FEDERAL COURT

INSURANCE: UIM barred by insured vehicle exclusion in single vehicle death accident … camper trailer insured under vehicle policy, not "uninsured vehicle" giving rise to UM … exclusion of payment for both liability and UIM not violative of public policy … premium did not pay for actuarial risk for which recovery sought … declaratory judgment for insurer … Cebull.

On 6/5/05 Fred & Mary Boyce were driving their 2002 Ford pickup on I-90 pulling a camper trailer. Driving behind was Mary's son Robert Flint and his wife and their son. Boyces' 2 grandchildren were also in the pickup. Mary lost control, causing a single-car accident. Boyces died from their injuries. The grandchildren survived. The pickup and 2 additional vehicles were insured under a Mountain West policy for which separate premiums were paid for UM and UIM. The 3 vehicles had $100,000/occurrence liability and $50,000/$100,000 UM and UIM. Mountain West paid the full limit of liability coverage on the pickup, which was distributed among 9 family members and heirs as well as the survivors. Flint and Fred Boyce Jr., co-PRs of Fred's Estate, claim that his damages exceed $100,000 and are seeking the stacked UIM and/or UM limits on the non-accident vehicles. Mountain West has denied coverage on those vehicles on the grounds that an underinsured vehicle does not include a vehicle insured under the liability coverage of the policy. Mountain West seeks a declaratory judgment that the policy does not provide the requested UM/UIM. It seeks summary judgment on the grounds that the insured vehicles do not meet the clear definition of "underinsured motor vehicle" in the policy, there was no premium paid for the UIM benefits sought, liability and UIM are not both recoverable under the circumstances, and any portability restriction in the insured vehicle definition under the UIM coverage services an actual difference in actuarial risk. Defendants seek summary judgment on the grounds that they have a right to UM because the trailer was not insured under the policy and the UIM exclusion violates public policy.

The UIM exclusion states: "An underinsured motor vehicle does not include a land motor vehicle insured under the liability coverage of this policy." Defendants concede that, at least facially, it is unambiguous.

According to Defendants, the pickup was insured for liability but the camper it was pulling was not, and consequently the uninsured trailer gives rise to UIM. Based on this argument, they seek to stack both UM and UIM for an "aggregate amount up to a total of $200,000." Mountain West, citing Oie (Mont 1998), contends that since the tortfeasor, Mary, was insured and therefore had liability coverage, she could not collect on her "uninsured motor vehicle" coverage. As noted by Mountain West, "uninsured motorist coverage acts as a substitute for a tortfeasor's missing liability coverage." Miller (9th Cir. 1989). Mary had liability coverage and therefore UM coverage does not apply. Defendants next argue that the trailer was uninsured thus giving rise to UM. Mountain West concedes that it was not a listed vehicle that was separately insured for liability, but contends that since it was attached to the insured pickup it was in fact insured, citing the policy definition of "insured vehicle" which includes "Under Coverage N [Liability] only, any trailer while attached to a vehicle described in the Declarations." Defendants reply that the "camper" was not a "trailer" per the policy's definition. They argue that a trailer is a "vehicle designed to carry cargo while being pulled by an insured vehicle," and that the camper is not designed to carry cargo, nor was it a farm wagon or implement, and thus was not a "trailer" as defined by the policy and is thus uninsured. However, National Farmers Union v. George (Mont. 1998) implicitly found a camper trailer, for coverage purposes, to be a "trailer" within the definition of a similar policy. Thus the camper trailer was insured under Coverage N, and Defendants cannot rely on it as an uninsured vehicle to give rise to UM coverage.

The policy limits the amount of coverage a family member can recover from another member's negligence to $25,000. Defendants contend that because of factors beyond Fred Boyce's control – the number of claimants and the family member limitation on liability coverage – he could not have obtained more liability coverage for himself. They contend that they should receive UIM in the amount of $75,000 (the difference between the stacked UIM limits on the other 2 vehicles and the $25,000 family member liability coverage restriction). They contend that even had Boyce purchased more liability coverage as Stutzman (Mont. 1997) suggests, his Estate would be limited to only $25,000. However, in light of Leibrand (Mont. 1995), this provision has already been voided and is no longer applicable. In fact, Mountain West avers that neither in this case nor in any other claims subsequent to Leibrand has it enforced this provision. Defendants received the full $100,000 liability limit. Regardless, other than conclusory allegations, they present no evidence that they were denied either UIM or UM on this ground.

