2015 WL 1726533 (Ky.Cir.Ct.) (Trial Order)
Circuit Court of Kentucky.
Knott County

Ryan AMBURGEY, Plaintiff,
v.
MAJOR ELKHORN MINING CO., LLC, Defendant,
and
CHUBB CUSTOM INSURANCE CO., Defendant.

No. 07-CI-00056.
April 14, 2015.

Order Re Defendant Chubb's Motion for Partial Summary Judgment and Plaintiff Amburgey's Cross-Motion for Partial Summary Judgment

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Kimberley Cornett Childers, Judge.

***1** This matter is before the Court on Plaintiff's Cross-Motion for Partial Summary Judgment on breach of duty to defend and breach of contract. The Court held a hearing on March 24, 2015. Having duly considered the respective positions of the parties, as presented in their briefs and at oral argument, the Court now renders its decision. For the reasons set forth below, Plaintiffs Cross-Motion is SUSTAINED and Defendant Chubb Custom Insurance Company's Motion is DENIED.

I. *PROCEDURAL HISTORY*

Plaintiff Ryan Amburgey filed his Complaint on. March 14, 2007, his Amended Complaint on February 14, 2008 and his Second Amended Complaint on December 12, 2013. Plaintiff alleges five causes of action against Chubb: (1) Breach of Duty to Defend; (2) Breach of Contract; (3) Violation of the Covenant of Good Faith and Fair Dealing; (4) Violation of KRS § 304.12-230 (Unfair Claims Settlement Practices); and (5) Violation of KRS § 367,170 (Consumer-Protection Act).

On December 10, 2014, Chubb moved for Partial Summary Judgment. On February 12, 2015, Amburgey filed a Response and Cross-Motion. Chubb filed a Reply and Response on March 6, 2015. Amburgey filed a Reply on March 11, 2015.

II. *FINDINGS OF FACT*

1. This case arises from negligent employment practices of defendant Major Elkhorn Mining Co., LLC (“MEMC”) for overworking and negligently failing to supervise its employee, creating a foreseeable risk of harm to others, in breach of its duty of care, which caused employee Lee Ratiliff to seriously injure Amburgey during an auto accident.

2. MEMC had a commercial general liability policy ("Policy No. 7956-02-26") with Chubb in force when the accident occurred. [1]

3. Within the coverage period of Policy No. 7956-02-26, on or about February 14, 2008, MEMC received a copy of the amended complaint filed by Amburgey in his lawsuit against the estate of Ratliff, adding his employer, MEMC, as a defendant for negligent employment practices. [2]

4. MEMC had no connection to the automobile involved in the accident. [3]

5. MEMC notified Chubb of the claim against it on February 22, 2008. [4]

6. The amended complaint shows that Amburgey sought to recover damages allegedly resulting from direct negligence that occurred at MEMC's premises.

7. The insuring agreement for coverage in Policy No. 7956-02-26, states:

Subject to all of the terms and conditions of this insurance, we will pay damages that the insured becomes legally obligated to pay by reason of liability:

***2** imposed by law; or

assumed in an **insured contract;**

for **bodily injury or property damage caused by an occurrence** that takes place in the Coverage Territory and to which this coverage applies.

***

Subject to all of the terms and conditions of this insurance, we will pay damages that the insured becomes legally obligated to pay by reason of liability imposed by law for … **personal injury** caused by an offense committed in the Coverage Territory and to which this coverage applies. [5]

9. The policy further provides: "Subject to the terms and conditions of this insurance, we will have the right and duty to defend the insured against a suit, even if such suit is false, fraudulent or groundless." [6]

" '**Occurrence** means an accident, including continuous or repealed exposure to substantially the same general harmful conditions." [7]

10. Under the insuring clause, Chubb insures against liability arising out of alleged negligent employment practices.

11. Policy No. 7956-02-26 contains the following Liability Insurance

Endorsement ("Auto Liability Insurance Exclusion");

With respect to all coverage(s) under this contract, this insurance does not apply to bodily injury or properly damage arising out of the ownership, maintenance, use (use includes operation and loading or unloading) or entrustment to others of any auto by any:

• insured; or

• other person or organization.

