delivery van driver was not listed on the Pekin policy, therefore mere notice of the underlying cause of action alone did not put Pekin on notice that it owed a defense to its omnibus insured. The delivery van driver should have tendered defense of the action to Pekin.

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