

[J-202-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CARMEN BORGIA ,	:	No.14 E.D. Appeal Docket 1999
	:	
Appellant	:	Appeal from the Judgment of the Superior
	:	Court entered on 7/8/98, reargument
	:	denied 9/9/98 at No. 570 Philadelphia
v.	:	1997, which reversed and remanded the
	:	Judgment entered on 1/2/97 by the Court
	:	of Common Pleas, Philadelphia County,
PRUDENTIAL INSURANCE COMPANY,	:	Civil Division at No. 2872 August Term,
	:	1995
Appellee	:	
	:	
	:	
	:	
	:	
	:	ARGUED: October 19, 1999

DISSENTING OPINION

MR. JUSTICE NIGRO

DECIDED: May 19, 2000

I respectfully dissent, as I believe the Superior Court properly identified the relevant inquiry as not simply whether the insurance policy encompasses an agreement to arbitrate but whether the appellant is a “covered person” under the contract and thereby entitled to enforce the arbitration provision. Thus, it is of no moment whether the alleged agreement underlying the petition to compel arbitration signals common law or statutory arbitration until the court determines whether these parties have agreed to arbitrate. In other words, if the appellant does not meet the threshold requirement of the contract to be deemed a “covered person,” then there was no agreement to arbitrate between the insurer and the appellant and, therefore, no basis for sending the parties’ underlying coverage dispute to arbitration

in the first place. Under the policy at issue, I agree with the Superior Court and find that appellant is not a “covered person.”

The Prudential policy at issue has an arbitration clause, which states in relevant part:

ARBITRATION

If we [Prudential] and a covered person disagree on policy coverages or amounts payable, either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree on the third arbitrator within 30 days, either may request that selection be made by a judge or a court having jurisdiction. . . .

Prudential Insurance Policy No. 28 2A872944 (“Policy”), Parts 4-7 at 9 (bolding in original; underline added).

Thus, the contractual right to arbitrate is limited to Prudential and a covered person and on the issues of coverages or amounts payable. Therefore, in order for appellant to request arbitration of a coverage dispute, he must be a covered person under the terms of the policy.

While the policy does not specifically define “covered person,” an examination of its provisions is instructive as to what the contracting parties agreed. First, the Declarations page lists only Carmen Borgia’s parents as the named insureds. Furthermore, the “Definitions” section reveals the following:

HOUSEHOLD RESIDENT

A **household resident** is someone who lives in your household. A **household resident** includes a **resident relative**.

* * * *

RESIDENT RELATIVE

A **resident relative** is someone who lives in **your** household and is related to **you** by blood, marriage, adoption or is a ward or foster child.

YOU OR YOUR

You or **your** means the person shown as the named insured on the Declarations of this policy and **your** spouse, if he or she lives in **your** household.

WE, US OR OUR

We, us, or our means Prudential Property and Casualty Insurance Company or one of its subsidiaries as shown on **your** Declarations.

Policy, Parts 1-3 at 2 (bolding in original).

The policy further explains that it provides coverage for cars described on the Declarations page (those for which a premium has been charged)¹ and for “substitute cars,” defined as follows:

SUBSTITUTE CARS

If a **car** covered under this part breaks down, is being serviced or repaired, or is stolen or destroyed, **we** will cover a **car you borrow temporarily** (with the owner’s permission) while **your car** is being repaired or replaced. **This car cannot be owned by you or a household resident.** The substitute **car** has the same coverage as the **car** that is out of service.

Policy Part 1 at 7; Part 4 (Uninsured Motorists) at 2; Part 5 (Underinsured Motorists) at 7 (bolding in original; underline added).

In addition, the policy covers certain “non-owned cars” such as a rental car or a borrowed car for a limited number of days, a non-owned car being described as follows:

NON-OWNED CAR

A **non-owned car** is a **car** which is not owned by, registered in the name of or furnished or available for the regular or frequent use of **you or a household resident.**

* * * *

Policy, Parts 1-3 at 2 (bolding in original; underline added).

In other words, a car owned by a resident relative that is not listed in the Declarations page is not an insured car under the policy.

¹ This section also provides coverage for “additional” and “replacement” cars for a limited period of time, until such are added to the Declarations page. None of these other categories has application to Carmen Borgia’s car.