This exclusion does not apply to:

• the parking of an auto on premises owned by or rented to you, provided the auto is not owned by or loaned or rented to any insured; or

• the operation of the equipment described in subparagraphs F.2. or F.3. of the definition of mobile equipment. [8]

12. Policy No. 7956-02-26 also states that; "This insurance is excess over any other insurance, whether primary, excess, contingent or on any other basis: … if the loss arises out of aircraft, autos or watercraft (to the extent not subject to the Aircraft, Autos Or Watercraft exclusion)." [9]

13. Chubb's claim notes reflect that the insurer understood that the allegations in the lawsuit concerned a non-owned auto. [10]

14. Chubb focused the investigation on the Auto Liability Insurance Exclusion rather than on the negligent employment practices claim." [11]

***3** 15. On or about February 26, 2008, Chubb summarily denied coverage. [12]

16. Chubb cited an Auto Liability Insurance Exclusion as the sole basis to avoid coverage stating; "To the extent that Bodily Injury is alleged, the damages stem from an automobile accident and arc precluded from coverage …" [13]

17. Chubb further stated that: "If you have an automobile liability policy with another insurance company, you should report this matter to that carrier." [14]

18. Chubb neither investigated nor addressed the alleged negligent employment practices. [15]

19. Chubb did not seek guidance from the Court—or a Federal Court—in the form of a Declaratory Judgment action before asserting there was no coverage for the occurrence.

20. Chubb also did not protect itself by providing a defense under a Reservation of Rights. Instead, Chubb left its insured to fend for itself.

21. After Chubb denied coverage, MEMC assigned to Plaintiff Amburgcy its rights against Chubb to protect its business. [16]

22. On December 12, 2013, as a result of Chubb's failure to defend, the Court entered partial summary judgment against MEMC in favor of the Plaintiff. [17]

23. The Court held that MRMC "overworked and negligently foiled to supervise its employee, creating a foreseeable risk of harm to others, in breach of its duty of care, causing plaintiff's damages." [18]

24. On or about January 29, 2014—during the course of litigation—Chubb reaffirmed its denial of coverage again citing the Auto Liability Insurance Exclusion under Policy No. 7956-02-26. [19]

III. *CONCLUSIONS OF LAW*

A. LEGAL STANDARD

1. Summary judgment is proper when there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law. [20]

2. Interpretation and construction of an insurance contract is a matter of law for the courts to determine. [21]

3. The interpretation of an insurance policy often presents a. pure question of law, rendering it appropriate for summary judgment. [22]

4. The Kentucky Supreme Court has referred to the following two rules of insurance contract interpretation as "cardinal principles": "(I) the contract should be liberally construed and all doubts resolved in favor of the insureds; and, (2) exceptions and exclusions should be strictly construed to make insurance effective." [23]

***4** 5. The language of an insurance policy, "must be interpreted according to the usage of the average man and as they would be read and understood by him in the light of the prevailing rule that uncertainties and ambiguities must be resolved in favor of the insured." [24]

6. "An insurance company should not be allowed to collect premiums by stimulating a reasonable expectation of risk protection in the mind of the consumer, and then hide behind a technical definition to snatch away the protection which induced the premium payment." [25]

7. Any limitation or exclusion of coverage or exclusion must be clearly stated in the policy in order to apprise the insured of such limitations. [26]

8. "An ambiguity may either appear on the face of the policy or … when a provision is applied to a particular claim." [27]

9. Insurers have an obligation to defend if there is an allegation "which potentially, possibly or might come within the coverage of the policy." [28]

10. The determination of whether a defense is required must be made at the outset of the litigation by reference to the complaint and the known facts. [29]

11. "[T]he insurance company, at its own peril, may elect not to defend the original action against a putative insured, although thereafter it may be liable for the judgment if it is judicially determined that the policy did in fact provide coverage in the circumstances." [30]

IV. *LEGAL DISCUSSION*

A. CHUBB BREACHED ITS DUTY TO DEFEND AND INDEMNIFY MEMC

1. The Allegations in the Underlying Action Subjecting MEMC to Liability are Covered Under the Terms of Policy No. 7956-02-26.

