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**VEHICLE OWNERS REMAIN PRIMARILY LIABLE
FOR THEIR PERMISSIVE USERS AND
ANY ATTEMPTS TO SHIFT THAT LIABILITY REMAIN VOID**

Contributor¹ -GREGORY A. LIGHT

In the published opinion of *Auto-Owners Ins. Co. v Martin*, dated June 16, 2009 (No. 281482), the Michigan Court of Appeals ruled in this declaratory action between Auto-Owners Insurance Company and State Farm Mutual Automobile Insurance Company that Auto-Owners Insurance Company, as the insurer of the vehicle involved in the subject accident, was primarily liable up to its policy limit of \$1 million before State Farm's excess coverage applied. In rendering this decision, the Court of Appeals found that Auto-Owners' attempt to exclude residual liability for the insured's garage customers was invalid, and that State Farm was entitled to reimbursement of its defense costs.

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The facts of the case are quite simple and undisputed. On March 22, 2004, Victor Martin was driving a vehicle owned by Grand Greenville, a used car dealership, with its permission, when he was involved in an accident with defendant Mapes. Grand Greenville carried garage liability insurance issued by Auto-Owners, with Mr. Martin carrying automobile insurance issued by State Farm on his personal vehicle, which was not involved in the accident. For purposes of this declaratory action, both parties agreed that Mr. Martin drove the vehicle at issue with permission, and was a “garage customer” as defined by Grand Greenville’s policy issued by Auto-Owners.

The language at issue in the Auto-Owners policy is as follows:

Garage customers² are not insureds with respect to the use of automobiles covered by this coverage form except in accordance with the following additional provisions:

(1) If there is other valid and collectible insurance, whether primary, excess or contingent, available to the garage customer and the limits of such insurance are sufficient to pay damages up to the applicable limit of the financial responsibility law of the state where the automobile is principally garaged, no damages are collectible under the policy.

(2) If there is other valid and collectible insurance available to the garage customer, whether primary, excess or contingent, and the limits of such insurance are insufficient to pay damages up to the applicable limit of the aforesaid financial responsibility law, then this insurance shall apply to the excess of damages up to such limit.

(3) If there is no other valid and collectible insurance, whether primary, excess or contingent, available to the garage customer, this insurance shall apply but the amount of damages payable under this policy shall not exceed the applicable limit of the aforesaid financial responsibility law.

The section of the policy entitled “CONDITIONS” provides, in part:

5. FINANCIAL RESPONSIBILITY. Such insurance as is afforded by this coverage form under Coverages A and B shall comply with the provision of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of an automobile

²The parties agree that Martin was a “garage customer” as defined by the policy.

during the policy period, to the extent of the coverage and limits of liability required by such law.

* * * * *

9. OTHER INSURANCE. . . . Except when stated to apply in excess of or contingent upon the absence of other insurance, the insurance afforded by this is [sic] coverage form is primary insurance. When this insurance is primary and the insured has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the Company's liability under this coverage form shall not be reduced by the existence of such other insurance.

Mr. Martin's policy of insurance with State Farm provided liability limits of \$100,000/\$300,000 and with respect to non-owned vehicles, this policy specifically indicated it was excess over any other available insurance or self-insurance. Pursuant to the aforementioned provisions, both Auto-Owners and State Farm moved for summary disposition, requesting the trial court to determine their respective priority in coverage for this matter. Relying on the Michigan Supreme Court case of *Citizens Insurance Company of America v Federated Mutual Insurance Company*, 448 Mich 225 (1995), the trial court ruled that Auto-Owners was responsible for paying \$20,000 on behalf of Martin under Michigan's No-Fault Act, but it was permissible for Auto-Owners to exclude coverage applicable to Martin above the \$20,000/\$40,000 limits of liability. The trial court therefore ordered that Auto-Owners was responsible for paying the first \$20,000 on behalf of Martin, State Farm was responsible for paying the next \$100,000 under its policy, with Auto-Owners then responsible for up to \$980,000 pursuant to its coverage of Grand Greenville.

