UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BRUNELLA JAIME, as Personal Representative of the Estate of KRISTOF MARCEL LEFEVERE;

Plaintiff,

v. **Case No.: 6:15-cv-1900-Orl-37TBS**

TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, a Foreign Corporation;

Defendant. /

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON EXISTENCE OF UNDERINSURED MOTORIST COVERAGE AND MEMORANDUM OF LAW IN SUPPORT

Pursuant to Local Rule 3.01 and Rule 56, Fed. R. Civ. P., Plaintiff submits Plaintiff's Motion for Partial Summary Judgment on Existence of Underinsured Motorist Coverage and Memorandum of Law In Support as follows:

I. Statement of the Case and Facts

On or about May 23, 2014 Plaintiff's decedent, Kristof Marcel Lefevere, was operating a motorcycle that he owned on Alafaya Trail in Orange County Florida. Plaintiff alleges that an underinsured motorist, Alexandra Guevara, negligently operated an automobile causing it to collide with his motorcycle resulting in his death.

Mr. Lefevere was an employee of Siemens Corporation. Defendant insured Siemens Corporation under a "Custom Insurance Policy" issued November 14, 2013. Included with this insurance policy was commercial automobile insurance policy

providing "business auto coverage". As a part of its agreement with Siemens Corporation, Defendant provided employees the opportunity to enroll in an "Executive Insurance Program" (EIP) that provided them with liability insurance coverage on their own personal motor vehicles ***at their own personal expense***, by way of deduction of the premium from their paycheck, in the same liability insurance limits amount as provided under the commercial automobile insurance policy covering vehicles owned by Siemens Corporation. (Travelers 000007-000010, 000058-000060)(James Parke – Pages 33-34). Mr. Lefevere was enrolled in the EIP (Steve Marrone Pages 17-18, 20, 21)(James Parke Page 26).

Plaintiff submitted a claim for underinsured motorist (UM) coverage under Defendant's policy of insurance and the EIP, and Defendant denied that Plaintiff was entitled to UM benefits for the May 23, 2014 accident claiming that the Defendant's policy of insurance did not provide UM coverage for Kristof Marcel Lefevere when operating his own personal vehicles, including his motorcycle, on his own personal time. (Steve Marrone – Pages 9-10); (Travelers 000988-0001019). Plaintiff contends that Defendant's policy of insurance does provide UM coverage for the accident or is so ambiguous that the ambiguities should be resolved in favor of coverage, that UM coverage was not rejected by any insured, and that there was no valid and legal selection of UM coverage in limits lower than the liability coverage afforded under the EIP.

Plaintiff seeks partial summary judgment finding that UM coverage exists under the terms and language of Defendant's policy in the full amount of liability coverage, i.e. two million dollars ($ 2,000,000.00).

II. Summary of Argument

Defendant defined Kristof Lefevere as a "named insured" in its policy of insurance. Defendant included Lefevere as a "named insured" for liability insurance purposes while operating his own personal vehicles. By defining Lefevere as a "named insured" Defendant made him a Class I insured. As a Class I insured, Kristof Lefevere was entitled to UM coverage when involved in an accident while operating his own personal vehicle. Defendant's attempt to exclude UM coverage for EIP enrolled employees' while operating their own personal vehicles is void as a violation of Florida's UM statute. In addition, Defendant failed to obtain a valid rejection of UM coverage. When a carrier fails to obtain the required UM rejection, UM coverage must be afforded for the accident in the same limits as the liability coverage, in this case, two million ($ 2,000,000) dollars.

By selling additional personal liability coverage to Kristof Lefevere at his own personal expense through the "executive insurance program" (EIP), Defendant created a separate contract of insurance requiring a separate UM rejection or selection form signed by Kristof Lefevere, the "named insured" under that contract. The UM selection form that was signed by a Siemens Corporation representative expressly selected lower UM limits only for Siemens owned vehicles and not vehicles owned by Kristof Lefevere. Having failed to obtain a written knowing rejection of UM or selection of lower limits from Lefevere for his own personal vehicles, Defendant is now required under the UM statute and controlling case law to afford UM coverage for the accident in the same limits as the liability coverage, i.e. two million ($ 2,000,000) dollars.