There is coverage for the alleged negligent employment practices because under Kentucky law the Auto Liability Insurance Exclusion only bars coverage if MEMC used an automobile, The Court held in *Murriel-Don Coal Co. Inc. v. Aspen Ins. UK Ltd.* that liability arising out of conceptually independent allegations of negligent employment practices are covered under a general liability insurance policy—-irrespective of an auto exclusion. [31] The same result applies here. "[A]n auto exclusion can only bar coverage if the insured owns, operates, borrows, or uses the automobile." [32] MEMC was facing liability for alleged negligent employment practices in overworking its employees. [33] MEMC's liability did not "arise out of its connection to the automobile involved in the accident. Instead, the liability *arose out of* conceptually independent allegations of negligent employment practices at one of its coal mines. Negligent, conduct in overworking employees can lead to many injurious results. [34] The Auto Liability Insurance Exclusion precludes coverage for vicarious liability for the negligence of a driver but does not preclude coverage for direct negligence against MEMC for its conduct that occurred on its premises. [35]

***5** All risks not expressly excluded under Policy No. 7956-02-26 arc covered, including those not contemplated by either party. [36] Under the insuring clause, Chubb promised to provide liability arising out of negligent employment practices. [37] Consequently, the allegations in the amended complaints subjecting MEMC to liability are covered under the terms of Policy No. 7956-02-26.

2. The Auto Liability Insurance Exclusion is Ambiguous.

Chubb's Auto Liability Insurance Exclusion is ambiguous as a matter of law because it is prone to more than one reasonable interpretation. Under Kentucky law, "[w]here an exclusion is susceptible to two reasonable interpretations, the interpretation favorable to the insured is adopted." [38] In *Murriel-Don Coal Co. Inc. v. Aspen Ins. UK Ltd.*, No. 10-CI-00318 (Nov. 28, 2011) the Court held that auto exclusions in general liability policies "exclude only those acts which the insured could insure against through separate auto insurance from a carrier that provides such coverage." [39] The Court found a similar general liability auto insurance exclusion to be ambiguous and thus inapplicable. [40] Chubb's Auto Liability Insurance Exclusion likewise can reasonably be read to exclude only those acts which the insured could insure against through separate auto insurance from a carrier that provides such coverage. Moreover, Chubb stated in its denial letter that: "If you have an automobile liability policy with another insurance company, you should report this matter to that carrier." [41]

This interpretation is consistent with the general role that auto exclusions play in commercial general liability policies. A recognized purpose of this type of auto exclusion is that: "In general, the liabilities excluded under the CGL insurance policy by reason of these provisions are covered under 'mirror-image' insuring agreements of automobile, aviation, and marine insurance policies." [42] It is clear that the Auto Liability Insurance Exclusion was (he type of exclusion meant to exclude coverage for risks "normally covered by other insurance." [43]

MEMC did not have automobile insurance covering liability arising from an automobile accident where it had no connection to the automobiles or drivers involved in the accident. "Moreover, there would be no need for an automobile insurance policy covering an automobile accident where one has no connection to the vehicles involved because one would not suffer any loss, damage, or liability from the accident." [44]

***6** While the Auto Liability Insurance Exclusion can also be interpreted to exclude coverage for damages that stem from an automobile accident, that is an interpretation of the exclusion most favorable to the insurer. [45] Even if Chubb's interpretation

is reasonable, it is at best one of two reasonable interpretations and the Court must construe the ambiguous exclusion in favor of the insured.

Policy No. 7956-02-26 must be liberally construed and all doubts resolved in favor of coverage. The Auto Liability Insurance Exclusion must be strictly construed to make insurance effective. Because the Auto Liability Insurance Exclusion is susceptible to two different interpretations, the reasonable interpretation favorable to MEMC must be adopted. Since the amended complaints made allegations that show the potential for coverage under Policy No, 7956-02-26, Chubb was required to defend MEMC in the instant litigation.

