IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JULIE YANG, a single woman,	)	**No. 28510-3-III**
	)	
Appellant,	)	
	)	
v.	)	
	)	
AIG SPECIALTY AUTO, a foreign insurer, nka 21st CENTURY INSURANCE CO., a foreign insurer, and/or nka ILLINOIS NATIONAL INSURANCE CO., a foreign insurer,	)	**Division Three**
	)	
Respondent.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Julie Yang appeals the trial court's denial of her motion to compel arbitration and her request for an award of reasonable attorney fees, arguing that arbitration of this case is required by the terms of her insurance policy. The trial court properly determined that arbitration is not mandatory under the policy unless both parties agree to arbitrate. We affirm.

FACTS

When Julie Yang was 13 years old, she was hit by a car while crossing the street at

a crosswalk on her way to school. She sustained severe injuries and has incurred substantial medical bills. At the time of the accident, Ms. Yang's parents had an automobile liability insurance policy from AIG Specialty Auto (AIG). The policy included underinsured motorist (UIM) coverage in the amount of $25,000. Since Ms. Yang was a minor when the accident occurred, she was covered by the policy.

Ms. Yang waited until she was 18 to resolve her claims in order to better understand the extent of her injuries. On June 9, 2009, Ms. Yang sent a letter to AIG demanding tender of her UIM policy limit. If AIG refused to tender, the letter demanded arbitration. Ms. Yang did not receive a prompt response, and sent a second demand letter on June 24, 2009. AIG responded in a letter dated July 1, 2009, and denied Ms. Yang's demand for tender of the UIM policy limit. In addition, AIG would not agree to arbitrate, claiming arbitration was not mandatory under the UIM endorsement section of the policy.

The day after receiving the letter from AIG, Ms. Yang filed a complaint in superior court. She subsequently filed a motion requesting the court to compel arbitration and award reasonable attorney fees. She claimed arbitration was mandatory under the policy. The trial court denied the motion and found the policy did not require arbitration unless both parties were in agreement.

Ms. Yang appealed to this court.

ANALYSIS

The only issue[1] before this court is the interpretation of the insurance policy's arbitration clause. Ms. Yang contends the trial court erred when it found arbitration was not mandatory unless both parties first agree to arbitrate. The policy's arbitration clause states in pertinent part:

ARBITRATION

A. If we and an "insured" do not agree:
1. Whether that "insured" is legally entitled to recover damages; or
2. As to the amount of damages which are recoverable by that "insured";
from the owner or operator of an "underinsured motor vehicle", then the matter may be arbitrated. However, disputes concerning coverage under this endorsement may not be arbitrated.
Both parties must agree to arbitration. If so agreed, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction.

Clerk's Papers (CP) 40.

Interpretation of an insurance policy is a question of law reviewed de novo. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007). Insurance policies are construed as contracts, so a policy's terms are interpreted according to basic contract principles. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665-666,

[1] Ms. Yang also argues she is entitled to an award of attorney fees at the trial court and appellate level. She does not prevail regarding the motion to compel arbitration and is thus not eligible for an award of attorney fees in this case.

15 P.3d 115 (2000).

The policy is considered as a whole, and is given a "'fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance.'" *Id.* at 666 (quoting *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 134 Wn.2d 413, 427, 951 P.2d 250 (1998)). If the language is clear, the court must enforce the policy as written and may not create ambiguity where none exists. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). A clause is only considered ambiguous if it is susceptible to two or more reasonable interpretations. *Id.* If an ambiguity exists, the clause is construed in favor of the insured. *Id.* at 172. However, "the expectations of the insured cannot override the plain language of the contract." *Id.* (citing *Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 378, 917 P.2d 116 (1996)).

The language of this policy indicates that if certain issues arise, "then the matter *may* be arbitrated." CP 40 (emphasis added). The use of the word "may" indicates that arbitration is permissive or discretionary. The policy then states that "[b]oth parties *must* agree to arbitration." *Id.* (emphasis added). The policy's use of the word "must" in this sentence indicates that it is mandatory for both to agree before arbitration will be required. Construing this language with the clause as a whole leads to the conclusion that arbitration is not mandatory under the policy and that a party can permissively decline to

arbitrate.

Nonetheless, Ms. Yang argues that an ambiguity exists in the last paragraph of the section of the policy quoted above. She contends the last sentence should be interpreted to mean that if the parties do not agree to arbitration, then one party can compel arbitration through a judge. Br. of Appellant at 18. This clause is not reasonably susceptible to Ms. Yang's interpretation. When the paragraph is read in its entirety, it is clear that the last sentence is referring to the process of selecting an arbitrator. Thus, this portion of the clause does not apply to the determination of whether an issue will be arbitrated in the first place.

Ms. Yang also argues that the policy's failure to state that trial was a possible alternative to arbitration created an ambiguity. She claims that an "average insurance purchaser" would have believed that arbitration was the only option available. She makes this argument by comparing the clause in this case with the arbitration clause at issue in *Mutual of Enumclaw Insurance Company v. Huddleston*, 119 Wn. App. 122, 77 P.3d 360 (2003). There the clause explicitly stated that both arbitration and trial were options for the parties if a dispute were to arise, which led the court to deny a motion to compel arbitration. *Id.* at 124. However, that case was merely interpreting that specific policy provision. *Id.* The court did not hold that the failure to discuss trial or other dispute

resolution alternatives would automatically render them unavailable when arbitration was not mandatory under the clause.

Here, the permissive language in Ms. Yang's policy regarding arbitration indicates that arbitration is not the only way to resolve a dispute between the parties. While the policy does not specifically state that trial is an option, the challenged clause does not eliminate trial or other dispute resolution alternatives as possible options for the parties. The language in the clause is clear that arbitration may be utilized only if all parties are in agreement. If both parties do not agree, the matter cannot be arbitrated and would have to be resolved via trial.

Last, Ms. Yang argues that AIG should not be permitted to demand a trial because of AIG's untimely response to Ms. Yang's demand letter, and because AIG misrepresented the policy language in its July 1 letter. She claims that these acts violate RCW 48.30.090, WAC 284-30-330(1), and/or WAC 284-30-360, and constitute unfair trade practice violations. While AIG's actions cannot be condoned, they do not affect the actual terms of the contract. Even if these acts amount to unfair trade practice violations, the possible sanctions do not change AIG's rights under the policy regarding arbitration.[2]

[2] Any harm that may have been caused by these alleged violations would more properly be redressed, if warranted, through an actual Consumer Protection Act claim against AIG. Chapter 19.86 RCW; *e.g., Indus. Indem. Co. of the Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 920, 792 P.2d 520 (1990).

There is no basis to compel the parties to arbitrate this case. Without the agreement of both parties, there is no duty to arbitrate. *See* RCW 7.04A.070(1) ("If the court finds that there is no enforceable agreement [to arbitrate], it may not order the parties to arbitrate."). Therefore, the trial court properly denied the motion to compel arbitration.

On appeal, AIG requests an award of costs pursuant to RAP 14.2. As the prevailing party on review, an award of costs is appropriate.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Brown, A.C.J. Sweeney, J.