

THE STATE OF NEW HAMPSHIRE
SUPREME COURT
2019 TERM
APRIL SESSION
2018-0706

JOHN O'DONNELL
v.
ALLSTATE INDEMNITY COMPANY

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE SEPTEMBER 2011 WAIVER OF ENHANCED UNINSURED MOTORIST COVERAGE UNDER JOHN O'DONNELL'S UMBRELLA POLICY WAS NOT IN FULL FORCE AND EFFECT AS THE 2015 POLICY WAS A NEW POLICY, AND WHETHER THE 2011 WAIVER WAS REVOKED BY HIM IS A MATERIAL QUESTION OF FACT.

Allstate Indemnity Company argues in its Brief that the 2011 waiver of underinsured motorist coverage was in full force and effect at the time of the November 2015 accident because Mr. O'Donnell had never revoked the waiver. *See*, Allstate Indemnity Company's Brief, p. 21. This argument is disingenuous and legally erroneous.

The statute at issue, R.S.A. 264:15, I, first mandates that equal coverage must be provided when an insured purchases an umbrella or excess policy: "for the purposes of this paragraph, umbrella or excess policies that provide excess limits to policies described in R.S.A. 259:61 shall also provide uninsured motorist coverage equal to the limits of liability purchased, unless the named insured rejects such coverage in writing." This statute then goes on to explain when a rejection of such equal coverage can occur: "rejection of such coverage by a named insured shall constitute a rejection of coverage by all insureds, shall apply to all vehicles then or thereafter eligible to be covered under the policy, and shall remain effective upon policy amendment or renewal, unless the named insured requests such coverage in writing." R.S.A. 264:15, I. A waiver of the equal coverage requirement will apply to an amendment of a policy or to renewal policies. In its Brief, Allstate Indemnity Company selected

phrases within two sentences of the statute to suggest that a rejection applies, apparently without limitation, unless the named insured requests the enhanced underinsured motorist coverage in writing. This suggested argument misdirects the Supreme Court's consideration of the argument before the Court and it is inconsistent with the plain language within the statute.

In fact, an initial rejection of enhanced underinsured motorist coverage will apply to all insureds and to all vehicles then or thereafter eligible to be covered under the policy and such a rejection would continue to apply "upon policy amendment or renewal." *Id.* The issue in this case has to do with the expiration of a personal umbrella policy, and a significant change to the coverage terms at the beginning of a new contract period. As such, the issue being considered is whether the 2011 waiver applies to an amendment policy, a renewal policy or to a new policy.

Additionally, there is a material question of fact as to whether John O'Donnell requested enhanced underinsured motorist coverage when he asked to change his coverage under the September 2, 2015 policy. It is undisputed that John O'Donnell approached Allstate Indemnity Company, through its agent, to change the face value of the umbrella policy from \$2,000,000 to \$1,000,000 as of September 2, 2015. Allstate's Answers to Plaintiff's Request to Admit, No. 5, Appendix to Brief (hereinafter AB), p. 166. Allstate admitted that John O'Donnell approached their agent to request the change. What is not known and what is not resolved, is whether John O'Donnell requested a change, in writing, and whether he requested equal uninsured motorist coverage under the umbrella policy when he

changed the overall coverage limits from \$2,000,000 to \$1,000,000 with respect to liability coverage.¹

Separately, the question remains as to whether or not the new insurance contract which began on September 2, 2015 was a renewal, an amendment, or a new and different policy. The Defendant's arguments in its Brief, along with the Superior Court's ruling on Summary Judgment, have not resolved the unanswered issues.

As was explained in the Appellant's opening Brief, the Superior Court issued an order finding that the new policy period, beginning on September 2, 2015, was a renewal with amendments. This cannot stand as it is inconsistent with the language of R.S.A. 264:15, I that allows an original rejection of enhanced underinsured motorist coverage to apply to a policy amendment or to a policy renewal. *Id.*

A renewal is not defined within R.S.A. 264:15, I. However, dictionary definitions define renew or renewal to mean "to make new again; to restore to freshness; to make anew spiritually; to regenerate; to begin again; to recommence; to resume; to restore to existence; to revive; to reestablish; to recreate; to replace; to grant or obtain an extension of." Black's Law Dictionary, 1165 (5th ed. 1979). Similarly, renewal is defined to mean ". . . to begin or take up again; resume; or to make effective for an additional period." Random House, Webster's Dictionary, 562 (2nd ed. 1996) *Accord*, 2 Couch on Insurance 3D § 29:1 (2010) ("it has been said that primarily, the term 'renewal' means that the original policy shall be

¹ The insurance agent, Daniel O'Donnell, was scheduled to be deposed in this matter on the day after the Superior Court issued its ruling on Summary Judgment and counsel for Allstate Indemnity Company cancelled the agent's deposition.

repeated in substance, it having the same significance in this connection as the word ‘extended,’ and renewal implies a fixed contract at the expiration of the original contract.”)

The 2011 waiver of enhanced underinsured motorist coverage does not apply to a new policy, as of September 2, 2015, where Mr. O’Donnell requested that the coverage terms were changed by \$1,000,000. The September 2, 2015 policy cannot be interpreted as a renewal where the policy had a significant change to the coverage amount; there was a \$1,000,000 change to the risk relationship. This was a new policy and a different policy.

II. THE 2011 WAIVER OF THE ENHANCED UNDERINSURED MOTORIST COVERAGE DID NOT EXTEND TO AN “AMENDED” POLICY WHICH BEGAN ON SEPTEMBER 2, 2015.

