UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:97-CV-698-H

HARRY P. PILLING and
CHRISTINE M. PILLING PLAINTIFFS

V.

RELIANCE INSURANCE COMPANY and
THE TRAVELERS INDEMNITY COMPANY DEFENDANTS

MEMORANDUM OPINION

This case arises out of a truck/automobile accident on May 3, 1997, in which Harry P. and Christine M. Pilling (the "Plaintiffs") were injured while driving their Kenworth truck. The tortfeasor, the driver of the other vehicle, did not have sufficient insurance to cover the apparent liability to Plaintiffs. Consequently, Plaintiffs seek a declaration that they are entitled to recover from $750,000 in underinsured motorists coverage under a Travelers Indemnity Company policy and from $1,000,000 in similar coverage under a Reliance Insurance Company policy. Both Defendants have taken the position that their respective underinsured motorists coverages are limited to $25,000 each. Everyone has moved for summary judgment.

I.

For purposes of these motions, the Court will accept the following facts as true and material. Although some of the events are interwoven, the material facts surrounding each insurance purchase are entirely separate. At the time of the accident Plaintiffs were in the midst of transitioning their business operations so that they could obtain their own permits and operating authority. While operating the Kenworth truck under a lease to D.B. Express,

Plaintiffs also pursued the process of obtaining their own ICC permit and separate insurance coverage. The coincidence of these circumstances explains why two separate insurance policies are at issue in this case.

Since 1994 Plaintiffs had operated their trucking business as a general partnership under the name of C&H Trucking. Their general partnership owned the Kenworth truck and regularly leased it to other motor carrier companies, such as D.B. Express, who held ICC permits. Plaintiffs hauled the loads as independent contractors. Consistent with this practice, on April 18, 1997, Plaintiffs signed a permit lease agreement to haul loads for D.B. Express. As a natural consequence of the April lease, David Brown, the principal of D.B. Express, added the Pillings' vehicle to his own insurance policy with The Travelers Indemnity Company ("Travelers"). Brown was the named insured under the Travelers policy, which had a limit for liability of $750,000. Plaintiffs' vehicle was added by a policy change endorsement.

For a number of years prior to 1997, Brown carried truckers' liability coverage from Reliance Insurance Company ("Reliance"). In 1997, Brown obtained coverage from Travelers. The circumstances under which Brown obtained the Travelers coverage are central to one part of this case. During this time, Brown used the services of the Putnam Transportation Agency ("Putnam"), a residual market agent. A legal and factual question exists whether Putnam was the agent of Brown or the agent of Travelers. Plaintiffs' statement of facts asserts that Putnam, acting through its representative, Patrick Kearney, was the agent of Travelers. However, Plaintiffs cite few if any supporting facts. Kearney's affidavit states that, in December 1996, he worked with Brown on the renewal of his trucking insurance coverage, and that he was authorized to fill out and sign the insurance documents in question. Other than as to the

uninsured/underinsured motorist ("UI/UIM") limits, Plaintiffs do not dispute the scope and nature of Kearney's agency.

After Brown decided on the Travelers policy, he sent Kearney a premium down payment to initiate the coverage. Through an underwriter, National Truck Underwriting Managers, Inc., Kearney obtained the Travelers application and policy documents. Kearney did in fact fill out and execute all of the insurance documents forwarded to him in order to bind the Travelers insurance for Brown. Brown has never raised a question as to Kearney's authority to bind the insurance on his behalf.

Kearney signed the documents, which included a Travelers acceptance/rejection form for UI/UIM motorists coverage. The form specifically rejected that coverage to the full extent of the policy liability limits and accepted the minimum underinsured motorists coverage allowed by law, which was $25,000. Travelers issued its policy on January 3, 1997, with an effective date of January 1, 1997. Plaintiffs claim that Kearney never fully explained the availability or premium price of UI/UIM coverage.

The other part of this case concerns a different Reliance policy. Because Plaintiffs hoped to do business with their own permits, they anticipated the need for their own liability coverage. They obtained that coverage under a Reliance policy which is completely unrelated to the policy covering Brown's vehicles prior to 1997. Plaintiffs obtained the Reliance coverage under somewhat complicated circumstances. Moreover, the events occurred in close proximity to the accident itself.

Ron Salyer, Plaintiffs' CPA, handled a variety of business transactions related to Plaintiffs' new business entity. Plaintiffs executed a power of attorney in favor of Salyer for that

purpose. Among their requests was that Salyer secure the necessary liability insurance coverage. The power of attorney specifically authorized Salyer to purchase insurance on Plaintiffs' behalf.

Plaintiffs asked Salyer to obtain a million dollars worth of coverage. They never discussed any other details, such as UI/UIM coverage. Salyer contacted James Stewart, a licensed insurance agent with the R. L. Price Insurance Agency. Salyer described the kind of coverage Plaintiffs needed and gave Stewart all the trucking and business specifications for the insurance. Stewart had no direct contact with Plaintiffs. Stewart spoke to several insurance underwriters about the insurance and eventually faxed Salyer a Reliance application and other documents obtained from Mid-Atlantic Group, a "Managing General Agent" for Reliance.

Among the documents faxed to Salyer was a blank Reliance UI/UIM acceptance/rejection form. He attached a note asking Salyer to sign and return the documents to him in order to bind coverage. Salyer received these documents at approximately 12:49 p.m. on May 2, 1997. After receiving the insurance information, including the blank UI/UIM coverage acceptance/rejection form, Salyer telephoned Stewart to discuss them. Stewart reiterated his statement that to bind the coverage Salyer must sign and return the documents. Immediately thereafter, Salyer did sign and return all the Reliance Insurance documents as requested. Among the documents which Salyer signed and returned was the UI/UIM acceptance/rejection form. Salyer signed this form without completing any of the blanks indicating his acceptance or rejection of the maximum underinsured motorists coverage or his acceptance of a lesser specified amount.

Immediately upon receiving the signed insurance documents, Stewart forwarded them to the Mid-Atlantic Group. Among those documents was the signed, blank UI/UIM coverage form.

No one disputes Stewart's testimony that he did not complete any of the blanks on the UI/UIM form. Sometime later, however, someone at Mid-Atlantic or Reliance did complete the blank UI/UIM form by writing in "$25,000" in place for accepting lower UI/UIM coverage. Although it is not clear from the evidence exactly who completed the blank form, no one disputes that it occurred without the knowledge of either Salyer, Stewart, or Plaintiffs and after Mid-Atlantic Group or Reliance had possession of the documents. The Reliance policy became completely effective as of May 2, 1997, the day before the accident.

After the coverage became binding, Stewart faxed a certificate of insurance to Salyer showing the terms of the insurance coverage. The certificate of insurance was blank as to the UI/UIM coverage. Nowhere on the certificate was the UI/UIM coverage limited to $25,000. At the time the coverage was issued, Stewart did not fax Salyer a full copy of all the insurance documents. Neither Plaintiffs nor Salyer received the whole policy until approximately July 8, 1997, when they first noticed that the UI/UIM coverage form had been completed to state a $25,000 UI/UIM coverage.

II.

The Court will first consider the Travelers coverage. Because of the lease agreement, Plaintiffs stand in the same position as the lessor, David Brown.[1] Under Ohio law, the underinsured coverage must equal the face amount of the policy, unless the insured expressly

[1]At various places in the pleadings, Plaintiffs allege that Brown told them he was "fully covered" for insurance purposes when the lease and contracting arrangement was negotiated, and that they would not have agreed to the lease without an understanding of "full" coverage, which arguably includes UI/UIM limits equal to the liability limits. Theoretically, these allegations might support a cause of action for misrepresentation against Brown, but Brown's statements to Plaintiffs cannot create liability for the Defendant Travelers. As to Travelers, Plaintiffs are entitled to the insurance coverage owed by Travelers to Brown and nothing more.

rejects that coverage and specifies a lesser amount. *See* Ohio Rev. Code Ann. §§ 3937.18(A), (C) (West 1999). Thus, Plaintiffs would be entitled to $750,000 underinsured motorist coverage under the Travelers policy, unless it was properly rejected. The signed acceptance/rejection form is a proper written rejection of an express, written offer of liability limits UI/UIM coverage. *See Gyori v. Johnston Coca-Cola Bottling Group, Inc.*, 669 N.E.2d 824, 826–27 (Ohio 1996). Because Kearney signed what, in the absence of any agency questions, would be a valid rejection of the liability limits for UI/UIM coverage purposes, the propriety of that rejection depends on the nature of Kearney's agency relationships, both with Brown and with Travelers. As a practical matter, if Kearney is Brown's agent for purposes of rejecting the UI/UIM coverage, then Plaintiffs have only $25,000 underinsured coverage under the Travelers policy.

