Plaintiff's Memorandum of Law In Response to Defendant's Amended Motion to Dismiss, and in Support of the Plaintiff's Motion for Judgment on the Pleadings

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NOW COMES the Plaintiff, THE FARMERS AUTOMOBILE INSURANCE ASSOCIATION, by its attorneys, ROBERT MARC CHEMERS and AMANDA J. BANNER of PRETZEL & STOUFFER, CHARTERED, and for its Memorandum of Law in Response to the Defendant's Amended Motion to Dismiss, and in Support of its Motion for Judgment on the Pleadings, states the following:

FACTUAL BACKGROUND

The Plaintiff, The Farmers Automobile Insurance Association (hereinafter "Farmers"), issued the following personal automobile liability insurance policies that are relevant to this action:

(1) Policy number 00V095563, issued to Mark Wilder and his wife;
(2) Policy number 00V117894, issued to Cecilia M. Butler and her husband; and
(3) Policy number 001249301, issued to Carol Jones and her husband.

Copies of the Farmers policies are attached to the Defendant's Amended Motion to Dismiss as Exhibit "C" and incorporated herein by reference.

The Defendant, Universal Underwriters Insurance Company (hereinafter "Universal"), issued the following policies that are relevant to the facts of this case:
(1) Policy number 108905H, issued to Sierra Motors, Inc.; and
(2) Policy number 136825E, issued to Geiser Ford, Inc.

Copies of the Universal policies are attached to the Defendant's Amended Motion to Dismiss as Exhibits "A" and "B" respectively, and are incorporated herein by reference.

Cecilia M. Butler was involved in an automobile accident on February 2,2000, while test driving a Plymouth Grand Voyager automobile owned by Sierra Motor Mall, resulting in $13,878.57 in damage to the dealer's vehicle. On June 21, 2000, Carol Jones was involved in an automobile accident while operating a loaner vehicle provided to her by Geiser Ford, Inc., resulting in 6,037.31 in damage to the Ford Taurus automobile owned by the dealer. In addition, on November 30, 2000, Mark Wilder was involved in an automobile accident while test driving a Ford Mustang automobile owned by Geiser Ford, Inc., resulting in 52,433.45 in damage to the dealer's vehicle. In each of these accidents, the individuals were operating vehicles

owned by the dealers, and were operating the automobiles on a test drive or loaner basis, with the express permission of the dealer/owner. Following each of the accidents, Universal demanded that Farmers indemnify its insured driver, contending that the test driver or loaner operator did not have "insured" status under the dealer policies of insurance that were issued by Universal. Farmers rejected Universal's demands, and contends that Universal is the primary insurer pursuant to the policies it issued to the dealers, and is responsible for the property damage to the vehicles when operated by a test driver or loaner customer.

Farmers filed its Complaint for Declaratory Judgment, seeking a declaration that Wilder, Butler, and Jones are "insureds" under the Universal policies at issue, that the Universal policy is primary and the Farmers policy is excess thereto, and that Universal has the obligation to pay the losses involving those insureds. Farmers further contends that Wilder, Butler and Jones are permissive users as test drivers or loaner vehicle operators, and if an individual is an insured for one purpose under Universal's policy, then that individual is insured for all purposes. In addition, Farmers asserts that it was vexatious, unreasonable, and violative of Section 5/155 of the Illinois Insurance Code, 215 ILCS § 5/155, for Universal to refuse to provide primary insurance for the accidents involving Wilder, Butler, and Jones.

Universal filed a Motion to Dismiss and Memorandum of Law in Support, and thereafter filed an Amended Motion to Dismiss and Memorandum of Law in Support. Since a motion to dismiss admits all well-pleaded allegations of the Complaint, Farmers has filed its response to the Amended Motion to Dismiss, as well as a Motion for Judgment on the Pleadings and Memorandum of Law in Support. It is Farmers' contention that its Complaint for Declaratory Judgement sets forth only a legal issue to be determined by this Court, namely, whether the Farmers' insureds are entitled to coverage under the Universal policies while test driving or operating loaner vehicles provided by the dealerships. Upon that basis, Farmers contends that it is entitled to judgment on the pleadings in its favor and against the Defendant Universal.