3. MEMC Is Entitled to All Coverage it Reasonably Expected Under Policy No. 7956-02-26.

The Auto Liability Insurance Exclusion is not plain and clear enough to defeat the reasonable expectations of coverage for claims of negligent employment practices. MEMC reasonably expected coverage under Policy No. 7956-02-26 for any potential liability arising from allegations of negligent employment practices.[46] In *Murriel-Don*, the Court held that. a. similar auto exclusion in a commercial general liability policy is inapplicable to preclude coverage for allegations of negligent employment practices.[47] The Kentucky Supreme Court stated that "[a]n essential tool in deciding whether an insurance policy is ambiguous, and consequently should be interpreted in favor of the insured, is the so-called 'doctrine of reasonable expectations.' "[48] "An average layperson would reasonably expect commercial general liability coverage for allegations of negligent employment practices. Obviously, the very name of the policy suggests the expectation of maximum coverage."[49] An insured's subjective expectations arc not relevant to ascertaining reasonable expectations. "Under controlling Kentucky law, the proper area of inquiry is what the [insured] could reasonably expect in light of what they actually paid for, not what they personally expected or whether those expectations could be ascertained."[50] An average layperson likewise would not reasonably expect the Auto Liability Insurance Exclusion to be applied to exclude coverage for the alleged negligent management decisions that formed the basis of claims against MEMC.

Exclusions arc inapplicable when they fail to clearly inform the insured that there is no coverage for claims arising from the acts of third-parties that have no connection to the insured.[51] The *P-W-M* court found an insolvency exclusion would be incompatible with the overall insurance policy, which protected against liability arising out of the "wrongful acts" of the insured, if it excluded claims arising out of insolvencies in which the insured had done no wrong.[52] Because (he insolvency exclusion was ambiguous the *P—W-M* court interpreted it in favor of coverage.[53] Chubb's Auto Liability Insurance Exclusion suffers from the same lack of precision.[54] Under Policy No. 7956-02-26, employees like Ratliff are an insured, "but they are insureds only for acts within the scope of their employment by [MEMC] or while performing duties related to the conduct of [MEMC's] business."[55] Here, it is undisputed that Ratliff—the driver of the auto—is not an. insured.[56]

***7** The *P-W-M* court held that the exclusion was ambiguous because the insurer failed to apprise the insured there was no coverage for insolvency regardless of any wrongful act by the insured.[57] The Auto Liability Insurance Exclusion likewise does not plainly and clearly exclude coverage for bodily injuries arising from automobile accidents where the insured had no connection to the automobiles involved but was alleged to have engaged in negligent conduct which contributed to causing the claimants' injuries. Chubb apparently contends that using the words "other person" in its exclusion has a talismanic effect to clear up any reasonable expectation of coverage.[58] While the insertion of the words "other person" might have cured the issues concerning the text used in the auto exclusion for the *Murriel-Don* case, it docs nothing to cure the confusing text in Chubb's Auto Liability Insurance Exclusion.[59] The Chubb Auto Liability Insurance Exclusion does not clearly state to the insured that an auto merely contributing to a claim—when the insured has no connection to the accident— would be extinguished. Chubb could have used words such as "non-ownership" to make this clear.

If an insurance company intends that, a policy exclusion should exclude coverage in situations that "arise out of" the acts of a third-party—rather than contributed to—the insurance company must say so explicitly in a plain and clear manner. It would seem, obviously, a relatively simple matter for Chubb to have written its limitation expressly to exclude involvement of a non-owned auto that only contributes to a claim arising out of negligent employment practices. Under *P-W-M*, MEMC reasonably expected coverage in a situation like this where it is undisputed that it had no direct connection to the auto accident.

