Loyola Consumer Law Review

Volume 3 | Issue 4 Article 9

1991

Eighth Circuit Holds That Insurer's Duty to Make Certain Coverage Available Was Not Breached by Failure to Explain Such Coverage

Frank J. Troppe

Finally, the Fourth Circuit held that Miles had no duty to warn of the risk of the transmission of the AIDS virus in September of 1983. Although pharmaceutical companies must warn consumers of the reasonably foreseeable risks associated with their products, the court concluded that they cannot be expected to warn of every possible harm associated with those products. The evidence indicated that when the Koyne was administered to Mrs. Doe there was no medical consensus that AIDS was transmissible by blood or blood products. The closest thing Miles had to a warning of the risk was a bulletin issued by the National Hemophilia Foundation in December, 1982 that described an "increased concern" with the "potential risk" of blood or blood product transmission of AIDS. According to the court, the knowledge of the risk at that time was insufficient to require Miles to warn of the possibility of the transmission of AIDS through Koyne. The court refused to force pharmaceutical companies to warn the public about every possible risk associated with the use of drugs, blood or blood products, as that would undermine the effectiveness of the warnings regarding these products. Thus, the Fourth Circuit held that Miles had no duty to warn prospective users about the risks associated with the use of Koyne.

The Fourth Circuit's Disposition of the Case

The Fourth Circuit affirmed the district court's conclusion that there were no issues of material fact necessary to the resolution of any of the Does' claims. According to the court, Koyne was an unavoidably unsafe product, and therefore it was not unreasonably dangerous. Also, the court held that Miles complied with the applicable standard of care both in its duty to ensure the safety of Koyne and in its duty to warn of the product's inherent dangers. Therefore, the Fourth Circuit upheld the summary judgment for the defendant, Miles Laboratories.

Stephen McKenna

Eighth Circuit Holds That Insurer's Duty to Make Certain Coverage Available Was Not Breached by Failure to Explain Such Coverage

In ***Edens v. Shelter Mutual Insurance Company,*** 923 F.2d 79 (8th Cir. 1991), the court held that an insurer made underinsured motorist coverage available to a policyholder when the insurer specifically mentioned, but did not explain such coverage on renewal forms and other correspondence with the policyholder.

Background

Marcus Edens ("Edens") was seriously injured when another vehicle struck the automobile in which he was a passenger. At the time of the accident, Edens was a passenger in a car which belonged to Irwin and Sandra Johnson ("the Johnsons"). The Johnsons were policyholders of Shelter Mutual Insurance Co., Inc. ("Shelter Mutual").

The other driver's insurance company paid Edens $25,000 in settlement of his claim. This amount failed to compensate him fully for the extent of his injuries. The Johnsons had not elected to purchase underinsured motorist coverage which might have entitled them to recover from their own insurer any damages in excess of the amount covered by the policy owned by the driver-at-fault. Edens claimed he was entitled to underinsured motorist coverage under the Johnsons' policy, because Shelter Mutual did not "make available" such coverage as mandated in Ark. Code Ann. § 23-89-209 (Supp. 1989).

The Arkansas underinsured motorist statute provided that every automobile liability insurer must "make available" to its policyholders coverage protecting them against underinsured motorists. Edens argued that Shelter Mutual violated the statute and that the law should therefore impute such coverage to the policyholders, and thus allow him to recover under the statute as a passenger.

Shelter Mutual asserted that it had not deviated from the statutory requirement, and that even if it had, there was no reason to impute coverage. Additionally, Shelter Mutual argued that even if coverage were imputed to the Johnsons, Edens was beyond the sphere of recovery since he was only a passenger in the vehicle.

Edens sued Shelter Mutual in Arkansas state court. The suit was removed on diversity grounds to federal court by Shelter Mutual.

The District Court Proceedings

The United States District Court for the Western District of Arkansas held that Shelter Mutual's practice of offering underinsured motorist coverage to policyholders, by including an obvious reference to it on their application and renewal form, adequately "made available" such coverage, as required by the statute.

Edens contended that Shelter Mutual had the obligation to take affirmative, "commercially reasonable" steps to make available its product, and that simply offering it without explanation put policyholders at a disadvantage. Shelter Mutual counterargued that it met the "make available" standard in the statute by providing a "check-off" box for choosing underinsured motorist coverage, placed three inches above the insured's signature block on the application as well as filing rates with the state insurance commissioner.

The court found the insurer in compliance with the statute and granted summary judgment for the insurer.

The Court of Appeals Affirms

Sitting in diversity to decide this case of first impression under state law, the Court of Appeals expressed its reluctance to expand the meaning of the statute without guidance from the state courts. In making its decision, the court focused on the intent of the Arkansas legislature, and on judicial interpretations from other jurisdictions dealing with similar legislation.

