



IN THE COURT OF APPEALS OF IOWA

FIRST NATIONAL BANK OF
COUNCIL BLUFFS,

Plaintiff-Appellant,

vs.

NORTHWESTERN NATIONAL INSURANCE
COMPANY OF MILWAUKEE, WISCONSIN,

Defendant-Appellee.

Filed February 5, 1980

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2-63255

Appeal from Pottawattamie District Court - Leo F. Connolly, Judge.

Plaintiff-insured appeals trial court's judgment for defendant-insurer in an action at law for recovery pursuant to the indemnity provisions of a contract for insurance alleging trial court erred: 1) in finding the policy unambiguous and 2) in denying the bank recovery. REVERSED.

Frank W. Pechacek, Jr., of Smith, Peterson, Beckman & Willson, Council Bluffs, for plaintiff-appellant.

John D. Sens of Johnson, Stuart, Tinley, Peters & Thorn, Council Bluffs, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

CARTER, J.

Plaintiff, First National Bank of Council Bluffs, (hereinafter called the bank) appeals trial court judgment denying it recovery under an insurance policy with defendant, Northwestern National Insurance Company of Milwaukee, Wisconsin (hereinafter called the insurer). The sole issue on appeal is whether the bank's claim is embraced by the applicable policy provisions.

The bank's claim against the insurer is based upon an alleged loss resulting from its inability to locate a 1977 Lincoln Mark V automobile which was its sole collateral for a loan made to one Otis Holt. The loan became delinquent and the bank attempted to reach Holt by telephone, only to discover his residential and business phones had been disconnected. After checking all credit references and personal references listed by Holt, the bank retained a private investigator. The investigator was eventually able to locate Holt but efforts to find the automobile proved futile.

The basic coverage clause under which a claim is made provided:

Coverage C — Confiscation and Skip Insurance — To indemnify the Insured to the extent of 100% of any direct loss that the Insured may sustain during the term of this policy

(a) By reason of the inability of the insured to locate the borrower or vehicle; or,

(b) By reason of the confiscation of a vehicle by a public officer but only in the event that the Insured shall have in good faith and in the usual course of business taken, received, made advances on, made loans against, or extended credit upon an instrument as hereinafter defined, as security for a loan to a customer of the Insured, or purchased such Instrument from a customer of the Insured.

Condition 19, of the contract, which relates in part to this coverage, provides:

Location of Property — Coverage C "Skip" losses only — Before the Insured shall make claim under this policy, every reasonable and practicable effort shall be made to locate the property represented by the Instrument and to repossess such property, or to locate the person or endorser of the Instrument, or collect for the balance due Insured. If the Insured is successful in any event, there shall be no claim under this policy.

When the Insured determines that a "SKIP" has occurred within the meaning of this policy, as distinguished from a borrower who is merely delinquent in his obligation to the Insured, prompt written notice shall be given to the Company or its agent setting forth all circumstances

concerning the loss and particularly the efforts that have been made pursuant to the paragraph above. The Company shall then have sixty (60) days in which to locate either the property represented by the Instrument or any obligee of the instrument.

If the Company locates the property represented by the instrument prior to payment of the claim its maximum liability shall be 100% of the reasonable expense of locating and returning the property to the office of the Insured, subject however to a maximum limit of liability to the Company of \$250.00 for this purpose.

The trial court, in denying the bank's claim, concluded that under both the general coverage provisions of Coverage C and the exclusionary provisions of condition 19 no claim is payable if the insured is able to locate either the borrower or the vehicle. The bank urges on appeal that the trial court's interpretation does not fairly reflect the scope of the insurer's obligations under Coverage C. It also urges that if any doubt exists as to its claim under the policy provisions this is a result of a contract ambiguity which should be resolved against the insurer.

I. Our examination of the applicable contract provisions produces disagreement with the trial court's conclusion that the bank's claim is not covered by the insurance contract. Subparagraph (a) of Coverage C provides for payment for 100% of any direct loss that the bank might sustain by reason of either of two occurrences: (1) inability to locate the borrower; or (2) inability to locate the vehicle. The insured's claim in the present case is based upon inability to locate the vehicle and, accordingly, any loss to the bank resulting directly from that circumstance falls within the basic coverage clause. Nothing in the basic coverage provisions for Coverage C provides that the inability to locate both the borrower and the vehicle is a requisite for recovery under the policy.

