CASE NOTE:

DUI EXCLUSIONARY CLAUSES IN INSURANCE CONTRACTS AND THE REASONABLE EXPECTATIONS OF THE ORDINARY CONSUMER: *PHILADELPHIA INDEMNITY INSURANCE COMPANY V. BARERRA*

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I. FACTUAL AND PROCEDURAL BACKGROUND

Juan Eduardo Quintero-Lopez rented a car from Value Rent-A-Car (Value) on April 22, 1993 for a one-week period.[1] Quintero-Lopez had rented from Value several times prior and each time purchased the optional "Loss Damage Waiver" (LDW) and the "Supplemental Liability Insurance" (SLI).[2] Both optional insurance policies were underwritten by Philadelphia Indemnity Insurance Company (Philadelphia), but Value self-insured the $15,000/$30,000 statutory minimum coverage it provided to renters.[3] Value marketed the SLI coverage through a brochure entitled "Relax You're on a Value Vacation."[4] The first page of Value's two-sided rental agreement contained a series of boxes that required the renter to decline or accept the additional insurance offerings.[5] The document shows that Quintero-Lopez accepted both the LDW and SLI insurance.[6]

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1. *See* Phila. Indem. Ins. Co. v. Barerra, 21 P.3d 395, 397 (Ariz. 2001).
2. *See id.*
3. *See id.*; *see also* ARIZ. REV. STAT. § 28-2166(B) (1997).
4. *See Barerra*, 21 P.3d at 397, 408 app. C. The marketing brochure provided by Value states in one section that the SLI policy is "excess automobile insurance," yet in a subsequent section describes the coverage as "primary coverage, meaning your [own] auto insurance policy will not be called on to contribute unless the loss exceeds the maximum of $1 million." *Id.* at 399.
5. *See id.* at 405 app. A(1).
6. *See id.*

The following day, while operating the rental vehicle under the influence of alcohol, Quintero-Lopez was involved in an automobile accident that injured Pedro Huerta and killed Melvin Sanchez, both of whom were passengers in his rented car.[7] Subsequently, Huerta's parents, on behalf of their minor son, brought a personal injury suit against Quintero-Lopez. Ana Barerra, Sanchez's mother, joined this suit, individually and on behalf of Sanchez's estate, and asserted a wrongful death claim against Quintero-Lopez.[8] The trial court entered judgment against Quintero-Lopez, awarding damages of $435,000 to Huerta and $270,000 to Barerra on behalf of Sanchez's estate.[9] Value tendered its policy limits of $30,000.[10] However, Philadelphia denied the claim, asserting the DUI exclusionary clause precluded coverage.[11] Quintero-Lopez assigned all of his claims to Barerra and Huerta after the parties entered into a *Morris* agreement.[12]

Philadelphia's declaratory action filed against Huerta, Barerra, and Quintero-Lopez (Petitioners) sought a ruling that it was not liable for any judgment arising out of the accident because Quintero-Lopez breached the DUI exclusionary clause of the rental agreement.[13] The trial court ruled the DUI exclusionary clause was enforceable and granted Philadelphia's summary judgment motion.[14] Petitioners appealed and the court of appeals affirmed the trial court's ruling, holding that the DUI exclusionary clause was neither void as unconscionable, against public policy, nor against the reasonable expectations of the insured.[15] The Arizona Supreme Court reversed the trial court's judgment and vacated the court of appeal's opinion, holding that the DUI exclusion in the rental policy is not enforceable because to do so would violate the reasonable expectations of the ordinary consumer.[16]

II. THE NATURE OF THE INSURANCE POLICY: PRIMARY OR EXCESS COVERAGE

Petitioners first claimed that the SLI policy issued by Philadelphia was additional primary insurance and, therefore, the Financial Responsibility Act (FRA) barred Philadelphia from invoking the DUI exclusionary clause to deny

7. *See id.* at 397.
8. *See id.* at 397–98.
9. *See id.* at 398.
10. *See id.*
11. *See id.*
12. *See id.* In *Morris*, the court held that after an insurer denies coverage, it is not a breach of the insurance cooperation contract for an insured to assign any claims against the insurer to the claimant so long as the agreement is fair and reasonable, non-collusive and not fraudulent, and does not bind an insurer to any of the factual stipulations. *See* United Serv. Auto. Ass'n v. Morris, 741 P.2d 246, 254 (Ariz. 1987).
13. *See Barerra*, 21 P.3d at 398.
14. *See id.*
15. *See* Phila. Indem. Ins. Co. v. Barerra, 998 P.2d 1066, 1067 (Ariz. Ct. App. 2000).
16. *See Barerra*, 21 P.3d at 398.

