

# no-fault newslines

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

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## Warning, Excluded Driver Not Excluded!

By John H. Cowley, Jr.

An excluded driver is not excluded from coverage when the excluded driver warning notice on the policy and certificate of insurance does not mirror the statutory language.

The Michigan Court of Appeals reversed the trial court in *Progressive Michigan Insurance Company v Smith, Mich App \_\_\_\_ COA No. 287505* (March 16, 2010) ruling that the warning notice requirement of the statute must be enforced as written. Therefore, the named driver exclusion in the policy was invalid because it did not strictly comply with the statute.

### SECRET WARDLE NOTES:

This decision is certainly one of form over substance. Insurance carriers should check their excluded driver language in order to assure that the exact statutory wording of the warning is utilized in order to insure the validity of the company's excluded driver provision.

Defendant Smith crossed the center line and struck another vehicle injuring its occupants, the Mihelsics. Due to an atrocious driving record which consisted of an accumulation of points, he did not have a valid driver's license at the time he purchased his truck. In order to obtain license plates and insurance for the truck, Smith added his friend, Sherri Harris to the vehicle title.

Harris obtained an insurance policy from Progressive Michigan Insurance Company and Smith paid the premiums. Harris signed a form at Progressive's request listing Smith as an excluded driver. The declaration page of the insurance policy also listed Harris as an excluded driver as did the certificate of insurance. MCL 500.3009(2) allows an insured to exclude certain drivers from liability coverage. The statute provides in part:

If authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance: Warning – when a named excluded person operates a vehicle all liability coverage is void – no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable.

In this case, the warning on the declaration page of the policy was identical to the portion of the statutory provision. However, in the warning provided on both the face of the policy and the certificate of insurance the last word was "responsible" instead of the statute's "liable."

## CONTINUED...

The Mihelsics brought a court action against Smith which resulted in a default in their favor. Progressive filed a declaratory action to determine its obligation to indemnify Smith and moved for summary disposition on the basis of the named driver exclusion. There was no dispute that both Smith and Harris knew that Smith was a named excluded driver under this insurance policy. Further, there were four separate insurance documents explicitly advising and warning that Smith was an excluded driver.

The Mihelsics responded by filing a counter motion for summary disposition arguing that Progressive had failed to use the required statutory language for exclusion of a named driver on the documents evidencing insurance coverage. The trial court concluded that the requirements of §3009(2) were not satisfied merely by the warning on the declaration page. However, the court determined that the excluded driver provision was valid under the statute because a “suitable” warning was provided.

In a 2-1 decision, the majority held that the legislature did not merely set forth the substance of the required warning. Instead, the statute mandated the use of “the following notice” which is provided verbatim for insurers to use. Further, the legislature did not merely state that the notice was required without specifying the effect of non-compliance. Rather it stated that if the required warning notice was not provided, the named person exclusion “shall not be valid.” The majority specifically rejected the argument that the meaning of the language used by Progressive conveyed the same meaning as the statutory mandated warning.

The dissent argued that the words “liable” and “responsible” were completely and totally synonymous. There was no dispute that Progressive placed the required verbatim warning notice on the declaration page of Plaintiff’s policy. The warnings on both the face of the policy itself and the certificate of insurance used the word “responsible” instead of “liable” as the very last word in the warning. However, the certificate of insurance went above and beyond the statutory requirement by providing an additional warning on the reverse side. Also, Smith testified that he “definitely knew” that he should not be driving on the date of the accident.

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We welcome your questions and comments.

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