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IN THE SUPREME COURT OF THE STATE OF DELAWARE

UNITED SERVICES AUTOMOBILE ASSOCIATION, Intervenor Below, Appellant, v. WILLIAM T. SCHWEIZER, MICHAEL J. LEWIS, and PATRICIA A. SCHWEIZER Plaintiffs Below, Appellees.	)	No. 137, 2014 Court Below: Superior Court of the State of Delaware in and for New Castle County. C.A. No.: N13C-07-239

APPELLANT UNITED SERVICES AUTOMOBILE ASSOCIATION'S REPLY BRIEF IN SUPPORT OF ITS APPEAL FROM THE DECISION OF THE SUPERIOR COURT

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I. Under the criteria set forth in *Sutch v. State Farm*, USAA filed its motion to intervene in a timely fashion.

a. Appellee Schweizer argues that USAA "sat on its rights" without adequate reason for delay in filing its motion to intervene. The Schweizers also appear to deny that Delaware public policy mandates that their claim be decided on its merits. Although the Schweizers acknowledge that *Sutch v. State Farm* is the controlling law on when a UM auto carrier is required to intervene, (Ans. Br. at 8), they do not cite or analyze the operative language in *Sutch* on when the motion to intervene must be filed; that is, when the carrier has "the opportunity to intervene to protect its interests before the arbitrator's decision ripened into a Superior Court judgment."[1] In the present case, USAA moved to intervene on January 15, 2014, which was not only before March 6, 2014 when the court below entered its order adopting the Commissioner's recommendations; and before February 27, 2014, the date on which the court below heard the motion to intervene; but also before January 30, 2014, the date on which the Commissioner issued his findings and recommendations. USAA timely filed its motion to intervene under the *Sutch* criteria.

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[1] *Sutch v. State Farm*, 672 A.2d 17, 22 (Del. 1995).

The Schweizers' reliance *Dairyland Ins. Co. v. Clark*[2] is misplaced. In *Dairyland*, the carrier had undertaken settlement negotiations with counsel for its insured before the commencement of suit, had knowledge of the law suit against the tortfeasor, and been granted an indefinite extension of time by the insured's counsel in which to file responsive pleadings.[3] The carrier was later notified by counsel, per stipulation, that intervention was required within 10 days. Because the carrier failed to do so until after 35 days, the court ruled that the intervention was untimely.[4] All of these circumstances materially distinguish *Dairyland* from in the instant case. USAA did not have prelitigation settlement discussions with the Schweizers, did not know about the suit until after a default judgment had been entered, and never received an offer by counsel of extended time to intervene.

Likewise, the Schweizers' reliance on *Peak Property & Casualty v. Speed*[5] is misplaced as the material facts are distinguishable from the instant case. In *Peak*, the carrier was aware of the underlying action for over a year in which discovery was available to the parties, knew of depositions going forth that might

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[2] 476 S.W.2d 202 (Ky. 1972).

[3] *Id*. at 204.

[4] *Id*. at 205.

[5] 2010 Del.Super. LEXIS 36, Cooch, J. (Del. Super. Feb. 12, 2010).

affect its position, but decided not to intervene until after discovery closed and without offering any reason for the delay.[6] In the present case, USAA did not know of the suit, nor of any opportunity to conduct discovery until after a default judgment had been entered. The Schweizers' citation to *Saucedo v. Bishop*[7] fails for similar reasons. In *Saucedo*, the UM carrier was aware of the underlying suit, took the deposition of the plaintiff, received copy of the default judgment and the amount of damages awarded, and still did not intervene until over five months later.[8] These facts differ significantly with the present case. USAA did not receive copy of the underlying complaint, the default judgment, and notice of the inquisition hearing until October 31, 2014, only two months before the inquisition hearing. Despite requests from USAA that the Schweizers provide copy of their medical records and treatment status even before USAA knew of the law suit, they never received such documentation until after the inquisition hearing. (A, 27-29).

The Schweizers complain that USAA has not given a reason as to why it failed to intervene prior to the inquisition hearing. (Ans. Br. at 9). As stated above, the answer is self-evident: USAA did not have any of the requested

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[6] *Id*. at *15.

[7] 2002 Cal.App. LEXIS 11070 (Cal.App. Nov. 27, 2002).

[8] *Id*. at *6-*7 and *19-*20.

documentation that would make attendance at an inquisition hearing meaningful. To be sure, USAA had not yet retained counsel and did not understand the finer points of Delaware law on intervention, but it did not "sit on its rights" or "not do anything about it," as it had already specifically requested on 10 separate occasions information that would enable it to act on the Schweizers' claim. (A, 5-13). For over a year and a half, the Schweizers failed to produce requested information essential to handling their claim, but now criticize USAA for not participating, on two months notice, of an inquisition hearing in a law suit that USAA previously had no knowledge. *Id*.