In reversing the trial court's ruling, the Michigan Court of Appeals relied primarily on its decision of *Farmers Insurance Exchange v Kurzmann*, 257 Mich App 412 (2003) ("*Kurzmann*"), and the Michigan Supreme Court ruling of *State Farm Mutual Automobile Insurance Company v Enterprise Leasing Company*, 452 Mich 25 (1996) ("*Enterprise*"). However, before analyzing those cases, the court here examined the Michigan Supreme Court's ruling in *Citizens, supra*, and determined, with Auto-Owners' acknowledgment, that its provision excluding residual liability coverage for "garage customers" except where the customer is uninsured or underinsured, is invalid to the extent that it would preclude the coverage required under the No-Fault Act. Accordingly, the primary issue to be decided in this case was the amount of residual liability coverage Auto-Owners would be required to provide for Martin's use of Grand Greenville's vehicle.

To do this, the court looked to *Enterprise, supra*, which overruled *State Farm Mutual Automobile Insurance Company v Snappy Car Rental*, 296 Mich App 143 (1992), holding that car rental companies and their insurers are required to provide primary residual liability coverage for the permissive use of the rental cars, up to their policy limits or minimum required by statute. *Enterprise, supra* at 33-36. (It is important to note that the Michigan Supreme Court specifically

refused to apply its ruling in *Citizens, supra* to rental car companies). However, there is no specification as to whether policy limits or the minimum required by statute controls when there is an attempt by the owner, as here, to exclude coverage. On remand in that case, the trial court concluded that Enterprise, which was self-insured with Travelers Insurance Company as an excess carrier for claims over \$500,000, could not limit the amount of its liability and rejected Enterprise's indemnity claim against the driver. Enterprise and Travelers appealed that decision, with another panel of the Michigan Court of Appeals ruling that while a car rental company enjoys the advantages of self-insurance, it cannot attempt to limit its risk by asserting that its responsibility is limited to the minimum coverage requirements of the No-Fault or the Financial Responsibility Acts. Consequently, Enterprise was found liable for the full amount of the settlement in that case. *Enterprise Leasing Company v Sako*, 233 Mich App 281, 284-285 (1998).

Thereafter, another panel of the Michigan Supreme Court ruled in *Kurzmann, supra*, that in circumstances where the insurer knows or should know that an exclusionary clause in its policy is invalid, the insurer is primarily liable up to the limits of its policy. *Id.* at 419-420, 422. Accordingly, in this case, the Court of Appeals held that like the insurer in *Kurzmann*, Auto-Owners knew or should have known that the exclusionary clause in the policy at issue was void. The No-Fault Act clearly directs that a policy sold pursuant to the Act must provide residual liability coverage for use of the vehicle insured, and eight years before Auto-Owners issued its policy, the Supreme Court specifically declared the type of exclusion at issue invalid. *Citizens, supra*. The Court of Appeals in this case, therefore, found the exclusionary clause to be ambiguous and, as such, to be construed in favor of the insured, providing coverage of policy limits to both the owner of the vehicle and its permissive users. Moreover, the court in this case indicated that if Auto-Owners wished to limit its coverage of garage customers to the statutory minimum, it could have expressly stated so, but chose not to, creating the ambiguity at issue. The court went on to state that even if *Kurzmann* were not binding, Auto-Owners would still be liable under the general principles of contract law. Under such principles, the inclusion of any invalid exclusionary provision results in the deletion or voiding of the offending language while leaving intact the remainder of the policy's terms and obligations, including the extent of coverage up to policy limits of \$1 million. This finding comports with the Supreme Court's ruling in *Enterprise, supra*. Finally, the court ruled that State Farm was entitled to reimbursement of its defense costs from Auto-Owners for defending Martin in the underlying action.

Accordingly, the trial court's ruling was reversed and remanded for a grant of summary disposition in favor of State Farm and Martin, and a judgment that Auto-Owners is primarily liable for Martin's use of the Grand Greenville's vehicle up to its \$1 million policy limit, that State Farm is only liable on an excess basis after Auto-Owners' coverage has been exhausted, and that State Farm is entitled to reimbursement of defense costs.

SPORADIC USE INSUFFICIENT TO CREATE 3102(h)(i) OWNERSHIP

Contributor³ - ALICIA M. SIEFER

In *Detroit Medical Center v Titan Insurance Company*, published opinion per curiam of the Court of Appeals, issued June 16, 2009, (Docket No. 283815), the Court of Appeals affirmed the trial court's ruling which held the injured party was not deemed an "owner" of the motor vehicle and Plaintiff was not entitled to attorney fees.