STANDARD FOR JUDGMENT ON THE PLEADINGS

Judgment on the pleadings is proper only where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Chicago Title & Trust Co. v. Steinitz, 288 Ill.App.3d 926, 681 N.E.2d 669 (1997); Richco Plastic Co. v. IMS Co., 288 Ill.App.3d 782, 681 N.E.2d 56 (1997). In ruling on a motion for judgment on the pleadings, only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record may be considered. All well-pleaded facts and all reasonable inferences from those facts are taken as true. Mt. Zion Bank & Trust v. Consolidated Communications, Inc., 169 I1l.2d 110, 660 N.E.2d 863 (1995). Since this case involves only a question of law to be determined by the Court, and the motion to dismiss filed by the Defendant admits all well-pleaded allegations of the Plaintiff's Complaint, judgment on the pleadings is

proper. In addition, since Universal is required, as discussed below, to provide primary coverage to the permissive users in this case, Farmers is entitled to the entry of judgment on the pleadings in its favor, and against the Defendant Universal.

ARGUMENT

In its Amended Motion to Dismiss, Universal contends that Illinois law does not require permissive users to be insured under owner's policies for damage to the owner's vehicle. This assertion is clearly contrary to Illinois law. Recent cases have consistently held that an automobile dealer's insurance policy must provide primary coverage for permissive users. In County Mut. Ins. Co. v. Universal Underwriters Ins. Co., 316 Ill.App.3d 161, 735 N.E.2d 1032 (2000), David Evans (hereinafter "Evans") was involved in an automobile accident while test-driving a vehicle owned by Mike Murphy Ford (hereinafter "Ford") and insured by Universal Underwriters Insurance Company. At the time of the accident, Evans was insured by Country Mutual Insurance Company.

Following the accident, Evans tendered his defense of the underlying personal injury and property damage claims to Universal, which tender Universal refused. Thereafter, Country Mutual assumed the defense of Evans pursuant to a full reservation of rights, settled the claims against Evans and then sued Universal for reimbursement. Both Country Mutual and Universal cross-moved for summary judgment and the trial court granted summary judgment in favor of Country Mutual, concluding that as the insurer of the dealership, Universal was required to provide primary insurance coverage in connection with the underlying action.
On appeal, Universal acknowledged that it had primary coverage for the accident, but argued that Country Mutual's policy also provided primary coverage. In this respect, Universal argued that the coverages of both companies were co-primary, and as such the damages should be pro-rated based on the applicable policy limits.

According to the Court, Universal was required to provide primary coverage to Evans because Evans was a customer test-driving a vehicle owned by Ford, its insured. The Court stated:

> [p]rimary liability is generally placed on the insurer of an automobile rather than on the insurer of a driver. [citations omitted]. Thus, a garage liability insurer has responsibility for providing primary coverage to customers test-driving on automobile dealers vehicles. [citations omitted].

Consequently, the Court determined that Universal, as the dealership's insurer, was required to provide primary insurance coverage for the claims asserted against Evans.

Similarly, in Browning v. Plumlee, 316 Ill.App.3d 738, 737 N.E.2d 320 (2000), Robert E. Browning and Nora Browning (hereinafter "the Brownings") filed a multi-count

complaint following an automobile accident which occurred when the Defendant Robert L. Plumlee (hereinafter "Plumlee") was test-driving a truck owned by the Defendant, Greg Weeks Pontiac Chevrolet-GEO (hereinafter "the Dealership"). The parties sought a declaratory judgment in order to determine whether the policy issued to Plumlee by State Farm Mutual Automobile Insurance Company provided coverage for the accident or if the policy issued by Universal Underwriters Insurance Company to the Dealership provided coverage. The trial court concluded that Universal was primarily responsible to provide coverage for the accident as the insurer of the vehicle's owner. On appeal, Universal argued that both State Farm and Universal should provide coverage for the accident and that the amount each insurer was obligated to pay should be pro-rated based upon the respective limits of each policy.

