

PROTHONOTARY,
FRANKLIN COUNTY, PA

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LINDA L. BEARD
PROTHONOTARY

DEPUTY 

**IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF
PENNSYLVANIA – FRANKLIN COUNTY BRANCH**

Pennsylvania National Mutual
Casualty Insurance Company,
Plaintiff

vs.

John P. Sprouse and Karen S.
Sprouse, individually and as
parents and natural guardians
of John J. Sprouse, deceased,
and John P. Sprouse,
administrator of the estate of
John J. Sprouse, deceased,
Defendants

Civil Action – Law

No. 2006 – 121

Douglas W. Herman, J.

OPINION

Background Facts and Procedural History

On December 8, 2003, Steven Syverud left his car for service at the Forrest Lincoln-Mercury dealership in Chambersburg. Forrester provided him with a loaner vehicle which was owned by the dealership to use while his own car was being serviced. On December 9, 2003, while driving the loaner vehicle on Interstate 81, Syverud allegedly struck a pedestrian, John J. Sprouse, who died as a result of injuries he suffered.

His parents, John P. Sprouse and Karen Sprouse, filed a wrongful death and survival action against Syverud (“the underlying action”).¹

The plaintiff in the current action (“Penn National”) had issued a Garage policy to Forrester.² The named insured is designated as a “Franchised Private Passenger Dealer.” The liability limit for each accident is \$500,000 under the Garage Policy. Penn National also had issued a Commercial Umbrella Liability policy to Forrester.³ The Umbrella Policy has an “each occurrence” limit of \$5,000,000 and a general aggregate limit of \$5,000,000. Penn National was the scrivener of both the Garage policy and the Umbrella policy. A third policy is also at play – a Personal Auto Policy which Progressive Casualty Insurance Company (“Progressive”) had issued to Syverud. The coverage limit for bodily injury to others under that policy is \$15,000 per person and \$30,000 per accident.⁴

Penn National filed this declaratory judgment action on January 11, 2006 seeking resolution of an actual controversy which exists between it and the defendants as to the scope of Penn National’s obligation to defend and/or indemnify Syverud in the underlying action under the Garage policy, the Umbrella policy and/or the Progressive policy. All defendants filed answers to the complaint. Penn National then filed a motion for summary judgment, followed by a cross-motion for summary judgment filed by the Sprouse defendants (“Sprouse”).⁵ The court received the written and oral arguments of counsel. This matter is ready for decision.

¹ Sprouse, et al. v. Syverud, No. 2005-3306, commenced November 21, 2005.

² Policy #GR9 0038307, effective from July 1, 2003 to July 1, 2004.

³ Policy #UL9 0038307, effective from July 1, 2003 to July 1, 2004.

⁴ Policy #57331681-0, effective from June 24, 2003 to December 24, 2003.

⁵ This declaratory judgment action has been discontinued as to defendants Syverud, Progressive, and Forrester. Remaining as defendants are John P. Sprouse and Karen Sprouse, individually and as parents and natural guardians of the decedent John J. Sprouse, and John P. Sprouse as administrator of his son’s estate.

The key issue is: at what point is Penn National's obligation to indemnify Syverud for the underlying wrongful death and survival action triggered under the Umbrella policy? In other words, what is the threshold amount above which the Umbrella policy must cover damages if Syverud becomes legally obligated to pay in connection with the underlying wrongful death action? Succinctly put, Penn National argues the Umbrella policy is not triggered until Syverud's liability in the underlying action reaches \$515,000, whereas Sprouse argues the Umbrella policy is triggered once Syverud's liability in the underlying action reaches \$30,000. We may consider cases from other jurisdictions in deciding this issue. Liberty Mutual Insurance Co. v. Marty's Express, 910 F.Supp. 221 (E.D. Pa.1996).

Applicable Legal Standards

Summary judgment should be granted: (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issue to be submitted to a jury. Pa.R.C.P. 1035.2.

The parties agree they are asking this court to decide the strictly legal question of Syverud's coverage under the Garage policy and the Umbrella policy. This is a matter of contract interpretation which can be resolved through examining the particular language of the policies. Paylor v. Hartford Insurance Co., 640 A.2d 1234 (Pa. 1994). An insurance

policy should be construed according to the unambiguous meaning of its words. Standard Venetian Blind Co. v. American Empire Insurance Co., 469 A.2d 563 (Pa.Super. 1983).