Defendants also focus on the number of claimants. Assuming that the Court were to find that public policy would override the policy exclusion, how many claimants would need to make claims before Stutzman was no longer valid? 2? 3? 5? To draw a public policy line based on the number of claimants would not only diminish Stutzman, but would create greater uncertainty to both insurer and insured. Under Montana law there is no statutory mandate for UIM. As such, parties may freely contract to produce exclusions or limitations on coverage. Id. Moreover, Stutzman concluded that:

> … public policy in fact supports the enforcement of the exclusionary clause at issue here. To invalidate an exclusion which prohibits recovery of underinsured motorist benefits where the vehicle in question is "owned by or furnished for the regular use of the named insured or any relative," would in effect, convert underinsured motorist coverage into liability coverage and "permit policyholders to substitute inexpensive underinsured motorist coverage for more expensive liability coverage." (Citing Kim v. State Farm Mutual Auto Ins. (9th Cir. 1991).)

Generally, the purpose of UIM is to provide indemnification for accident victims when the tortfeasor does not provide adequate indemnification. Sorensen (Mont. 1996). Optional UIM is intended to protect the insured against losses occasioned by negligence of "other drivers" who are underinsured. Mercury Indemnity v. Kim (Ill. 2005). "Other drivers" necessarily implies the drivers of vehicles other than the vehicle owned & operated by the insured. Id. Further, numerous jurisdictions recognize the insured vehicle exclusion similar to if not identical to that in Mountain West's policy to prevent stacking of UIM onto liability coverage under a single policy. Thus the provision that an "underinsured motor vehicle does not include a land motor vehicle insured under the liability coverage of the policy" does not violate public policy and is well-supported in Montana and other states.

Mountain West contends that the UIM premium does not contemplate the actuarial risk of Boyce recovering both UIM and liability under the same policy. It contends that the risk underwritten in exchange for the premiums paid for UIM was based on the situation where Fred Boyce is damaged by the tortfeasor who has liability coverage, provided in a separate policy, that is insufficient to fully cover the damages. It contends that the insured vehicle exclusion prevents the Estate from receiving gratis coverage and Mountain West from being forced to underwrite a risk for which no premium was charged or received. Dale Brooks states in his affidavit that the Boyce policy included premiums for UM/UIM that were charged on each of the 3 vehicles, but reduced in recognition of the multiple vehicles insured. Further, the premiums do not contemplate UM/UIM where the vehicle is insured in the same policy for liability coverage, but anticipates coverage where the other party had coverage from another policy (UIM) or should have had coverage from another policy (UM). He avers that premiums charged are based on consideration of past claims, and since no past UM/UIM losses were incurred when liability coverage was provided under the same policy, they were not considered in the claims projections or premiums. He asserts that if the definition of the claims was broadened by providing portability to insureds to include those claims in vehicles insured under the same policy there would be a significant increase in UIM claims and thus an increase in UIM costs. He states that in 11/04 Mountain West offered liability coverages for $300,000 and higher limits and that Boyces selected a $100,000 liability limit. Accordingly, Mountain West states that its premiums are structured to charge the insureds only for the coverage purchased. Defendants argue that an insurer's underwriting files, intentions, or desires are irrelevant to whether its policy provides coverage, Crandall (Wisc. 2004), and that underwriting information is irrelevant to the policy's intent, Miller (9th Cir. 1994). However, regardless of any policy language, it is undisputed that Boyce did not pay a premium for the actuarial risk that Defendants are now seeking recovery on. Moreover, other jurisdictions have enforced restrictions on portability of UIM on grounds that no premium has been paid for it. Burstein (Pa. 2002); Mercury Indemnity v. Kim. Gibson (Mont. 2007) stated:

> Under our cases, public policy requires that an insurer may not enforce a policy provision which permits the insurer to receive valuable consideration for coverage which is not actually provided. Thus, this public policy presumes that the coverage otherwise exists. Here, premiums were paid under each policy for MPC. The coverage, however, was available only under the circumstances specified in the policies. If those circumstances do not exist, coverage does not exist.

The UIM exclusion is not facially ambiguous and is not in violation of Montana's public policy, and therefore Mountain West is not required to provide UIM in this instance. Further, the UIM premiums paid for do not provide the type of coverage Defendants are seeking.

It is undisputed that Defendants suffered damages that exceed liability limits of the Boyce policy. Regretfully, given the state of the law, this Court can afford them no remedy. Rather, it is the Legislature that is better suited to develop some type of statutory protections in this arena. Summary judgment for Mountain West.

Mountain West Fame Bureau Mutual Ins. v. Flint & Boyce, 36 MFR 19, 2/29/08.

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