IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

YOKO GAREY, and HOWARD GAREY,	)	
Plaintiffs,	)	
v.	)	C.A. No. N10C-12-230 WCC
HARTFORD UNDERWRITERS INSURANCE COMPANY,	)	
Defendant.	)	

Submitted: July 6, 2011
Decided: October 31, 2011

Upon Plaintiff's Motion for Summary Judgment - GRANTED
Upon Defendant's Motion for Summary Judgment - DENIED

OPINION

Lawrance Spiller Kimmel, Esquire; Kimmel, Carter, Roman & Peltz, P.A. 56 W. Main Street, Fourth Floor, Newark, DE 19702. Attorney for Plaintiffs.

Albert H. Manwaring, IV, Esquire; James H.S. Levine, Esquire; Pepper Hamilton LLP, Hercules Plaza, Suite 5100, 1313 Market Street, P.O. Box 1709, Wilmington, DE 19899-1709. Attorneys for Defendant.

CARPENTER, J.

In this declaratory judgment action, the plaintiffs, Yoko and Howard Garey ("the Gareys"), seek to reform their automobile insurance policy to increase their uninsured and underinsured motorist coverage to match their liability coverage under the same policy. The plaintiffs and the defendant insurance carrier, Hartford Underwriters Insurance Company ("Hartford"), have brought cross motions for summary judgment. There are no critical disputed facts and the only question the Court is to determine is whether Hartford communicated to the Gareys a meaningful offer of uninsured/underinsured motorist coverage up to the limits of their liability coverage.

FACTS

On March 13, 2009, Yoko Garey was injured in an automobile accident when her vehicle collided with another driver's vehicle. The Gareys settled their liability claims with the other driver and his insurance company for the policy limits of $100,000. At the time of the accident, the Gareys carried uninsured/underinsured motorist ("UM/UIM") coverage under their Hartford insurance policy in the amount of $100,000 per person and $300,000 per accident. The Gareys now seek reformation of their policy to raise the amount of uninsured/underinsured motorist coverage to match their bodily injury liability coverage, which was $250,000 per person and $500,000 per accident.

The Gareys first purchased an insurance policy from Hartford in May 2003. The Gareys signed Hartford's pre-printed application form for AARP members, selecting bodily injury liability coverage at $250,000/$500,000 and UM/UIM coverage at $100,000/$300,000. The app-package included instructions for making any changes to coverage limits and directs the applicant to initial those changes. The application package also included an explanation of uninsured and underinsured motorist coverage and stated, in bold print, "**[W]e recommend you include it in your policy at limits equal to your Liability limits**. Your self-protection and that of your passengers should equal the protection you provide others."[1] A box on the bottom of the page listed the Gareys' selection of UM/UIM coverage at $100,000/$300,000 and instructed the applicant that UM/UIM coverage would be included in the policy "at limits equal to your Bodily Injury Liability limits" if no selection was made.[2] The following page included a checklist of items for possible changes to the policy. Under the UM/UIM heading, the form offered the statement, "I accept Uninsured/ Underinsured Motorists Coverage with the following change: (This limit cannot be greater than your Bodily Injury Liability limit)" and listed six options for UM/UIM coverage,

[1] Pl. Mot. for Summ. J. Exh. A.
[2] *Id.*

including $250,000/$500,000 and $500,000/$1,000,000.[3] This page of the application was signed but none of the boxes indicating alternate selections were checked.[4] As such, the Court assumes for the purpose of these motions that the Gareys chose the $100,000/$300,000 UM/UIM coverage when they initially applied for insurance from Hartford.

