

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNIVERSAL UNDERWRITERS	:	NO. 03-CV-2541
GROUP	:	
	:	
v.	:	
	:	
ROBERT S. TUSAY, JR.	:	

MEMORANDUM OPINION AND ORDER

Rufe, J.

April 27, 2004

In this declaratory judgment action, the parties seek a judicial determination as to whether Robert S. Tusay, Jr. (“Tusay”) is entitled to underinsured motorist benefits under an insurance policy issued to his employer, Matt-Bri, Inc. d/b/a Brian’s Harley Davidson/Buell (“Matt-Bri”). Cross-Motions for summary judgment are pending. For the following reasons, the Court grants the Motion of Universal Underwriters Group (“Universal”) and denies the Cross-Motion of Tusay.

FACTUAL BACKGROUND

On November 29, 2000, Universal issued Policy No. 215355 to Matt-Bri, a company that sells and repairs Harley Davidson motorcycles in Langhorne, Pennsylvania. The policy, which was effective from August 1, 2000 through August 1, 2001, provided \$500,000 in both uninsured motorist and underinsured motorist benefits to Brian Bentley (“Bentley”), his wife Maureen Bentley, and General Manager Daniel McCarthy, III only. Because Matt-Bri had up to 65 employees, Bentley, the President and sole shareholder of Matt-Bri, rejected uninsured and underinsured motorist benefits (and other elective coverage) for all other Matt-Bri

employees.¹ Bentley and his wife were covered because the Universal policy is the only automobile coverage they have while McCarthy was covered because under the terms of his employment he is entitled to a company vehicle.² Bentley understood when he rejected coverage for Matt-Bri employees that uninsured and underinsured motorist coverage for them was optional.³

In accordance with the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa. Cons. Stat. §§ 1731 and 1791 (“MVFRL”), Bentley, on behalf of Matt-Bri, signed various insurance waiver forms, including a Rejection of Uninsured Motorist Protection Form and a Rejection of Underinsured Motorist Protection Form. Endorsements to the forms provided for uninsured and underinsured coverage for Bentley, his wife, and McCarthy only. Bentley also executed a Pennsylvania Auto Supplement Important Notice, which provided in relevant part as follows:

Insurance companies operating in the Commonwealth of Pennsylvania are required by law to make available for purchase the following benefits for you, your spouse or other relatives or minors in your custody or in the custody of your relatives residing in your household, occupants of your motor vehicle or persons struck by your motor vehicle:

* * * * *

(6) Uninsured, underinsured and bodily injury liability coverage up to at least \$100,000.00 because of injury to one person in any one accident and up to at least \$300,000.00 because of injury to two or more persons in any one accident or, at the option of the insurer, up

¹ Brian Bentley Dep. Tr. at 28-29.

² Id. at 29.

³ Id. at 30.

to at least \$300,000.00 in a single limit for these coverages, except for policies issued under the Assigned Plan. Also, at least \$5,000.00 for damages to property of other in any one accident.

Unbeknownst to Bentley at the time, Universal had a policy and practice of only offering uninsured and underinsured motorist coverage to principals of corporations, notwithstanding the MVFRL requirement that such insurance be offered.⁴

On June 2, 2001, Tusay, a technician at Matt-Bri, test-drove a 1999 Dyna Sports Harley Davidson motorcycle that he was considering purchasing. The Matt-Bri manager granted Tusay permission to take the motorcycle home that evening to show to his wife. While operating the motorcycle, Tusay was involved in an automobile accident in which he seriously injured his leg.⁵ The driver of the other vehicle had \$15,000 in liability coverage, which was tendered to Tusay. Tusay thereafter sought underinsured motorist benefits from Universal under the Matt-Bri policy. On July 17, 2001, Universal denied coverage on the basis that there was no underinsured motorist coverage for Tusay under the subject policy due to Matt-Bri's rejection of underinsured motorist benefits.

In the instant action, Universal seeks a declaration that the insurance policy did not provide underinsured motorist protection to Tusay. Tusay counters that the rejection waiver signed by his employer does not comply with Pennsylvania law since the MVFRL mandates that everyone, including the named insured, reject uninsured and underinsured benefits. Additionally, Tusay asserts that any rejection of underinsured coverage is void because Universal's practice of

⁴ See 75 Pa. Cons. Stat. § 1731.

⁵ For the purpose of the instant motions only, Universal agrees that Tusay was permissively using the vehicle.

not offering uninsured and underinsured motorist coverage to all employees of corporations, partnerships, or sole proprietorships violates Pennsylvania law.

STANDARD OF REVIEW

Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.⁶

The party moving for summary judgment has the initial burden of showing the basis for its motion.⁷ Once the moving party adequately supports its motion, the burden shifts to the non-moving party to go beyond the mere pleadings and present evidence that there is a genuine issue of material fact for trial.⁸ Cross-motions for summary judgment are treated in the same manner.⁹

DISCUSSION

The key issue in this case is whether there is a remedy available to Tusay for Universal's failure to offer underinsured motorist benefits to Matt-Bri employees. While Matt-Bri rejected underinsured motorist coverage, Tusay argues that the rejection was invalid due to Universal's policy of refusing to provide coverage to individuals other than principals. Because

⁶ Fed. R. Civ. P. 56(c).

⁷ Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

⁸ See id. at 324.