The Schweizers complain that they would be prejudiced if USAA is allowed to intervene, because they would have to litigate a disputed claim in the normal fashion before they would be compensated. (Ans. Br. at 11-12). The Schweizers assume that they are entitled to compensation and insinuate unfair practices by USAA, but fail to recognize that they have not allowed USAA a fair opportunity to evaluate their claims. Strangely, the Schweizers argue that USAA is not prejudiced by not intervening even though it would not be permitted to conduct discovery, take depositions, and conduct medical exams to ascertain the nature and extent of the plaintiffs' injuries and damages.

Contrary to the Schweizers' assertion that USAA has not contested the

awards to Patricia Schweizer and Michael Lewis, (Ans. Br. at 13), USAA went on record in its motion to intervene that it was not only concerned about William Schweizer's pre-accident medical history, but also that "the plaintiffs are only allowed to recover for those injuries that were proximately caused by this accident." (B, 4). In fairness to the Schweizers, USAA went on to state that "plaintiffs are entitled to be fully compensated for all of their injuries proximately caused by the accident, but should not be entitled to a windfall." (B, 5). Thus, the claims of all plaintiffs have properly been placed in issue. The Schweizer's suggestion that USAA now seeks a second bite of the apple following the Commissioner's recommendations, (Ans. Br. at 13), ignores the fact that USAA never had a first bite of the apple. Indeed, USAA sought to intervene before the Commissioner issued his findings and before plaintiffs had produced any documentation of the their medical histories and damages.

Without providing any legal authority, the Schweizers argue that because USAA paid PIP benefits to the plaintiffs, USAA cannot argue that the plaintiffs had pre-existing conditions that would affect their claim for UM benefits. The Schweizers ignore that fact that they carried minimal PIP benefits that quickly exhausted, (A, 10), after which USAA no longer monitored the claim because it was not liable to make further payment. For purposes of subsequent claims, PIP

payments are considered accommodation payments and may not be used to prove the liability of the payor.[9] With regard to any pre-existing medical conditions that would bear further scrutiny before their damages could be determined, the Schweizers are content to rely solely on the Commissioner's findings when they know that the Commissioner did not review any records or reports on the plaintiffs' pre-accident medical histories. (A, 32-33).

b. The Schweizers argue that because a default judgment had been entered against the tortfeasor, USAA is bound by that judgment. They ignore the fact that USAA had no knowledge of the law suit or the default judgment until they were informed by the Schweizers' counsel a month after the default had been entered. (A, 029). USAA obviously had no proper opportunity to intervene and protect its position in these circumstances. In conclusory fashion and without legal authority, the Schweizers then argue that USAA did nothing and that the adoption of the Commissioner's recommendations and entry of judgment occurred as a "matter of course." As previously discussed, USAA moved to intervene well before the Commissioner's recommendations were entered as a judgment by the court below.

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[9] *See* 10 *Del. C.* §4317, 18 *Del. C.* §906(a)(2), and Del.R.Evid. 408 (payments made by tortfeasor not admissible to prove liability of tortfeasor, whether an individual or a UM carrier.) *See Connely-Yancy v. Nationwide*, 2006 WL 1148758, Brady, J. (Del.Super. Apr. 27, 2006).

The Schweizers misstate the facts in *Watkins v. Matthews*.[10] They state that the plaintiffs had not placed the uninsured carrier on notice of the arbitration, but there is nothing in Judge Graves' decision stating that. Rather, the carrier was informed of the law suit at the time it was filed and put on notice that there was a claim in excess of the tortfeasor's coverage. When the carrier sought to intervene after the Rule 16.1 arbitration hearing, Judge Graves granted their motion to intervene because the arbitrator's decision had not yet ripened into an entry of judgment against the tortfeasor, as provided in *Sutch*. In fairness to the plaintiff, the judge conditioned the carrier's intervention by requiring it to pay the arbitration expenses of the parties.[11] Even though USAA was not made aware of the Schweizers' law suit until after a default had been entered, its motion to intervene mirrors the timing of the carrier in *Watkins*, and should be granted for the same reasons. As previously stated, USAA has offered to pay the inquisition hearing expenses of the plaintiffs below.

The Schweizers argue that because a default was entered against the tortfeasor, USAA should be bound by the findings at the inquisition hearing even though it sought to intervene before the court had entered the default and adopted

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[10] 1996 Del.Super LEXIS 32, Graves, J. (Del. Super. Feb. 23, 1996).