On July 25, 2006, the Gareys added a 2004 Jeep Liberty, the vehicle Mrs. Garey was driving at the time of the accident, to their policy. Hartford sent a material change packet to the Gareys, which included form DRA-849-0, a prepared form addressing UM/UIM coverage. The form describes UM/UIM coverage and repeats the recommendation to purchase UM/UIM coverage at limits equal to the liability limits.[5] Under the heading "Uninsured Motorist Coverage Limits," the form states, "You may purchase this coverage at limits up to your bodily injury limits. Some of the more common limits and their premiums are displayed below."[6] Beneath the text is a table displaying the following:[7]

[3] *Id.*
[4] *Id.*
[5] Pl. Mot. for Summ. J. Exh. B.
[6] *Id.*
[7] *Id.*

MINIMUM LIMIT Per Person/Per Accident	PREMIUM
$15,000/$30,000	$14
INCREASED LIMITS	**ADDITIONAL PREMIUM**
$25,000/$50,000	$13
$50,000/$100,000	29
$100,000/$300,000	48

The next page of the form, titled "Your Coverage Selections," is blank and shows no selection for UM/UIM coverage options.[8] The signature section of the page is also blank.[9] There is some dispute whether the plaintiffs received this document,[10] but Hartford has provided an affidavit stating that Hartford's information technology system automatically issues form DRA-849-0 to any Hartford Delaware AARP automobile insurance customer making any change or amendment to their policy after January 4, 1999.[11] This dispute is not critical to the issue here and since the Gareys did not complete any form amending their UM/UIM coverage, the original amount selected remained as part of their policy.

STANDARD OF REVIEW

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[12] The moving party must initially demonstrate that there is no genuine issue of material

[8] *Id.*
[9] *Id.*
[10] Pl. Mot. for Summ. J. ¶5.
[11] Def. Mot. for Summ. J. Exh. D.
[12] Super. Ct. Civ. R. 56(c).

fact.[13] If that burden is met, the burden then shifts to the non-moving party to demonstrate that an issue of material fact remains in dispute.[14]

The existence of cross motions for summary judgment "does not act *per se* as a concession that there is an absence of factual issues. Rather, a party moving for summary judgment concedes the absence of a factual issue and the truth of the nonmoving party's allegations only for purposes of its own motion, and does not waive its right to assert that there are disputed facts that preclude summary judgment in favor of the other party."[15] Put another way, "neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law."[16]

DISCUSSION

I. The "Meaningful Offer" Requirement

The single issue presented by these cross motions for summary judgment is whether Hartford made a "meaningful offer" to the Gareys to purchase uninsured/underinsured motorist coverage up to the limits of their liability coverage. 18 *Del. C.* §3902(b) sets forth an insurance carrier's duty to provide uninsured/underinsured motorist coverage:

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[13] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).
[14] *Id.*
[15] *United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997) (citations omitted).
[16] *Shukitt v. United States Automobile Ass'n*, 2003 WL 22048222, *3 (Del. Super. Aug. 13, 2003).

> Every insurer shall offer to the insured the option to purchase additional coverage for personal injury or death up to a limit of $100,000 per person and $300,000 per accident or $300,000 single limit, but not to exceed the limits for bodily injury liability set forth in the basic policy. Such additional insurance shall include underinsured bodily injury liability coverage.

The purpose of the statute is to allow individuals who carry liability coverage in excess of the minimum statutory amount an opportunity to carry equal uninsured and underinsured coverage.[17] Thus, the statute imposes an affirmative duty on insurance carriers to offer uninsured and underinsured motorist coverage "so that the insured can make an informed decision. An informed decision can be made only if all of the facts reasonably necessary for a person to be adequately informed to make a rational, knowledgeable and meaningful determination have been supplied."[18]

The insurer bears the burden of proof in establishing compliance with the statute. To carry its burden, the insurer must show that it made a "meaningful offer," which is defined to include: "(1) the cost of the additional coverage; (2) a communication to the insured which clearly offers uninsured motorist coverage; and (3) an offer for uninsured motorist coverage made in the same manner and with the same emphasis as the insurer's coverage."[19] When an insurer fails to

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[17] *Id.*

[18] *Id.* (citations omitted). The insurance carrier has an affirmative duty to offer uninsured/underinsured motorist coverage "when a new policy, other than a renewal, is offered, and a new policy is issued when there is a material change in the policy." Adding or removing a vehicle covered under the policy is considered a "material change."