Plaintiff provided medical services to Maria Jimenez after she was injured in a motor vehicle accident. Jimenez was driving an uninsured vehicle. Defendant Titan was assigned the claim by the Assigned Claims Facility. Titan asserted that Jimenez was an "owner" of the vehicle and, as such, was precluded from recovering medical expenses based upon MCL 500.3113(b).

In determining whether Jimenez was an "owner" for purposes of the no fault act, the Court cites MCL 500.3101(2)(h)(i) which provides, "[a] person renting a motor vehicle or having the use of thereof, under a lease or otherwise, for a period that is greater than 30 days."

Both Jimenez and Jose Gonzalez, the father of Jimenez' two children, were interviewed and certain facts regarding "ownership" were elicited. Based upon their testimony, the following was discovered:

- Gonzalez was the titled owner of the vehicle, however, he cancelled the insurance as he had stopped using the vehicle because he had another.
- The vehicle was kept at Jimenez' residence, however, Gonzalez may have lived with Jimenez.
- Jimenez used the vehicle approximately 7 times over the course of one month and same was used primarily for grocery shopping.
- Jimenez had to obtain permission and the keys from Gonzalez to use the vehicle (although permission may have never been denied).
- Jimenez put gasoline in the vehicle, but Gonzalez was otherwise responsible for maintenance.

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Based upon these set of facts, the trial court determined that the permissive use and lack of keys belied any finding of a right of ownership. It compared the case at hand to that of *Ardt v Titan*, 233 Mich App 685; 593 NW2d 215 (1999) and *Chop v Zielinski*, 244 Mich App 677; 624 NW2d 539 (2001). In *Ardt*, the Court concluded that conflicting evidence of sporadic versus regular unsupervised usage created a genuine issue of material fact that necessitated trial. In that case, the driver, who lived with his mother, was using his mother's uninsured vehicle at the time of the accident. A witness said the driver regularly used the car for more than 30 days, whereas his mother said he only used it a "few" times for minor purposes, such as having it washed.

In *Chop*, the Court held that the injured person and driver could not be the owner since she did not hold title and was merely a borrower. In that case, Plaintiff mistakenly believed that she was to be awarded the car in the divorce, kept the car at her apartment and used it for work and errands for at least six weeks.

In the present case, the Michigan Court of Appeals found that Jimenez did not "have the use" of the vehicle "for a period that is greater than 30 days." Specifically, the court found "no transfer of a right of use, but simply an agreement to periodically lend." It went on to state that the "permission was not for a contiguous 30 days, but sporadic." Moreover, the court reasoned that Jimenez did not believe she had any right of ownership and she did not have "unfettered use." Based upon such, the Court of Appeals affirmed the trial court's finding that Jimenez was not an owner of Gonzalez' vehicle.

In affirming the trial court's denial of attorney fees to Plaintiff in the present case, the Court of Appeals reasoned that Defendant's initial denial of benefits was not unreasonable as it found some indicia of ownership and it also found that the question of statutory construction was legitimate. It went on to state that despite the Court's finding that Jimenez' need for permission to use the vehicle and her sporadic use thereof contraindicated ownership, the facts of *Ardt* and *Chop* gave rise to a justifiable contrary argument. Thus, the benefits were "reasonably in dispute" and therefore not overdue. Accordingly, the trial court properly declined to award attorney fees to Plaintiff.

This published opinion is significant for the proposition that when determining whether an individual is deemed an "owner" pursuant to MCL 500.3101(2)(h)(i), there must be an actual "transfer" of a right to use the vehicle and "periodic" or "sporadic" use is insufficient.

BASICS OF NO-FAULT

James Borin will be teaching the No-Fault Course at Lawrence Tech University commencing September 1, 2009. Please call Tim Meloche at LTU for additional information and registration. His telephone number is (248)204-4055.



SAVE THE DATE

Garan Lucow Miller's Annual Golf Outing

The Inn at St. John's, Plymouth, Michigan

September 16, 2009

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Mark your calendar for the Firm's Indy City Seminar which will be held in Indianapolis on Thursday, October 22, 2009. **Watch Law Fax for further details.**

FALL BREAKFAST SEMINAR

Mark your calendar for the Firm's Fall Breakfast Seminar which will be held at the Troy Marriott Hotel on Thursday November 5, 2009. **Watch Law Fax for further details.**