STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

AUTO CLUB INSURANCE ASSOCIATION,

Plaintiff,

vs. File No. 88-61975-CK

KAREN RUTH HALONEN, Personal Representative of the Estate of Steven Roy Halonen, Deceased. HON. LAWRENCE M. GLAZER

Defendant.

OPINION AND ORDER

ON SUMMARY DISPOSITION

This is a declaratory judgment action arising out of stipulated facts.

The parties have stipulated to the following pertinent facts:

On the night of June 6, 1986 Plaintiff's decedent, Steven Halonen, age 27, was riding his motorcycle through the parking lot of the Lansing Mall when he was struck and killed by an automobile driven by Martino Parsons.

At the time of the fatal accident, Martino Parsons was 15 years old, possessed no driver's license and had not taken a drivers education course. He resided with his parents, Roosevelt and Eva Parsons.

The car which Martino Parsons was driving was a 1981 Ford solely owned by his father, Roosevelt Parsons. The 1981 Ford was insured under a no-fault automobile insurance policy issued by Transamerica Insurance Corporation (Policy Number JFA1780 2561) with maximum limits of bodily injury liability coverage in the amounts of $20,000.00 per person/$40,000.00 per occurrence.

Subsequently, decedent's personal representative (Defendant in the instant action) filed a wrongful death suit against Roosevelt and Martino Parsons. That suit (Ingham County Circuit Court File No. 86-57265-NI) was settled when Transamerica agreed to pay its policy limits and be released (i.e., $20,000.00).

Martino Parsons lived with his father, Roosevelt Parsons and his mother Eva Parsons. Eva Parsons owned a 1977 Oldsmobile insured under a policy of no-fault insurance issued by Plaintiff herein, Auto Club Insurance Association (Policy No. 1-220-83-25-07). The applicable policy limit for bodily injury of the ACIA insurance policy are $50,000.00 per person, $100,000.00 per occurrence.

In this action, Plaintiff ACIA seeks a declaration that it has no duty to pay Defendant under its insurance policy.

Each party has filed a motion for summary disposition, based upon the stipulated facts and the policy in question.

Decision on the parties' cross-motions is governed by Michigan law as applied to the insurance policy in question, which the Court has reviewed.

At page 12 under the heading "GENERAL POLICY CONDITIONS APPLYING TO ALL PARTS OF THIS POLICY" we find: "4. NO DUPLICATION OR PYRAMIDING.

Under no circumstances will we be required to pyramid or duplicate any types, amounts or limits of motor vehicle coverages available from us or any other insurance company. This condition does not apply to death indemnity coverage."

Turning back to the 'DEFINITIONS USED THROUGHOUT THIS POLICY", the Court finds no definition of "pyramid". The Court also finds that the term "pyramid" is a term of art, not in common usage (except perhaps, to describe so-called "pyramid sales schemes").

Furthermore, the prohibition against pyramiding is clearly an exclusion, yet it is found under the section entitled 'GENERAL POLICY CONDITIONS APPLYING TO ALL PARTS OF THIS POLICY."

In this respect, the facts of this case are virtually on all fours with the facts in Yahr v Garcia (1989) 177 Mich App 705.

If anything, the questioned clause in Yahr was considerably less ambiguous than the quoted "non-pyramiding" clause at issue here.

The clause in Yahr read:

"OTHER INSURANCE IN THE COMPANY

With respect to any occurrence, accident or loss to which this and any other insurance policy or policies issued to the insured by the company also apply, no payment shall be made hereunder which, when added to any amount paid or payable under such other insurance policy or policies, would result in a total payment to the insured or any other person in excess of the highest applicable limit of liability under any one such policy."

Not only did the Yahr Court hold the quoted clause ambiguous, it also held:

> "The 'other insurance' clause in this policy appears under the Conditions Section on the next to last page of the policy. It does not logically belong there, as it is much more an exclusion than a condition."

Exactly the same words may be written about the placement of the "anti-pyramiding" clause in the instant policy.

Plaintiffs take the position that Powers v DAIIE, 427 Mich 602 (1986) is not binding precedent because it was not a majority decision. This is true; however, the opinion of Justice Williams was adopted by the Michigan Court of Appeals panel which wrote Yahr; thus, it is now the law of Michigan, unless a different panel holds to the contrary.

