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[Babinski v. Am. Family Ins. Group](#)

United States District Court for the District of Minnesota

April 11, 2008, Decided; April 11, 2008, Filed

07-CV-3374(JMR/RLE)

Reporter

543 F. Supp. 2d 1035 *; 2008 U.S. Dist. LEXIS 29883 **

Donald Babinski v. American Family Insurance Group

Subsequent History: Reversed by, Remanded by, Vacated by [Babinski v. Am. Family Ins. Group, 2009 U.S. App. LEXIS 13189 \(8th Cir. Minn., June 18, 2009\)](#)

Core Terms

insured, policy's, drop-down, household, coverage, resident, invalid

Case Summary

Procedural Posture

Plaintiff insured and defendant insurer filed cross-motions for summary judgment. The insured asked the court to find the insurance policy purchased from defendant offered coverage of up to \$ 1 million. The insurer asked the court to limit the coverage to \$ 30,000.

Overview

The court first invalidated the policy's "household exclusion" because Minnesota had held them invalid since 1979 and invalidation appeared to be in accord with North Dakota practice. The court denied the insurer's request to enforce the policy's "drop-down exclusion" and limit its liability to 3 % of the policy's face amount. The court held that the exclusion was not elf-explanatory. The insurer would have the court interpret it to mean the policy paid only the amount the state required as minimum liability insurance for a driver to drive in the state. The court took judicial notice of Minnesota's law requiring a driver to maintain a minimum of \$ 30,000 in liability coverage in order to drive in the state. The policy had a face amount of \$ 1 million. If the court applied the exclusion as the insurer suggested, the policy would pay \$ 30,000, or 3 % of the policy's face value. The court declined to do so. The court found that the insurer's policy was vague,

ambiguous, and fell far below any ordinary consumer's reasonable expectation. The policy had a face value of \$ 1 million, and reading within the policy's four corners, it was impossible to discern the sum it would pay.

Outcome

The court denied defendant's motion for summary judgment and granted plaintiff's cross-motion. The court directed defendant to pay plaintiff attorney's fees.

LexisNexis® Headnotes

Insurance Law > ... > Policy Interpretation > Ambiguous Terms > Construction Against Insurers

[HN1](#) **Ambiguous Terms, Construction Against Insurers**

Insurance policy interpretation, and the application of those terms to the facts of the case, are questions of law. It is axiomatic that a court will resolve any ambiguity against the insurer and in accordance with the reasonable expectations of the insured.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

[HN2](#) **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact. The party opposing summary judgment may not rest upon the allegations set forth in its pleadings, but must produce significant probative evidence demonstrating a genuine issue for trial.

Insurance Law > ... > Commercial General Liability
Insurance > Exclusions > General Overview

Insurance Law > ... > Motor Vehicle
Insurance > Exclusions > Household Members

[HN3](#) **Commercial General Liability Insurance, Exclusions**

Minnesota has held "household exclusions" invalid as a matter of law since 1979. Invalidation of such an exclusion appears to be in accord with South Dakota's practice.

Governments > Courts > Judicial Precedent

[HN4](#) **Courts, Judicial Precedent**

While Minnesota's appellate court opinions are persuasive authority and entitled to respectful consideration, they are not binding on a federal district court.

Insurance Law > Remedies > Costs & Attorney
Fees > General Overview

[HN5](#) **Remedies, Costs & Attorney Fees**

Where an insurer has breached the insurance contract in some respect, an insured is entitled to recover the attorney's fees and costs.

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For American Family Insurance Group, Defendant: William S Partridge, LEAD ATTORNEY, Farrish Johnson Law Office, Chtd, Mankato, MN.

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Judges: James M. Rosenbaum, United States Chief District Judge.

