



**In the
Missouri Court of Appeals
Western District**

JASON L. RICE,

Respondent,

v.

**SHELTER MUTUAL INSURANCE
COMPANY,**

Appellant.

WD69411

OPINION FILED:

March 10, 2009

**Appeal from the Circuit Court of Johnson County, Missouri
The Honorable Joseph P. Dandurand**

Before Ronald R. Holliger, P.J.,¹ Lisa White Hardwick, and James Edward Welsh, JJ.

Shelter Mutual Insurance Company appeals the circuit court's grant of summary judgment in favor of Jason Rice on Rice's claim for uninsured motorist benefits under three policies issued to Rice's parents by Shelter. While working for his employer, Rice was injured in an accident caused by an uninsured motorist. Rice received workers' compensation benefits for his injuries. On appeal, Shelter argues that a policy provision limiting uninsured motorist (UM) coverage to statutorily mandated minimum amounts where the insured receives workers' compensation benefits is fully enforceable under Missouri law. Because the provision is not void

¹Judge Holliger was a member of this court at the time the case was argued; however, he has subsequently retired from the court and did not take part in the outcome of this case.

as against public policy, is not illusory, and presents no ambiguity of consequence to this case, Rice was not entitled to judgment as a matter of law. We, therefore, reverse and remand the case to the circuit court.

Factual and Procedural Background

Jason Rice was injured on the job while a passenger in a vehicle involved in an accident with an uninsured motorist. At the time, he was insured under three automobile liability policies purchased from Shelter by his parents on three different vehicles. Each policy provided UM coverage in amounts exceeding \$25,000 per individual, per accident, for bodily injury. The total "stacked" uninsured motorist coverage available to Rice was \$600,000. Shelter does not deny that Rice's damages are at least \$600,000. It is undisputed that Rice was entitled to the full extent of this uninsured motorist coverage, pursuant to the terms of the policies. It is also undisputed that Rice received workers' compensation benefits as a result of the accident.

Rice demanded the full \$600,000 from Shelter, but Shelter declined and instead tendered payment of \$75,000. Shelter claimed that a limitation provision in the policies made it liable only to the extent of the minimum requirements of Missouri's Financial Responsibility Law because Rice received workers' compensation benefits due to the accident. Shelter claimed that this amount is \$25,000 per policy. Rice brought suit to recover the remaining \$525,000.

The policy provision at issue, which is common to all three policies, is as follows:

**PART IV--UNINSURED MOTORISTS
COVERAGE E--UNINSURED MOTORISTS**

.....

INSURING AGREEMENT FOR COVERAGE E

Subject to the limit of our liability stated in this Coverage, we will pay damages for bodily injury sustained by an Insured which that Insured, or that insured's legal representative, is legally entitled to recover from the owner or operator of an

uninsured motor vehicle. The bodily injury must be caused by accident and arise out of the ownership or use of the uninsured motor vehicle.

EXCLUSIONS

If an applicable uninsured motorist insurance law or financial responsibility law renders any exclusion provision of this policy unenforceable, we will provide only the minimum limits required by such law. However, if other insurance covers our insured's claim and provides those required minimum limits, the exclusion provisions of this policy are fully enforceable.

Coverage E does not apply:

....

- (3) To damages sustained by any Insured if benefits are:
 - (a) payable to, or on behalf of, such insured under any compensation law, as a result of the same accident, or
 - (b) required by any compensation law to be provided to, or on behalf of, such insured as a result of the same accident.

This exclusion does not apply to the amounts of coverage mandated by any uninsured motorist insurance law or financial responsibility law applicable to the accident, but does apply to coverages which are not mandated by such laws.

....

EFFECT OF UNINSURED MOTORIST INSURANCE LAWS OR FINANCIAL RESPONSIBILITY LAWS

If an applicable uninsured motorist law or financial responsibility law renders any provision of this Part of the policy unenforceable, we will provide only the minimum limits mandated by such law. However, if other insurance covers an insured's claim and provides those required minimum limits, the provisions of this policy are fully enforceable.