A policy provision is ambiguous if using alternative or more precise language would have put the matter in dispute beyond reasonable question. Erie Insurance Exchange v. E.L., 941 A.2d 1270 (Pa.Super. 2008)(citations omitted). When the terms of an insurance contract are not defined, the court must construe those terms consistent with their plain and ordinary meaning. Lititz Mutual and Insurance Co. v. Steely, 785 A.2d 975 (Pa. 2001). Where a policy provision is ambiguous, it must be construed in favor of the insured and against the insurer where the insurer is the scrivener. Richmond v. Prudential and Casualty Insurance Co., 789 A.2d 271 (Pa.Super. 2001).

Relevant Policy Language

The Garage policy provides liability coverage for any “auto” pursuant to section I of the Garage Coverage Form and the Policy Declarations. Section II.A.1. of the Garage Coverage Form, titled “Liability Coverage,” provides as follows:

- a. [Penn National] will pay all sums an “insured” legally must pay as damages because of “bodily injury” or “property damage” to which this insurance applies, caused by an “accident” and resulting from “garage operations” involving the ownership, maintenance or use of covered “autos.”...

[Penn National has] the right and duty to defend any “insured” against a “suit” asking for these damages. However, we have no duty to defend any “insured” against a “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply...Our duty to defend or settle ends when the applicable “Liability Coverage Limit of Insurance – “Garage Operations” – Other Than Covered “Autos” has been exhausted by payment of judgments or settlements.

- b. This insurance applies to “bodily injury” and “property damage” only if:
- (1) The “accident” occurs in the coverage territory;
 - (2) The “bodily injury” or “property damage” occurs during the policy period; and
 - (3) Prior to the policy period, no “insured”...knew that the “bodily injury” or “property damage” occurred, in whole or in part...

(CA 00 05 1001).

Pursuant to the Pennsylvania Garage Liability Coverage Changes Endorsement (CA 01 57 10 97), “Who is an Insured,” is defined for covered autos as follows: “a.(2): Anyone else while using with your permission a covered ‘auto’ you own, hire or borrow except (d) [The named insured’s] customers, if your business is shown in the Declarations as an ‘auto’ dealership. However, those customers are ‘insureds’ up to the compulsory or financial responsibility law limits where the covered ‘auto’ is principally garaged.” The Pennsylvania Garage Liability Coverage Changes Endorsement provides Syverud with only \$15,000 in liability coverage. The parties agree this is the extent of his liability coverage under the Garage policy in light of the limits of coverage under Syverud’s personal policy with Progressive. 75 Pa.C.S.A. §1702. The parties also agree Syverud is an insured for bodily injury claims under the Garage policy and also under the Umbrella policy.

Section I of the Umbrella Liability Policy - Coverage – provides as follows:

1. Insuring Agreement

[Penn National] will pay on behalf of the insured the “ultimate net loss” in excess of the “applicable underlying limit” which the insured becomes legally obligated to pay as damages because of Coverage A – Bodily Injury and Property Damage Liability Coverage B – Personal Injury and Advertising Injury Liability

to which this insurance applies caused by an “occurrence” happening anywhere in the world.

2. Defense of Claims or Suits and Supplementary Payments

- a. We will have no duty to defend any claim or "suit" that any other insurer has a duty to defend. If we elect to join the defense of such claims or "suit," we will pay all expenses we incur.
- b. We will have the right and duty to defend any "suit" for damages which are payable under Coverage A or B (*including damages wholly or partly within the "retained limit"*) but which are not payable by a policy of "underlying insurance," or any other available insurance, because
 - (1) Such damages are not covered;
 - (2) The "underlying insurance" has been exhausted by the payment of claims...

(70 2051 07 87)(italics in the original). Section II of the Umbrella policy provides that the following is an insured: "As respects the "auto hazard," anyone using an 'auto' you own, hire or borrow, including any person, or organization legally responsible for such use, provided it is with your permission." 2.a(1). As noted above, the parties agree that Syverud, as a permissive user of a vehicle owned by Forrester, qualifies as an insured under the Umbrella policy.

Under Section V of the Umbrella policy, "applicable underlying limit" means, if the policies of "underlying insurance" apply to the "occurrence," the amount of insurance stated in the policies of "underlying insurance" is the Schedule of Underlying Insurance or any other available insurance. The term "underlying insurance" means the policies listed in the Schedule of Underlying Insurance, and includes any renewal or replacement of such policies and any other insurance available to the insured.

The Garage policy is listed in the Umbrella policy Schedule. (Form 71-0461). The Garage policy is an auto policy of underlying insurance for purpose of the "auto hazard"

definition. Syverud was using an auto owned by Forrester with its permission at the time of the alleged bodily injury and therefore he is an insured under the Umbrella policy with respect to the auto hazard.