Opinion by: James M. Rosenbaum

Opinion

[*1036] ORDER

This matter is before the Court on cross-motions for summary judgment. Plaintiff asks the Court to find the insurance policy purchased from defendant offers coverage of up to \$ 1 million. Defendant asks the Court to limit the coverage to \$ 30,000. Plaintiff's motion is granted; defendant's motion is denied.

I. Background

Plaintiff, Donald Babinski, purchased a \$ 1 million insurance policy from defendant. While the policy was in effect, his son, John Babinski, and John's wife, Kathi, were killed in an automobile accident while John was driving plaintiff's truck. Kathi's **[**2]** estate commenced a wrongful death action against John's estate, of which plaintiff is the personal representative. On April 4, 2007, defendant sent plaintiff a letter stating his policy "provide[d] liability coverage for any possible wrongful death claims made by Kathi Babinski's next of kin." Ex. A; Court Anderson Aff.

Notwithstanding this declaration, American Family later cited the policy's exclusion provisions in support of its contention that it was not required to indemnify plaintiff to the full \$ 1 million policy limit. Defendant did, however, acknowledge its duty to pay something under the policy's "Liability Provision," which states:

We will pay compensatory damages an insured person is legally liable for because of bodily injury and property damage due to the use of a car or utility trailer.

We will defend any suit or settle any claim for damages payable under this policy as we think proper.

Ex. 1; Donald Babinski Aff.

The policy's definition of "insured person" includes "any person using your insured car." But under "Exclusion

10," the policy does not cover:

Bodily injury to:

- a. Any person injured while operating your insured car;
- b. You or any person related to you and residing **[**3]** in your household;
- c. Any person related to the operator and residing in the household of the operator.

This exclusion applies only to the extent the limits of liability of this policy exceed the limits of liability required by law.

Id.

Defendant contends that, under the "household exclusion" or "drop-down exclusion," it is only required to indemnify plaintiff up to \$ 30,000.00, rather than the policy limit. Compl. P 9; Answer P 3. Defendant further claims South Dakota law applies, requiring the Court to reduce its financial responsibility to plaintiff. The Court disagrees.

II. Analysis

HN1 Insurance policy interpretation, and the application of those terms to the facts of the case, are questions of law. *Franklin v. W. Nat'l Mut. Ins. Co.*, 574 N.W.2d 405, 406 (Minn. 1998). It is axiomatic that a court will resolve any ambiguity against the insurer and in accordance with the reasonable expectations of the insured. *Caledonia Cmty. Hosp. v. St. Paul Fire & Marine Ins. Co.*, 307 Minn. 352, 239 N.W.2d 768, 770 (Minn. 1976).

HN2 Summary judgment is appropriate when the evidence, viewed in the light most favorable **[*1037]** to the nonmoving party, presents no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); **[**4]** *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 246, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The party opposing summary judgment may not rest upon the allegations set forth in its pleadings, but must produce significant probative evidence demonstrating a genuine issue for trial. See *Anderson*, 477 U.S. at 248-49.

A. Household Exclusion

The Court begins by invalidating the policy's "household exclusion." While swiftly done, this holding merely recognizes that **HN3** Minnesota has held such exclusions invalid as a matter of law since 1979. See *Hime v. State Farm Fire & Cas. Co.*, 284 N.W.2d 829

(*Minn. 1979*). This invalidation appears to be in accord with South Dakota's practice, and likely yields the same result. *Id.* at 832; see also *MGA Ins. Co. v. Goodsell*, 2005 SD 118, 707 N.W.2d 483, 488 (S.D. 2005) (invalidating household exclusion of liability coverage for injury to resident relative of permissive user).

B. Drop-Down Exclusion

Next, the Court denies defendant's request to enforce the policy's "drop-down exclusion" and limit its liability to 3% of the policy's face amount. The "drop-down" would occur if the Court enforced the closing term of "Exclusion 10" as requested by American Family. The clause states: "This exclusion applies only to **[**5]** the extent the limits of liability of this policy exceed the limits of liability required by law."