[19] *Id.*

carry its burden, Delaware courts "treat the offer as a continuing offer for additional coverage, which the insured may accept" even after the insured has been in an accident.[20] Because of the complexity in insurance contracts and the different degrees of sophistication between the insurer and the insured, ambiguity in insurance contracts is generally construed against the insurer.[21]

II. Form DRA-849-0

The test for a meaningful offer is easily summarized: the insurer must "clearly and unambiguously delineate[] the maximum amount of uninsured/ underinsured motorist coverage potentially available" to the insured.[22] This Court has ordered reformation of insurance policies to increase the amount of UM/UIM coverage on numerous occasions. In *Shukitt v. United Services Automobile Association*,[23] the Court rejected USAA's offer of additional UM/UIM coverage, noting that the documents sent by the insurer in that case "failed to contain a clear offer of additional coverage."[24] More recently, this Court rejected language in a Liberty Mutual Insurance application, which listed twelve levels of UM/UIM coverage and stated that UM/UIM coverage was available "in limits up to the

[20] *Id.*
[21] *Boettner v. Liberty Mut. Fire Ins. Co.*, 2010 WL 1266830, *3 (Del. Super. Mar. 31, 2010) (citing *Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982)).
[22] *Boettner*, 2010 WL 1266830, *1.
[23] 2003 WL 22048222
[24] *Id.* at *4.

Bodily Injury Liability Limits or $100,000/$300,000, whichever is less."[25] The Court found such language too ambiguous to constitute a meaningful offer, noting that "the offer does not make it clear what amount of uninsured/underinsured motorist coverage was available to Plaintiff" and that the document seemed to imply that the plaintiff "could only purchase uninsured/underinsured coverage up to $100,000/$300,000" even though the liability limits of his policy were $250,000/$500,000.[26]

Here, Hartford argues that it is entitled to summary judgment because this Court on three previous occasions has found that Form DRA-849-0 satisfies the requirements for a meaningful offer. In *Britzenhoff v. Hartford Underwriters Insurance Company*,[27] the first decision by this Court to affirm the validity of Form DRA-849-0, the Court dismissed a complaint by a plaintiff who sought to have his insurance policy reformed to raise his uninsured/underinsured motorist coverage from the statutory minimum of $15,000 per person to equal his liability limit of $100,000 per person. The DRA-849-0 form involved in the *Britzenhoff* case included the same recommendation to purchase uninsured/underinsured motorist coverage at limits equal to the insured's liability coverage as quoted above and a list of three tiers of uninsured/underinsured motorist coverage

[25] *Boettner,* 2010 WL 1266830, *2.
[26] *Id.* at *3.
[27] 2004 WL 2191184 (Del. Super. Aug. 11, 2004).

amounts and the corresponding increase in premium, which were reproduced in the Court's opinion as follows:[28]

Uninsured/Underinsured Motorists		
50,000/100,000	43.00	43.00
100,000/300,000	61.00	61.00
25,000 [*sic*]/500,000	75.00	75.00

The Court concluded that the information presented in Form DRA-849-0 was adequate to satisfy Hartford's obligation to make a meaningful offer: "The offer is made in the same manner and with more emphasis than Britzenhoff's other coverage. In fact, in bold print, Hartford recommended that Britzenhoff accept additional UM/UIM coverage equal to the limits of his other coverage. Moreover, the cost of the additional coverage is included in the application."[29]

In 2008, this Court issued two more decisions affirming that Form DRA-849-0 satisfies Hartford's obligation to make a "meaningful offer" of uninsured/underinsured motorist coverage. In *Cooper v. Hartford Insurance Company*,[30] the Court denied summary judgment to plaintiffs, who sought reformation of their insurance policy with Hartford to raise their UM/UIM coverage limits from the minimum of $15,000 per person and $30,000 per accident