coverage.[17] According to the Petitioners, an exclusionary clause in a vehicle liability insurance policy is void as against public policy if it denies coverage for the minimum statutory amount set by the FRA.[18] In support of their position, the Petitioners pointed to the addendum that Quintero-Lopez signed when he purchased the SLI policy, which states that the policy "increases liability coverage up to $1,000,000 in *primary* liability insurance to protect against third-party liability claims... ."[19]

In response, Philadelphia argued that the SLI policy was excess or additional coverage and therefore FRA did not apply.[20] Relying on *Arceneaux v. State Farm Mutual Automobile Insurance Co.*,[21] Philadelphia pointed out that the Arizona Supreme Court previously held that exclusionary clauses in insurance polices providing coverage in excess or in addition to statutory minimums may be enforceable.[22] In the process, Philadelphia introduced the policy it issued to Value, which clearly stated that the automobile coverage was intended to be excess or additional rather than primary, and argued that the rationale of *Arceneaux* applied to exclude coverage in the present case.[23] Nonetheless, the court determined that Philadelphia's intent was not binding to the renter since Quintero-Lopez never received a copy of the policy.[24] The court, however, chose not to dispose of the case on the issue of primary versus excess or additional, instead opting to analyze and resolve the dispute under the doctrine of reasonable expectations.[25]

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17. *See id.*

18. *See id.* (citing ARIZ. REV. STAT. § 28-4001 to -4153 (1997)); *see also* ARIZ. REV. STAT. § 28-2166 (1997) (requiring car rental companies to provide "public liability insurance" in limits of at least $15,000/$30,000).

19. *Id.* at 398–99, 407 app. B (emphasis in original).

20. *See id.* at 398.

21. 550 P.2d 87 (Ariz. 1976).

22. *See Barerra*, 21 P.3d at 398 (citing *Arceneaux*, 550 P.2d at 88–89). The court noted that because it was deciding the case under the reasonable expectations doctrine it was unnecessary to determine if *Arceneaux* applied. *See id.* Moreover, the court noted that although *Arceneaux* provides for the enforcement of exclusionary coverage provisions it does not mean such clauses are strictly valid and enforceable. *See id.* at 399.

23. *See id.* at 399.

24. *See id.*

25. *See id.* Despite the court's decision to resolve the case under the doctrine of reasonable expectations, an underwriter of additional coverage may want to consider coordinating policy language with the renter to avoid ambiguity in the insurance contract. Such coordination could prevent invocation of the canon of construing ambiguities against the drafter of the contract to the detriment of the insurer. *See* RESTATEMENT OF CONTRACTS § 236(d) (1932). However, a coordinated approach to policy language which mitigates or alleviates ambiguity does not ensure enforceability since "[i]t may affect the substantive provisions of the policy, regardless of how the policy is drafted." Roger C. Henderson, *Reasonable Expectations in Insurance Law*, 51 OHIO ST. L.J. 823, 827 (1990) (citing Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 968 (1970)).

III. *DARNER*, *GORDINIER* AND THE REASONABLE EXPECTATIONS OF THE ORDINARY CUSTOMER

Philadelphia asserted that the DUI exclusion was enforceable for several reasons.[26] First, Philadelphia contended that the provision located on the front page of the rental agreement was conspicuous and stated in understandable terms that any breach of the rental agreement would render the contract null and void.[27] The court rejected this argument, finding the terms of the provision to be a condition subsequent statement that was overbroad and that would allow technical violations of the policy to void all coverage.[28]

Additionally, Philadelphia urged the court to recognize the DUI exclusion clause on the back on the rental agreement as sufficiently conspicuous and understandable.[29] More specifically, Philadelphia relied on a California Court of Appeals decision, *Hertz Corp. v. Home Insurance Co.*,[30] which held that DUI coverage exclusions that are conspicuous and phrased in clear language are enforceable.[31] The court distinguished the *Hertz* case from the facts in the case at bar for several reasons.[32] First, *Hertz* did not recognize the doctrine of reasonable expectations.[33] Second, the DUI exclusion clause in the *Hertz* case was highlighted in capital letters and set apart from other policy provisions on the second page of the rental contract.[34] Moreover, the renter was required to check a box indicating the exclusions had been read and understood.[35] The insurance contract Value provided Quintero-Lopez did neither, placing the DUI exclusion in fine print within the "PROHIBITED USE OF CAR" section of the policy instead of the "LIABILITY INSURANCE" section.[36]

The *Barerra* court also rejected Philadelphia's argument that it was incumbent on the consumer to read the policy and understand that driving the vehicle under the influence would render the liability coverage null and void,

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26. *See Barerra*, 21 P.3d at 400–03.

