

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE CINCINNATI INSURANCE COMPANIES : CIVIL ACTION  
: :  
v. : :  
: No. 03-2220  
CHARLES MOSLEY, SR. and : :  
CYNTHIA MOSLEY : :

**ORDER - MEMORANDUM**

AND NOW, this 7th day of October, 2003, the motion of defendants Charles Mosley, Sr. and Cynthia Mosley to dismiss this action for declaratory judgment is denied, Fed. R. Civ. P. 12(b)(6).<sup>1</sup> Jurisdiction is diversity, and Pennsylvania law governs this dispute.

The complaint of The Cincinnati Insurance Company alleges that a policy of insurance issued by Cincinnati to Western and Southern Life Insurance Company (defendant Charles Mosley's employer) does not contain uninsured motorist coverage for injuries that Mosley sustained on June 19, 1998 in an auto accident. Mosley moves for dismissal on jurisdictional grounds, arguing that the policy of insurance requires the dispute to be arbitrated. Cincinnati counters that this is a coverage dispute and, under the terms of the policy, is not subject to arbitration.

The underlying facts are straightforward. On June 19, 1998, Charles Mosley, while operating his motor vehicle in the course of his employment, was involved in an accident with an unknown driver and sustained serious injuries. Complaint, ¶¶ 6, 8, 9. He notified Cincinnati of the accident and requested the appointment of an arbitrator under the

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<sup>1</sup> Under Federal Rule of Civil Procedure 12(b)(6), accepting as true all well-pleaded facts and reasonable inferences contained in the complaint, the district court may dismiss the complaint "only if it is certain that no relief can be granted under any set of facts which could be proved." General Refractories Co. v. Fireman's Fund Ins. Co., 337 F.3d 297, 303 n.1 (3d Cir. 2003), quoting Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 919 (3d Cir. 1999).

provisions of the company's uninsured motorist coverage. Complaint, ¶ 7. On June 18, 2002, Mosley, himself, appointed an arbitrator, and on July 2, 2002, Cincinnati appointed one. Defendants' Motion to Dismiss, ¶¶ 5, 6. On April 7, 2003, Cincinnati filed this action for a declaratory judgment that Mosley was not an insured under the policy. Id., ¶ 7.<sup>2</sup>

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<sup>2</sup> Cincinnati's argument relies on the policy's "Business Auto Coverage Form." Complaint, ¶¶ 11-15. The Declaration Sheet states that uninsured motorist coverage is for "Owned Autos Only," which is defined in the Business Auto Coverage Form as follows:

Only those 'autos' you own (and for Liability Coverage any 'trailers' you don't own while attached to power units you do own). This includes those 'autos' you acquire ownership of after the policy begins.

Business Auto Coverage Form, section A.2, Exhibit "B" to Complaint. Liability Coverage extends only to "insureds," defined in relevant part in the Business Auto Coverage Form as

1. You for any covered 'auto'.
2. Anyone else while using with your permission a covered 'auto' you own, hire or borrow . . . .

Id., section II.A.1. According to Cincinnati, because Mosley was not using a "covered auto" at the time of the accident, he is not an insured as that term is defined in the policy and is not entitled to coverage.

Mosley moved to dismiss the complaint for lack of jurisdiction, invoking the arbitration clause set forth in the Uninsured Motorist Coverage-Bodily Injury Endorsement to the policy.<sup>3</sup> The arbitration clause reads, in relevant part:

If we and an ‘insured’ disagree whether the ‘insured’ is legally entitled to recover damages from the owner or driver of an ‘uninsured motor vehicle’ or do not agree as to the amount of the damages that are recoverable by that ‘insured’, then the matter may be arbitrated. However, disputes concerning coverage under this endorsement may not be arbitrated.

Id., section 4.a.

“Under Pennsylvania law, the determination of whether an issue must be submitted to arbitration depends upon (1) whether the parties entered into an agreement to arbitrate, and (2) whether the dispute falls within the scope of that agreement. . . . Furthermore, the scope of arbitration ‘is determined by the intention of the parties as ascertained in accordance with the rules governing contracts generally.’ State Farm Mut. Auto. Ins. Co. v. Coviello, 233 F.3d 710,716 (3d Cir. 2000), citing Flightways Corp. v. Keystone Helicopter Corp., 331 A.2d 184, 185 (Pa. 1975); Sley Sys. Garages v. Transp. Workers Union of America, 178 A.2d 560, 561-62 (Pa. 1962). See also Henning v. State Farm Mut. Ins. Co., 795 A.2d

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<sup>3</sup> The endorsement states that Cincinnati “will pay all sums the ‘insured’ is legally entitled to recover as compensatory damages from the owner or driver of an ‘uninsured motor vehicle’ because of ‘bodily injury’ sustained by the ‘insured’ caused by an ‘accident.’” Uninsured Motorist Coverage Endorsement, section A.1. The endorsement defines an “insured” as:

1. You.
2. If you are an individual, any “family member”.
3. Anyone else “occupying” a covered “auto” or a temporary substitute for a covered “auto”.
4. Anyone for damages he or she is entitled to recover because of “bodily injury” sustained by another “insured”.

Id., section B.1-4.

994, 996 (Pa. Super. 2002) (quoting Coviello). With respect to interpretation of an insurance policy, where the language of the policy is “clear and unambiguous, a court is required to give effect to that language.” Standard Venetian Blind Co. v. American Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983), quoting Pennsylvania Manufacturers Ass’n Ins. Co. v. Aetna Cas. & Sur. Ins. Co., 233 A.2d 548 (Pa. 1963).

The policy in question unequivocally states that “disputes concerning coverage under this endorsement may not be arbitrated.”<sup>4</sup> The threshold issue presented is whether movant driver was an insured under the policy’s uninsured motorist coverage. At this stage, it does not involve entitlement to or the amount of damages alleged to have been occasioned by the accident. It is a “dispute concerning coverage” - which, under the categorical language of the policy, “may not be arbitrated.”<sup>5</sup>

BY THE COURT:

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Edmund V. Ludwig, J.

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<sup>4</sup> The arbitration clause is not, as movants argue, identical with the policy language in Brennan v. General Accident Fire and Life Assurance Co., 574 A.2d 580, 583 (Pa. 1990) (“normally the arbitrator has the authority to decide all matters necessary to dispose of the claim.”) This is significant: “It is settled law in Pennsylvania that unless restricted by the submission, the arbitrators are the final judges of law and fact and their award will not be disturbed for mistake of either . . . ‘[S]ubmission’ mean[s] the contract taken as a whole.” Id. at 581 (emphasis added). Here, the submission is restricted and the scope of the arbitrators’ authority is correspondingly limited.

<sup>5</sup> Mosley also maintains, without authority, that Cincinnati waived its right to litigate this issue. However, aside from whether non-arbitrability is waivable, there is no showing of material prejudice at this point. E.g., Cincinnati has not belatedly moved to have the coverage issue decided only after an unfavorable decision by a panel of arbitrators. See Globe Indemnity Co. v. Derevjaniak, 1997 WL 397483, at \*3 (E.D. Pa., July 10, 1997).

