COA Opinion: Strict statutory construction renders insurer's exclusion unenforceable

22. March 2010

The debate over strict statutory language interpretation took a somewhat unusual, but very polite and respectful, turn in the Court of Appeals' published opinion on March 16, 2010 in *Progressive Michigan Ins. Co. v. William Smith, et al.*, No. 287505. Judge Bandstra authored the opinion of the divided panel, which held that the warning notice requirement of MCL § 500.3009(2) for auto insurance policies must be strictly enforced as written, and thus the named driver exclusion here was unenforceable. Judge Murray concurred, and Judge Markey dissented. Judge Bandstra's opinion of the panel can be found here. Judge Murray's concurrence can be found here, and Judge Markey's dissent can be found here.

Defendant William Smith had no driver's license because he had accumulated too many points on his record. He purchased a truck and added a friend, Defendant Sherri Harris, to the title. Ms. Harris obtained insurance for the truck, which listed Smith as an excluded driver on: (1) a form signed by Harris, (2) on the declaration page, and (3) on the certificate of insurance. Smith subsequently drove the truck, and injured Appellants Scott and Andrea Mihelsic when he crossed the centerline and caused an auto accident.

The trial court held that there was no coverage for the accident under the policy on the truck because of the driver exclusion naming Smith. The Court of Appeals, by Judge Bandstra, reversed, holding that the exclusion was unenforceable because the required statutory language had not been used in the policy's exclusion. The statute requires particular wording to be used in certain places in the policy to warn that no coverage is available if the excluded driver operates the vehicle:

If authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance: Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable.

The exact wording of the warning, as used on the face of the policy and in the certificate of insurance, varied by only one word—"responsible" instead of "liable." The exact wording was used on the declaration page. A debate then ensued about where the exact wording had to appear, based on the grammatical structure of the sentence discussing placement, with Progressive arguing that it was sufficient that the exact wording appear in only one

location. Judge Bandstra rejected this reading, and held that it had to appear in both the certificate and in one of the other named locations—period. Without that, the exclusion was unenforceable. The trial court had come to the same conclusion that the warning was required in two places in the policy, but held that substantial compliance with the warning's wording was enough. The Court of Appeals disagreed because the statute provides for the specific "following notice" to appear.

Judge Murray concurred but wrote to reiterate that Judge Markey's dissent essentially would apply the "absurd result" doctrine, or ignore statutory language when an unjust or unintended result would occur. He rejected this approach, despite his personal view that the outcome here was "unfortunate."

Judge Markey began her dissent by reaffirming her commitment to strict statutory construction, but also by noting that the rare facts of this case completely thwarted the Legislature's intent and essentially allowed bad actors to profit. The facts of this case indicate without exception that Smith and Harris fully understood that Smith was not covered under the policy because of his poor driving record, which was what the Legislature wanted to accomplish. Judge Markey wrote that this was particularly true in light of the inescapable conclusion that Smith and Harris "colluded to obtain insurance coverage from Progressive without concern that Smith was not supposed to drive the vehicle." As such, Judge Markey would have affirmed the trial court based on a conclusion that a strict construction here vitiated the Legislature's intent.