

COLORADO COURT OF APPEALS

Court of Appeals No.: 07CA2218
Boulder County District Court No. 06CV321
Honorable D.D. Mallard, Judge

Edward and Kimberly Ivkov, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

Progressive Halcyon, an Ohio corporation,

Defendant-Appellee.

JUDGMENT VACATED AND CASE
REMANDED WITH DIRECTIONS

Division IV
Opinion by: JUDGE ROY
Webb and Hawthorne, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced: November 26, 2008

Hill & Robbins, P.C., Robert F. Hill, John H. Evans, Jr., Nathan P. Flynn, Denver, Colorado; Evans & McFarland, LLC, J. Luke McFarland, M. Gabriel McFarland, Golden, Colorado; McFarland Law Offices, Zachary C. McFarland, Thomas D. McFarland, Golden, Colorado, for Plaintiffs-Appellants

Baker & Hostetler, LLP, Paul G. Karlsgodt, Casie D. Collignon, Denver, Colorado, for Defendant-Appellee

Roberts Levin Rosenberg, PC, Bradley A. Levin, Denver, Colorado, for Amicus Curiae Colorado Trial Lawyers Association

Plaintiffs, Edward and Kimberly Ivkov (the insureds), individually and on behalf of all others similarly situated, appeal the trial court's summary judgment in favor of Progressive Halcyon Insurance Company (the insurer) on all of their claims. We vacate the judgment and remand the case for further proceedings consistent with this opinion.

The insureds purchased motor vehicle insurance including liability and uninsured motorist/underinsured motorist (UM/UIM) insurance coverage on two vehicles in one policy from the insurer. Only the UM/UIM coverage is at issue here.

The policy charged a separate premium for each vehicle and coverage. It excluded UM/UIM coverage for "bodily injury sustained by any person while using or occupying: any motor vehicle . . . owned by you or a relative, other than a covered vehicle" (OBNI exclusion).

In addition, the policy insured two classes of insureds -- Class 1 included the named insured and any other person related to the named insured by blood, marriage, or adoption, including a ward or foster child, who is a resident of the named insured's household, or temporarily living elsewhere; Class 2 included any other person

occupying a covered vehicle with the consent of the named insured or a pedestrian if the accident involved the covered auto. If a customer purchased UM/UIM coverage on one vehicle, only Class 1 was insured. However, upon insuring a second vehicle both classes were insured.

This litigation was originally filed in 2003 as a class action with twenty-seven plaintiffs against twenty-five insurance companies. The action was subsequently severed in 2006.

The insureds asserted claims for: fraudulent concealment; negligent misrepresentation by omission; unjust enrichment; bad faith violation of the Colorado Consumer Protection Act; and declaratory judgment. The relief sought included compensatory damages together with punitive damages, treble damages, and attorney fees permitted by law, depending on the claim.

The insureds argue that the insurer had a duty to advise its insureds of the implications of *DeHerrera v. Sentry Insurance, Co.*, 30 P.3d 167 (Colo. 2001), and *Jaimes v. State Farm Mut. Auto. Insurance Co.*, 53 P.3d 743 (Colo. App. 2002), regarding the purchase of UM/UIM coverage. The insurer counters, and the trial court agreed, that because of its lawful multi-vehicle policy

business practice, the insureds did not have an option to purchase UM/UIM coverage on only one vehicle; thus, there was no decision for the insureds to make, nothing for the insurer to disclose concerning its practices and, for the same reason, the insureds could not have been misled by the wrongly included OBNI exclusion.

With respect to these issues, we follow the opinion of this division in *Wagner v. Travelers Property Casualty Co.*, ___ P.3d ___ (Colo. App. No. 07CA2112, Nov. 13, 2008), in which we held that the inclusion of the OBNI exclusion after *DeHerrera* and *Jaimes* was potentially misleading and that there was a genuine issue of material fact as to how the insurer represented it was selling UM/UIM coverage -- on a policy/household basis or on a vehicle basis.