⁹ Transportes Ferreos de Venezuela II CA v. NKK Corp., 239 F.3d 555, 560 (3d Cir. 2001). Although the motorcycle accident occurred in New Jersey, the parties appear to agree that Pennsylvania law applies to this case. In an insurance dispute based upon diversity where the insured is from Pennsylvania, a district court applies the laws of the state where the insurance policy was contracted, which is where it was delivered. Frog, Switch & Mfg. Co., Inc v. Traveler's Indem. Co., 193 F.3d 742, 746 (3d Cir. 1999). If proof as to place of delivery is lacking, there is a presumption that delivery took place at the insured's residence. See Carosella & Ferry, P.C. v. TIG Ins. Co., 189 F. Supp. 2d 249, 252 (E.D. Pa. 2001); Fed. Kemper Ins. Co. v. Ward, 679 F. Supp. 489, 491 (E.D. Pa. 1988), aff'd, 860 F.2d 1074 (3d Cir. 1988). The Court presumes the insurance policy was delivered at Matt-Bri's Pennsylvania location, and thus Pennsylvania law applies.

Universal violated the MVFRL, Tusay submits that he is entitled to coverage in the amount of \$500,000.

This case is analogous to Salazar v. Allstate Insurance Co., 702 A.2d 1038 (Pa. 1997). In Salazar, resident relatives of a named insured commenced action against an insurer seeking uninsured motorist benefits after they were involved in a hit-and-run collision. The passengers challenged a waiver of uninsured motorist coverage by the named insured due to the insurer's failure to comply with the notice requirements regarding uninsured motorist coverage. The court ruled that although the insurer failed to comply with statutory notice requirements, the MVFRL provided no remedy for non-compliance. The court noted that it could not create a remedy without reforming the insurance contract. Because the legislature provided no "enforcement mechanism" for the requirement, the plaintiffs had no remedy.¹⁰

In the case at bar, there is uncontroverted evidence that Bentley understood the purpose of elective underinsured motorist coverage and had no intention of obtaining uninsured and underinsured motorist coverage for Matt-Bri's employees. Even if Universal's failure to offer underinsured motorist coverage constituted a violation of the MVFRL, the Court concludes that Matt-Bri's rejection of underinsured motorist coverage is not deficient. The evidence here demonstrates that Universal's failure to offer underinsured motorist coverage to all employees did not proximately cause any injury to Tusay because Bentley would not have obtained this optional coverage, even if it had been available to all employees. Bentley testified that he assumed that the coverage was available and noted that it had been his company's practice since

¹⁰ Id. at 1044; see also Donnelly v. Bauer, 720 A.2d 447 (Pa. 1998) (holding that the MVFRL provides no remedy for failure to provide the full tort/limited tort cost differentials in violation of 75 Pa. Cons. Stat. § 1705(a)(1)).

1985 to reject elective coverage for employees.¹¹

The Court also rejects Tusay's claim that Bentley, as president and sole shareholder of Matt-Bri, lacked the authority to reject benefits for the corporation's employees. The Third Circuit Court of Appeals addressed a similar issue in Travelers Indemnity Co. v. DiBartolo, 171 F.3d 168, 172 (3d Cir. 1999), where it ruled that a corporation could waive uninsured/underinsured motorist protection for its employees. The court reasoned that since the MVFRL allows an insured to reject uninsured motorist coverage for members of his or her household, it follows that a corporation, which has financial responsibility for a policy, could similarly reject optional benefits on behalf of its employees. The fact that several specifically named individuals were to receive such coverage is of no consequence.¹²

While Universal's practice of failing to offer coverage to corporate employees appears to have violated Section 1731, the MVFRL does not provide a remedy for this violation.¹³ Because Universal obtained from the named insured a waiver of benefits of underinsured benefits, Tusay is not entitled to such coverage under the Matt-Bri insurance policy. This outcome is appropriate because (1) Matt-Bri did not pay a premium for underinsured benefits for its employees, and (2) Bentley would have rejected such benefits for employees even if they had been offered by Universal. This Court's ruling is consistent with the goal of the

¹¹ Bentley Dep. Tr. at 28-30.

¹² See MIC Prop. & Cas. Co. v. Crawford, No. 01-CV-0714, 2001 U.S. Dist. LEXIS 24212 (E.D. Pa. Oct. 21, 2001) (allowing corporation, as named insured, to reduce benefits for certain individuals while retaining higher limits for principals and their family members).

¹³ A federal court sitting in diversity "should be especially reluctant to create new rights that neither the state legislature nor the state courts have seen fit to recognize." Nationwide Ins. Co. v. Buffetta, 230 F.3d 634, 642 (3d Cir. 2000).

MVFRL “to control escalating insurance costs, which would be thwarted if corporations could not reject” uninsured and underinsured motorist coverage.¹⁴

CONCLUSION

For the foregoing reasons, the Court grants Universal’s Motion for Summary judgment and denies Tusay’s Cross-Motion for Summary Judgment.

An appropriate Order follows.

¹⁴ See Travelers, 171 F.3d at 170 (citing Paylor v. Hartford Ins. Co., 640 A.2d 1234 (Pa. 1994)).

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ROBERT S. TUSAY, JR.	:	

ORDER

AND NOW, this 27th day of April, 2004, in accordance with the foregoing

Memorandum Opinion, it is hereby ORDERED and DECREED as follows:

- (1) The Motion for Summary Judgment of Universal Underwriters Group [Doc. No. 17] is GRANTED.
- (2) The Cross-Motion for Summary Judgment of Robert S. Tusay, Jr. [Doc. No. 19] is DENIED.
- (3) The Court hereby declares that Robert S. Tusay, Jr. is not entitled to underinsured motorists benefits under Policy No. 215355.
- (4) The Clerk of the Court shall enter judgment in favor of Universal Underwriters Group and against Robert S. Tusay, Jr. on all counts.
- (5) The Clerk of the Court shall CLOSE this case for statistical purposes.

BY THE COURT:

RUFE, CYNTHIA M., J.