41.01747

COPIES MAILED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Case No: 2014-CP-26- 6382

Erie Insurance Exchange,

Plaintiff,

vs.

Government Employees Insurance Company, Mark Allison Scoggin and Angela Bennett Hill.

Defendants.

ORDER

HORRY COUNTY
2015 MAY -7 PM 1:02
MELANIE ROGERS-WARD
CLERK OF COURT

This action is for Declaratory Judgment by Erie Insurance Exchange ("Erie") seeking to have this Court declare the rights of the parties relative to a policy issued by Government Employees Insurance Company ("GEICO"). Specifically at issue is whether the GEICO policy provides excess liability coverage in the underlying action filed by Plaintiff and Erie Insured, Angela Bennett Hill, against GEICO insured Mark Allison Scoggin. Based upon my consideration of the parties' Stipulation of Facts, the pleadings, the policies, counsels' arguments, submitted memoranda and South Carolina law, I find that the GEICO policy does provide excess coverage for the underlying motor vehicle accident ("MVA").

The underlying MVA occurred on September 5, 2012 in Horry County involving a 2011 Hyundai owned by Mauren Craig but operated by Hill and a 2002 Ford Taurus operated by Scoggin. The Hill vehicle was headed East on 11th Avenue North when she alleges that Scoggin made a left turn across her lane of travel, causing the subject accident and the injuries she complains of in the underlying liability lawsuit, which is pending in this Court. The Taurus

operated by Scoggin was owned by his mother, the late Mildred Scoggin, and insured by GEICO under Policy Number 0929-32-50-09 with liability coverage of $50,000.00 per person and $100,000.00 per accident. After an investigation, GEICO paid the $50,000.00 liability coverage to Hill in exchange for a Covenant Not to Execute protecting Mark Scoggin. Hill claims that her injuries exceeded the liability coverage.

GEICO carried a separate policy for Mark Scoggin on a 2005 Chevrolet Colorado under Policy Number 4085-57-17-45 which provided liability coverage of $25,000.00 per person and $50,000.00 per accident. The Craig vehicle operated by Hill was insured by Erie under Policy Number Q05 1107128 which provided stated underinsured/underinsured motorist coverage of $100,000.00 per person and $300,000.00 per accident. The Hills are residents of North Carolina and their Erie policy is a North Carolina contract and under the contract and North Carolina law, the amount of available UM/UI coverage for a given accident is reduced by the amount of liability and excess liability coverage and is reduced by any PIP or medical bills coverage paid. In this case, Erie paid Hill the $1,000.00 medical benefits/PIP coverage available under the policy.

Erie claims that excess liability coverage of $25,000.00 is available under the GEICO policy for the subject accident. However, GEICO denied the excess liability coverage claim under the Mark Scoggin policy based upon its determination that under its Mark Scoggin policy, the Mildred Scoggin vehicle Mr. Scoggin was operating was neither an "owned" or a "non-owned" vehicle. Erie contends that under the terms of the Mark Scoggin GEICO policy, and under South Carolina law, that excess coverage does apply to the underlying liability action.

All parties agree that Mildred and Mark Scoggin were mother and son, that they resided together, and that Mark Scoggin did not own his mother's car. Further, all parties agree that the

terms and conditions of both GEICO policies covering the Mark and Mildred Scoggin vehicles were identical. Therefore, the issues in this case center around the term "non-owned", which appears in the Omnibus or "insuring" clause of the GEICO policy and is defined in the policy but does not appear on the declarations page of the policy. According to GEICO's definition of "non-owned," a car owned by a household member furnished for the regular use of another household member would be "non-owned."