Here, unlike in *Wagner*, the trial court dealt separately with the claims alleged in the complaint and granted summary judgment as to each. However, it did so based on its conclusion that, because the insurer used multi-vehicle policies and did not permit the insureds to purchase UM/UIM coverage on less than all vehicles owned, it had no duty under section 10-4-609, C.R.S. 2008, to

advise its insureds on the implications of *DeHerrera* and *Jaimes* as a matter of law. In *Wagner*, we held that section 10-4-609(4) does not require the disclosure, but concluded that that is not the end of the analysis and the claims pleaded by the insureds need to be addressed individually.

Further, the trial court concluded that the insurer need not “advise its insureds that the business practices of other insurance companies permit” acceptance or rejection of UM/UIM coverage separately for each vehicle. But, for the reasons set forth in *Wagner*, we discern a disputed issue of material fact whether the insurer failed to disclose that the purchase of UM/UIM coverage on additional vehicles provided marginal or no benefit.

Finally, at oral arguments we asked that each party assume an adverse result in *Wagner*, which had not then been announced and to distinguish this case from *Wagner*. Counsel for the insureds stated that there was no such distinction. Counsel for the insurer, however, stated that its OBNI exclusion was different from that considered in *Wagner* in that it reduced, but did not eliminate UM/UIM coverages. The insurer’s OBNI exclusion states:

Coverage under this Part III [UM/UIM] is not provided for bodily Injury sustained by *any person* while using or occupying:

.....

d. a motorized vehicle, including motorcycles and motorscooters, or device of any type designed to be operated on the public roads that is owned by you or a relative, other than a covered vehicle. *However, this exclusion shall apply only to the damages that are in excess of the minimum limits of liability coverage required by the Colorado Revised Statute, Section 10-4-609.*

(Emphasis added and supplied.)

At the outset, the first sentence, while worded somewhat differently, is legally indistinguishable from the OBNI exclusion in *Wagner, DeHerrera* and *Jaimes* and is, therefore, void as against public policy. Without the first sentence, the meaning of the second sentence is by no means clear because, as a matter of law, there is no exclusion to which it can refer. If, however, we read the provision as a whole and the second sentence is to be given meaning, the exclusion limits UM coverage when the insured occupies a nonowned vehicle to “not less than twenty-five thousand dollars because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than fifty thousand dollars because of bodily injury to or death

of two or more persons in any one accident.” See §§ 10-4-609(1)(a), 42-7-103(2), C.R.S. 2008.

In addition, the second sentence virtually eliminates UIM coverage. According to the policy, if a greater coverage is purchased, the limit of liability for UIM coverage is reduced “by all sums paid because of bodily injury by or on behalf of any persons or organizations that may be legally responsible.” Therefore, if the at-fault driver carries the minimum coverage required in Colorado and that policy pays its policy limits, there is not UIM coverage.

Most importantly, however, the exclusion continues to provide UM/UIM coverage on a vehicle, not an insured. It is also misleading in that the policy cannot be enforced as written and a reasonable customer who read the exclusion could believe that he or she must insure all owned vehicles under the insurer’s policy to have UM/UIM coverage on any of them. Therefore, in our view, the OBNI exclusion in the insurer’s policy is contrary to public policy under section 10-4-609, *DeHerrera*, and *Jaimes*, and its inclusion in the policy may be misleading in the absence of disclosures that the insureds assert should have been provided.

Therefore, the order granting summary judgment is vacated and the case is remanded for further proceedings consistent with the views expressed in this and the *Wagner* opinion.

JUDGE WEBB and JUDGE HAWTHORNE concur.

Court of Appeals

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NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41 (b), the mandate of the Court of Appeals may issue forty-six days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52 (b) will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT:

Janice B. Davidson
Chief Judge

DATED: July 1, 1998