Allstate Indemnity Company suggests in its Brief that beginning on September 2, 2015, that Mr. O’Donnell continued his insurance policy relationship with amended limits. This is inaccurate. The statute allows a waiver to apply where a policy is amended. R.S.A. 264:15, I. An amendment to a policy occurs during the policy period, it does not apply to an expired contract.

In spite of the efforts to obfuscate the contractual relations between John O’Donnell and Allstate Indemnity Company, *see*, Allstate Indemnity Company’s Brief, p. 25, the September 2, 2015 personal umbrella policy was a contract which began on September 2, 2015 and ran until September 2, 2016 at 12:01 a.m. standard time. AB, p. 155. It was a term contract. There was an expiration date for the 2014 policy which ended on

September 2, 2015; and, a commencement date for the 2015 insurance policy which began on September 2, 2015. It was a new policy period with new coverage terms that were reduced by \$1,000,000.

There was no amendment with regard to the coverage terms that began on September 2, 2015 as an amendment requested by an insured must be done by an endorsement or a written change to the policy. AB, p. 65 (Allstate's policy terms). Additionally, an endorsement to an insurance policy is a term of art in the insurance industry which calls for a change to the terms of the policy. *See, Ellis v. Royal Insurance Companies*, 129 N.H. 326, 338 (1987) (“ . . . the purpose of an endorsement is, by definition, to change the terms of the policy[] . . .”). There was no such endorsement or policy change until the new policy took effect on September 2, 2015.

Allstate Indemnity Company answered interrogatories where it acknowledged that there was an insurance coverage change from \$2,000,000 coverage limits to \$1,000,000 coverage limits on the personal umbrella policy as of September 2, 2015. AB, p. 175. With respect to the personal umbrella policy period, there was no change or amendment of any kind from September 2, 2011 through September 2, 2015. *Id.* The only change that occurred during the policy period of 2014-2015 applied to the automobile insurance policy (not the personal umbrella policy) and that change occurred on August 16, 2015 which reflected only a change in Mr. O'Donnell's address. AB, p. 175.

Despite Allstate Indemnity Company's sworn answers to interrogatories, as referenced immediately above, Allstate Indemnity Company suggests that there was an amendment to their policy which somehow applied to the new contract which began on September 2, 2015.

What must be recognized is that one cannot amend what does not exist. You cannot amend the 2014-2015 policy because it expired on September 2, 2015 at 12:01 a.m. A new contract term began on September 2, 2015 with material changes to the coverage terms.

To amend means “to change or modify for the better. To alter by modification, deletion or addition.” Black’s Law Dictionary, 74 (5th ed. 1979). With respect to the personal umbrella contract that began on September 2, 2015, there was not an alteration, modification or deletion with regard to the coverages that existed in a prior, expired insurance contract; rather, it was a new contract, not an amended contract.

Allstate Indemnity Company also suggests that John O’Donnell acknowledged and seemingly agreed that the 2011 waiver would apply to any and all contractual agreements between Mr. O’Donnell and Allstate Indemnity Company. Appellee’s Brief, p. 35. Allstate references the selection/rejection form signed by Mr. O’Donnell on September 27, 2011 to suggest that the waiver of enhanced underinsured motorist coverage would apply to all continuations of my policy. *Id.* Even if the selection or rejection waiver could be construed as suggested by Allstate Indemnity Company, an agreement cannot supersede or control over the terms of a statute. Santos v. Metropolitan Property & Casualty Insurance Company, 2019 WL 275, 437 p. 10 (N.H. Supr. January 17, 2019). (“The parties to an insurance contract may not by agreement limit the required coverage in contravention of R.S.A. Chapter 264.”) R.S.A. 264:15, I permits an original waiver of underinsured motorist coverage to apply when there is a policy renewal or an amendment to the policy. The New Hampshire statute does not allow an original waiver of underinsured motorist coverage to

apply broadly and without limitations to any and all future relations between the insurer and the insured. *Id.* Allstate Indemnity Company's argument to the contrary through reliance on its contractual terms is without merit.

CONCLUSION

As of September 2, 2015, John O'Donnell reduced his coverage limits under the personal umbrella policy issued by Allstate Indemnity Company by \$1,000,000, and this coverage change occurred at the beginning of a new insurance contract. This was a material change to the coverage risks in relation to the prior, expired insurance contracts. Allstate Indemnity Company attempts to avoid providing excess or umbrella coverage by relying on a 2011 waiver of enhanced underinsured motorist coverage must fail where the new coverage terms defeat the suggestion that the 2015 policy was a renewal or an amendment. Allstate Indemnity Company did not ask or request John O'Donnell to waive underinsured motorist limits in association with his new contractual relationship which began on September 2, 2015. Accordingly, the 2011 waiver has no effect on the September 2, 2015 personal umbrella policy which requires equal coverage limits between the underinsured motorist coverage and the liability coverage set out within the declaration pages.

The Superior Court wrongly applied the 2011 waiver of enhanced underinsured motorist coverage by erroneously suggesting that the new policy on September 2, 2015 was a renewal with amendments. Such a construction of the statute is not allowed and summary judgment must be reversed.

Respectfully submitted,

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Dated: 6/10/2019

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the within was this day served via electronic submission through the Court's electronic filing system upon:

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CERTIFICATION OF WORD LIMIT

I hereby certify that the total words in this Reply Brief does not exceed the maximum of 3,000 words.

/s/ Mark D. Morrissette