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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Nationwide Mutual Ins. Co.,)	
)	
Plaintiff,)	
)	Civil Action No. 88-0011-W
v.)	consolidated into
)	Civil Action No. 87-0069-W
Continental Ins. Co., <u>et al.</u> ,)	
)	
Defendants.)	

FINAL JUDGMENT ORDER

This case is before the Court on the cross-motions for summary judgment originally filed in Nationwide Mutual Ins. Co. v. Continental Ins. Co., et al., Civil Action No. 88-0011-W. After consideration of the briefs filed by the parties on these motions, the Court finds that no issues of fact remain for trial in this case and GRANTS IN PART and DENIES IN PART both motions for summary judgment as described below.

Because this Final Judgment Order resolves all issues in controversy in Civil Action No. 88-0011-W, the Court hereby VACATES its Order dated March 8, 1990 to the extent that it consolidated Civil Action No. 88-0011-W into the case styled Willard R. Vaughan v. Ronald E. Bonar, et al., Civil Action No. 87-0069-W. Jury selection in Civil Action No. 87-0069-W will begin at 9:00 a.m. on Monday, May 21, 1990 at the Federal Courthouse in Wheeling. At that time, counsel will be advised of the precise time that they are to return for the trial of this case.

I.

The underlying facts of this case are not in dispute. On April 22, 1986, Willard R. Vaughan was at Weirton Steel Corporation making a delivery for his employer. He was struck by a 1986 Olds Firenza and pinned between his truck and the car's rear bumper. The Firenza was owned by McComb's Chevrolet, Inc., and was on loan to Ronald E. Bonar while McComb's repaired Bonar's car. The car had been driven on the roads and highways of West Virginia on at least thirty days during March and April of 1986.

At the time of the accident, McComb's Chevrolet was insured by Continental Insurance Company under a liability policy with a limit of \$500,000 per accident or loss, and had \$1,000,000 umbrella policy issued by Buckeye Union, a Continental agency. The \$500,000 Continental policy purports to exclude permissive users of McComb's vehicles from coverage when they have other insurance coverage or, in the event that any other coverage is statutorily insufficient, to limit its coverage to the minimum mandated by financial responsibility laws. Bonar himself was insured by Nationwide Mutual Insurance Company under a standard owner's liability policy that stated he was covered for losses incurred while operating a temporary substitute vehicle when those losses were not covered by other insurance. The coverage limit of the Nationwide policy was \$20,000 for this accident.

II.

Given these facts, the Court makes the following conclusions of law:

1. In its insurance agreement with McComb's Chevrolet, Continental agreed that it would provide the types of coverages required of out-of-state vehicles by the jurisdiction where a covered auto is being operated. By this language, Continental bound itself to provide the coverage that West Virginia law requires of the owners and operators of vehicles in that State.

2. West Virginia Code § 33-6-31 provides that no liability insurance policy shall be issued or delivered in West Virginia, or issued for any vehicle titled there, that excludes permissive users from its definition of "named insureds." In a case involving an in-state insurance policy that attempted to exclude permissive users from coverage, the West Virginia Supreme Court stated:

The mandatory omnibus requirements imposed by West Virginia Code § 33-6-31(a) indicate that the legislature has demonstrated a clear intent to afford coverage to anyone using a vehicle with the owner's permission as a means of giving greater protection to those who are involved in accidents. The statute should be liberally construed to effect coverage.

Burr v. Nationwide Mutual Ins. Co., 359 S.E.2d 626, 627 (W.Va. 1987). The legislative intent referred to in Burr supports a declaration that the attempted exclusion of permissive users from Continental's policy with McComb's was ineffective. However, because that policy was not issued or delivered in West Virginia, and because the Firenza was not titled in West Virginia, § 33-6-

31(a) does not on its face apply to this case.

3. West Virginia Code § 17D-2A-3, however, does apply to this case. It provides: "Every nonresident owner or registrant of a motor vehicle, which is operated upon any road or highway of this State, and which has been physically present within this State for more than thirty days during the preceding three hundred sixty-five days, shall thereafter maintain security as hereinafter provided in effect continuously throughout the period such motor vehicle remains within this State." As counsel for Continental conceded during a conference call held on May 17, 1990 regarding these motions and other matters, there is no dispute that this car was operated within the State of West Virginia for at least thirty of the three hundred sixty-five days surrounding this accident.

4. West Virginia Code § 17D-4-12, which is part of the financial responsibility law referred to in § 17D-2A-3, requires that owner's liability policies "insure the person named therein and any other person, as insured, using any such vehicle or vehicles with the express or implied permission of such named insured." Bonar was such a permissive user of the Firenza owned by McComb's and covered by the Continental insurance policy.

5. West Virginia has a well-established policy of liberal construction of these liability insurance statutes in favor of coverage for permissive users of vehicles. This policy leads this Court to believe that the West Virginia Supreme Court would prohibit an out-of-state insurer from excluding permissive users

from the "named insureds" under its liability policy. Thus, the Court finds that Continental's policy language that attempts to exclude permissive users like Bonar from its coverage to be void and of no effect.

6. This logic does not, however, mean that Bonar is a covered individual under the umbrella liability insurance policy issued by Buckeye Union to McComb's. While West Virginia law does not allow owners' liability policies to exclude permissive users from their coverage, the West Virginia Supreme Court has not extended this bar to umbrella policies like that issued by Buckeye Union, which are allowed to exclude such users. Therefore, the Buckeye Union umbrella liability policy provides coverage to McComb's only and does not cover Bonar directly.

7. This leaves the issue of who the primary insurer is in this case. In State Farm Automobile Ins. Co. v. Universal Underwriters Ins. Co., 383 S.E.2d 791 (W.Va. 1989), both the owner's and operator's policies had clauses stating that their omnibus coverage for permissive users was excess over other collectible insurance. The West Virginia Supreme Court reasoned: "'where the owner of an automobile or truck has a policy with an omnibus clause, and the additional insured also has a non-ownership policy which provides that it shall only constitute excess coverage over and above any other valid, collectible insurance, the owner's insurer has the primary liability.'" Id. at 796 (quoting 8A J. Appleman, Insurance Law & Practice § 4909.45 at 418 (1981)).

8. The Continental policy involved in this case purports to escape from liability whenever a permissive user is covered by other insurance. The Nationwide policy at issue here, on the other hand, has what is commonly referred to as a "pro-rata" clause that is not properly characterized as an "excess" clause. This fact distinguishes this case from State Farm. Where one liability insurance policy applies to a given situation solely by operation of law while another applies of its own terms, equity requires that latter be declared the primary insurer.

III.

Pursuant to the parties' cross-prayers for relief in this case, the Court DECLARES the rights, duties and other legal relations existing between the parties to be as follows:

1. That Bonar has coverage of \$20,000 under his liability insurance policy with Nationwide;
2. That Bonar, as a permissive user of a covered vehicle, has coverage of \$500,000 as if he were a named insured in McComb's liability insurance policy issued by Continental;
3. That Nationwide is the primary insurer of Bonar in the litigation underlying this declaratory judgment action (i.e., Vaughan v. Bonar, et al., Civil Action No. 87-0069-W);
4. That Continental's policy affords excess, secondary coverage for the claims advanced in the underlying suit;
5. That Nationwide has a duty to provide Bonar with a defense to the underlying lawsuit; and

6. That the Buckeye Union policy issued to McComb's does not provide coverage to Bonar, but covers only the excess liability of McComb's in the underlying suit.

It is so ORDERED.

Let the Clerk send a copy of this Order to all counsel of record.

DATE

UNITED STATES DISTRICT JUDGE