All provisions of this Part of the policy which exceed the requirements of any applicable uninsured motorist insurance law or financial responsibility law or are not governed by it, are fully enforceable.

The policy defines "compensation law" as:

[A]ny law under which benefits are paid to a person as compensation for the effects of bodily injury, without regard to fault, because of that person's status as an employee or beneficiary. It includes, but is not limited to, workers' compensation laws, disability laws, the Federal Employers' Liability Act and the Jones Act.

Both parties moved for summary judgment. The circuit court examined the above policy language and concluded, "[i]f all the overlapping exclusionary language contained in the policies is given meaning, then the insured received no perceivable value for the premiums paid for uninsured motorist coverage; and the appearance and reasonable expectation of having purchased Six Hundred Thousand Dollars of uninsured motorist coverage would be illusory." It also concluded that "[t]he exclusionary language of Coverage E in the Shelter policies is so excessively broad as to be void and contrary to the public policy of Missouri." The court denied Shelter's motion and granted Rice's motion, awarding him \$525,000 plus statutory interest for a total of \$559,952.05. Shelter appeals.

Standard of Review

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 74.04. "When considering appeals from summary judgments, the Court will review the record in the light most favorable to the party against whom judgment was entered." *ITT Comm. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). "Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion." *Id.* "We accord the non-movant the benefit of all reasonable inferences from the record." *Id.* "Our review is essentially *de novo*. The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." *Id.* "[A]n appellate court need not defer to the trial court's order granting summary judgment." *Id.*

Discussion

Shelter's sole point on appeal is a contention that the exclusionary language, limiting uninsured motorist coverage to statutory minimums if the insured is entitled to benefits under a "compensation law," does not violate the law or public policy. Section 379.203.1² requires all automobile liability insurance policies to include uninsured motorist coverage "in not less than the limits for bodily injury or death set forth in section 303.030." Section 303.030.5, part of the Motor Vehicle Financial Responsibility Law, in turn requires automobile liability policies to include a minimum of "twenty-five thousand dollars because of bodily injury to or death of one person in any one accident."

In reply, Rice seeks a determination, as a matter of first impression in Missouri, that an exclusion of amounts of uninsured motorist coverage in excess of the statutory minimum violates the public policy implicit in section 379.203 and, therefore, is void. Rice also argues that, as the circuit court found, the uninsured motorist coverage in this case was illusory because the policyholders received nothing for their premiums if all exclusionary language is given full effect. Lastly, Rice contends that there is ambiguity in the Exclusions section that requires us to affirm the circuit court's judgment.

Although the combined effect of the UM provisions of the Shelter Policy is not immediately clear, the UM section as a whole is not ambiguous. Although the applicable parts of the UM section are set forth above, it is necessary to discuss the paragraphs separately to realize their effect. The first paragraph under the "Exclusions" section is a "savings clause" of sorts,

²All Missouri statutory references are to RSMo 2000, updated through the 2008 Cumulative Supplement.

which by its own terms has application only where some policy provision is rendered unenforceable:

If an applicable uninsured motorist insurance law or financial responsibility law renders any exclusion provision of this policy unenforceable, we will provide only the minimum limits required by such law. However, if other insurance covers our insured's claim and provides those required minimum limits, the exclusion provisions of this policy are fully enforceable.

Following this first savings clause is the list of actual exclusions, one of which is the "compensation law" exclusion at issue here:

Coverage E does not apply:

....

- (3) To damages sustained by any Insured if benefits are:
 - (a) payable to, or on behalf of, such insured under any compensation law, as a result of the same accident, or
 - (b) required by any compensation law to be provided to, or on behalf of, such insured as a result of the same accident.

This exclusion does not apply to the amounts of coverage mandated by any uninsured motorist insurance law or financial responsibility law applicable to the accident, but does apply to coverages which are not mandated by such laws.

Then, following the exclusions, is a section entitled "EFFECT OF UNINSURED MOTORIST INSURANCE LAWS OR FINANCIAL RESPONSIBILITY LAWS." Under this title appears another savings clause, nearly identical to the first.

