UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
OP 1079

TITAN INSURANCE COMPANY, f/k/a/
IMPERIAL MIDWEST INSURANCE COMPANY

Plaintiff,

Case No. 5:94-CV-177

v.

HON. ROBERT HOLMES BELL

NANCY A. BAKHUYZEN, *et al.*,

Defendant.
_____/

OPINION

Before this court is plaintiff Titan Insurance Company's motion for summary judgment in which it seeks a declaration that, under the terms of its automobile insurance policy with the deceased, Nicholas L. Bakhuyzen, it owes the estate of the same no duty to defend nor indemnify it with respect to claims arising out of a motor vehicle accident which claimed the life of the deceased.

I.

On March 10, 1993, Nicholas Bakhuyzen was driving a motor vehicle that collided with a train. The accident resulted in the death of Bakhuyzen and damage to the train.

Plaintiff had issued an automobile insurance policy (# 01-PA-000124409) to the deceased for the policy period of November 18, 1992 to May 18, 1993, covering a 1983 Dodge pickup truck.

In the section of the policy entitled "PART A - LIABILITY," the policy provides:

> We will pay damages for **bodily injury** or **property damage** for which any **insured** is held legally responsible because of an auto accident. We will settle

or defend, as we consider appropriate, any claim or suit asking for these damages. Besides our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted. We have no duty to defend any suit or settle any claim for **bodily injury** or **property damage** not covered under this policy.

This liability section also provides the following definition for this part of the policy:

> **Your covered auto** includes any other **auto** not owned by, furnished or available for the regular use of you or a **family member**. No vehicle shall be considered **your covered auto** unless you or a **family member** use it with permission of the owner.

Finally, the liability section provides the following exclusion:

> We do <u>not</u> provide Liability Coverage for any person:
>
> * * *
>
> 7. Maintaining or using any vehicle while that person works or otherwise engages in any **business** (other than farming or ranching) not described in Exclusion 6 [related to selling, storing, repairing, parking, or servicing vehicles]. This exception does not apply to the maintenance or use of a private passenger auto, pickup or van that you own, or a trailer used with a vehicle described above.
>
> The policy's definition section provides in relevant part:
>
> The definition of boldfaced words follows.
>
> * * *
>
> **Auto** means:
>
> 1. A four wheel land motor vehicle of the private passenger or station wagon type licensed for use upon public highways.
>
> 2. A four wheel land motor vehicle of the pickup, panel or van type licensed for use upon public highways. The rated load capacity must not be more than 2,000 pounds. This does not mean a vehicle used in any **business** other than incidental or for farming or ranching.
>
> * * *
>
> **Business** includes trade, profession or occupation.

Your covered auto means:

* * *

6. Any other **auto** not owned by, furnished or available for the regular use of you or a **family member**.

The No-Fault part of the policy provides the following additional definition for the No-Fault Coverage only:

> **Auto** means a vehicle, including a trailer, with more than two wheels required to be registered in Michigan. . . .

The No-Fault part contains the following exclusion:

> This coverage does **not** apply to **bodily injury** sustained by:
>
> * * *
>
> 8. You or a **family member** while **occupying** an **auto** owned or registered by his/her employer for which security is maintained as required under the provisions of the **Code**.

Defendant Henry Balkema admitted in his answer to the complaint that the deceased was operating his employer's 1982 Mack Truck with an attached liquid propane tank in the course of his employment at the time of the accident.

Defendant Amtrak admitted, in response to plaintiff's motion for summary judgment, that the deceased "was driving a vehicle for his employer Van Andel LP Gas."

The deceased's employer, defendant Van Andel Propane, Inc. (Van Andel), states, in answers to interrogatories, that it was owner of the truck driven by the deceased and that the deceased was employed as a "Truck Driver/Delivery Man" for it on the date of the accident.

Defendant Nancy Bakhuyzen admitted that the deceased was driving a propane truck in the performance of his employment for Van Andel at the time of the accident.

II.

