UNITED SERVS. AUTO. ASS'N V. AGRICULTURAL INS. CO., 1960-NMSC-093, 67 N.M. 333, 355 P.2d 143 (S. Ct. 1960)

UNITED SERVICES AUTOMOBILE ASSOCIATION,
Plaintiff-Appellant,
vs.
AGRICULTURAL INSURANCE COMPANY OF WATERTOWN, N.Y.,
Defendant-Appellee

No. 6720

SUPREME COURT OF NEW MEXICO

1960-NMSC-093, 67 N.M. 333, 355 P.2d 143

September 06, 1960

Action by one insurer against another to recover amount on basis that fire policies issued by both parties on household goods destroyed by fire were concurrent and the parties were liable for loss on prorata basis. The District Court, Chaves County, George T. Harris, D.J., entered judgment for defendant and plaintiff appealed. The Supreme Court, Compton, C.J., held that where two fire policies insured household goods while in due course of transit from time property passed into custody of carrier, policies insured same property, same interest and against same risk and constituted concurrent insurance and payment of loss would be prorated on basis of total insurance, even though one policy did not contain a proration clause.

COUNSEL

William L. Shaner, Roswell, for appellant.

Atwood & Malone, Paul A. Cooter, Roswell, for appellee.

JUDGES

Carmody, Moise and Chavez, JJ., concur. Noble, J., not participating.

AUTHOR: COMPTON

OPINION

*{*334}* **{1}** This controversy is between two insurers of unscheduled personal property destroyed by fire August 7, 1957, while in transit from Chicopee, Massachusetts, to Roswell, New Mexico, the property of one Christopher P. Dixon.

{2} Previously, on July 23, 1957, the insured procured from the appellant a blanket policy of insurance designated as "Household Goods and Personal Effects Floater" insuring unscheduled personal property and household goods owned by him against loss by fire while in transit, wherever located, in amount of $6,000.

{3} Subsequently, on August 6, 1957, the insured also procured transit insurance from the appellee insuring unscheduled personal property and household goods owned by him against loss by fire while in transit from Chicopee, Massachusetts, to Roswell, New Mexico, in the amount of $3,000.

{4} The value of the property destroyed was $6,006.50, of which amount the appellant paid Dixon $4,006.50, and the appellee paid $2,000. Thereupon, the appellant instituted this action against appellee to recover the amount of $1,000. The trial court found that the policies were concurrent and that the parties were liable for the loss pro rata. Judgment was entered accordingly, and the appellant appeals.

{5} The appellant contends that the appellee was primarily liable for the loss to the extent of $3,000, as its policy was specific in covering the loss from Massachusetts to, Roswell, New Mexico. On the other hand, appellee contends that the policies constitute concurrent insurance and the loss should be apportioned to the total insurance carried.

*{*335}* **{6}** As we view the pertinent provisions of the policies, they are substantially the same.

{7} The appellant's policy provides:

"To insure property described herein while in due course of transit under conditions heretofore mentioned, from the time said property passes into the custody of the carrier at initial point of shipment and to cover thereafter until delivered in accordance with bill of lading, shipping receipt or other contract of shipment to permanent storage or insured's temporary or permanent address."

{8} The appellee's policy provides:

"To insure property described herein while in due course of transit by trucks operated for or by the Carrier or by or for any connecting carrier to whom transferred by the Carrier under bill of lading, shipping receipt or other contract of shipment issued by the Carrier, from the time said property passes into the custody of the Carrier at initial point of shipment and to cover thereafter until same is delivered at final point of destination, named herein."

{9} In determining whether the policies in question are primary or concurrent, the test is whether they insure the same property, the same interest, and against the same risk; if so, they constitute double or concurrent insurance, and payment for loss is to be prorated on the basis of the total insurance. Liberty Motor Freight Lines, Inc. v. United States Guarantee Co., 133 N.J.L. 35, 42 A.2d 394, 169 A.L.R. 384, and annotation

following. Also see 46 C.J.S. Insurance 1207; 29(a) Am. Jur. Insurance, 1717, and cases cited. Compare Miller v. Home Ins. Co., 108 Pa. Super. 278, 164 A. 819.

{10} It is further asserted that the court erred in holding that appellee was entitled to prorate the loss since its policy did not contain a proration clause. True, its policy contains no such provision; nevertheless, in case of double or concurrent insurance, all insurers are liable and the loss falls on them equitably in proportion to the insurance carried. Commercial Standard Insurance Co. v. American Employers Insurance Co., 6 Cir., 209 F.2d 60. See also 29(a) Am. Jur. Insurance, 1717, supra; 46 C.J.S. Insurance 1207, supra.

{11} We conclude that appellee's position is sound. Both policies insure the same property, the same interest, and against the same risk. It follows, therefore, the judgment should be affirmed.

{12} It is so ordered.