It is apparent from the entire UM section of the policy that the insured is afforded at least the statutory mandated minimum coverage in all instances. If the "compensation law" exclusion is enforceable, it guarantees the minimum coverage by declaring in its last paragraph that the exclusion is inapplicable to such amounts. If, on the other hand, the compensation law exclusion is unenforceable, the savings clauses purport to limit the insured's recovery to the statutory minimums, and no less. Moreover, even if the final sentence of each savings clause has the

effect of reviving a void policy exclusion (which it can not—see discussion below), the enumerated exclusions themselves, including the "compensation law" exclusion, again guarantee the statutory minimums.

Our analysis begins, then, with the "compensation law" exclusion, which is the provision determined by the circuit court to be void. If, and only if, we agree that the exclusion is void will we apply the language of the savings clauses or determine whether those clauses are effective.

I. The Exclusion of Coverage Amounts Above Those Mandated By Financial Responsibility Laws, Based on Insured's Receipt of Workers' Compensation Benefits, Is Not Void As Against Public Policy.

It is settled that a UM exclusion which, by offsetting amounts payable to the insured in workers' compensation benefits, could reduce UM coverage to an amount below the statutory minimum, is void. *Cano v. Travelers Ins. Co.*, 656 S.W.2d 266, 270 (Mo. banc 1983); *Douthet v. State Farm Mut. Auto. Ins. Co.*, 546 S.W.2d 156, 159 (Mo. banc 1977). *Douthet* held that section 379.203 requires that statutorily mandated amounts of UM coverage "not be diminished by contractual limitation" and that "[i]t would violate the public policy expressed in [section] 379.203 to permit diminution of coverage by requiring credit for workmen's compensation payments." 546 S.W.2d at 159. *Cano*, which similarly involved a policy purporting to offset UM coverage against workers' compensation benefits without restriction, reiterated the rationale of *Douthet*. "We hold on the basis of *Douthet* that the policy language . . . reducing the uninsured motorist liability by the amount of workers' compensation benefits was ineffective because of the public policy implicit in § 379.203" *Cano*, 656 S.W.2d at 270.

Although the Shelter policy does not seek to offset workers' compensation amounts, but rather seeks to eliminate UM payments beyond \$25,000 if *any* workers' compensation benefits are payable to the insured as a result of the accident, the principles announced in *Douthet* are

equally applicable here. An elimination of all UM coverage in the event of workers' compensation recovery would be a void provision.

However, the Shelter policy, apparently in anticipation of such a result, ensures that UM coverage will in no case be reduced to an amount below "coverage mandated by any uninsured motorist insurance law or financial responsibility law applicable to the accident." Therefore, the limitation at issue does not strictly violate *Douthet*. The issue presented is, therefore, whether the reasoning of *Douthet* necessarily extends so as to prohibit, based on the public policy implicit in section 379.203, an exclusion that limits UM recovery in excess of that required by statute on the basis of workers' compensation recovery. This issue has not been settled in Missouri, although this court has addressed it in dicta. *Williams v. Cas. Reciprocal Exch.*, 929 S.W.2d 802, 809-10 (Mo. App. 1996).

In *Williams*, we addressed a policy provision similar to that in *Cano* and *Douthet*; that is, one that offset UM coverage by amounts recoverable as workers' compensation benefits without guaranteeing any minimum benefit. *Id.* We held that *Cano* and *Douthet* voided such a provision "up to \$25,000." *Id.* at 809. The court then went on to address the issue presented here--whether the limitation was enforceable as to amounts in excess of \$25,000:

We . . . agree that *Cano* and *Douthet* do not explicitly require that the public policy be held unenforceable above the \$25,000 statutory minimum, and that Missouri has held that household exclusion provisions contained in uninsured motorist policies are enforceable for amounts in excess of \$25,000. *Halpin v. American Family Mut. Ins. Co.*, 823 S.W.2d 479, 483 (Mo. banc 1992); *State Farm Mutual Ins. Co. v. McGuire*, 905 S.W.2d 150, 153 (Mo. App, 1995)). For this reason, and to avoid what they deem double recovery by the insured, some courts enforce such contractual limitations as to workers' compensation benefits for that portion of a judgment which is in excess of the statutory minimum. See Larson, *The Law of Workmen's Compensation*, § 71.23(h), Vol. 2A, (1995); Jeffrey L. Cole, Annot., *Uninsured and Underinsured Motorist Coverage: Validity, Construction, and Effect of Policy Provision Purporting to Reduce*

Coverage By Amount Paid or Payable Under Workers' Compensation Law, 31 A.L.R. 5th 116 (1995).

Id. at 809-10. The court then noted that the cited secondary authorities cite no Missouri case supporting enforcement of such provisions, but that "the only Missouri case we have found, [*Barker v. Palmarin*, 799 S.W.2d 117, 118-19 (Mo. App. 1990)], appears to reach the opposite result." *Id.* at 810. However, because the insurance company in *Williams* had failed to introduce the offset provision at trial, the court disposed of the case on procedural grounds. *Id.*

We disagree with the *Williams* court's characterization of *Barker*. In that case, an employee was injured in a work-related accident, and the workers' compensation carrier, having made payments to the injured employee, sought to subrogate its claim against the employee's UM coverage. *Barker*, 799 S.W.2d at 117-18. We held that "the uninsured carrier is not a 'third person' liable to the employer or its compensation carrier," as contemplated by the workers' compensation subrogation statute, and, therefore, subrogation of this type is not allowed. *Id.* at 118. While this decided the issue on appeal, we stated in *dicta*:

There is a provision in the Northland policy saying the uninsured motorist benefits do not apply to compensation benefits. The practical effect of a holding for the employer-insurer in this type of case would be to diminish the amount of uninsured coverage available to the employee. Such a ruling would allow the compensation carrier to deplete the uninsured coverage, up to the amount paid under workers' compensation, before the injured motorist-employee could start collecting. As the trial court noted, this result would run counter to [*Cano*, which held that] an uninsured carrier is not entitled to an offset for compensation benefits received by the employee. Although the case at bar involves a compensation carrier asking for the benefits of uninsured proceeds, the rationale is the same. The Safety Responsibility Law, and the policy expressed in §379.203 . . . , is to disallow a diminution in benefits to motorists injured by uninsured drivers.

. . . .

The rationale of *Cano* is clear—uninsured benefits should not be reduced to injured motorists just because worker's compensation also applied to the injuries. As the trial court noted, a favorable result to the compensation carrier would result in a

diminution of benefits to the employee covered by the Northland uninsured coverage. If the amount in worker's compensation is taken by American from the Northland coverage, the net benefits to the plaintiff-claimant are reduced. Such a result would fly in the face of the philosophy of *Cano*.

Id. at 119. This language does not address the issue in this case; it does not touch upon *Cano's* effect on coverage above statutorily mandated amounts. Moreover, it appears to deal entirely with the effects of the subrogation issue, which is not present here. Therefore, *Barker* provides us no guidance.

Nor do we think that the "double recovery" issue mentioned in *Williams* and the sources cited therein is determinative in this case. Shelter does not argue that allowing Rice to recover both UM and workers' compensation benefits would amount to double recovery. Rather, it contends only that public policy reflected in Missouri law does not prohibit enforcement of the policy terms.

Several Missouri cases discuss the public policy implications of section 379.203 or the parallel provisions governing liability insurance. In *Cameron Mutual Insurance Co. v. Madden*, the Missouri Supreme Court discussed the public policy behind section 379.203 in determining whether a provision that prevented stacking of UI coverage, where the vehicles are all covered under a single policy, was enforceable. 533 S.W.2d 538, 544-45 (Mo. banc 1976). The court held the provision was void as against the public policy expressed in section 379.203. *Id.*

"[C]ases should not and will not turn on how well the insurer drafts a limiting clause because the law does not permit insurers to collect a premium for certain coverage, then take that coverage away by such a clause no matter how clear or unambiguous it may be." *Id.* at 545 (quoting *Great Cent. Ins. Co. v. Edge*, 298 So.2d 607, 610 (Ala. 1974)).