This exclusion is not at all self-explanatory. Defendant would have the Court interpret it to mean the policy pays only the amount the state requires as minimum liability insurance for a driver to drive in the state. The Court takes judicial notice of Minnesota's law requiring a driver to maintain a minimum of \$ 30,000 in liability coverage in order to drive in this state. The policy has a face amount of \$ 1 million. If the Court applied the exclusion as the insurer suggests, the policy would pay \$ 30,000, or 3% of the policy's face value. The Court declines to do so.

As an initial matter, the Minnesota Supreme Court has not addressed the enforceability of such exclusions. The Minnesota Court of Appeals touched this question in *Frey v. United States Auto. Ass'n*, 743 N.W.2d 337, 2007 WL 4634034 (Minn. Ct. App. 2008). The *Frey* court appeared sympathetic to such a drop-down. The Court declines to accept the Court of Appeals reading for three reasons.

First, the Court considers that, **HN4** while Minnesota's appellate courts opinions are persuasive authority and entitled to respectful consideration, they **[**6]** are not binding. *Marvin Lumber and Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873, 883 (8th Cir. 2000).


Second, this case is factually distinguishable from *Frey*. There, the Minnesota Court of Appeals enforced drop-down limits on bodily-injury coverage for a family member who resided in the home. 743 N.W.2d 337, [WL] at *2. But that court also recognized the non-resident victim could recover a sum above the statutory minimum. 743 N.W.2d 337, [WL] at *7. Here, the parties agree John and Kathi did not reside with the insured. Pl.'s Mot. Summ. J. 2; Def.'s Mot. Summ. J. 1-2. Thus,

even under *Frey*, plaintiff would likely be entitled to recover more than American Family contends.

Third, and importantly, the *Frey* insurance policy set forth in writing - in actual figures - the amount it would pay to resident drivers. It did not use the "stealth" language employed in defendant's policy.

[*1038] This leads the Court to find American Family's policy vague, ambiguous, and falls far below any ordinary consumer's reasonable expectation. The American Family policy before this Court has a face value of \$ 1 million; it never refers to any other sum. And it is not difficult - it is impossible - to tell from within the policy's four corners the amount **[**7]** it will pay. According to defendant, the company pays the minimum insured amount in the state in which the accident occurs. Again, the Court takes judicial notice that Minnesota and South Dakota impose differing minimum insurance sums. Minnesota's is \$ 30,000.00; South Dakota's is \$ 25,000.00. This means that if the same accident took place in South Dakota, American Family would not even pay the 3% it is offering here; it would pay \$ 25,000, a 2.5% sum. Reading within the policy's four corners, it is impossible to discern the sum it will pay.

Even if the Court applied the provision in question as a "drop-down exclusion," the policy remains ambiguous. There is no reference to the state's minimum insurance amount to which defendant would drop down. Both the Court, and certainly the insured, search in vain for any such statement within the policy's four corners. This makes the policy unclear, vague, and misleading, such that the Court declines to enforce it.

Finally, taking all of the facts in the light most favorable to plaintiff, the Court finds Donald Babinski is entitled to recover attorney's fees. [HN5](#)  Where an "insurer has breached the insurance contract in some respect[,]" an insured **[**8]** is entitled to recover the attorney's fees and costs. [Chicago Title Ins. Co. v. Fed. Deposit Ins. Co., 172 F.3d 601, 605 \(8th Cir. 1999\)](#). Accordingly, defendant shall pay the amount of \$ 35,712.33 in attorney's fees.

III. Conclusion

For these reasons, the Court denies defendant's motion for summary judgment and grants plaintiff's cross-motion. On this record, the Court cannot, of course, determine the liability American Family bears. But the Court does find the policy's exclusion invalid. This is a \$ 1 million policy, and so it shall remain.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 11, 2008

s/ James M. Rosenbaum

JAMES M. ROSENBAUM

United States Chief District Judge

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