Discussion

According to Penn National, the Umbrella policy is not immediately triggered after the limits of the Garage policy are paid. Rather, Penn National's liability under the Umbrella policy arises at the fixed point of \$515,000 - the combination of the Garage policy's stated \$500,000 limit and Syverud's \$15,000 Progressive policy limit, the latter of which is encompassed in the "applicable underlying limit" as other available insurance. Penn National asks the court to grant it a declaratory judgment which establishes that its duty to indemnify Syverud in the underlying action under the Garage policy is limited to \$15,000 by the provision pertaining to permissive drivers and that Penn National's duty to indemnify Syverud in the underlying action under the Umbrella policy is not triggered unless and until any judgment or settlement exceeds \$515,000.

According to Sprouse, however, the Umbrella policy is immediately triggered after the payment of the "applicable underlying limits," which are the \$15,000 limits of the Garage policy and the \$15,000 limits of the Progressive policy. Under this reasoning, Penn National's liability under the Umbrella policy is triggered at \$30,000 insofar as both the Garage policy and the Progressive policy are encompassed within the plain meaning of the definition of "applicable underlying limit" and "underlying insurance." Sprouse requests we grant him a declaratory judgment which holds that Penn National's duty to indemnify Syverud for the underlying action under the Umbrella policy is triggered once

any judgment or settlement exceeds \$30,000. After careful consideration of the relevant policies and related documents, the pertinent case law, the standards governing summary judgment, and well-established principles which govern the interpretation of insurance contracts, including umbrella and/or excess policies, we find Penn National's motion for summary judgment should be granted.

It is well-established that an umbrella policy has two functions: (1) to provide for a higher limit of liability for those losses typically covered by liability insurance, for example, general liability and comprehensive auto liability for bodily injury and property damages; and (2) to provide for some coverage of those less common losses not typically covered by liability insurance, for example, malpractice liability, advertiser's liability, blanket contractual liability, world-wide operations liability, and the like. Garmany v. Mission Insurance Co., 785 F.2d. 941 (11th Cir. 1986). An umbrella policy is an excess policy over a primary policy with an "excess other insurance" clause. Chester Carriers, Inc. v. National Union Fire Ins. Co. of Pittsburgh, 767 A.2d 555 (Pa.Super. 2001).

The whole idea behind an umbrella policy is to provide an individual with affordable protection against excess judgments obtained against him by a third party. As a general rule, the basic purpose of an umbrella policy is not to provide an individual with automobile insurance. Stoumen v. Public Service Mutual Insurance Co., 834 F.Supp. 140 (E.D. Pa.1993). Support for this principle is found in the fact that insurers charge lower premiums for the two different types of policies, with umbrella policy premiums being substantially lower than those charged for automobile insurance. In this context we note that the record shows Forrester's annual premium for the Garage policy was \$23,502 and the Umbrella policy's annual premium was \$6,621. (Exhibits C and D

attached to Penn National's motion for summary judgment, 71 01 53 06 98, and Form 71-0450, respectively).

In order to determine the relative insurable risk and the cost of the coverage, an insurer must know at what point its liability will be triggered. "To hold otherwise subjects the insurer to unforeseeable and variable risks depending on the underlying insurance actually maintained by any one of the potential insureds." Fried v. North River Ins. Co., 710 F.2d 1022, 1026, fn. 6 (4th Cir.1983); 15 Couch on Insurance 3d, §220.35 (2008). The purpose of an umbrella policy is to protect the assets of the named insured, not the customers' assets. Section 1702 of Pennsylvania's Motor Vehicle Financial Responsibility Law mandates that certain minimum primary coverages be available to permissive drivers such as Syverud under the Garage policy. Those minimum coverages do not extend to umbrella coverage which exceeds the full amount of the coverage contracted for and purchased in a primary policy such as this Garage policy. Kropa v. Gateway Ford, et al, ___ A.2d ___ 2009 WL 1362357 (Pa. Super.), citing Cordero v. Potomac Ins. Co. of Illinois, 794 A.2d 897 (Pa. Super. 2002). It should be noted that Kropa was decided on May 15, 2009 while the undersigned was in the process of analyzing the respective arguments of counsel and reviewing the available case law.

In Garmany, the permissive user (like Syverud here) was test-driving a dealership's car when he was involved in an accident with a second car. One person died and several others in the second car were injured. The dealer's primary policy provided coverage for a permissive driver only if the driver had no insurance of his own. In that situation, the permissive driver received the minimum coverage limits required by law (\$10,000 per person/\$20,000 per accident) under the dealer's primary policy with

\$500,000 in limits. The dealer's umbrella policy contained a liability limit of \$1,000,000. The issue was whether the umbrella coverage available to the permissive driver was triggered at \$500,000 as stated in the Schedule of Underlying Insurance describing the underlying policy, or instead was triggered at \$20,000, which was the amount of coverage actually provided to the permissive driver under the dealer's primary policy.