A motion for summary judgment shall be rendered if the evidence on file "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex v. Catrett*, 477 U.S. 317 (1986).

III.

Plaintiff's motion is somewhat inconsistent with its complaint. In the brief attached to its motion, plaintiff states: "Titan does not, in this action, attempt to dispute its obligation to provide survivor's benefits to Bakhuyzen's family under the no-fault act." Yet, in its complaint, Count V, entitled "Decedent not an "Insured Under Part B - No-Fault", plaintiff seeks entry of a judgment declaring "that it owes no personal injury protection coverage or property protection coverage under Part B - No-Fault . . . ."

The policy excludes this accident from the No-Fault coverage of the policy through the eighth exclusion which excludes coverage for "[y]ou . . . while occupying an auto owned or registered by his/her employer . . . ." The court, however, will not grant judgment on this count (if that is what plaintiff still seeks) since plaintiff has not briefed this issue and the court is doubtful of the exclusion's effectiveness. Moreover, this exclusion excludes coverage for bodily injury, not for property damage.

IV.

Plaintiff argues that its policy does not cover this accident since the truck which the deceased was driving at the time was not an "auto" as that term is defined in the policy.

This court agrees that the truck was not an "auto" as *defined* by the policy, but coverage should not be denied on this basis because the policy also provides that plaintiff "will pay for **bodily injury** and **property damage** for which any **insured** is held legally responsible because of an auto accident." At best, the policy is poorly drafted, in that neither "auto" nor "accident" is in boldface indicating that the words have a technical meaning as defined in the policy. What was probably intended was something like the following: "We will pay for **bodily injury** and **property damage** for which any **insured** is held legally responsible because of an **accident** involving **your covered auto**." Since the term "auto accident" is not given a technical meaning it is possible that term could include a truck-train accident, in which case the accident would be covered, regardless of the fact that the truck was not an "auto", unless otherwise excluded by the policy.

V.

Plaintiff also contends that it is not liable under the insurance contract's exclusion of coverage for vehicles used for business purposes. The answers to the complaint and interrogatories, as well as admissions make clear that the deceased was using the propane truck for employment purposes at the time of the accident. The only defendant to respond to plaintiff's motion for summary judgment is Amtrak. Amtrak's response does not deal with the substance of plaintiff's motion, but instead asserts that the motion is premature since discovery is still on-going in its case against the estate of the deceased and, in that case, plaintiff has not produced its file on the case pursuant to Amtrak's request for production of documents. Amtrak also asserts that Plaintiff's position is inconsistent with its position as an intervenor in *Homestead Ins. Co. v. Van Andel L.P. Gas* (No. 94-CV-30S) (C.D. Utah).

Such a response is not material to the proper resolution of this controversy as it respects plaintiff's potential liability under Michigan's "NoFault" automobile insurance statute, not its liability under the terms of the subject insurance policy.

There being no genuine issue that the terms of plaintiff's insurance policy with the deceased excluded coverage of vehicles operated for business purposes, or that the deceased was operating his employer's propane truck for occupational purposes at the time of the accident, the court declares that plaintiff has no liability, *under the terms of its automobile insurance policy with Nicholas Bakhuyzen*, to defend or indemnify the estate of the same for damage claims arising out of the fatal accident. No judgment is ordered concerning plaintiff's liability under Michigan's "No-Fault" Insurance statute.

An order consistent with this opinion will be entered.

Dated: October 2, 1995

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

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HON. ROBERT HOLMES BELL

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that a partial summary judgment is granted to plaintiff Titan Insurance Company. Plaintiff has no liability, under its policy with Nicholas L. Bakhuyzen, to defend nor indemnify the estate of the same with respect to damage claims arising out of the March 10, 1993 motor vehicle accident.

NO JUDGMENT IS ORDERED respecting "Count V" of plaintiff's complaint, concerning its liability for personal injury and property protection coverage under Michigan's "No-Fault" Insurance statute.

Dated: October 2, 1995

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE