SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

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GEORGETOWN, DE 19947

August 11, 2004

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RE: Brintzenhoff v. Hartford Underwriters Ins. Co.
C.A. No. 04C-03-005 ESB

Date Submitted: June 4, 2004

Dear Counsel:

This is my decision on defendant Hartford Underwriters Insurance Company's ("Hartford") Motion to Dismiss the Complaint filed by plaintiff David A. Brintzenhoff ("Brintzenhoff"). Hartford's motion is granted for the reasons stated herein.

STATEMENT OF THE CASE

Brintzenhoff was injured on September 24, 2001 when he was rear ended by a third-party tortfeasor while test driving a vehicle owned by a local car dealer. Brintzenhoff has an insurance policy with Hartford, and claims to have suffered physical and economic injuries presently totaling

$42,043.67. Brintzenhoff's policy provides for liability coverage of $100,000 per person and underinsured motorist (UIM) coverage of $15,000 per person. The local car dealer has UIM coverage of $40,000 per person through Universal Underwriters Insurance Company ("Universal"). Brintzenhoff has settled his claims against the third-party tortfeasor for the tortfeasor's liability policy limit of $15,000.

Brintzenhoff filed this action against Hartford and Universal on March 1, 2004, seeking payment from one or both insurance companies to compensate him for his injuries. Brintzenhoff seeks a declaration from the Court that the Hartford policy should be reformed because Hartford allegedly failed to offer him UIM coverage equal to his liability coverage, or $100,000 per person, as required by 18 *Del. C.* § 3902(b). Brintzenhoff further claims that Universal "intentionally misled" him as to his rights under its policy.

DISCUSSION

1. The Insurance Application Contained a Meaningful Offer of UM/UIM Coverage and Should Not Be Reformed.

A threshold issue of law in this insurance coverage case is whether Hartford' policy contains a meaningful offer for UM/UIM coverage.[1] 18 *Del. C.* § 3902(b) governs this issue and requires that every insurer offer its insured the option to purchase UM/UIM coverage equal to their liability coverage up to $100,000.[2] The purpose of the statute is to "ensure that responsible Delaware drivers

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[1] *Shukitt v. UASS*, 2003 WL 22048222, at *3 (Del. Super. Ct.), *citing Drenth v. Colonial Penn Ins. Co.*, 1997 Del. Super. Ct. LEXIS 466, at *5.

[2] More specifically, 18 *Del. C.* § 3902(b), in part, provides the following:

> 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

--- i.e. drivers who maintain responsible limits of liability coverage --- can avail themselves of equal UM/UIM coverage in the event they encounter less responsible tortfeasors."[3] In order to achieve the purpose of the statute, "Delaware courts have strictly enforced Section 3902(b)'s requirement that insurance carriers clearly communicate offers of additional UM/UIM coverage to their policyholders."[4] This duty imposed by statute "is the duty to offer such insurance so that the insured can make an informed decision."[5] An insured can make an informed decision only after "all of the facts reasonably necessary for a person to be adequately informed to make a rational, knowledgeable and meaningful determination have been supplied."[6]

It is well established that it is the affirmative duty of the insurer to make the offer.[7] Moreover, the insurer bears the burden of establishing compliance with § 3902(b) when the offer language has been challenged.[8] In order to meet its burden, it is necessary for Hartford to establish that the offer included the following: "(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 other

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underinsured bodily injury liability coverage.

[3] *Shukitt*, 2003 WL at *3.

[4] *Id., citing Harding v. N.K.S.Distribs., Inc.*, 1991 Del. Super. Ct. LEXIS 395, at *4; *Walsh v. State Farm Mut. Auto Ins. Co.*, 624 F.Supp. 1093, 1099 (D.Del. 1985).

[5] *Shukitt*, 2003 WL at *3, *citing Morris v. Allstate Ins. Co.*, 1984 Del. Super. Ct. LEXIS 806, at *3-4.

[6] *Shukitt*, 2003 WL at *3.

[7] *Id.*, *citing Harding*, 1991 Del. Super. Ct. LEXIS 395, at *3.

[8] *Shukitt*, 2003 WL at *3, *citing Drenth*, 1997 Del. Super. Ct. LEXIS 466, at *8.

coverage."[9] If Hartford is unable to satisfy this burden, the offer is treated as a "continuing offer for additional insurance, which the insured may accept even after the insured's accident."[10] Moreover, the presumption is that the insured would accept the offer for additional coverage.[11] Therefore, if the Court determines that no meaningful offer was made by Hartford, it is necessary to reform the policy to increase Brintzenhoff's UM/UIM coverage to match his liability coverage limits.[12]

Hartford claims that it complied with the requirements of § 3902(b). In support of its claim, Hartford explains that page 5 of the Hartford application specifically offered Brintzenhoff the opportunity to increase his and his wife's UM/UIM coverage to $50,000, $100,000 or $250,000 per person. The increased premium associated with the higher limits of coverage is included next to each coverage amount. On pages 6 and 7, the application further provides a comprehensive but concise explanation of the UM/UIM coverage options available to Brintzenhoff and how it relates to his liability/no-fault coverage. The following explanation is provided within the application:

> Uninsured/Underinsured Motorists coverage is not mandatory, but it is required that the coverage be offered to all policyholders. This coverage is designed to pay damages for injuries that could be received in accidents caused by drivers of uninsured and underinsured vehicles.
>
> Uninsured/Underinsured Motorists Coverage is optional in Delaware. **However, we recommend you include it in your policy at limits equal to your Liability limits.**

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[9] *Shukitt*, 2003 WL at *3, *citing Hudson v. Colonial Penn Ins. Co.*, 1993 Del. Super. Ct. LEXIS 241, at *7.

[10] *Shukitt*, 2003 WL at *3, *citing Drenth*, 1997 Del. Super. Ct. LEXIS 466, at *8.

[11] *Shukitt*, 2003 WL at *3, *citing Knapp v. United Servs. Auto. Assoc.*, 1997 Del. Super. Ct. LEXIS 384, at *8.

[12] *Shukitt*, 2003 WL at *3, *citing Eskridge v. Nat'l Gen. Ins. Co.*, 1997 Del. Super. Ct. LEXIS 53, at *16.

> Your self-protection and that of your passengers should equal the protection you provide others.
>
> Uninsured/Underinsured Motorists Coverage applies to private passenger vehicles. It covers you, relatives living with you and other people in your car.
>
> Uninsured/Underinsured Motorists Coverage pays for bodily injury or death caused by an uninsured driver, a hit-and-run driver, an insured driver whose Bodily Injury Liability limits are less than the amount of your Uninsured Motorists limit and are adequate to cover the bodily injury losses incurred.[13]

Based on this language in the application, Hartford claims that the application offers the relevant UM/UIM coverage in the same manner and with the same emphasis as it stated Brintzenhoff's liability coverage, and further provides the details of the cost of coverage. Therefore, Hartford argues that the application contained a meaningful offer of coverage.

Hartford refers to *Mason v. USAA*, 1996 Del. Super. Ct. LEXIS 320, in support of its claim that a meaningful offer was made to Brintzenhoff. However, this case was overturned on appeal to the Delaware Supreme Court.[14] On appeal, the Delaware Supreme Court reversed and remanded the decision of the Superior Court, finding that a 50-page information packet regularly sent by the insurer to its insured every six months did not fulfill the duty to offer the insured additional UM/UIM coverage above the $15,000 minimum.[15] Despite the Superior Court's finding that a meaningful offer had been made, the Supreme Court found that the language in the information packet was

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[13]Def's Mot. Ex. B at 7.

[14]*Mason v. USAA*, 697 A.2d 388 (Del. 1997).

[15]*Id.*

ambiguous due to its location and emphasis, and that the discussion of additional coverage was buried on page 41 of the 50 page packet.[16] Moreover, the Court made the following determination:

> The relevant language was not in a separate section nor highlighted in any manner, but loosely spread throughout eight pages of text. Most importantly, the text does not clearly state that an offer of additional insurance is being made. Rather, the materials merely obliquely indicate that additional coverage is available.[17]

Although the Court found that the insurer did not comply with the requirements of § 3902(b) by failing to make a meaningful offer of additional UM/UIM coverage to the insured, *Mason* is factually distinguishable from the case at bar. Along with the other coverage choices available to Brintzenhoff, page 5 of the application lists three tiers of UM/UIM coverage amounts and the corresponding increase in premium.[18] Following the Personal Injury Protection (No-Fault) Coverage Options, the application also explains Uninsured/Underinsured Motorists Coverage in the same manner as Brintzenhoff's other coverage.

Unlike the application at issue in *Mason*, language in the Hartford application not only states that additional coverage is available, it also states, in bold print, that Hartford *recommends* that Brintzenhoff include UM/UIM coverage in his policy at limits equal to his liability limits (emphasis added).[19] On page 9 of the application, there is a Change Section for UM/UIM coverage following

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[16]*Id.* at 394.

[17]*Id.*

[18]Def.'s Mot. Ex. B at 5, which provides the following amounts and prices of coverage:

Uninsured/Underinsured Motorists		
50,000/100,000	43.00	43.00
100,000/300,000	61.00	61.00
25,000/500,000	75.00	75.00

[19]Def.'s Mot. Ex. B at 7.

the Change Section for Personal Injury Protection coverage, where Brintzenhoff was able to accept the amount of UM/UIM coverage or reject it. Following this section on page 9, Brintzenhoff and his wife signed the application, thereby confirming their selections for Personal Injury Protection coverage and UM/UIM coverage.

Despite the evidence supporting a finding of a meaningful offer, Brintzenhoff cites *Eskridge v. Nat'l General Ins. Co.*, 1997 WL 127959 (Del. Super. Ct.), in support of his argument that the application did not contain a meaningful offer of coverage. However, *Eskridge* is also factually distinguishable from the case at bar. This Court applied the analysis and holding set forth in *Morris v. Allstate Ins. Co.*, Del. Super. Ct., C.A. No. 82C-OC-23, Taylor, J. (July 10, 1984), and found that the holding in *Morris* was on point, and that the "offer" made by the insurer was inadequate. Although the applications at issue in *Eskridge* and *Morris* contain language similar to the language set forth in the Hartford application, the Hartford application provides further information. In *Morris*, the relevant language is as follows:

> UNINSURED MOTORISTS COVERAGE
> (available in limits up the Bodily Injury Liability Limits or $300,000 / $300,000 [sic] whichever is less)
> Insured Motorists Coverage is not mandatory, but it is required that the coverage by offered to all policyholders. This coverage is designed to pay damages for injuries that could be received in accidents caused by drivers of uninsured vehicles.[20]

In that opinion, this Court made the following determination:

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[20] *Eskridge*, 1997 WL at *5-6, *quoting Morris*, Del. Super. Ct., C.A. No. 82C-OC-23, Taylor, J. (July 10, 1984) at 5.

> Turning to the language which defendant relies upon in its application form, the language lacks the affirmative force of a meaningful offer, as contemplated by the statute. While this could be overcome by oral action by the agent, none occurred.[21]

The insurer in *Eskridge* attempted to distinguish *Morris* by alleging that its employee must have discussed the option to purchase additional UM/UIM coverage with the insured.[22] However, no evidence was presented in support of this assertion, and it was therefore ignored by the Court.[23] Alternatively, the Court found that the communication failed because it was not made in the same manner and with as much emphasis as the insured's other coverage.[24] Moreover, the communication failed because the language was in "considerably smaller print" and no clear explanation of the cost of the coverage was set forth in the application.[25]

That is clearly not the case here. The offer is made in the same manner and with more emphasis than Brintzenhoff's other coverage. In fact, in bold print, Hartford recommended that Brintzenhoff 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. Therefore, I find that Hartford did make a meaningful offer of additional UM/UIM coverage to Brintzenhoff. Accordingly, I will not reform Brintzenhoff's policy.

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[21] *Id.*

[22] *Eskridge*, 1997 WL at *6.

[23] *Id.*

[24] *Id.*

[25] *Id.* at *2, 6.

2. Brintzenhoff Has Exhausted the UM/UIM Coverage Limit of $15,000 Under the Hartford Policy.

As a result of my finding above that a meaningful offer was made by Hartford to Brintzenhoff, and that Brintzenhoff's coverage should not be reformed, Brintzenhoff's UM/UIM coverage limit remains $15,000. The record reflects that Hartford has already paid Brintzenhoff's medical expenses in an amount equal to, or in excess of the $15,000 limit of his UM/UIM coverage. Accordingly, Hartford has no further liability to Brintzenhoff and its motion to dismiss is granted.

CONCLUSION

Hartford's Motion to Dismiss is granted for the reasons stated herein.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

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cc: Prothonotary's Office