No. 23969 -- Gladstone B. Kelly v. Larry Painter, Jr., and Night Rock Inc., A West Virginia Company, DBA Gatsby's

Starcher, J., concurring:

I concur with the majority's opinion that the liquor liability exclusion in question eliminates the insurance carrier's potential liability and duty to defend under the policy for any claim related to the "selling, serving or furnishing" of liquor. This exclusion applies, however, only to the extent that plaintiff Kelly seeks to impose liability on defendant-policyholder Gatsby's for "causing or contributing" to the intoxication of defendant Painter by selling him alcohol. I therefore agree that because of liquor liability exclusion is clear and unambiguous, the circuit court's ruling that the policy was vague and that Aetna Casualty and Surety Company was required to provide coverage to Gatsby's should be reversed.

However, as the majority opinion makes clear, this matter has been remanded for further consideration. On remand, the circuit court should determine whether insurance coverage exists under one of the plaintiff's alternate theories of liability unrelated to the "selling, serving or furnishing of alcoholic beverages," such as the negligent maintenance by Gatsby's of its premises, namely its parking lot.

The liquor liability exclusion contained in the standard commercial general liability policy, as with any exclusion, must be strictly construed against the insurance carrier. Once a policyholder proves that an occurrence is within the scope of policy

coverage, the insurance carrier seeking to avoid liability on the policy bears the burden of proving the operative facts necessary to the operation of the exclusion. *See* Syllabus Points 5 and 7, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987).

I have grave concerns regarding the inclusion of the liquor liability exclusion into a commercial general liability policy that is sold to a bar. It seems almost nonsensical for a business to pay premiums for a business insurance policy that specifically excludes coverage for the primary activity of the business -- yet that is exactly what is at issue in this case. Aetna sold a bar a liability policy that does not cover any liability arising from the sale of liquor.

In such a situation, I would hope that an insurance agent selling a standard commercial liability policy to a business that sells liquor would specifically point out that no coverage exists for liability arising from liquor sales.[1] If a policyholder proves he or she had no knowledge of this exclusion prior to purchasing the policy, a court should find the exclusion unenforceable. Insurance policies are far from being contracts negotiated at arm's length, and are closer to being a packaged product sold on a take-it-or-leave-it

[1]*See Aetna Cas. and Sur. Co. v. Velasco*, 240 Cal.Rptr. 290 (Cal.App. 1987) (insurer's failure to point out liquor liability exclusion to insured rendered exclusion unenforceable). *See also, Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 277 (Minn. 1985) ("[C]ourts recognize that people purchase insurance relying on others, the agent or company, to provide a policy that meets their needs.").

basis. The law expects an insurance salesman to tell an insurance consumer that an insurance product does not do what the consumer would expect it to do.[2]

[2]We do not seriously expect that an insurance consumer will carefully read and understand an insurance policy. In fact, most consumers never even see the policy until after the premiums are paid. *See, e.g. Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 905 (3d Cir. 1997) ("The control exercised by insurers is especially problematic when the insured . . . does not receive the actual insurance policy until after offering to buy insurance and paying the first premium. . . . [W]hen the insured does not know or have reason to know of the existence of an unfavorable provision, then the insured lacks the ability to negotiate a more favorable insurance policy, and [the insured's] sophistication or putative bargaining power is meaningless."); *Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.*, 366 N.W.2d at 277 ("[I]n the majority of cases, a lay person lacks the necessary skills to read and understand insurance policies, which are typically long, set out in very small type and written from a legalistic or insurance expert's perspective."); *Rempel v. Nationwide Life Ins. Co., Inc.*, 471 Pa. 404, ___, 370 A.2d 366, 368 (1977) ("[T]he consumer's signature is not required on the policy. In fact, it is received weeks, or perhaps longer, after the signing of the application. The significant decision by the consumer is not made when the policy is received. The receipt of the policy is the acceptance of the offer previously made. It is at the time that the offer is being made by the consumer -- when the application is being signed -- that the consumer is making the decision to 'buy' or 'not to buy' the insurance. By the time the written policy is received, it has lost its importance to the insured."); *C&J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 174 (Iowa 1975) ("It is generally recognized the insured will not read the detailed, cross-referenced, standardized, mass-produced insurance form, nor understand it is he does."); J. Calamari, *Duty to Read: A Changing Concept*, 43 Fordham L.Rev. 341 (1974) ("[I]n the current era of mass marketing, a party may reasonably believe that he is not expected to read a standardized document and would be met with impatience if he did. In such circumstances an imputation that he assents to all of the terms in the document is dubious law. An assertion that he is bound by them would place a premium upon an artful draftsman who is able to put asunder what the salesman and the customer have joined together."); *Restatement of Contracts (Second)* § 207 (noting that standard-form agreements are seldom read). *See also, Davis v. M.L.G. Corp.*, 712 P.2d 985, 992 (Colo. 1986) ("[T]he detailed provisions of standardized contracts are seldom read by consumers.").

The Court assumed in this case that the bar owner was advised of the existence of the liquor liability exclusion. Further, while the language of the exclusion is clear, as indicated previously the exclusionary language must be strictly construed against the insurance carrier. In this case, the liquor liability exclusion operates to exclude coverage only for the bar's actions in "causing or contributing" to the intoxication of the defendant drunk driver. The liquor liability exclusion would not exclude coverage for the negligent training, supervision or management of the bar's employees. It also would not exclude from coverage injuries occurring on or near the bar's property arising from the negligent maintenance of the property, or failing to supervise intoxicated patrons.

In this case, it appears that the plaintiff has alleged that the bar was in some manner negligent in its management of its premises and parking lot. This issue was not fully addressed in the majority's opinion.[3] Accordingly, on remand the circuit court should examine the record to determine whether coverage exists under the commercial general liability policy sold by Aetna to the defendant bar for some action other than the sale of liquor. If the plaintiff is able to support a theory of liability against the

[3]The record suggests that the owners of defendant Gatsby's were aware that the public was at risk if patrons congregated in its parking lot drinking or "sleeping it off" after hours. The bar apparently had a laudable policy of clearing the parking lot after hours, and calling taxis or the police for persons unable to drive. The record suggests that the bar also had gates to control access to the parking lot. Gatsby's failed to comply with its own policies regarding the management of its parking lot on the night the plaintiff was injured.

policyholder bar that does not involve "causing or contributing to the intoxication" of defendant Painter arising from Gatsby's "business of . . . selling, serving or furnishing alcoholic beverages," then coverage and a duty to defend exists under the Aetna policy.

I therefore concur.