[28] *Id.* at *3.
[29] *Id.* at *4.
[30] 2008 WL 4174761 (Del. Super. Mar. 31, 2008).

to match their liability coverage at $100,000 per person and $300,000 per accident.[31] The *Cooper* Court spent little time discussing the DRA-849-0 form, which it concluded "adequately convey[ed] an offer of UM/UIM coverage."[32] Similarly, in *Hodges v. Hartford Underwriters Insurance Company*,[33] another case where the plaintiffs sought to increase their UM/UIM coverage from $15,000 per person to $100,00 per person, the Court again held, without extended discussion, that the DRA-849-0 form satisfied Hartford's obligation to make a meaningful offer.[34]

Unfortunately, the cases cited by Hartford do not resolve the issue in this case. In all of those cases, the plaintiffs sought, at a minimum, reformation of their UM/UIM coverage up to the amount of $100,000 per person and $300,000 per accident, a coverage amount that is specifically listed on the form with its applicable cost. Had the plaintiffs here only sought reformation up to the $100,000/$300,000 limit, this case would be easily resolved. It is clear from the record that Hartford provided cost information regarding this level of coverage in its documents and the Court agrees that the form otherwise complies with the statute.

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[31] *Id.* at *1.
[32] *Id.* at *2.
[33] 2008 WL 4152687 (Del. Super. Aug. 29, 2008).
[34] *Id.* at *3.

But the record in this case presents no evidence that Hartford made information about the cost of uninsured/underinsured motorist coverage at the $250,000/$500,000 limit available in either the application or the material change packet. The absence of premium information for uninsured and underinsured motorist coverage at liability limits is a significant flaw that distinguishes the DRA-849-0 form sent to the Gareys from the form approved by this Court in *Britzenhoff*. The cost of additional coverage is essential to making an informed decision about a purchase. It is difficult to see how Hartford's documentation could constitute a meaningful offer while omitting such important information.

While it is true that the DRA-849-0 form states that the list of coverage levels and corresponding premiums for uninsured and underinsured motorist coverage is not exhaustive, this is not sufficient to save the DRA-849-0 form in this case. It is clear this is a standard form used by Hartford regardless of the bodily injury coverage chosen by a policyholder. In most cases, Hartford's form will be sufficient to satisfy their statutory obligation. However, on those occasions where a policyholder has the right to select UM/UIM coverage beyond $100,000/$300,000, the maximum amount listed, the form simply does not work. While perhaps this standardization is economically more efficient for Hartford, it fails to satisfy the company's statutory obligations on those occasions where one

has chosen bodily injury limits that exceed those listed in the UM/UIM examples on the DRA-849-0 form. Here, to learn the cost of uninsured and underinsured motorist coverage at the $250,000/$500,000 level, the Gareys would have had to seek this information from a Hartford employee or agent. Nothing in the record in this case suggests that any Hartford employee ever did explain, orally or otherwise, the corresponding premiums for any level of coverage other than those identified on the DRA-849-0 form. Delaware's insurance law is designed to place the burden of providing adequate information about insurance coverage on the insurer.[35] It would defeat the purpose of requiring a meaningful offer if the Court were to find that a preprinted form which did not list the additional premium for a specified level of coverage that was available to the policyholder constituted a meaningful offer.

Under the facts of this case Hartford has failed to meet its burden of demonstrating that DRA-849-0 satisfied its statutory obligation to make a meaningful offer to its policyholders of the maximum amount of UM/UIM

[35] *See Shukitt*, 2003 WL 22048222 at *5 (noting that the Court's "focus on the availability of information at the time of the material change is important to achieve the statute's goal of encouraging policyholders to make well-informed decisions about their coverage.").

coverage potentially available to them. Accordingly, Hartford's motion for summary judgment is DENIED and the Gareys' motion for summary judgment is GRANTED.[36]

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[36] Because the Court finds that Hartford did not make a valid offer of UM/UIM coverage at the $250,000/$500,000, it need not address the Gareys' contentions that they did not receive the material change packet form in 2006.