The court gleaned the intent of the Arkansas legislature from Arkansas statutes regulating other

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Insurer's Duty

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types of insurance, namely uninsured motorist and "no-fault" coverage. The statutes governing these coverages provided that they would be included automatically in a policy unless the insured specifically rejected them. Ark. Code Ann. § 23-89-403 (Supp. 1984) and Ark. Code Ann. § 23-89-202 (Supp. 1989). This language was much stronger than that found in the underinsured motorist statute, which simply required that the coverage be "made available." This difference suggested to the court that the state legislature considered uninsured motorist and "no-fault" coverage more important than underinsured coverage, and that Shelter Mutual's duty to provide underinsured coverage was simply to make it available to its policyholders.

There were few decisions, from any jurisdiction, which interpreted the "make available" language. Edens relied heavily on *Jacobson v. Illinois Farmers Insurance Company*, 264 N.W.2d 804 (Minn. 1978) which approved of an insurer's actions as "commercially reasonable" when that insurer "made available" coverage by offering an application accompanied by information about the coverage to its renewing policyholders.

Shelter Mutual did not offer information to the Johnsons. Using the *Jacobson* analysis, Edens argued that Shelter Mutual did not "make available" the coverage. Edens contended that consumers in general, and the Johnsons in particular, were too ignorant to decide on the value of such coverage without more information. Rejecting this argument as one better addressed to and by the Arkansas legislature, the court stated its hesitancy to read a "commercial reasonableness test" into the statute and refused to do so.

Summary Judgment Was Proper

The Court of Appeals affirmed the summary judgment for Shelter Mutual on the basis that the insurer complied with the Arkansas underinsured motorist statute. The court did not reach the question of whether coverage would have been imputed if Shelter Mutual had violated the statute, nor did the court consider whether Edens's status as a passenger, rather than a policyholder, would have affected his ability to recover under imputed coverage. Finally, the court noted that this was a close case and that the waiver of oral argument by both sides was unfortunate.

Frank J. Troppe

Granting Contested Telephone Rate Increases Without Evidentiary Hearing Violates Due Process

Recently, the Supreme Court of Iowa ruled on the constitutionality of allowing a utility rate increase when opponents of the increase were not given the opportunity for an evidentiary hearing. In ***Office of Consumer Advocate v. Iowa State Commerce Commission,*** 465 N.W.2d 280 (Iowa 1991), the court held that the Iowa Utilities Board ("Utilities Board") violated the Office of Consumer Advocate's ("OCA") constitutional rights to due process when the Utilities Board determined that a proposed telephone rate increase was reasonable without having allowed the OCA opportunity to present evidence contesting the credibility of material facts submitted in support of the increase.

Background

In December 1985, United Telephone Company of Iowa ("United") filed a rate increase application with the Iowa State Commerce Commission (now known as the Iowa Utilities Board). United sought to increase its directory assistance charges from $0.25 to $0.75 and to create new operator service charges ranging from $0.75 to $2.75 effective as of January 5, 1986. Pursuant to Iowa Code § 476.6(7), the United official responsible for rates and tariffs attached to his application a sworn affidavit stating that the proposed increases were necessary to offset increased expenses incurred by the company as a result of a contractual change with Northwestern Bell. In addition, United provided a statement of projected revenues and expenses under the current and revised agreements.

United notified its customers of the proposed increases by letter and invited them to file written objections with the Utilities Board. The Utilities Board received several objections. One of these was from the OCA, asserting that the increases were unreasonable and unjust and asking the Utilities Board to deny United's application or, alternatively, to docket it for further investigation. OCA stated that United had failed to supply sufficient evidence supporting the reasonableness of the increases and questioned United's claim that the proposed changes were revenue neutral. It charged that United had understated its revenue projections and overstated its expenses.

United answered OCA by arguing that Iowa Code § 476.6(7) and corresponding administrative regulations allowed rate making without evidentiary hearings when rate changes affected only specific services and not basic or general rates. Although United admitted that its expense and revenue figures were based on estimates, the company argued that the increases were reasonable because it would suffer revenue losses even with the proposed increases.

Despite OCA's concerns, and without granting an evidentiary hearing, the Utilities Board authorized the tariff, or rate increases. When, however, the Utilities Board received a subsequent proposal by United to increase rates unrelated to those in its previous request, the Utilities Board questioned whether the proposed tariffs were piecemeal, general ratemaking requiring the submission of additional factual evidence. The Utilities Board then suspended United's rate increases and asked OCA and United to submit briefs solely on the legal issues of whether the increases were specific or general and whether the agency had the authority to approve the increases without evidentiary hearing.