Absent "a very specific exclusion informing an insured that coverage is excluded for the acts of third-parties, an average layperson would reasonably expect commercial general liability coverage for allegations of negligent employment practices." [60] Chubb's exclusion does not so inform its insured. Here, MEMC is entitled to all coverage it reasonably expected under Policy No. 7956-02-26.

4. Chubb is Liable for Breaching its Duty to Defend MEMC.

Chubb is liable for breaching its duty to defend MEMC against an allegation which potentially, possibly or might come within the coverage terms of Chubb insurance Policy No. 7956-02-26. The "duty to defend is broader than the duty to indemnify." [61] The allegations in the amended complaints claimed *direct* negligence against MEMC, "which potentially, possibly or might come within the coverage terms" of Policy No. 7956-02-26. [62] The Court's order granting partial summary judgment against MEMC in favor of Amburgey likewise demonstrates *direct* negligence found against MEMC, "which potentially, possibly or might come within the coverage terms" of Policy No. 7956-02-26. [63] The Court held that MEMC "overworked and negligently failed to supervise its employee, creating a foreseeable risk of harm to others, in breach of its duty of care, causing plaintiff's damages." [64]

***8** In *Murriel-Don*, the Court held under a similar set of circumstances that a general liability insurer violated its duty to defend a coal mining company. [65] Chubb similarly violated its duty to defend MEMC.

B. CHUBB IS IN BREACH OF CONTRACT AND LIABLE FOR ALL DAMAGES NATURALLY FLOWING FROM THE FAILURE TO DEFEND MEMC

Chubb is now liable for the all the damages naturally flowing from its failure to defend. The Kentucky Supreme Court has consistently held:

> 'If the insurer believes there is no coverage, it has several options. One is to defend the claim anyway, while preserving by a reservation of rights letter its right to challenge the coverage at a later date. Another is to elect not to defend. However, should coverage be found, the insurer will be liable for all damages naturally flowing from the failure to provide a defense.' [66]

The damages "naturally flowing" from the failure to defend include a default judgment, where the insured either hired no attorney or elected to defend itself. [67] Chubb is barred from contesting MEMC's actual liability since the question of liability was resolved by summary judgment rather than a settlement. [68] Chubb is bound by the result of the partial summary judgment order absent fraud or collusion in creating an inflated judgment. [69] Chubb has neither argued fraud nor presented any evidence of collusion. Consequently, the Court finds there are no material questions of fact concerning this issue. The Court finds no showing of fraud or collusion here.

Chubb elected not to defend. MEMC. That MEMC assigned its rights and summary judgment on liability was ordered are among the risks Chubb took in failing to come to its aid and Ryan Amburgcy—as assignee of MEMC—is entitled to all damages naturally flowing from the breach irrespective of policy limits.

V. *CONCLUSION*

***9** In light of the foregoing, Plaintiff's Cross-Motion is SUSTAINED and Defendant's Cross-Motion is DENIED as follows: 1. Chubb Breached its Duty to Defend MEMC, Chubb is found to be in Breach of Contract and is liable to MEMC for all damages that naturally flow from the partial summary judgment: order in favor of Amburgey.

2. The amount of damages will be determined at a later date.

GIVEN UNDER MY HAND as Judge of the Knott County Court this *14th* day of April, 2015.

<<signature>>

HON. KIMBERLY CORNETT CHILDERS

JUDGE KNOTT CIRCUIT COURT

Footnotes

1 PL's Exhibit B (Policy No. 7956-02-26).

2 SeeTI.'s Am. Compl., Feb. 14, 2008; *see also* PL's Sec. Am. Compl., Dec. 12. 2013 (Amburgey filed a second amended complaint alleging that MEMC overworked and negligently failed to supervise its employees creating a foreseeable risk of harm to others and further alleged that MEMC negligently allowed Ratliff "to leave its premises in a slate that it knew or should have known to be a danger to the other motorists on the highways.").

3 *See* Pl's Exhibit D, Thornsberry Dcp., 60:17-20, Sep. 17, 2014.

