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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice, concurring:

I write separately to emphasize the extremely narrow holding reached by the Court in this matter, a holding necessitated by the unique circumstances presented herein. In this case we are presented with the rare situation wherein two primary insurance policies were purchased to provide liability coverage for the same automobile. One policy was issued by Oak Casualty Insurance Company (“Oak Casualty”), the other by appellant National Union Fire Insurance Company (“National Union”). Subsequent to the accident at issue herein, an Illinois court declared Oak Casualty to be insolvent and ordered its liquidation. As a result, no coverage was available under the Oak Casualty policy to respond to Gauze’s claim and to defend Reed in the related underlying civil action brought against her by Gauze. Therefore, the West Virginia Insurance Guaranty Association (“Guaranty Association”), a statutory entity, was statutorily required to become involved in place of Oak Casualty in the defense of the Guaze lawsuit. The Guaranty Association also sought to determine whether any other available insurance existed to satisfy the Guaze claim. Pursuant to statute, all other insurance available to satisfy a “covered claim” must be exhausted before the Guaranty Association may pay a “covered claim” asserted against an insolvent insurer. W. Va. Code § 33-26-12 (1970).

Despite policy language that it “provides primary insurance” for “any covered ‘auto’ you own,”¹ National Union contends that its policy’s “other insurance” provisions operate to avoid requiring it to respond to Mr. Gauze’s claim and to defend Ms. Reed. According to National Union, its policy does not provide coverage for the “covered claim” herein because the existence of the Oak Casualty policy, regardless of the solvency of Oak Casualty, converted the National Union policy from a “primary” policy to an “excess” policy.² Were the National Union policy indeed an “excess” policy, its argument would have merit. However, the plain terms of National Union’s policy language declare that it provides primary coverage arising from operation of the vehicle involved in the Gauze accident.

Thus, this Court is presented with the unusual situation wherein two primary liability insurance policies were purchased to cover the same vehicle. In West Virginia,

¹ National Union’s policy contained the following provision in the section discussing “other insurance.”

For any covered “auto” you own, this Coverage Form provides primary insurance. For any covered “auto” you don’t own, the insurance provided by this coverage form is excess over any other collectible insurance.

The Human Resource Development Fund was both the owner of the vehicle at issue in this litigation and an insured under the National Union policy. Even if the insured did not own the vehicle, the policy would still be primary as there is no other *collectible* insurance due to Oak Casualty’s insolvency.

² It is undisputed that excess policies of insurance do not “drop down” to provide primary coverage when the primary insurer becomes insolvent.

primary insurance coverage follows the vehicle, not the driver. *Allstate Insurance Company v. State Automobile Mutual Insurance Company*, 178 W. Va. 702, 707, 364 S.E.2d 30, 33 (1987) (where two policies of insurance provide liability coverage for an automobile accident and contain competing “other insurance” provisions, the policy insuring *the vehicle* is to provide primary coverage and the policy insuring the driver becomes excess). The National Union policy at issue herein provided primary liability coverage for the accident at issue both under its own terms and under West Virginia law. Had Oak Casualty remained solvent, an examination of competing “other insurance” provisions contained in both the Oak Casualty policy and the National Union policy would have been necessary to determine how liability should be apportioned between the two. However, Oak Casualty’s insolvency eliminates the need for this task. Since no other solvent, primary policy exists, National Union’s policy is the sole primary policy available to respond to the Guaze claim. The Guaranty Association is statutorily prohibited from paying claims unless all other available insurance covering the claim is exhausted. Because National Union’s policy is a primarily liability policy, its insurance policy is required to be exhausted before the Guaranty Association’s obligation is triggered. If the value of Mr. Gauze’s claim exceeds the National Union policy limits, the Guaranty Association would then be required to provide coverage up to statutory limits and subject to statutory offset requirements. *See* W. Va. Code § 33-26-12.