The Court sees two different, but interconnected, theories of recovery in the Plaintiffs' arguments. The first theory is that Putnam (by its employee, Patrick Kearney) was not Brown's agent for UI/UIM purposes. This argument does not depend on Kearney's apparent authority to the outside world, but rather on the existence of an express or implied agency relationship between Brown and Kearney. The present record contains contradictory but undeveloped evidence of the understanding between Brown and Kearney. Kearney was an independent insurance broker, and Brown asked him to secure new coverage for his trucking business. Brown and Kearney discussed UI/UIM limits. In an affidavit, Kearney asserts that Brown authorized him to fill out and sign a UI/UIM rejection. Brown counters that he never understood UI/UIM insurance or its purposes, and that he never received a quote for the full coverage, so any "authorization" was not made knowingly.

It would seem natural that an agent generically empowered to procure insurance would

have authority to define the parameters of coverage. But the Ohio courts and legislature seem to have decided otherwise. Each has confirmed that UI/UIM limits are exceptional and subject to a higher standard than that of normal agency principles:

> By virtue of R.C. 3937.18, a named insured must knowingly and expressly ratify an agent's act of rejecting equivalent uninsured motorist coverage in order for the rejection to be valid.

Braden v. State Farm Mut. Auto. Ins. Co., 637 N.E.2d 109, 111 (Ohio Ct. App. 1994). One must knowingly and expressly give his agent the authority to reject the UI/UIM liability limits. An apparent or implied ratification will not suffice. *See id.* Based on the limited discovery conducted at this point, whether Brown understood UI/UIM coverage and whether he expressly permitted or ratified Putnam's rejection of it seem to be contested issues of fact. On its face, Kearney's affidavit does not specifically address the discussions of UI/UIM coverage detailed in Brown's deposition. Consequently, the Court cannot determine whether a factual dispute exists on this point.[2]

The second theory concerns Putnam and Kearney's agency relationship with Travelers. Assuming that, during the investigatory stage, Kearney was Brown's agent for purposes of UI/UIM rejection, what was the effect of deciding to contract for insurance with Travelers? Under the Ohio Supreme Court's decision in *Damon's Missouri, Inc. v. Davis*, Kearney's agency would switch at some point in the insurance transaction:

> [W]hile an insurance broker (or independent insurance agent) is investigating the

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[2]Furthermore, the Court recognizes an issue not discussed in the parties' briefs—the intersection of *Gyori* and *Braden* for agency rejection purposes. *Gyori* was decided two years after *Braden*, and held that the offer and the rejection of equivalent UI/UIM limits must be made in writing. *See Gyori*, 669 N.E.2d at 826–27. The Court has found no case discussing *Gyori*'s effect on the *Braden* standard, so it is unclear whether the named insured's knowing and express ratification of an agent's rejection must also be made in writing. Such a requirement would effectively create two layers of written rejection.

> insurance requirements of his or her customer, the potential insured, such broker is not an agent for a particular insurer. However, an insurance broker becomes an agent for a particular insurer when: (1) the broker notifies its customer that he or she intends to place the customer's insurance coverage with a particular insurer; or (2) the broker accepts an application for insurance on behalf of the customer.

590 N.E.2d 254, 260 (Ohio 1992). If Kearney became Travelers' agent, Travelers would be responsible for all subsequent errors in his explanation of the UI/UIM limits and his advice regarding whether or not to accept them. *Damon's*, 590 N.E.2d at 258-60 (insurer is only culpable for errors of its agents occurring after the agency relationship ripens).

The effect of the *Damon's* rule is that the absence of a knowing and express ratification of an insurance agent's rejection of UI/UIM liability limits might be attributed to the ultimate insurer by the agency "switch." This rule has far-reaching and somewhat odd consequences. But if Brown's original ratification were knowing and express, no negligence would exist on Kearney's part, so Travelers could not be saddled with "errors" made by Kearney as its agent-by-law. Thus, this aspect of Plaintiffs' second theory is decided on the same issue as the first. For the same reasons, summary judgment is inappropriate.