4 Dcf.'s; Exhibit 6 at Chubb_Amb 01978 ("General Liability Notice of Occurrence/Claim").

5 PL's Exhibit B, Chubb_Amb 00017 (emphasis in original).

6 *Id.*, Chubb_Amb 00018 (emphasis in original).

7 *Id.*, Chubb_Amb 00046 (emphasis in original).

8 *See* PL's Exhibit B at Chubb_Amb 00070 (emphasis in original).

9 *Id.*, at Chubb_Amb 00037 (demonstrating that the use of an automobile is not an automatic exclusion) (emphasis in original).

10 PL's Exhibit C, Chubb_Amb 01.962, Feb. 25, 2008 ("First question is coverage. This is a GL policy, not an auto policy. Acord says there is no hired and non-owned endorsement on the policy, but please verify this.").

11 *Id.*, Chubb_Amb 01961, Feb. 25, 2008 ("There is an auto exclusion endorsement on the policy and no hired and non owned coverage under this gl policy."); Chubb_Amb 01960, Feb. 25, 2008 ("I want to find out if there is an auto policy that this matter has been reported to as that is the policy that should respond to loss."); Chubb_Amb 01956, Feb. 26, 2008 ("This is a gl policy and there is not hired and non owned coverage."); Chubb_Amb 01942, Mar, 4, 2008 (discussing hired and non owned auto endorsement pronouncing that: "It should be easy for [MBMC] to get out of this by affidavit stating that he was no in course and scope.").

12 *See* Def.'s Exhibit 7 (denial letter).

13 *See* Dcf.'s Exhibit 7 (denial letter).

14 *Id.*

15 *Id; see also* PL's Exhibit C, Chubb_Amb 01962, Feb. 25, 2008 (claim notes).

16 *See* Def.'s Exhibit 11 (Assignment); *see also* PL's Exhibit D, Thomsberry Dep., 55:7-18, Sep. 17, 2014 (explaining that the Assignment was the only option to protect MEMC).

17 *See* Order, Dec. 12, 2013 (granting partial summary judgment).

18 *Id.*

19 PL's Exhibit E, Chubb_Amb 02002, Jan. 29, 2014 (referencing "Liability Insurance Endorsement Exclusions.").

20 *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991); CR 56.03.

21 *Stone v. Kentucky Farm Bureau Mutual Insurance Company*, 34 S. W.3d 809, 810 (Ky. App. 2000); *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1999).

22 *See Stone*, 34 S.W.3d at 810-811.

23 *Ky. Farm Bureau Mut. Ins. Co. v. McKinney*, 831 S.W.2d 164, 166 (Ky. 1992) (internal quotation marks and citation omitted); *see also State Farm Mut. Auto. Ms. Co. v. Shelton*, 413 S.W.2d 344, 347 (Ky. 1967); *Kentucky Farm Bureau Insurance Co. v. Vanover*, 506 S.W.2d 517, 519 (Ky. 1974).

24 *Fryman v. Pilot Life Ins. Co.*, 704 S.W.2d 205, 206 (Ky. 1986).

25 *Aetna Cas. & Sur. Co. v. Kentucky*, 179 S.W.3d 830, 837 (Ky. 2005).

26 *See St. Paul Fire & Marine Insurance Company v. Powell-Walton-Milward Inc.*, 870 S.W.2d 223, 227 (Ky. 1994).

27 *Id.*

28 *O 'Bannon v. Aetna Casualty and Surety Company. Ky.*, 678 S. W.2d 390, 392 (1984).

29 *See James Graham Brown Found., Inc. v. St. Paul fire & Marine Ins. Co.*, 814 S.W.2d 273, 279 (Ky. 1991) (citation omitted).

30 *Cincinnati Ins. Co. v. Vance*, 730 S.W.2d 521, 522 (Ky, 1987).

31 *See Murriel-Don Coal Co. Inc. v. Aspen Ins. UK Ltd*, No. 10-CI-00318, 2011 WL 12686635, at p.l1 (Knott Cir. Tr. Order Nov. 28, 2011).