APPLICABLE PROVISIONS OF THE GEICO POLICY:

(1) THE EXCESS CLAUSE:

This case concerns ***GEICO's Excess Liability Clause*** and it provides as follows:

"Any insurance we provide for losses arising out of the ownership, maintenance or use of a vehicle you do not own shall be excess over any other valid and collectible insurance. (GEICO Policy; "Other Insurance")

Other provisions of the GEICO Policy relevant to this matter are as follows:

(2) THE OMNIBUS CLAUSE:

Under Section I, we will pay damages which an ***insured*** *becomes legally obligated to pay because of:*

1. ***bodily injury,*** *sustained by a person; and*
2. *damage to or destruction of property;*

arising out of the ownership, maintenance or use of the ***owned auto*** *or a* ***non-owned auto.***

We will defend any suit for damages payable under the terms of this policy. We may investigate and settle any claims or suit. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.

(GEICO Policy: p. 4 of 15)

(3) CERTAIN POLICY DEFINITIONS:

(a) "**Insured** means a person or organization described under PERSONS INSURED." (GEICO Policy; "Definitions" - #4)

(b) "**Relative** means a person who continuously lives in your household, and is related to you by blood, marriage, or adoption (including a ward or foster child.)" GEICO Policy Amendment; "Definitions" - #8)

(c) "**Non-owned auto** means a private passenger, farm, or utility auto or trailer not owned by or furnished for the regular use of either you or your relatives, except a temporary substitute auto. You or your relatives must be using the non-owned auto or trailer within the scope of permission given by its owner. A non-owned auto rented or leased for more than 30 days will be considered as furnished for regular use. (GEICO Policy Amendment; "Definitions" - #5)

(d) "**Owned auto** means: (a) a vehicle described in this policy for which a premium charge is shown for these coverages; (b) a **trailer** owned by you; (c) a **private passenger, farm** or **utility auto**, ownership of which **you** acquire during the policy period or for which **you** enter into a lease during the policy period for a term of six months or more, if: (i) it replaces an **owned auto** as defined in (a) above; or (ii) we insure all **private passenger, farm** and **utility autos** owned or leased by **you** on the date of the acquisition, and **you ask** us to add it to the policy no more than 30 days later; (GEICO Policy; "Definitions" - #6)

(e) "**Temporary substitute auto** means an automobile or **trailer,** not owned by **you,** temporarily used with the permission of the owner. This vehicle must be used as a substitute for the **owned auto** or **trailer** when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction. (GEICO Policy; "Definitions" - #9)

II. **ISSUES AS TO COVERAGE AND GEICO'S DENIAL OF COVERAGE:**

A. *GEICO'S PAYMENT OF THE LIABILITY COVERAGE UNDER THE MILDRED SCOGGIN POLICY:*

The Mildred Scoggin coverage determination by GEICO applied the definitions of the Omnibus Clause to find that Mark Scoggin had liability coverage under the Mildred Scoggin policy for the subject MVA. If the Mildred Scoggin vehicle were neither an owned nor a non-owned vehicle as to her son's use of it on the day of this accident, then liability coverage wouldn't have applied under the Omnibus clause, because as a vehicle that was not owned or non-owned, it wouldn't fall within the coverage provisions of the Policy. Under GEICO's policy, a car is NOT "non-owned" if it is owned by a resident relative and furnished for regular use.

Yet, GEICO paid liability coverage in exchange for a Covenant Not To Execute. Because Mark Scoggin did not own his mother's car, and he paid no premium for it, the liability coverage had to have been paid under the Mildred Scoggin policy for Mark Scoggin's use of that car as a "non-owned" auto. That car would still be a "Non-owned" vehicle for purposes of considering the excess liability coverage under the Mark Scoggin policy. GEICO stipulated that the Mildred Scoggin vehicle was a non-owned vehicle as to Mark Scoggin under the present facts by paying the liability coverage in exchange for a Covenant and in so doing, it stipulated that the Mildred Scoggin car was not available for Mark Scoggin's regular use. That car retains the same status when considering the Excess Coverage under the Mark Scoggin policy because the terms and conditions of the two policies have been stipulated to be identical.