The public policy at issue in *Cameron* does not prevent enforcement of the "compensation law" provision in the Shelter policy. Unlike the provision in *Cameron*, which effectively sought to completely deprive the insured of coverage for which he paid premiums, regardless of the circumstances surrounding the accident, the "compensation law" provision here applies only where benefits are payable or required to be paid under a "compensation law," as defined by the policy. Therefore, Rice was not deprived of coverage for which he paid because recovery under a "compensation law" was only a possibility affecting coverage, and not an inevitability ensuring that Rice would not receive the excess UM coverage for which he gave valuable consideration. Rice received \$600,000 of UM coverage for the premiums paid, to which he was fully entitled had he not been entitled to benefits under a "compensation law."

Nevertheless, Rice argues that the public policy behind section 379.203 requires something more than a mere minimum of \$25,000 in UM coverage. In *Kuda v. American Family Mutual Insurance Co.*, the medical expenses coverage of an insurance policy was, according to an exclusion, reduced by amounts recovered for medical expenses under the UM or liability coverage. 790 S.W.2d 464, 465 (Mo. banc 1990). The Supreme Court found that the purpose behind section 379.203 "is to establish a level of protection equivalent to the liability coverage the insured would have received had the insured been involved in an accident with an insured tortfeasor." *Id.* at 467. The court found that such purpose was defeated by the policy's medical expense limitation, apparently reasoning that, had the tortfeasor been insured, the insured would have recovered both under his own medical expenses coverage and from the tortfeasor's liability policy. *Id.*

Rice urges that, based on the public policy stated in *Kuda*, he is entitled to the same uninsured motorist coverage as if the uninsured motorist had \$600,000 of applicable liability

insurance coverage. *Kuda* can not be read so broadly. The stated public policy is not to provide the insured with coverage equal to his damages by constructing a fiction that the tortfeasor possessed that amount of liability insurance. Rather, *Kuda* simply recognizes that section 379.203 guarantees a measure of protection that may not be eroded by contract. It is clear what that measure of protection is. Section 379.203 requires auto insurance policies to provide at least \$25,000 of UM coverage per accident, per person for personal injury. We cannot be certain that a given tortfeasor has more than \$25,000 of liability coverage, but we can be certain the law requires *some* insurance policy to provide that amount in every case of injury. To say that section 379.203 requires insurance policies to include more than \$25,000 in UM coverage, as a matter of public policy, would be at odds with the express language of the statute itself. We, therefore, reject Rice's argument that the amounts listed in section 303.030.5 are something other than statutorily mandated minimums for both liability and UM coverage.

Rice also points to *Dawson v. Denney-Parker*, 967 S.W.2d 90 (Mo. App. 1998), to support his contention that section 379.203 mandates more than \$25,000 in coverage. In that case, a policy provision which attempted to preclude UM coverage where there was no physical contact between vehicles was void because of the 1982 amendment to section 379.203, which rendered such clauses unenforceable. *Id.* at 92. The issue on appeal was whether amounts of purchased coverage beyond \$25,000 could be excluded based on the fact of no physical contact. *Id.* The court found that the "legal entitlement" created by section 379.203 is "the right to recover from the uninsured motorist, not the insured's right to recover the statutory minimum uninsured motorist benefits." *Id.* at 93. The court held that the imposition of a physical contact requirement was void, even as to amounts beyond the statutory minimums. *Id.*

However, *Dawson* is based on an express statutory prohibition of exclusions based on the lack of physical contact. In contrast, the legislature has not acted to prohibit reduction of UM coverage based on receipt of workers' compensation benefits by the insured. Moreover, Rice's right "to recover from the uninsured motorist" amounts to a right to recover exactly what the uninsured motorist would have had if he had complied with the law--no more and no less. Section 303.030.5 sets that amount. Therefore, *Dawson* does not aid Rice.