32 *Id.* (citing *Hugenberg v. West Am. Ins. Co.*, 249 S.W.3d 174, 186-187 (Ky. App. 2006)).

33 *See* PL's Sec. Am. Compl., ¶ 8, Dec. 12, 2013.

34 10 Things to Hate About Sleep Loss, WcbMD, www.wcbmd.com/sleep-disorders/excessive-sleepiness-10/l0-results-sleep-loss (studies show that sleep deprivation leads to accidents and injuries on the job); *see also* MSHA Injury Prevention Program, "Fatigue," www.msha.gov/IllnessJPrevention/Tips/fatigue.htm ("Employers often expect employees to work longer hours. Although this may benefit both the employee and the employer, the price paid is usually fatigue."); MSHA Accident Prevention Program, "Work Schedules," www.msha.gov/Accident_ Prevention/ideas/break.htm ("A 1998 German study found that workers experienced a significant rise in accidents and traumatic incidents after nine to ten hours on the job. Other studies have found that people who are sleep-deprived as a result of overwork have an increased risk of injuries.").

35 *Cf. DeStock No. 14, Inc. v. Logsdon*, 993 S.W.2d 952, 959 (Ky. 1999) (establishment can be held liable for its independent negligent act); *see also Salem Group v. Oliver*, 128 N.J. 1, 607 A.2d 138, 139 (N.J. 1992) (court held that the motor vehicle exclusion in an insurance policy did not operate to relieve the insurance company of the duty of providing a defense with respect to alleged social host liability for supplying alcoholic beverages); *Sarp v. U.S. Fid. Guaranty Co.*, 572 So.2d 158, 160 (La. App. 1 Cir. 1990), cert. denied 573 So.2d 1136 (La. 1991) ("We can foresee various means other than use of an automobile by which negligent conduct due to intoxication could have resulted in injury. The use of the automobile in this case, though an essential fact of *this* accident, was not an essential clement of the *theory* of liability.") (emphasis in original).

36 *James Graham Brown Foundation, Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 278 (Ky. 1991),

37 *See* PL's Exhibit B, Chubb_Amb 00017; Chubb Amb 00018; Chubb_Amb 00046.

38 *P-W-M*, 870 S.W.2d at 226.

39 *See Murriel-Don*, 2011 WL 12686635, at pp.8-9.

40 *Id.*

41 *See* Def.'s Exhibit 7 (denial letter).

42 21. Eric Mills Holmes, HOLMES' APPLEMAN ON INSURANCE 2d § 132.7 [A] [2] (2009).

43 *Essex Ins. Co. v. City of Bakersfield*, 154 Cal.App.4th 696, 709-710, 65 Cal.Rptr.3d 1 (2007) ("The auto exclusion (as well as the aircraft and watercraft exclusions) is an exclusion designed to limit coverage for risks normally covered by other insurance. 'To cover these risks, the insured must purchase separate insurance." '),

44 *Bakersfield*, 154 Cal.App.4th at 71.0 (citing Cal. Ins. Code, § 22 ("insurance is 'a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event' ").

45 *See* Def.'s Exhibit 7 ("To the extent that Bodily Injury is alleged, the damages stem from an automobile accident and are precluded from coverage …"),

46 PL's Exhibit D, Thomsberry Dep., 21:1-13 (even though he is not an expert, MEMC owner is able to read the policy), 50:13-52:15 (MEMC expected coverage for conduct that occurred on its premises), Sep. 17, 2014.

47 *See Mwriel-Don*, 2011 WL 12686635, at pp. 10-11.

48 *Simon v. Cont* V *Ins. Co., Ky.*, 724 S.W.2d 210, 212 (1987).

49 *See Murriel-Don*, 2011 WL 12686635, at p. 10.

50 *Estate of Swartz v. Metropolitan Property & Cas. Co.*, 949 S.W.2d 72, 76 (Ky. App. 1997).

51 *E.g., P-W-M,* 870 S.W.2d at 227 (the Kentucky Supreme Court held that policy exclusion was ambiguous because it did not clearly state that there would be no coverage for claims arising from the acts of a third-party, and not the insured).