On appeal, Universal argued that Plumlee's personal automobile liability policy was in effect at the time of the accident and extended to his use of the truck, and as such coverage should be pro-rated between the insurers. State Farm argued that according to the Illinois Supreme Court, garage policies covering car dealerships provide the sole primary coverage for test-drivers operating vehicles owned by the dealership. Relying on State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Group, 182 III.2d 240, 695 N.E.2d 848 (1998), the Court reasoned that an automobile dealership's automobile liability policy must provide coverage for test-drivers even where the test-driver has a personal automobile liability insurance policy which provides coverage for the insured's operation of non-owned vehicles. Consequently, the Court concluded that:

> [w]here a car dealership allows its customers to test-drive its test vehicles, the car dealership is required by law to provide primary insurance coverage to the test-driver, regardless of whether the test-driver also has coverage. The Supreme Court's finding that the dealership by law must provide primary coverage necessarily excludes a finding that the test-drivers insurance might also be co-primary.

Likewise, in Pekin Ins. Co. v. State Farm Mut. Auto. Ins. Co., 305 Ill.App.3d 417, 711 N.E.2d 1227 (1999), Carol Ann Hager (hereinafter "Hager") filed a lawsuit against Linda C. Saylor (hereinafter "Saylor") for personal injuries she sustained following an automobile accident. At the time of the accident, Saylor was test-driving a vehicle owned by Sullivan Chevrolet Company (hereinafter "Sullivan Chevrolet"). Pekin Insurance Company provided insurance coverage for Sullivan Chevrolet's vehicles and State Farm Mutual Automobile Insurance Company provided automobile liability insurance coverage for Saylor.

Following the accident, Pekin filed a declaratory judgment action against Saylor, Hager and State Farm seeking a determination that it was not primarily obligated to defend Saylor because language in Sullivan Chevrolet's insurance policy excluded her from coverage. State Farm and Pekin cross-moved for summary judgment and

the trial court granted State Farm's motion, holding that the Pekin policy provided primary coverage and that Pekin was obligated to provide a defense for Saylor.

On appeal, State Farm argued that §7-317 of the Illinois Safety and Family Financial Responsibility Law (625 ILCS 5/7-317(b)), required Sullivan Chevrolet to insure all of its test-drivers. In this respect, State Farm contended that Pekin was required to provide primary coverage for Saylor, notwithstanding language contained in Sullivan Chevrolet's policy. The Court concluded that Sullivan Chevrolet's policy provided coverage for Saylor, reasoning that primary liability is generally placed on the insurer of the owner of an automobile rather than the insurer of the test-driver.1 See also 7A Am. Jur.2d Automobile Insurance §543 (1997).

Moreover, in State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Group, 182 I1.2d 240, 695 N.E.2d 848 (1998), Rodney Luckhart (hereinafter "Luckhart") test-drove a Jeep Cherokee owned by the Defendant, Joyce Pontiac GMC, Jeep-Eagle and Toyota (hereinafter "Joyce Pontiac") and negligently collided with a vehicle owned by Vivian Carter (hereinafter "Carter") and operated by Raun Calinee (hereinafter "Calinee"). At the time of the accident, Luckhart was insured by an automobile liability policy issued by State Farm Mutual Automobile Insurance Company. State Farm paid for Calinee's and Carter's property damage and personal injuries and then submitted a claim to Joyce Pontiac's insurance carrier, Universal Underwriters Group, contending that the garage policy issued by Universal to Joyce Pontiac provided primary coverage for Luckhart's liability because Luckhart was test-driving the Jeep Cherokee at the time of the accident. Universal denied State Farm's subrogation claim, contending that the garage policy issued to Joyce Pontiac provided no coverage to Luckhart in connection with the accident. The trial court entered judgment in favor of State Farm and the Appellate Court affirmed, holding that Luckhart was an "insured" under the garage policy issued by Universal.