Hence, GEICO denied excess coverage under the Mark Scoggin policy on the grounds that the Mildred Scoggin vehicle was not a "non-owned" vehicle as to Mark Scoggin, despite the fact that it had reached the opposite conclusion in paying the liability coverage under the same

facts and based upon the same policy terms and conditions. The Court finds that for purposes of Excess coverage under the Mark Scoggin policy, GEICO is bound by its determinations under the Mildred Scoggin policy.

B. *LANGUAGE OF THE EXCESS CLAUSE:*

The Excess Clause does not use the "owned" and "non-owned" criteria, but rather, uses common, ordinary language that is not defined in the policy; to wit, .in pertinent part, it says that "Insurance for losses arising out of the use of a vehicle you do not own shall be excess." (GEICO Policy; "Other Insurance") It uses the undefined phrase "use of a vehicle you do not own" rather than employing the policy's "owned" and "non-owned" terminology which is defined.

South Carolina law holds that when terms are not defined in a policy, an interpreting Court should define them "according to the usual understanding of the term's significance to the ordinary person." S.C. Farm Bureau Mut. Ins. Co. v. Durham, 380 S.C. 506, 671 S.E.2d 610, 2009 S.C. LEXIS 6 (S.C. 2009). Mark Scoggin did not own his mother's vehicle and he was using it by driving it at the time of the subject accident. Thus, the Court finds that the Excess Liability Cause would provide coverage for the subject accident.

C. THE LACK OF AN APPLICABLE EXCLUSION:

The GEICO policy includes a definition for "non-owned" auto but that is not part of the exclusions for using a vehicle provided for your regular use owned by a family member so there is no exclusion that takes away coverage; GEICO's reliance on the definition for non-owned autos has no applicability in this case because that exclusion applies only while carrying persons employed or otherwise engaged in auto business; Regular use is not noted in the exclusions or

the Amendment and it doesn't refer to regular use or using another vehicle owned by a family member. The Court finds that there is no applicable exclusion supporting GEICO's denial of excess coverage in this case.

D. THE POLICY DECLARATIONS:

The Policy's Declarations Page declares that Mark Scoggin is insured for bodily injury liability coverage of $25,000.00/$50,0000.00. §38-77-142 of the SC Code requires that "insurers must provide liability coverage to insureds "within the coverage of the policy" and may not limit or reduce liability coverage in the policy below the declared or "face amount" of the coverage. Williams v. Gov't Employees Ins. Co (GEICO) Opinion No. 27435, 2014 S.C. LEXIS 361 (S.C. Aug. 20, 2014);

The GEICO policy uses the Omnibus Clause, rather than a listed exclusion, to exclude coverage based on an insured's "regular use" of a resident relative's vehicle. An insured would not look to an Omnibus clause for an exclusion, but would look to the listed exclusions to review his coverage. Using the Omnibus Clause in this fashion is confusing and misleading. The Policy also contains conflicting provisions that eliminate or reduce coverage. Specifically at issue in this case, the Omnibus Clause uses the defined terms "owned" and "non-owned" and then the Excess liability Clause conditions coverage on driving a car he does not own. This is contrary to South Carolina law as interpreted by our State's Supreme Court; to wit - "Once the face amount of coverage is agreed upon, it may not be arbitrarily reduced or limited by conflicting policy provisions that effectively retract this stated coverage." Williams v. GEICO, *supra.*

The GEICO policy's declaration page for the Mark Scoggin policy at issue contained no warning of the reduced or eliminated coverage. Although the company provided separate policies covering separate vehicles owned by resident relatives of the same household, GEICO's

declarations pages did not warn either insured that the coverage for which they paid might be reduced, or as with the Mark Scoggin Excess coverage, eliminated altogether, by their act of driving their resident relative's vehicle.

This Court finds that under South Carolina law, GEICO can not declare that it provides Mark Scoggin with coverage of $25,000.00/$50,000.00 and then withdraw that coverage or define it out of existence. Williams v. GEICO, *supra*.

