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News Story

Routine business practices can't prove UIM was rejected New law would eliminate UIM form requirement

By GUY LORANGER, Staff Writer

A memorandum opinion issued by a U.S. magistrate judge earlier this month illustrates a problem that prompted the General Assembly to change the state's uninsured and underinsured motorist coverage laws during this summer's short session.

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Under the current version of the N.C. Motor Vehicle Safety and Financial Responsibility Act, a policy that includes UM coverage and contains bodily injury liability limits exceeding the statutory minimums must also provide UIM coverage unless the insurer can prove a valid rejection of that coverage.

A valid rejection would need to be in writing on a form approved by the

N.C. Rate Bureau and Commissioner of Insurance.

In a Sept. 5 opinion, Judge Wallace W. Dixon of the Middle District ruled that an insurance company that had misplaced a customer's UIM selection/rejection form could not rely on its "routine business practices" to prove the customer had validly rejected the UIM.

And because the insurance company could not prove that it gave the customer a chance to choose her UIM coverage level, the company was on the hook for the maximum amount recoverable under statute, or \$1 million, the magistrate ruled.

The insurance company, Progressive Southeastern Insurance, has since filed objections to the recommended summary judgment ruling, and the case will head to trial.

The case's main issue, meanwhile, will vanish from the legal scene after House Bill 738 takes effect Jan. 1.

The bill, which applies to all motor vehicle insurance policies issued or renewed on or after that date, would change G.S. Sect. 20-279.21(b)(3) and (b)(4) by eliminating the selection/rejection form requirement.

It would mandate that insurers provide UM/UIM coverage with limits equal to the highest limits of bodily injury liability coverage for any one vehicle insured under the policy, and it would require insurers to give "reasonable notice" to consumers of their right to purchase up to \$1 million of such coverage.

Gov. Mike Easley signed the bill in July.

"We're not going to worry any more about selection/rejection forms," said Raleigh attorney Jay Trehy, who was part of a team of attorneys from N.C. Advocates for Justice who drafted proposed legislation for H.B. 738.

"Of course, this could come up for any policy issued up to Dec. 31, but it will slowly transition out as a problem. I think this bill was an opportunity to fix this for both the insurers and the insured."

Joe Stewart, the executive director of the Insurance Federation of North Carolina, agreed.

"Legislators were interested in making the coverage mandatory as a way to provide protection to consumers, but also, there was a recognition of this selection/rejection form creating this unfair 'gotcha' opportunity for someone in the context of a lawsuit," Stewart said.

NO FORM, NO LUCK

The case, *Progressive Southeastern Insurance Co. v. Greene* (*North Carolina Lawyers Weekly* No. 08-03-1077, 20 pages), arose in July 2006 when the insurance policyholder's husband was injured by a car that hit his motorcycle.

The policyholder, Sonya Greene, had purchased the coverage from one of Progressive's independent agents in July 2000. She sought UIM coverage from Progressive even though the policy expressly stated that she had rejected UIM and Progressive had never charged or collected a premium for UIM coverage.

The insurance company sought a summary judgment in federal court declaring that it did not have to provide UIM coverage.

The case went to the magistrate judge. Because the parties did not consent to the magistrate's memorandum opinion, that meant that objections could be filed and reviewed de novo by a U.S. District Court judge.

Even though the company could not locate a signed UIM selection/rejection form, it argued that it could present evidence of its routine business practices to show that Greene had rejected the coverage and had signed a form that was identical to one approved by the N.C. Rate Bureau.

Progressive's proof included affidavits from agents and employees stating that the company required a signed UIM selection/rejection form before it issued any policies.

The company also said it provided UM and UIM coverage as a default measure whenever there had been no affirmative selection or rejection from the customer.

Since Greene's policy indicated a rejection of UIM coverage, she had to have taken some affirmative action, Progressive claimed.

Greene, on the other hand, said she could not recall whether she was offered the coverage and rejected it. Progressive's failure to produce a signed form, she said, meant the company was compelled to provide the coverage up to \$1 million.

The U.S. magistrate judge sided with Greene.

Even though no North Carolina appellate case had ever addressed the issue of whether routine business practices could be used to show a valid rejection of UIM, Judge Dixon said that case law required "strict compliance" with G.S. Sect. 20-279.21(b)(4).

That meant that if an insurance company could not produce an actual copy of a signed form, the company could not prove that there had been a valid rejection.

Allowing a company to use routine business practices in the absence of a signed form "would give incentive to unscrupulous insurers to misplace signed forms," particularly if those forms did not comply with the statute, Dixon said.

Dixon said it would also lead to an absurd result: Courts would scrutinize an insurer's compliance more strenuously when the insurer actually produced a signed form than when an insurer failed to produce the form at all.

The insurance company's failure to produce the required form should be treated as if the customer had never been offered the form, Dixon ruled, citing *Williams v. Nationwide Mutual Insurance Co.*, 174 N.C. App. 601 (2005).

Hence, Greene was entitled to the maximum statutory amount of \$1 million.

SOLUTION

The new law that will take effect Jan. 1 was enacted in recognition that the growing number of undocumented residents in the state could lead to a higher number of uninsured drivers, Stewart said.

A key aspect of H.B. 738 is that it will not only mandate UM/UIM coverage, it also will require notice of the customer's right to reject the UIM coverage or select coverage up to \$1 million whenever the policy is purchased or renewed.

"Under the old law, once the form was signed, the agent didn't need to tell you about it again ... it was a one-time deal," Trehy said. "Under the new statute, it will be brought up every six months."

Questions or comments may be directed to guy.loranger@nc.lawyersweekly.com.

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