Under the UM/UIM sections² the policy further spells out “What Cars are Covered” as the cars on the Declarations page, “replacement” and “additional” cars to be added to the policy, and “substitute” cars and other “non-owned” cars as described supra. Assuming claimant is injured in a covered car, these sections then go on to state who is considered an insured for purposes of UM/UIM coverage:

WHO IS INSURED

IN YOUR CAR (INCLUDES A SUBSTITUTE CAR)

You and a **resident relative** are insured while using **your car** or a substitute **car** covered under this part.

Other people are insured while using **your car** or a substitute **car** covered under this part if **you** give them permission to use it. They must use the **car** in the way **you** intended.

IN A NON-OWNED CAR

You and a **resident relative** are insured while using a **non-owned car**. The owner must give permission to use it. It must be used in the way intended by the owner.

HIT BY A MOTOR VEHICLE

You and a **resident relative** are insured if hit by an underinsured **motor vehicle** while a pedestrian.

Policy Part 5 (UIM) at 7 (bolding in original).

At the time of the accident, Borgia was living with his parents and was driving his own car which was not a car listed in the Declarations page of the Prudential policy, but was insured separately under his own Nationwide policy. Borgia sustained damages in excess of \$15,000. However, the car that hit his was only insured for damages to

² UM and UIM are covered in two distinct sections of the policy but the governing language as to coverage is identical in both sections.

Borgia up to its policy limit of \$15,000. This action arose because Borgia, who did not opt for uninsured motorist (UM) or underinsured motorist (UIM) protection under his own policy, sought to recover his damages in excess of \$15,000 from his parents' underinsured motorists policy coverage. Under the Prudential policy, as explained, supra, bodily injury to a resident relative such as appellant is covered only so long as the claimant is using a covered car.

Thus, although Borgia was a resident relative of the insureds under the Prudential policy, he was not using any of the covered cars under the policy and he was not a pedestrian. Additionally, language in the UM/UIM section of the policy fails to accord "covered person" status to Borgia by virtue of the fact that, although he was a resident relative and was injured by an underinsured motorist, it was while in a car owned by him and not insured under the policy. In short, there is coverage only if a named insured or a resident relative is injured while driving a vehicle listed in the Declarations page, while he is a pedestrian, or if the vehicle involved in the accident is *not owned by the named insured or by any resident relative.*³

Thus, considering all provisions of the policy, a covered person must not only be a named insured or a resident relative but also must be using a covered car as defined, supra. Under the circumstances therefore, Borgia is not a "covered person." As the policy expressly provides for arbitration *only* as between Prudential and a "covered person," and Borgia does not qualify as a covered person, he is in no position to compel arbitration. Therefore, the trial court erred in dismissing Prudential's declaratory judgment action and compelling arbitration.

³ I also note that Borgia's parents chose the non-stacking option for UM/UIM coverage.

Accordingly, I would affirm the Superior Court's holding that, under the circumstances, Borgia is not a "covered person" under the Prudential policy's arbitration clause, and that entry of judgment in favor of Prudential on its declaratory judgment action is correct.⁴

Madame Justice Newman joins in the dissenting opinion.

⁴ This conclusion is not only pursuant to the express and unambiguous contract language, it is completely consistent with recent decisions of this Court upholding the "household exclusion" of UIM coverage for bodily injury suffered while not occupying a covered vehicle. Specifically, this Court upheld such provision in Eichelman v. Nationwide Insurance Company, 551 Pa. 558, 711 A.2d 1006 (1998), where the sole issue was whether a person who, as here, voluntarily elected to forgo UIM coverage on his own vehicle is precluded from recovering UIM benefits from separate policies issued to family members with whom he resides as a result of contract language in the family members' policy excluding such recovery when he is occupying his own vehicle. In upholding the exclusion, we noted that a claimant who voluntarily chose not to purchase UIM coverage received reduced premiums in return and was thereby required to be held to his voluntary choice. Additionally, we had certain instructive observations about the legislative intent behind the Motor Vehicle Financial Responsibility Law (MVFRL) in regard to such exclusions, notably:

Allowing the "household exclusion" language to stand in this case is further bolstered by the intent behind the MVFRL, to stop the spiralling [sic] costs of automobile insurance in the Commonwealth. If appellant's position [that a family member's UIM coverage should insure him when he is occupying his own, undeclared, car] were accepted, it would allow an entire family living in a single household with numerous automobiles to obtain underinsured motorist coverage for each family member through a single insurance policy on one of the automobiles in the household. If this result were allowed, it would most likely result in higher insurance premiums on all insureds (even those without family members living at their residence) since insurers would be required to factor expanded coverage cost into rates charged for underinsured motorist coverage.

Id. at 566, 711 A.2d at 1010.