E. THE POLICY DEFINITIONS:

GEICO is limiting the coverage declared on its declarations page by way of carefully crafted definitions. In the present case, GEICO's application of these definitions excluded excess coverage for an insured because, at the time of the MVA, he was operating a vehicle owned by a resident relative. Had GEICO's insured, Mr. Scoggin, been driving a neighbor's car, it would qualify as a "non-owned vehicle" and be covered.

The key to invoking a vehicle as being NOT "non-owned" under the definitions is whether the resident relative's vehicle is available for the "regular use" of a GEICO insured. "Under a liability policy excluding coverage where an automobile involved in an accident was "furnished for regular use" to the insured, the term may be used in the sense of time, steady as opposed to occasional; or in the sense of type of use, usual as against unusual. Hartford Acc. & Indem Co. v. Hiland, 7 Cir., 349 F. (2d) 376." Aetna Casualty & Surety Co. v. Sessions, 260 SC 150, 194 SE2d 844 (1973). In the present case, Mr. Scoggin was using his mother's vehicle to transport a pet to a veterinary appointment, and was using the vehicle because his mother's car was better suited and equipped to transport the animal. Nothing in these facts or in the record indicates that Mark Scoggin drove his mother's car steadily as opposed to occasionally, or that

his use of the car was usual rather than unusual. Further, the purpose of the "regular use" exclusion is to prevent an insured from purchasing one policy as to one automobile and be covered without qualification for all vehicles available for his use. Aetna Casualty & Surety Co. v. Sessions, *supra.* In this case, there were two vehicles in the household of Mildred and Mark Scoggin and both were insured by GEICO such that GEICO regularly collected a premium for both vehicles.

The Court, therefore, finds that the Mildred Scoggin vehicle was not available for the regular use of Mark Scoggin within the meaning of that term in South Carolina and it further finds that application of the "regular use" doctrine serves no valid purpose where two vehicles in a household are covered by the same insurer and that insurer is regularly paid a premium for the coverage of both vehicles.

E. AMBIGUOUS PROVISIONS OF THE POLICY:

"Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *Diamond State Ins. Co. v. Homestead Indus., Inc.*, 318 S.C. 231, 236, 456 S.E.2d 912, 915 (1995). "A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Hawkins*, 328 S.C. at 592, 493 S.E.2d at 878 (quoting 17A Am. Jur. 2d *Contracts* § 338, at 345 (1991)." Williams v. GEICO, *supra.*

After review, the Court finds that the provisions of the GEICO policy are ambiguous. The relevant ambiguities are:

1. The Declarations Page for the Mark Scoggin policy states as follows: "This is a description of your coverage." It also states that Coverage applies where a premium or $0.00 is shown for a vehicle." Despite the fact that the described coverage included $25,000.00/$50,000.00 in bodily injury and UM coverage, and included comprehensive and collision coverages, provisions of the policy, and the policy definitions of "owned," "non-owned," and "relative", are such that GEICO has determined the policy provides no coverage to Mark Scoggin for the present loss; and;

2. The policy definition of "owned" auto conflicts with the Declarations Page certifying coverage of $25,000.00/$50,000.00 to Mark Scoggin for this loss; and

3. The policy provision as to "Losses We Will Pay For You Under Section I" provides that the Policy covers on bodily injury liability arising out of the "ownership, maintenance or use" of an owned or non-owned auto. The "Other Insurance" provision does not use the defined terms of owned or non-owned but instead provides that bodily injury coverage for a vehicle "you do not own" shall be excess. Given this ambiguity, as to this accident, the more liberal provision should control and - in the alternative - the policy declares that bodily injury coverage for an accident that occurred while Mark Scoggin operated a vehicle that he did not own would be excess; and

4. The policy defines a "temporary substitute auto" as an "owned" vehicle but it would be a vehicle "you do not own" for purposes of the excess clause; and

5. The policy defines a "non-owned auto" as one not owned by or furnished for the regular use of either you (Mark Scoggin) or a relative (Mildred Scoggin) other than a "temporary substitute auto" but the "Other Insurance"/Excess provision references a "non-owned auto" as "a vehicle you do not own; and

Because the GEICO policy is ambiguous in the pertinent particulars noted above, this Court finds that it must be construed against GEICO and in favor of the insured to find that excess liability coverage for the subject MVA exists.

