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 marks the second round of motions for summary judgment in this insurance coverage dispute arising out of an accident between the Plaintiffs' truck and an automobile. The Court has recounted the salient facts in its January 4, 2000 Memorandum Opinion and will not revisit them here. In that Memorandum Opinion, this Court declared Plaintiffs' uninsured/underinsured motorist ("UI/UIM") coverage under the Reliance Insurance Company ("Reliance") policy to be $1,000,000, but denied competing dispositive motions regarding the Travelers Indemnity Company ("Travelers") coverage. Now before the Court are renewed motions for summary judgment concerning the Travelers coverage, the relationship between Travelers and Reliance coverage, the scope of those coverages, and whether any damages must be determined by arbitration. The Court will address each of these questions in turn.

I.

Whether Travelers owes the Plaintiffs $25,000 or $750,000 in UI/UIM coverage largely depends on when Kearney, the insurance agent handling the Travelers policy, became Traveler's

agent under Ohio law. If he was Traveler's agent when he rejected coverage, then the rejection was invalid. On the other hand, if he was Brown's agent then the rejection was valid and the policy only provides $25,000 in UM/UIM coverage.

The Ohio Supreme Court has established a bright line rule regarding when the independent insurance agent changes hats and becomes the agent of the insurer: "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 with a particular insurer; or (2) the broker accepts an application for insurance on behalf of the customer." *Damon's Missouri, Inc. v. Davis*, 590 N.E.2d 254, 260 (Ohio 1992). Traveler's attempts to sidestep the clear terms of this holding by relying on *Dusina v. Bowers*, No. 13311, 1992 WL 246033 (Ohio App. Oct. 2, 1992), fail.

Sitting in diversity, this Court is bound only by the highest court of Ohio. *See Comm'r of Internal Revenue v. Bosch*, 387 U.S. 456, 465 (1967). While the holdings of other state courts may provide indications of what the highest court may do, they do not serve as independent sources for authoritatively determining the law of the state. The *Dusina* court dodges the clear holding of *Damon's* by explicitly challenging the reasoning of the Ohio Supreme Court: "We question how the independence of an agent is changed by his mere intent or by his acceptance of a proposed application prior to delivery and acceptance by the insurer of the application for coverage." *Dusina*, 1992 WL 246033, at *4. Because this Court is bound only by the Ohio Supreme Court, *Dusina* cannot alter this Court's interpretation of Ohio law.

Under the clear rule of *Damon's* the actual issuance of a policy is irrelevant. Rather, the operative events are either the agent's notification to the customer that he intends to place

insurance with a particular company or the agent's acceptance of an application for insurance on behalf of the customer. In a December 10, 1996 letter, Kearney notified Brown, the customer, that he would place insurance with Travelers, thus meeting the first prong of *Damon's* test.

Even if this unambiguous letter did not suffice to make Kearney the agent of Travelers, the acceptance of the policy down payment and the application to Travelers on December 30, 1996 made Kearney Traveler's agent under the second prong of *Damon's* test. Kearney's application initiated coverage, effective at 12:01 A.M. on December 31, 1996. Later that day, Kearney completed the UM/UIM coverage form, after the effective date of the policy. Under either prong of *Damon's* test, Kearsey had become Traveler's agent by the time he completed the UM/UIM coverage form thus making Traveler's responsible for his errors. *Damon's*, 590 N.E.2d at 258-60. This Court therefore finds that the standard UI/UIM coverage was not validly rejected. Travelers must provide $750,000 in UI/UIM coverage.

II

Since both the Travelers and Reliance policies provide UI/UIM coverage, this Court now addresses the relationship between them. The Plaintiffs argue that the policies must be stacked to provide a total of $ 1.75 million in coverage; Reliance says that the anti-stacking provisions limit the total UI/UIM coverage to one million, the highest limit, and that Reliance and Travelers share the cost pro rata; while Travelers urges that the policies do not stack, and that Travelers' liability is excess to that of Reliance.

The law in effect at the time the insurance contract was entered governs the obligations of the parties as to UI/UIM claims. *Ross v. Farmers Insurance Group of Companies*, 695 N.E.2d 732, 738 (Ohio 1998). Under *Ross*, the recent amendments to Ohio's UI/UIM law taking effect

September 22, 2000 are irrelevant for this Court's determination. The relevant Ohio law allowed insurers to prevent stacking through policy language. OHIO REV. STAT. ANN § 3937.18(G) (1996).

Both policies contain identical endorsements that limit UIM coverage: "The maximum recovery under all Coverage Forms or policies combined may equal but not exceed the highest applicable limit for any one vehicle under any coverage form or policy providing coverage on either a primary or excess basis." UIM Endorsement (E)(1)(a). This language appears absolutely clear. The UIM Endorsement also prevents duplicate payments. *Id.* at (D)(2). Under basic principles of contract interpretation, this provision would also bar stacking of policies. Thus, the total limit of UI/UIM coverage available from Reliance and Travelers is $1,000,000.