As in the case at bar, the umbrella policy in Garmany set a threshold trigger point of liability for loss "in excess of...the limits of the underlying insurance as set out in the attached schedule..." As that court noted, "[t]hat schedule sets the limits of the...primary policy as \$500,000. Those provisions contain no alternative possibilities or contingencies, nor do they attempt to account for variances in coverage as to different situations encountered under the same underlying policy. [Therefore], [t]hese two clauses, when read in tandem, unambiguously set a fixed point at which [the umbrella insurer's] liability under the excess policy arises - \$500,000. We simply do not discern any ambiguity under this - the only reasonable construction of the umbrella policy." Id at 946.

We agree with Penn National that the Garmany court implied that the governing minimum limits are those listed in the Schedule of Underlying Insurance (\$500,000), not the actual amount of coverage provided by the underlying policy (\$20,000). It is clear from all the circumstances that Penn National and Forrester intended there to be a fixed threshold at which the insurer's duty to pay for an auto accident would arise under the umbrella policy and this amount (\$500,000) is reflected by the limit of the Garage policy listed on the Umbrella policy's Schedule of Underlying Insurance. As expected, Sprouse maintains this court should not consider Garmany because it is not binding precedent. In addition, Sprouse argues Garmany is not even persuasive authority insofar as it is

factually distinguishable from the case at bar in a way which must control the outcome here once we focus on the plain meaning of certain key terms defined in the Umbrella policy. However, we find Sprouse's interpretation to be strained at best.

Sprouse first points to Section I – Coverage – of the Umbrella policy which states Penn National “will pay on behalf of the insured the ‘ultimate net loss’ in excess of the ‘applicable underlying limit’ which the insured becomes legally obligated to pay as damages...” The “applicable underlying limit” is defined in Section V of the Umbrella policy as the policies of “underlying insurance” in the Schedule of Underlying Insurance or any other available insurance...” The term “underlying insurance” in Section V means the policies listed in the Schedule of Underlying Insurance and includes “any...replacement of such policies, and any other insurance available to the insured.”

Sprouse next points to the Garage Liability Coverage Changes Endorsement (CA 01 57 10 97). This Endorsement is specifically listed on the Declarations page of the Garage Coverage Form and on the Schedule of Underlying Insurance. The plain language of CA 01 57 10 97 states in capitalized, bold lettering: **THIS ENDORSEMENT CHANGES THE POLICY.** Just a few lines down, the Endorsement states: “For ‘garage operations’ conducted in Pennsylvania, this endorsement *modifies* insurance provided under the following: GARAGE COVERAGE FORM.” (Italics supplied). According to Sprouse, the result is the Endorsement “changes/modifies/replaces” the coverage applicable to customers like Mr. Syverud and makes the “applicable underlying limit” of the Garage policy \$15,000 plus the \$15,000 limits of Mr. Syverud’s personal policy with Progressive. By applying the plain meaning of the Umbrella policy’s definitions of “applicable underlying limit” and “underlying insurance,” Penn National’s obligation to

pay under the Umbrella policy is triggered once this combined \$30,000 is paid. Sprouse maintains that the existence of this Endorsement is what distinguishes the instant case from Garmany. Also, Garmany cites Fried, *supra*, but the umbrella policy at play in Fried did not even contain a definition of the term “applicable limits.” This, Sprouse contends, renders that latter case unpersuasive. We cannot accept Sprouse’s effort to find a meaningful distinction between Garmany and the instant case.

An Endorsement is an amendment to or modification of the general terms of an existing insurance policy. By their very nature, Endorsements are designed to trump general policy provisions, and if there is a conflict between the main policy’s provisions and the Endorsement, the Endorsement prevails, particularly where the Endorsement is more specific. Nationwide Mut. Ins. Co. v. Schmidt, 307 F.Supp. 2d 674 (W.D. Pa. 2004); Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co., 530 F.3d 395 (5th Cir. 2008); 2 Couch on Insurance §21:21 (2008).