On appeal to the Supreme Court, the Court concluded that the liability policy of an automobile dealership must provide coverage for test-drivers like Luckhart, and that Luckhart was an "insured" under Joyce Pontiac's garage policy at the time of the accident. In reaching this conclusion, the Court noted that pursuant to custom in the insurance industry, primary liability is generally placed on the insurer of the owner of an automobile rather than on the insurer of the operator of the automobile. Consequently, the Court held that the insurance policy issued by Universal to Joyce Pontiac provided omnibus coverage for Luckhart.

Here, Universal contends that permissive users are not required to be insured under an owner's policy for damage to the owner's vehicle. This assertion clearly contradicts section 7-317(b)(2) of the Financial Responsibility Law, which requires the owner's policy of liability insurance to "insure the person named therein and any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured." The attempts by Universal to distinguish the long line of precedent requiring the owner's policies to provide

primary coverage to permissive users are irrelevant, since it is clear that primary liability is generally placed on the insurer of the owner of an automobile rather than on the insurer of the operator of the automobile. The Financial Responsibility Law does not require that the accident involve "property damage to others before the owner's policy must provide insurance coverage. All that is required is that the person is using the vehicle with the express or implied permission of the named insured. In all three cases, the Farmers insureds were either test driving vehicles owned by the dealership, or operating a loaner vehicle owned by the dealership. In all three cases, the insureds had the permission of the named insureds to operate those vehicles. The Universal policy defines "Who is an Insured" as "any other person ... required by law to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission." Section 7-317(b)(2) clearly requires the dealership to include permissive users as insureds under their policies. As such, Farmers is entitled to judgment on the pleadings defining Mark Wilder, Cecilia M. Butler, and Carol Jones as insureds under the Universal policies issued to Geiser Ford, Inc. and Sierra Motor Mall.

THE EXCLUSIONS RELIED UPON BY UNIVERSAL ARE CONTRARY TO ILLINOIS PUBLIC POLICY AND THEREFORE VOID.

Universal relies upon its exclusion which states that the insurance does not apply to "injury or covered pollution damages to personal property, including autos, owned by, rented or leased to, used by, in the care, custody or control of, or being transported by the insured." However, Universal's attempt to limit coverage in contravention to statutory requirements will render that exclusionary language void. The Illinois Supreme Court recently held in State Farm Mutual Auto. Ins. Co. v. Smith, 197 Ill.2d 369, 757 N.E.2d 881 (2001), that Section 7-317(b)(2) is clear, where it mandates that a motor vehicle liability policy, or a liability insurance policy, cover the named insured and any other ening the vehicle with the nameinsured's permission. The Smith Court further held that a statute's underlying purpose cannot be circumvented by a restriction or exclusion written into an insurance policy.

In Smith, the policy which insured the vehicle at issue contained an automobile business exclusion which sought to exclude coverage in instances where the insured vehicle was being repaired, serviced or used by any person employed or engaged in any way in a car business. The accident in Smith involved a valet driver, who sought coverage from the State Farm policy that insured the vehicle. State Farm relied upon its automobile exclusion to deny coverage. The Court held the exclusion was void, since it violated Illinois public policy which required a vehicle owner's insurance carrier cover any person driving the owner's vehicle with the express or implied permission of the owner. Since the automobile exclusion necessarily excluded coverage for individuals who were using the insured's vehicle with the insured's express or implied permission, it violated section 7-317(b)(2) of the Illinois Vehicle Code, and was therefore void.

Similarly, the Court in Bertini v. State Farm Mutual Auto. Ins. Co., 48 Ill.App.3d 851, 362 N.E.2d 1355 (1st Dist. 1977), held that the insurer could not limit uninsured motorist coverage to the named insured where liability coverage was afforded to omnibus insureds. In Bertini, the policy at issue limited uninsured motorist coverage to the named insured as stated in the policy. However, the policy, in its liability section, afforded coverage to the named insured, in addition to any other person using the insured vehicle with the permission of the named insured. The Court noted that Section 143a of the Insurance Code required that all persons insured under the liability portion of an automobile liability policy be protected under the uninsured motorist coverage. The Court held that "if one is an insured for the purpose of liability protection, he is deemed an insured for the purpose of uninsured motorist protection." Id. at 855. Since the State Farm policy sought to limit coverage, in contravention with statutory requirements, the Court held that the limitation was void.