Both policies render coverage for non-owned vehicles as excess and secondary to any policy providing primary coverage. Section V(B)(5)(c), the relevant provision for UI/UIM (and not liability) coverage, provides "this Coverage Form provides primary insurance for any covered 'auto' you own and excess insurance for any covered 'auto' you don't own." Since Plaintiffs owned the truck in the accident and Reliance issued their policy to the Plaintiffs, Reliance provided primary insurance. David Brown purchased the policy from Travelers and subsequently added Plaintiffs' truck to the policy. Thus, the plain meaning of each policy establishes Reliance as the primary coverage and Travelers as the secondary coverage.

The Court finds that the MCS-90 endorsement does not affect the determination of priority for UI/UIM coverage. The MCS-90 endorsement only addresses liability for negligence and leaves "all terms, conditions, and limitations" in the policy "in full force." As such, it does not alter the priority provisions of the policy of the UI/UIM endorsement.

To recap, in these circumstances Reliance has $1,000,000 in primary UI/UIM coverage, while Travelers has $750,000 in excess UI/UIM coverage. The UIM endorsements limit combined coverage to $1,000,000. Under both policies, the Other Insurance provisions preclude pro rata division when only one policy provides primary coverage and another policy provides excess coverage. UIM Endorsement §§ (E)(1)(c)(1) & (E)(1)(c)(2). Under section (E)(1)(c)(1), Reliance must cover the entire $1,000,000 because their share is the proportion that their limit of liability ($1,000,000) bears to the total of all applicable limits of liability *for coverage on a primary basis* ($1,000,000). Because the primary coverage meets the coverage limit, Travelers owes the Plaintiffs no UI/UIM coverage.

Under Ohio law an insured's payment of the policy limits of the insured's policy reduces the Plaintiffs UI/UIM coverage by the payment amount, $100,000: "[T]he policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all . . . insurance policies covering persons liable to the insured." OHIO REV. STAT. §3937.18(A)(2) (1996). Thus, the Plaintiffs have $900,000 in UI/UIM coverage.

III

Reliance argues that its UI/UIM coverage is limited to damages for bodily injury and does not extend to claims for emotional distress and post-traumatic stress disorder. Because this case addresses the scope of UI/UIM coverage and not the nature or extent of Plaintiffs' injuries, this Court reviews Reliance's claims only as a matter of law. As discussed *supra*, the law applicable to the UI/UIM coverage is the law in effect at the beginning of the policy. *Ross*, 695 N.E.2d at 738.

Thus, this Court's role is to apply the law of Ohio in effect in 1996. The Ohio Supreme

Court, in a 2000 decision, interpreted the law in effect in 1996 and held that insurers could not limit UI/UIM coverage to bodily injury alone: "we hold that [§] 3937.18(A)(1) . . . , does not permit an insurer to limit uninsured motorist coverage in such a way that an insured must suffer bodily injury, sickness, or disease in order to recover damages from the insurer." *Moore v. State Auto. Mut. Ins. Co.*, 723 N.E.2d 97, 102 (Ohio 2000). The Ohio legislature's recent express overruling of *Moore*, effective September 22, 2000, further clarifies the state of the law in 1996. OHIO REV. STAT. § 3937.18(A) (2000). *Ross* makes clear the new law cannot retroactively change the rights and obligations of the parties established in 1996. Thus, the Court holds that the Reliance UI/UIM coverage is not limited to bodily injury alone.

IV

Finally, Reliance urges this Court to enforce the arbitration provisions of the policy. The parties do not dispute that on May 3, 1997, the date of the accident, Plaintiffs had not received a copy of the policy nor had arbitration been discussed prior to that date. In spite of the strong Ohio policy of encouraging arbitration, *see Brennan v. Brennan*, 128 N.E.2d 89, 94 (Ohio 1955), the Ohio Supreme Court has clearly stated in the context of UI/UIM insurance the insureds must consent to the arbitration and have a "meeting of the minds." *Nationwide Mut. Ins. Co. v. Marsh*, 472 N.E.2d 1061, 1062 (Ohio 1984). Here, as in *Marsh*, the insureds did not receive notice that the policy contained an arbitration provision until after the accident at issue and thus could not have consented. Thus, the arbitration clause is not a part of the policy, and Reliance, therefore, cannot force Plaintiffs to arbitrate the issue of damages.

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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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 is SUSTAINED and Travelers must provide $750,000 of UI/UIM coverage to Plaintiffs arising out of the May 3, 1997 accident.

IT IS FURTHER ORDERED that Defendants Travelers and Reliance are entitled to a set-off of $100,000 based on the prior payment to the Pillings from USAA Insurance Company.

IT IS FURTHER ORDERED that Defendant Travelers' motion for summary judgment against Defendant Reliance is SUSTAINED to the extent that Travelers' UI/UIM coverage is excess to the coverage provided by Reliance. The total underinsured motorists coverage owed to the Plaintiffs is $1,000,000, subject to the $100,000 set-off.

IT IS FURTHER ORDERED that Plaintiffs' motion for a summary judgment as to Defendant Reliance on the issues of emotional distress and arbitration is SUSTAINED and Reliance cannot limit the underinsured motorists coverage to bodily injury alone and the

arbitration clause is not part of the policy between Reliance and Plaintiffs.

IT IS FURTHER ORDERED that Defendant Reliance's motion for summary judgment is DENIED.

All other motions before the Court are moot.

This is a final and appealable order.

This _____ day of October, 2000.

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

cc: Counsel of Record