27. *See id.* at 400, 405 app. A(1).

28. *See id.* at 400. The court noted that, for example, the rental policy requires the renter lock the doors whenever the vehicle is left unattended. *See id.* at 400 n.7. According to the terms of the policy, such an omission would render the liability coverage null and void. *See id.* at 400. Counsel for Philadelphia conceded at oral argument that certain provisions in the policy would be unenforceable. *See id.* at 400 n.7.

29. *See id* at 400, 405 app. A(2).

30. 18 Cal. Rptr. 2d 267 (Cal. Ct. App. 1993).

31. *See Barerra*, 21 P.3d at 401 (citing Hertz Corp. v. Home Ins. Co., 18 Cal. Rptr. 2d 267, 273 (Cal. Ct. App. 1993)).

32. *See id.* at 400.

33. *See id.* at 401; *see also* Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 399 (Ariz. 1984) (holding that the doctrine of reasonable expectations relieves a party from "certain clauses of an agreement which he did not negotiate, probably did not read, and probably would not have understood had he read them").

34. *See Barerra*, 21 P.3d at 401.

35. *See id.*

36. *See id.*

thereby negating any expectations that he would be covered while driving under the influence.[37] The court focused on the nature of the transaction and the expectations of both parties, reasoning that the nature of the "contract is one of adhesion and the transaction one in which speed and efficiency are dominant" and neither party expects "to spend fifteen or twenty minutes at the rental desk reading all of the small print and asking for an explanation of the terms involved."[38]

Finally, Philadelphia argued that the policy provisions were unambiguous and therefore should be analyzed under the four situations promulgated in *Gordinier v. Aetna Casualty & Surety Co.*[39] Regarding the first *Gordinier* situation, the court rejected Philadelphia's argument that a reasonably intelligent consumer could decipher the policy language.[40] Regarding the second situation, Philadelphia argued that the policy terms sufficiently notified Quintero-Lopez of the DUI exclusion.[41] The court rejected this argument, finding that the DUI exclusion was unenforceable "because of its technical wording and inconspicuous location within the policy boilerplate, and because it guts the coverage ostensibly granted."[42]

Value continued to rent and offer additional insurance to Quintero-Lopez, despite his disclosure of a DUI arrest and citation for excessive speed during a prior rental.[43] Applying the third and fourth situations of the *Gordinier* analysis, the court reasoned that by continuing to rent to Quintero-Lopez, Value created an objective impression of coverage and induced Quintero-Lopez to believe that the SLI policy coverage was not excluded despite an arrest for driving under the influence.[44] The rule that emerges from *Barerra* is that, to be enforceable, DUI exclusions in insurance polices which vitiate the primary purpose of the

37. *See id.*

38. *Id.* at 402.

39. *See id.* (citing Gordinier v. Aetna Cas. & Sur. Co., 742 P.2d 277, 283–84 (Ariz. 1987)). In the first situation in *Gordinier*, "[w]here the contract terms, although not ambiguous to the court, cannot be understood by the reasonably intelligent consumer who might check on his or her rights, the court will interpret them in light of the objective, reasonable expectations of the average insured." *Id.* at 403 (quoting *Gordinier*, 742 P.2d at 283–84). The second situation involves a case "[w]here the insured did not receive full and adequate notice of the term in question, and the provision is either unusual or unexpected, or one that emasculates apparent coverage." *Id.* The third situation in *Gordinier* looks to a case "[w]here some activity which can be reasonably attributed to the insurer would create an objective impression of coverage in the mind of a reasonable insured." *Id.* Last, coverage will be established "[w]here some activity reasonably attributable to the insurer has induced a particular insured to reasonably believe that he has coverage, although such coverage is expressly and unambiguously denied by the policy." *Id.*

40. *See id.* at 403.

41. *See id.*

42. *Id.* (citing State Farm Mut. Auto. Ins. Co. v. Dimmer, 773 P.2d 1012, 1021 (Ariz. Ct. App. 1988)).

43. *See id.* at 404.

44. *See id.* The court also noted that Value did not take affirmative steps to notify Quintero-Lopez that coverage under the SLI and LDW polices was possibly excluded because of his previous driving record. *See id.*

transaction must be sufficiently conspicuous and understandable, brought to the customers' attention, and comprehendible as determined by the nature of the transaction.[45]

45. *See id.*