[11] *Id*. at *2-*3.

the findings of the Commissioner. The Schweizer's position is contrary to the *Sutch* decision. Their reliance on *Johnson v. Hayes Cal Builders*[12] is misplaced. In *Johnson*, the intervening carrier sought to set aside the entry of a default and judgment against its insured arising from pleading and discovery irregularities in the underlying case.[13] Those circumstances bear no relationship to the present case in which USAA was unaware of the underlying law suit. Likewise, the Schweizers' citation to *Gerdesmeier v. Sutherland*[14] offers no support to their argument that the "tort judgment" conclusively entitles them to the damages awarded at the inquisition hearing. In *Gerdesmeier*, the plaintiffs gave the UM carrier notice of the underlying suit, sent the carrier all of the requested medical information, and informed the carrier of their motion to default the torfeasor.[15] None of these circumstances arose in the present case.

The Schweizers make the curious argument that although they had not responded to USAA's repeated requests for all documentation regarding plaintiffs' medical treatment and status as well as further information on the tortfeasor's

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[12] 387 P.2d 394 (Cal. 1963).

[13] *Id*. at 395-96.

[14] 690 N.W.2d 126 (Minn. 2004).

[15] *Id*. at 127.

uninsured status, (A, 5-14, 27-28), USAA "knew this was an uninsured motorist claim and that it ultimately would be responsible for paying plaintiffs for their damages." (Ans. Br. at 20). Their argument ignores the simple fact that in a vacuum of information, USAA could not meaningfully evaluate and participate in an inquisition hearing on their damages. The Schweizers then assert, without documentary support, that USAA had all along acknowledged their claim was a "valid" uninsured motorist claim when, in fact, USAA had acknowledged a claim, but made no representation that the claim was "valid," pending receipt of additional supporting documentation. (A, 28). The Schweizers speculate that USAA made a "reasoned decision to take no action until after the inquisition hearing," but ignore USAA's consistent efforts from January 2012 through October 2013 to address their claims without any receiving a response from the Schweizers. (A, 5-14, 27-28). In these circumstances, if USAA was neglectful in not intervening during the two-month interval between the Schweizers' unilateral notice of the inquisition hearing on October 31, 2013 and the hearing date on January 7, 2014, the neglect was excusable because the Schweizers never provided the information requested and needed by USAA to evaluate their uninsured motorist claims or make a proper decision on intervening in a law suit and an inquisition hearing that was presented to them out of the blue.

ARGUMENT

II. The issue presented on appeal is whether the court below erred as matter of law when it denied USAA's motion to intervene as untimely.

In its motion to intervene and at oral argument, USAA raised supporting arguments on litigating the plaintiffs' claims on their merits and on the reasons for USAA's failure to intervene until a week after the inquisition hearing, but before the entry of a judgment. These arguments are now properly before the Court on appeal. In its motion, USAA contended that "the plaintiffs are only entitled to recover for those injuries that were properly caused by this accident. Denying USAA the opportunity to address the issue of any pre-existing medical conditions on the merits would potentially result in the plaintiffs being unfairly compensated for more than the just value of their injuries." (B, 4-5). At oral argument, USAA argued that the plaintiffs' claim for damages needed "to be litigated through discovery, . . . to do some discovery, have a . . . defense medical exam and go through the usual discovery to fully flesh out what the injuries are, . . ." (A, 43). Delaware law favors resolution of claims on their merits rather than disposition on procedural formalities.[16] In a timely manner, USAA moved to intervene so that it

[16] *See, e.g., Keener v. Isken*, 58 A.3d 407, 408 (Del. 2013); *Drejka v. Hitchens Tire Serv., Inc.*, 15 A.3d 1221, 1224 (Del. 2010).

could perform the discovery and investigation that it was unable to accomplish due to plaintiffs' failure to provide requested information essential to the evaluation of plaintiffs' claims.

The question of why USAA did not retain counsel sooner or seek to intervene before the inquisition hearing was also raised at oral argument when the court asked: "Why didn't USAA seek to have the inquisition postponed, seek to intervene at that point?" (A, 47.) USAA pointed out that "there was correspondence between the USAA adjuster and [counsel for the Schweizers] on whether or not in fact there was coverage through the tortfeasor's carrier." *Id*. USAA had not yet retained counsel because it wanted clarification from plaintiffs' counsel on this point. As discussed previously, USAA also had not received any of the medical information it had been requesting for over a year and a half. In this context, it may well have been neglectful of USAA not to retain counsel and intervene before the inquisition hearing, (A, 48), but there were legitimate reasons to explain a delay in filing its motion to intervene.

The above arguments were fairly raised in the court below and are properly presented for review on appeal. The question presented was whether USAA timely filed its motion to intervene. (A, 55). The arguments for and against this question have been preserved in the record and in the orders of the court below.

CONCLUSION

For the reasons discussed above, Appellant United Services Automobile Association requests that the Court reverse the February 27, 2014 and March 6, 2014 orders of the lower court, vacate the findings of the inquisition hearing, permit USAA to intervene in the case below, and remand the matter for consideration on the merits of a fully developed record.

Respectfully submitted,

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