Another Missouri case, *Ezell v. Columbia Insurance Co.*, enforced a limitation as to amounts in excess of \$25,000 where the provision was void as to amounts up to \$25,000. 942 S.W.2d 913 (Mo. App. 1996). The limitation at issue excluded UI coverage if the vehicle involved in the accident was owned by a family member. *Id.* at 914. The court held that the exclusion was void as "repugnant to the mandate of § 379.203." *Id.* at 917. However, the court held the limitation enforceable as to amounts beyond \$25,000, stating, "[s]o long as policy provisions meet the minimum requirements of the law and do not conflict with it, the parties remain free to create the insurance contract of their choice." *Id.* at 919.

Similarly, the Missouri Supreme Court has held that a "household" exclusion in a liability policy, while void as to amounts up to the statutory minimum, is enforceable as to amounts exceeding the minimum. *Halpin v. Am. Family Mut. Ins. Co.*, 823 S.W.2d 479, 482-83 (Mo. banc 1992); *see also Am. Standard Ins. Co. of Wis. v. Bracht*, 103 S.W.3d 281 (Mo. App. 2003) (enforcing limitation that offset liability insurance payments against UM coverage, to the extent of coverage in excess of statutory minimums). "When the contract language is clear . . . exceptions based on public policy must usually find support in necessary implication from statutory provisions." *Halpin*, 823 S.W.2d at 483. Although it was construing statutes governing liability policies and not UM coverage, the court found that "[s]ection 303.190.7 manifests to

insureds that they have no basis for expecting coverage in excess of the requirements of § 303.190.2." *Id.* Because both liability and UM policies must carry the same minimums, the reasoning of *Halpin* is equally applicable to UM coverage. *Ezell*, 942 S.W.2d at 918.

Moreover, in the case of *undersinsured* motorist coverage, which is not mandated by statute, workers' compensation setoff provisions have been enforced in Missouri. *Addison v. State Farm Mut. Auto. Ins. Co.*, 932 S.W.2d 788 (Mo. App. 1996); *Green v. Federated Mut. Ins. Co.*, 13 S.W.3d 647 (Mo. App. 1999). These cases strongly suggest that, absent a statutory mandate, no public policy interferes with an insurer's right to include a workers' compensation offset, subject to ordinary contract defenses. Indeed, the difference between underinsured motorist coverage and UM coverage in amounts exceeding the statutory mandate is, from the perspective of the policyholder, almost nonexistent. Because we have determined that section 379.203 mandates only \$25,000 of UM coverage per person, per accident, there is no statute that requires more than this amount. Therefore, as in the case of underinsured motorist coverage, the rights of the parties are governed by contract law. *Addison* and *Green* hold that contract law does not prevent a workers' compensation setoff provision. *Id.*

Rice was not entitled to judgment as a matter of law on this issue.

II. Although the "Compensation Law" Exclusion Narrows the Circumstances Under Which the Insured Will Receive Uninsured Motorist Benefits In Excess of the Mandatory Minimums, The Policy Is Not Illusory.

The circuit court determined that "[i]f all the overlapping exclusionary language contained in the policies is given meaning, then the insured received no perceivable value for the premiums paid for uninsured motorist coverage; and the appearance and reasonable expectation of having purchased Six Hundred Thousand Dollars of uninsured motorist coverage would be illusory." Both the circuit court and Rice base this conclusion on the premise that the policy's

definition of "compensation law" is so broad that it encompasses such benefits as Medicare, Medicaid, and even health insurance. While we need not decide whether or not that definition could be read to include these benefits,³ thus depriving the insured of all UM coverage beyond the statutory minimum if he received any other public or private insurance benefit, we do not think that this contingency renders the policy illusory.