F. STATE LAW, PUBLIC POLICY & WILLIAMS V. GEICO:

Excess Coverage is not subject to the provisions of the "Motor Vehicle Financial Responsibility Act" (Chapter 9, Title 56, SC Code Ann.) or its public policy considerations but it is subject to the state's insurance laws, specifically including the requirements of §38-77-142 that policy provisions cannot reduce the face amount of coverage stated in the Declarations and the GEICO policy at issue, or GEICO's interpretation of the policy, violates South Carolina law and public policy. Williams v. GEICO, *supra.*

Further, the Policy's Declarations Page declares that Mark Scoggins is insured for bodily injury liability coverage of $25,000.00/$50,0000.00. §38-77-142 of the SC Code requires that "insurers must provide liability coverage to insureds "within the coverage of the policy" and may not limit or reduce liability coverage in the policy below the declared or "face amount" of the coverage. Williams v. GEICO, *supra.* "Once the face amount of coverage is agreed upon, it (the insurer) may not be arbitrarily reduced or limited by conflicting policy provisions that effectively retract this stated coverage." Williams v. GEICO, *supra.*

Despite the foregoing, after agreeing to provide Mark Scoggin with coverage of $25,000.00/$50,000.00, GEICO uses carefully crafted policy definitions and the Omnibus Clause of its policy, together with the familial relationship between Mark and Mildred Scoggin to limit the policy coverage available to Mark Scoggin. This violates South Carolina law and public policy; to wit - "To allow an insurer to determine the extent to which an injured party can recover within the insured's policy coverage based solely on a familial relationship is arbitrary and capricious and violative of public policy." Williams v. GEICO, *supra.*

Based upon the foregoing, this Court finds that GEICO's use of its Omnibus Clause and definitions provisions, the latter of which clearly conflicted with the language of the excess

clause as was specifically addressed above, improperly and arbitrarily reduced or limited by conflicting policy provisions which retracted, limited or withdrew the coverage stated on the declarations page of the Mark Scoggin Policy. This is contrary to both public policy and the law of the State of South Carolina.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

A. That GEICO's Policy 4085-57-17-45, covering named insured Mark Scoggin, provides excess liability coverage of $25,000.00 potentially available to the Plaintiff Hill, for her claim and lawsuit arising out of the motor vehicle accident of September 5, 2012; and

B. In terms of priority, the excess liability coverage under the Mark Scoggin policy would be payable before the underinsured coverage under Hill's policy;

C. The policy of Erie Insurance Exchange is a North Carolina policy and under the policy and North Carolina law, coverage limits of underinsured/uninsured coverage are reduced by the amount of the payment of the liability coverage and by Erie's prior payment to the Plaintiff of its medical payments coverage such that after GEICO's payment to the Plaintiff of its $75,000.00 in available coverage, 24,000.00 in UI/UM coverage would be available under Erie's policy; and

D. GEICO's policy provisions referenced above, including those which purport to limit or withdraw excess liability coverage from the Mark Scoggin policy, violate public policy and are therefore void *ab initio* and incapable of being enforced; and

E. The Court awards the Plaintiff the attorney's fees and costs necessitated by GEICO's denial of coverage under the Mark Scoggin Policy. The Court gives the Plaintiff ten (10) days to file an Affidavit documenting the attorney's fees and costs paid pertaining to the DJ action only. The Defendants will have ten (10) days to file an Affidavit opposing the amounts claimed. This Court will then issue a ruling as to the amount of the Attorney's Fee and Cost award.

AND IT IS SO ORDERED.

The Honorable PAUL M. BURCH
Presiding Judge, Fifteenth Judicial Circuit

Dated: April 29th, 2015