But the *Damon's* rule may create another legal problem for Travelers. If Kearney was legally Travelers' agent when he signed the UI/UIM form, then the execution may be invalid, even if Brown had already made a knowing and express ratification of Kearney's rejection. Because the written rejection would be made by the insurer's agent rather than the insured's agent, invalidity seems to be the proper result under the *Damon's* rule, although it has little logical relationship to the statutory policy of informed decision making by insurance consumers. From the current factual background, the Court cannot determine whether Kearney notified Brown of his intent to use Travelers or whether Kearney accepted an insurance application on

Brown's behalf, so the question must be deferred pending further discovery.

To resolve the Travelers' coverage, the Court has considered issues of some factual and legal uncertainty. After the parties have reviewed the Court's Memorandum Opinion, any side might believe that a conference would be helpful to discuss future discovery or to reconsider the legal issues. The Court would honor such a request.

III.

The second part of this case presents no contested issues of material fact and a clear-cut legal result. Salyer executed the insurance application sent to him by Stewart, but failed to fill in the acceptance/rejection form. Salyer faxed the application to Stewart, who in turn faxed it to Mid-Atlantic Group. Stewart merely acted as a conduit and altered nothing on the form. Only after it reached Mid-Atlantic Group was the form altered to reflect a purported rejection of the liability limits for underinsured motorists coverage.

The parties have argued extensively about the nature of Stewart's agency. But whether Stewart was an agent for Plaintiffs or an agent for Reliance is immaterial to the effect of the signed acceptance/rejection form on Plaintiffs' underinsured motorists coverage limits. Even assuming that Stewart was Plaintiffs' agent, when he forwarded the application to Mid-Atlantic Group, the signed acceptance/rejection form was a meaningless document. By its own terms, it neither accepted nor rejected coverage as required under Ohio law. Mid-Atlantic Group was clearly the agent of Reliance, *see* Ohio Rev. Code Ann. § 3905.75 (West 1999), so any amendment made to the form in its hands could not create a written rejection of UI/UIM limits by the insured.

The applicable rule of law in Ohio is unequivocal: "The reasoning that led to our holding

above (requiring offers of UM coverage to be in writing) necessitates the same requirement for rejections. . . . We are persuaded that requiring rejection of UM coverage to be in writing comports with the spirit of R.C. 3917.18 and with public policy." *Gyori*, 669 N.E.2d at 827.[3] Under no circumstances could the blank form constitute a proper written rejection of liability limits under the standard outlined by the Ohio Supreme Court in *Gyori*. Since no written rejection was made, the Pillings acquired UI/UIM coverage at the policy's liability limits by operation of law. *See Gyori*, 669 N.E.2d at 826–27; *Abate v. Pioneer Mut. Cas. Co.*, 258 N.E.2d 429, 430–32 (Ohio 1970). Hence, the Pillings' underinsured motorists coverage with Reliance extends to $1,000,000.00.

The Court will enter an order consistent with this Memorandum Opinion.

JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

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[3]Reliance argues that three cases would allow extrinsic or oral evidence to supplement the absence of a proper written rejection. *See Anderson v. Hartford Underwriters Ins. Co.*, 645 N.E.2d 75, 78 (Ohio Ct. App. 1994); *Lucas v. Liberty Mut. Ins. Co.*, 638 N.E.2d 1076, 1077–78 (Ohio Ct. App. 1994); *Sachs v. American Economy Ins. Co.*, 605 N.E.2d 403, 407 (Ohio Ct. App. 1992). To the extent that these lower appellate cases circumvent the lack of an express, written rejection of underinsured motorist coverage at a policy's liability limits, they are in direct conflict with the Ohio Supreme Court's later decision in *Gyori*, and therefore would seem to be overruled.

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ORDER

The parties have made cross-motions for a summary judgment. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiffs' motion for a summary judgment as to the claim against Defendant The Travelers Indemnity Company and Defendant Travelers' motion for a summary judgment are both DENIED at this time. Either party may make a further motion upon the completion of relevant discovery.

IT IS FURTHER ORDERED that Plaintiffs' motion for a summary judgment as to the claim against Defendant Reliance Insurance Company is GRANTED. The limits of Plaintiffs' underinsured motorist coverage under the Reliance policy are hereby declared to be $1,000,000. Defendant Reliance's motion for a summary judgment is DENIED.

All other motions before the Court are moot.

This _____ day of January, 2000.

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JOHN G. HEYBURN II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record