To say that an agreement is illusory is to say there is a failure of consideration. *Cooper v. Jensen*, 448 S.W.2d 308, 314 (Mo. App. 1969). A contract is illusory where a party "had it always in his power to keep his promise and yet to escape performance of anything detrimental to himself or beneficial to the promisee." *Id.* "The phrase 'illusory promise' means 'words in promissory form that promise nothing.' CORBIN ON CONTRACTS Section 5.28. An illusory promise is not a promise at all and cannot act as consideration; therefore no contract is formed." *Magruder Quarry & Co., L.L.C. v. Briscoe*, 83 S.W.3d 647, 650 (Mo. App. 2002). "The tendency of the law, however, is to uphold the contract by finding the promise was not illusory when it appears that the parties intended a contract." *Id.* Moreover, "the law does not concern itself with the adequacy of the consideration," *Doss v. EPIC Healthcare Mgmt. Co.*, 901 S.W.2d 216, 220 (Mo. App. 1995), and "[e]ven slight consideration is sufficient to support a promise." *Moore v. Seabaugh*, 684 S.W.2d 492, 496 (Mo. App. 1984).

In *Melton v. Country Mutual Insurance Co.*, an insured argued that a contract of underinsured motorist coverage was illusory because the coverage purportedly applied only as

³Indeed, we question whether the definition could be read so broadly as to include these benefits. See Annotation, *Uninsured or Underinsured Motorist Insurance: Validity and Construction of Policy Provision Purporting to Reduce Recovery By Amount of Social Security Disability Benefits or Payments Under Similar Disability Benefits Law*, 24 A.L.R.5th 766 (1994); 12 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* 3d §171.43 (2005).

"excess" insurance, where all other available sources had been exhausted. 75 S.W.3d 321, 323-24, 327 (Mo. App. 2002). The court stated, "[a]bsent a statute or public policy requiring coverage, a court will not use its inventive powers to rewrite a policy to provide coverage for which the parties never contracted." *Id.* at 327. The court held that the policy was not illusory because the insured "was assured she would receive the contracted amount of protection." *Id.*

Shelter gave considerably more than nothing as consideration for the UM coverage issued to Rice. Shelter's liability amounted to \$600,000 in the conceivable event that Rice did not receive benefits payable pursuant to workers' compensation laws, disability laws, the Federal Employers' Liability Act, or the Jones Act. Although we agree that the "compensation law" exclusion is draconian, especially considering that it is not an "offset" but rather a complete preclusion of coverage, Rice did not argue below and does not argue now that the provision is unconscionable. The UM coverage is not illusory.

III. The Clause Purported By Rice To Be Ambiguous Is Inapplicable To This Case.

Rice further argues that the last sentence of the "savings clause" creates an ambiguity which requires us to construe the UM language so as to provide the full amount of coverage in this case. "Where insurance policies are unambiguous, they will be enforced as written absent a statute or public policy requiring coverage." *Peters v. Employers Mut. Cas. Co.*, 853 S.W.2d 300, 302 (Mo. banc 1993). "If the language is ambiguous, it will be construed against the insurer. An ambiguity exists where there is duplicity, indistinctness, or uncertainty in the meaning of the words used in the contract." *Id.* (internal citation omitted). The savings clause reads:

If an applicable uninsured motorist law or financial responsibility law renders any provision of this Part of the policy unenforceable, we will provide only the

minimum limits mandated by such law. *However, if other insurance covers an insured's claim and provides those required minimum limits, the provisions of this policy are fully enforceable.*

(Emphasis added.) The meaning of this last sentence is not apparent. It reads not as a contract term, but rather as a legal opinion. If the foregoing part of the paragraph is applicable, then a policy provision has been rendered unenforceable by law. Whether the "provisions of this policy" are thereafter enforceable is a dead issue, and no attempt by the contract to revive an unenforceable provision can be given effect. But even considering the ambiguity, we can only construe it in favor of the insured. *Id.* Construing the sentence, or even the whole paragraph, in favor of Rice leads to the conclusion that the sentence is a nullity. Therefore, the ambiguity in this clause, which was not central to the circuit court's opinion and in fact not relied upon by Shelter in denying the excess coverage, does not change our analysis.

Conclusion

For the foregoing reasons, Rice was not entitled to judgment as a matter of law. We reverse and remand the case to the circuit court for findings consistent with this opinion.

James Edward Welsh, Judge

All concur.