While we accept these general principles of interpretation, we disagree with Sprouse’s contention that the Garage policy’s Endorsement’s modification amounts to a replacement of the entire policy and that there are meaningful factual differences between the instant case and Garmany. As Penn National concedes, the Garmany court did not make it clear whether the primary auto policy’s step-down clause reducing the limits actually provided to \$20,000 appeared in an Endorsement or in the main policy form itself, whereas the step-down clause in the Penn National’s Garage policy appears in the Endorsement and not in the General Coverage Form. Nevertheless, the salient, critical factor is that the primary policy in Garmany, as here, had a stated limit of \$500,000 for purposes of underlying insurance.

The Schedule of Underlying Insurance contains a particularized list of insurance policies which underlie or “sit beneath” the Umbrella policy. The purpose of such a Schedule is to clearly list the limits above which the insurer intended to provide coverage. Merchants Mutual Ins. Co. v. Hartford Ins. Group, 145 Misc.2d 1 (N.Y. Sup. 1989). The Schedule of Underlying Insurance lists three policies: a Commercial General Liability policy, a Garage Liability policy, and an Employer’s Liability policy. These three policies, along with any other available insurance, comprise the underlying insurance for the Umbrella policy. The Schedule clearly states there is a limit of \$500,000 under the Garage policy for bodily injury for “each accident - auto”. (Umbrella policy, Schedule of Underlying Insurance, Form 71-0461).

The Garage policy contains a Declarations page. The Declarations page is the first page of an existing insurance policy and summarizes the terms of that policy, including stating the insurer’s limit on liability. Bergmann v. Hutton, 337 Or. 596, 101 P.3d 353 (2004). The purpose of a Declarations page is to list coverage selections and identify their upper parameters. Skeete v. Dorvius, 184 N.J. 5, 875 A.2d 859 (2005). Unless the facts dictate otherwise, a Declarations page is part of the policy and is incorporated by reference into the policy. Finch v. Farmers Ins. Exchange, 265 Neb. 277, 656 N.W.2d 262 (2003). The Garage policy Declarations includes a “Schedule of Coverages and Covered Autos” and lists the “each accident - auto” liability limit of \$500,000. The Declarations page also lists by number the policy Forms and Endorsements which comprise the Garage policy (71 0153 06 98).

Penn National points out that a Declarations page is different from a Schedule of Underlying Insurance.⁶ Even if the Declarations page is tantamount to a Schedule of Underlying Insurance for purposes of the Umbrella policy, listing the forms and Endorsements at the bottom of the first page of the Declarations is clearly separate from the listing of the policy limits in the middle of the page (where the \$500,000 “each accident – auto” language is) and does not modify, replace or otherwise change the stated limits. The Garage policy’s Declarations “each accident – auto” limit of \$500,000 dovetails with the limit set forth on the Umbrella policy’s Schedule of Underlying Insurance, and it is this \$500,000 limit which combines with the \$15,000 “other available insurance” under Syverud’s Progressive policy to comprise the \$515,000 “applicable underlying limit” pursuant to the Umbrella policy.

Finally, as noted previously, we received the Superior Court’s opinion in Kropa v. Gateway Ford, supra, while the draft of this opinion was substantially complete. We would simply note that the facts of that case and more particularly, the insurance contracts between the parties in that case, are very similar to those in this case. We believe Kropa is solid support for this court’s decision in the instant case.

Penn National is entitled to summary judgment in this declaratory judgment action. It will be obligated under the Umbrella policy only for the ultimate net loss in excess of \$515,000. An appropriate Order of Court is attached.

⁶ We note that “Schedule of Underlying Insurance” is not in itself defined under either the Garage policy or the Umbrella policy. In general terms, a “schedule” is a sheet of paper which is attached to the principal document, and describes, lists or inventories in detail the matters referred to in the principal document. Black’s Law Dictionary.

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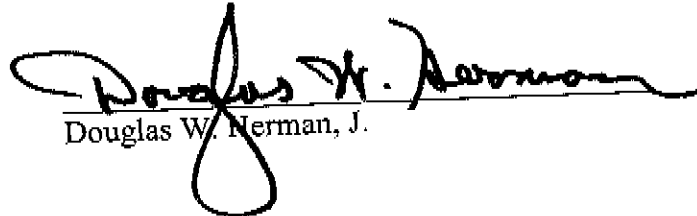
Douglas W. Herman, J.

ORDER OF COURT

NOW THIS 21st day of June 2009, the Court hereby GRANTS the motion for summary judgment filed by the plaintiff, and DENIES the cross-motion for summary judgment filed by the defendants.

Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order, including a copy of this Order, to each parties' attorney of record and shall note in the docket the giving of such notice and the time and manner thereof.

By the Court,


Douglas W. Nerman, J.

The Prothonotary shall give notice to:
Michael S. Savett, Esquire, for plaintiff
Michael F. Wenke, Esquire, for defendants