Similarly, Universal is attempting to exclude coverage for the accidents involving vehicles owned by the dealerships, although Illinois law requires the owner's policy to provide primary coverage to permissive users. Universal contends that permissive users are not included under the physical damage coverage part of the Universal policies. However, Illinois courts do not allow insurers to limit coverage in such instances where a statute specifically requires the owner's policy to provide coverage for permissive users. Universal also contends that permissive users are not included under the provision which provides "this insurance will not benefit, directly or indirectly, any carrier or bailee." Again, this provision contradicts the statutory requirement that the owner's policy insure any person using the insured vehicle with the express or implied permission of the named insured. As the Supreme Court noted in State Farm v. Smith, supra:

The Illinois legislature has decided that the public policy of Illinois requires that an insurance company that issues a liabilitypolicy ormotorvehice to an insured must cover the insured and any other person who has received the insured's express or implied permission to use the vehicle... This court may not establish a public policy which is contrary to the public policy that the Illinois legislature has determined is appropriate for the State of Illinois.

State Farm v. Smith, 757 N.E.2d at 885. Therefore, any attempts by Universal to limit coverage that is required for permissive users under an owner's liability policy is in clear contradiction with Illinois precedent and statutory requirements, and any such exclusions seeking to limit coverage in that respect should be declared void. Since Universal will not be able to limit coverage afforded to the permissive users under the owner's liability policies, Farmers is entitled to judgment on the pleadings in its favor.

UNIVERSAL HAS VIOLATED SECTION 5/155 OF THE ILLINOIS INSURANCE CODE.

Farmers contends that Universal violated Section 5/155 of the Illinois Insurance Code (735 ILCS § 5/155) by its refusal to provide primary insurance to Wilder, Butler and Jones following the accidents involving vehicles owned by the dealerships at issue. Universal's refusal to provide primary insurance was vexatious and unreasonable in light of the fact that Illinois law clearly provides that primary liability is generally placed on the insurer of the owner of an automobile rather than on the insurer of the operator of the automobile. Since Universal failed to provide primary insurance to Wilder, Butler, and Jones, contrary to the requirements of Section 7-317(b) of the Financial Responsibility Law, this Court should hold that Universal acted unreasonably and vexatiously, and should award a $25,000 penalty for each claim plus costs, interests, and attorneys' fees to Farmers.

WHEREFORE, the Plaintiff, THE FARMERS AUTOMOBILE INSURANCE ASSOCIATION, respectfully requests this Honorable Court to enter judgment on the pleadings in its favor, and declaring the rights of the parties as follows:

A. That Universal Underwriters Insurance Company is liable under its policy of insurance issued to Geiser Ford, Inc. to pay the damages sustained to that dealer's vehicle in the accident involving Mark S. Wilder and the accident involving Carol Jones.
B. That Universal Underwriters Insurance Company is liable under its policy of insurance issued to Sierra Motor Mall to pay the damages sustained to that dealer's vehicle in the accident involving Cecilia M. Butler.
C. That The Farmers Automobile Insurance Association is not obligated to pay under its policies of insurance in connection with the accidents involving Mark Wilder, Cecilia M. Butler and Carol Jones.
D. That this Court grant The Farmers Automobile Insurance Association such other and further relief as the Court deems fit and just under the circumstances.
E. That a judgment should be entered against Universal Underwriters Insurance Company for a penalty of $25,000 for each claim plus costs, interests and attorneys' fees.
F. That The Farmers Automobile Insurance Association have and recover and be awarded its just and reasonable costs incurred herein and have execution issue therefor.