52 *P-W-M,* 870 S.W.2d at 226.

53 *Id.* at 227.

54 *Bakersfield,* 154 Cal.App.4th at 707-708 ("Thus, an average layperson would interpret the auto exclusions as applying to lawsuits involving the use of or other acts relating to any 'auto' by any insured.").

55 *See* PL's Exhibit B at Chubby Arab 00020 (definition under "Employees and Volunteer Workers.").

56 *See* PL's Exhibit C at Chubb_Amb 01962 ("Clmt. on way home. Need to verify that he was not on an errand or doing anything to promote insured business on way home. If not, see no liability and S.J. issue."); see also Chubb_Amb 01942 ("It should be easy for them to get out of this by affidavit stating that he was not in the course and scope.").

57 *P-W-M,* 870 S.W.2d at 227 ("It would seem, obviously, a relatively simple matter for St, Paul to have written its limitation expressly to exclude inability to pay, irrespective of a wrongful act or not.").

58 *Compare* Chubb's Resp., at p. 16 *with Murriel-Don,* 2011 WL 12686635, at pp. 10-11 (Chubb misinterprets the *Murriel-Don* order by interjecting the "any other person" discussion from the doctrine of reasonable expectations into the ambiguity discussion.).

59 *Compare* PL's Exhibit B at Chubb_Amb 00070 (Chubb's policy omits any reference to the words "non-ownership," "caused by" or "contributed to") *with* PL's Ex. G, Aspen Auto Exclusion (using the words "non-ownership," "caused by" or "contributed to" in an auto exclusion); *compare also Bakersfield,* 154 Cal.App.4th at 707 (using the words non-ownership," "caused by" or "contributed to" in an auto exclusion).

60 *See Murriel-Don,* 2011 WL 12686635, at p. 11.

61 *James Graham Brown Found.,* 814 S.W.2d at 280 (citation omitted).

62 *Aetna Cas. & Surely Co., Inc.,* 179 S.W.3d at 841.

63 *See* Order, Dec. 12, 2013 (granting partial summary judgment).

64 *Id.*

65 *See Murriel-Don,* 2011 WL 12686635, at pp.14-15.

66 *E.g., Cincinnati Ins. Co.,* 306 S.W.3d at 79, FN 44 (Ky. 2010) (quoting *Aetna CAS. & Surety Co., Inc.,* 179 S.W.3d at. 841).

67 *Grimes v. Nationwide Mut Ins. Co.,* 705 S.W.2d 926, 932 (Ky. App. 1985) ("That Gibbs did not hire an attorney and allowed a default to be taken are risks Nationwide took in failing to come to his defense."); *see also The Medical Protective Co. of Fort Wayne v. Davis,* 581 S.W.2d 25 (Ky. App. 1979) (that an insured may seek to defend himself without counsel and in doing so fails to comply with the rules of civil procedure resulting in a default judgment is one of risks the insurer must take); *Eskridge v. Educator and Executive Insurers, Ky.,* 611 S.W.2d 887 (Ky. 1984) (allowing for judgment against insurer to exceed policy limits with interest dating back to judgment in the underlying action where the insurer failed to defend); *Cincinnati Ins. Co. v. Vance,* 730 S.W.2d 521, 523 (Ky. 1987) ("We further agree that if the insurer has elected not to provide a defense wrongfully or erroneously because it is later determined that the policy provided coverage, the insurer then would have breached the terms of its policy and the aggrieved party then would be entitled to recover all damages naturally flowing from the breach irrespective of policy limits.").

68 *State Farm Mut. Aula. Ins. Co. v. Shelton,* 368 S. W.2d 734, 737 (Ky. 1963); *see also Metro. Cos. Ins. Co. of N.Y. v. Albrillon,* 282 S.W. 187, 189 (Ky. 1926).

69 *O 'Barman v. Aetna CMS, & Sur. Co.,* 678 S.W.2d 390, 393 (Ky. 1984) (citation omitted).

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