II. We next review the trial court's determination that condition 19 excludes coverage of the bank's claim. In this regard we apply the rule that where the basic coverage clause embraces the loss (as we have determined it does in the prior division) any limitation or exclusion from such coverage must be defined in clear and explicit terms. See Zenti v. Home Insurance Co., 262 N.W.2d 588, 589-90 (Iowa 1978).¹

¹ We find no merit in the insurer's contention that this rule should apply only to policies issued to "average members of the public" and not to an entity as sophisticated as a national bank.

Our reading of condition 19 suggests that it provides, as a condition to making claim under subparagraph (a) of Coverage C, that the insured shall make reasonable effort to accomplish one of three things: (1) locate and repossess the property; or (2) locate the person or endorser of the instrument; or (3) collect for the balance due. Clearly the bank satisfied this part of the conditions. The potential ambiguity in condition 19 which gives rise to the present dispute is the provision that "If the insured is successful in any event, there shall be no claim under this policy." We find this language, when it is considered in light of the general scheme of coverage, is susceptible to an interpretation related to the type of claim being made. Thus, if inability to locate the borrower is the basis of the insured's claim, success by the insured in accomplishing that undertaking (or similar success by the insurer acting under the second paragraph of condition 19) will defeat recovery. Similarly, if inability to locate and to repossess a vehicle given as collateral is the basis of the claim, ultimate success in such effort will defeat the claim. But to accept the insurer's contention that success in locating the borrower defeats a claim based on missing collateral appears entirely inconsistent with the basic coverage which the contract purports to provide.

Apart from and in addition to covering losses sustained by reason of absconding debtors, Coverage C expressly provides that it insures against losses sustained as a result of inability to locate vehicles given as collateral for a loan. The inability of the insured to locate the borrower certainly does not preclude the possibility of injury sustained from lost collateral. To interpret the policy in the manner urged by the insurer would, in many instances, render the separate coverage for collateral loss totally meaningless.

Additional support for our interpretation is found in the treatment which the policy accords to confiscation of a vehicle by a public officer. On such losses, condition 19 does not apply. The requirement of condition 19 with respect to effort by the insured to locate the property is obviously inapplicable under such circumstances. But, if the insurer is correct in urging that it was the intent of condition 19 to preclude coverage for lost collateral if the borrower is located such exclusion would logically apply to confiscated collateral as well as to unlocated collateral. We suggest that the coverage

on confiscation losses is written as it is because it is the intent of the policy that location of the borrower is not a requirement for recovery based on either type of collateral loss.

III. Lastly, we note that, contrary to the views of the trial court, our interpretation does not permit double recovery on a claim. Applicable principles of subrogation operate to assure that this cannot happen. For the reasons stated the judgment of the trial court is reversed and the cause remanded for determination of the amount of the direct loss, if any, sustained by the bank as a result of its inability to locate the automobile.

REVERSED.

Johnson and Donielson, JJ., dissent.

JOHNSON, J. (dissenting)

An insurer has the duty to express any policy limitations and exclusions in clear and explicit terms. Zenti v. Home Insurance Co., 262 N.W.2d 588, 590 (Iowa 1978). Under Iowa law, rules of construction are applied only where the insurance policy is ambiguous in offering more than one reasonable interpretation. Steel Products Co. v. Miller's National Insurance Co., 209 N.W.2d 32, 36 (Iowa 1973); Iowa-Des Moines National Bank v. Insurance Company of North America, 459 F.2d 650, 653 (8th Cir. 1972). If the exclusionary language of the insurance contract is unambiguous, however, intent is then determined by what the contract itself says. Iowa R. App. P. 14(f)(14); Rick v. Dyna Technology, Inc., 204 N.W.2d 867, 871 (Iowa 1973). Words and phrases of a policy should not be strained to impose liability not intended or purchased. State Farm Automobile Insurance Co. v. Malcolm, 259 N.W.2d 833, 835 (Iowa 1977).

Applying these standards to the contract, I agree with trial court's conclusion the language of Coverage C in conjunction with condition 19 of the policy is unambiguous and does not provide for indemnification of the bank if either the borrower or the vehicle is located. Since the bank found Holt prior to filing this claim, skip coverage under the policy is not available.

Danielson, J., joins this dissent.