The Yahr Court went on to state:

> ". . . we find that an insured is not without some reasonable expectations when choosing insurance. One such expectation is that when one refers to the Exclusions section, one will find listed there the situations which the policy will not cover. . . . A situation in which more than one policy has liability for an accident falls in that category. Thus we agree that this . . . insurance contract defeated the insured's reasonable expectation that exclusions would appear in the Exclusions section." (At 711)

A person seeking to understand what (and whom) this policy covers would logically begin by examining the Table of Contents found at page two. That table is divided logically. It begins with the "Definitions" section. Then follow parts I through V, setting out the particular types of coverage. Part I is "Liability Insurance Coverages". Part II is "Michigan No Fault Insurance Coverages". Part III is "Death Indemnity Insurance Coverage". Part IV is "Uninsured Motorists Coverage". Part V is "Car Damage Insurance Coverages". The last substantive section is entitled "General Policy Conditions Applying to All Parts of this Policy".

The reasonably prudent prospective purchaser of insurance who wishes to know what liability he or she will incur, should he or she (or a member of his or her family) injure or kill another person while operating a motor vehicle, would logically turn to part I, "Liability Insurance Coverages". Within this section, there is, in the Table of Contents, a line entitled "Exclusions", indicating that this is found at pages four and five. Turning to that section, we do not find any heading entitled "Exclusions". However, we do find sections entitled "PERSONS NOT COVERED", "CARS NOT COVERED", and "BODILY INJURY AND PROPERTY DAMAGE NOT COVERED".

If an insured is to be uncovered for liability for death or injury caused by a member of the household driving a household car, surely that exclusion will be found in one of these sections.

The sections, in their entirety, read as follows:

> "PERSONS NOT COVERED
>
> The Liability Coverage does not cover:
>
> the United State of America and any of its agencies;
>
> a person covered by any contract of nuclear energy liability insurance;
>
> a person covered by the Federal Tort Claims Act.
>
> CARS NOT COVERED
>
> The liability Coverage does not cover:

YOUR CAR if used in the course of the car business. YOU or a RELATIVE, however, are covered;

an OTHER CAR if used in the course of the car business by anyone;

an OTHER CAR if used in the course of any other of an insured person except a private passenger car operated or occupied by you.

BODILY INJURY AND PROPERTY DAMAGE NOT COVERED

WE will not pay for:

Bodily Injury during the course of employment; to an insured person's domestic employee who is entitled to Worker's Compensation; or to any other employee of an insured person;

Bodily Injury to an insured person's fellow employee while using an INSURED CAR in the course of employment. However, WE will cover YOU;

Bodily injury or property damage if an insured person assumes liability by contract or agreement;

Bodily Injury or property damage caused intentionally by or at the direction of an insured person; property damage to motor vehicles for which an insured person is liable due to Section 3135 (2)(d) of the Code. This Exclusion does not apply if the words "INCLUDING MICHIGAN LIMITED PROPERTY DAMAGE LIABILITY COVERAGE" are shown on the Declaration Certificate;

property damage to any property owned by, in charge of, transported by or rented to an insured person. Property Damage to a residence or a private garage or carport rented to an insured person is covered.

In summary, the "PERSONS NOT COVERED" section does not purport to exclude any member of the household driving any household car.

The "CARS NOT COVERED" section purports to exclude only business uses of "YOUR CAR" and "OTHER CAR". The "BODILY INJURY AND PROPERTY DAMAGE NOT COVERED" section excludes a number of

specialized situations, such as employment and contractual assumption of liability and intentional damage; it does not exclude any of the ordinary personal uses of a personal automobile.

Justice Williams, writing in Powers, stated:

> "In [Francis v Scheper, 326 Mich 441] At 447-448, [the Court] held that 'it was incumbent upon defendant casualty company . . . so to draft the policy as to make clear the extent of non-liability under the exclusion clause.' The implication of this rule is not only that ambiguities are to be construed against the insurer, but that the insurer has a positive and affirmative duty to 'make clear' any exclusion.
>
> . . . Applying this rule to the instant cases, we discover that there was no reference at all to the so-called owned-automobile exclusion in the Exclusions section. Consequently, the insurers are in violation of this rule and the exclusion is invalid unless it can be said that the definition of 'non-owned automobile' was not a definition clause but an exclusion clause."

At 633, Justice Williams wrote:

> "Inasmuch as the excluded cars, i.e., cars owned by family members residing in the same household as the policyholder, are the ones most likely to be occasionally driven by the other insured family members, the owned-vehicle exclusion is the most significant exclusion in the liability coverage of the policies. If a policyholder refers to the section entitled "Exclusions", a long list of exceptions to coverage would be discovered, but not a single word regarding the exclusion most likely to be invoked."
>
> "We believe that insured persons reading the liability provisions of these policies would reasonably expect liability coverage when driving the automobile insured by the policy and when driving other

cars not owned by the insured. If the insurer intends to exclude such coverage when the insured person drives a certain car or cars, it is simple enough to say so." (Emphasis in original)

Turning to the section of the instant policy entitled "LIABILITY INSURANCE COVERAGES", the prudent purchaser would find that "insured person(s) means:

FOR YOUR CAR, you and any relative,

Any other person using it with your permission;

For OTHER CARS, used with the permission of a person having the right to grant it and if YOUR CAR is a private passenger car . . . ,

You, if an individual,

any relative who does not own a private passenger car or utility car . . ."

Under the above-quoted clause, the minor son of the Parsons would seem to qualify as an insured person.

The second critical clause to which the prudent purchaser would turn is entitled "BODILY INJURY LIABILITY COVERAGE PROPERTY DAMAGE LIABILITY COVERAGE".

Under that caption, the policy states:

"We will pay damages for which any insured person is legally liable because of bodily injury or property damage arising out of the ownership, maintenance or use, including the loading or unloading of an INSURED CAR."

The Court notes that the key phrase is "INSURED CAR". It is not "YOUR CAR" or "OTHER CAR".

What is the prudent purchaser to make of this phrase, "INSURED CAR"? Does it mean the insured car, or does it mean any insured car? This is, indeed, the critical question.

The prudent purchaser would look back over the page and find, two paragraphs earlier (in the section defining "Insured Person") this clause:

"Any other person who does not own or hire, but is

legally responsible for the use of, any INSURED CAR operated by an insured person."

ose juxtaposition of this language, a prudent entitled to believe that the phrase "INSURED n defining Bodily Injury Liability Coverage is intended to refer back to the phrase "ANY INSURED CAR" in the previous section defining "insured person(s)".

In summary, the instant policy, like the policy examined in Powers, includes key phrases of exclusion only in the Definitions section. These key exclusions are not contained in either the sections defining the pertinent liability nor in the Exclusions sections.

In the instant case, as in the Powers case, the phrases "YOUR CAR" and "OTHER CAR" have commonly understood meanings. It is only by turning to the Definitions section that the purchaser would learn that "OTHER CAR(S)" has a special, limited meaning:

> "any car or trailer that you or any resident of your household does not own, lease for 31 days or more, or have furnished or available for frequent or regular use."

The Court thus finds that the ordinary, reasonably prudent purchaser would give the phrases "YOUR CAR" and "OTHER CARS" their ordinary, plain meanings, just as would the prudent purchaser in the Powers and Yahr cases. The Court finds that this policy violates "Rule Number three", discussed in Powers and Yahr, in that the insurer has failed to draft the policy so as to make clear the extent of non-liability under the Exclusion clause.

For the reasons stated above, summary disposition is GRANTED to Defendant Halonen, and summary disposition is DENIED to Plaintiff Auto Club Insurance Association.

LAWRENCE M. GLAZER
Circuit Judge

Dated: October 4, 1989

PROOF OF SERVICE

I hereby certify that on the 4th day of October, 1989 I served a copy of the foregoing Order upon each attorney of record in the above matter, by placing same in a sealed envelope, addressed to their business addresses as disclosed by the court file, and placed in the U.S. Mail at Lansing, Michigan.

Laurie Klont

Laurie M. Klont