III. Standard for Granting Summary Judgment

It is well settled that construction of an insurance policy is a question of law for the court. *Jones v. Utica Mutual Insurance Co.,* 463 So.2d 1153 (Fla. 1985); *Zautner v. Liberty Mutual Insurance Co.,* 382 So.2d 106 (Fla. 3d DCA 1980); and *Arias v. Affirmative Insurance Co.,* 944 So.2d 1195 (Fla. 4th DCA 2006). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed.R.Civ.P. 56(c).* There is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

IV. Florida Uninsured/Underinsured Motorist Statute

If the liability portions of an insurance policy are applicable to a particular accident, then the uninsured motorist provisions are likewise applicable. *World Wide Underwriters Ins. Co. v. Welker,* 640 So.2d 46 (Fla. 1994). *Section 627.727(1), Fla. Stat.* mandates that a primary policy include UM coverage unless an informed, knowing, written rejection of such coverage is made by the insured on the proper form. The purpose of this is "to assure that an insured appreciates the availability of UM coverage and makes a knowledgeable and deliberate decision to accept or reject it." *Travelers Ins. Co. v. Quirk,* 583 So. 2d 1026, 1029 (Fla. 1991); *O'Brien v. State Farm Fire & Casualty Co.,* 999 So.2d 1081 (Fla. 1st DCA 2009). See also *Collins v. Government Employees Insurance Co.,* 922 So.2d 353 (Fla. 3rd DCA 2006). The public policy of the State of Florida is to favor the provision of uninsured and underinsured motorist coverage for damages and injuries to insureds caused by uninsured motorists under whatever

conditions, locations or circumstances the insured happens to be in at the time. See *Rando v. Government Employees Insurance Co.,* 39 So.3d 244 (Fla. 2010):

> Florida's public policy, as reflected in section **627.727**, Florida Statutes, favors the providing of insurance coverage for losses caused by uninsured motorists. "Uninsured motorist protection does not inure to a particular motor vehicle, but instead protects the named insured or insured members of his family against bodily injury inflicted by the negligence of any uninsured motorist under whatever conditions, locations, or circumstances any of such insureds happen to be in at the time." *Coleman v. Florida Ins. Guar. Ass'n, Inc*., 517 So. 2d 686, 689 (Fla. 1988) (citing *Mullis v. State Farm Mut. Auto. Ins. Co*., 252 So. 2d 229 (Fla. 1971)).

Florida's Uninsured/Underinsured Motorist Statute provides specific mechanisms by which insureds may reject uninsured motorist coverage or select uninsured motorist coverage in lower limits or with certain specific enumerated limitations. To accomplish this, insurers must satisfy the statutory requirement of obtaining the knowing and informed consent of the insured as required by the statutory provisions. See *Rando v. Government Employees Insurance Co., supra.* It is the opinion of the Supreme Court of Florida that these requirements were the *quid pro quo* given by the legislature to the insurers for the right to limit uninsured motorist coverage. *Id.; Government Employees Insurance Co. v. Douglas,* 654 So.2d 118 (Fla. 1995).

The mechanisms by which uninsured/underinsured motorist coverage may be rejected or lower limits selected or by which certain specific limitations enumerated by statute may be selected in Florida are outlined in *§ 627.727, Fla. Stat.* as follows:

> (1) ***No motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle*** registered or principally garaged in this state ***unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles***

because of bodily injury, sickness, or disease, including death, resulting therefrom. However, the coverage required under this section is not applicable when, or to the extent that, an insured named in the policy makes a ***written rejection of the coverage on behalf of all insureds under the policy***…The rejection or selection of lower limits shall be made ***on a form approved by the office***. …

(2) ***The limits of uninsured motorist coverage shall be not less than the limits of bodily injury liability insurance purchased by the named insured***…

(9) ***Insurers may offer policies of uninsured motorist coverage containing policy provisions, in language approved by the office, establishing*** that if the insured accepts this offer:

> ***(a) The coverage provided as to two or more motor vehicles shall not be added together to determine the limit of insurance coverage available to an injured person for any one accident, except as provided in paragraph (c).***
> ***(b) If at the time of the accident the injured person is occupying a motor vehicle, the uninsured motorist coverage available to her or him is the coverage available as to that motor vehicle.***
> ***(c) If the injured person is occupying a motor vehicle which is not owned by her or him or by a family member residing with her or him, the injured person is entitled to the highest limits of uninsured motorist coverage afforded for any one vehicle as to which she or he is a named insured or insured family member. Such coverage shall be excess over the coverage on the vehicle the injured person is occupying.***
> ***(d) The uninsured motorist coverage provided by the policy does not apply to the named insured or family members residing in her or his household who are injured while occupying any vehicle owned by such insureds for which uninsured motorist coverage was not purchased.***
> ***(e) If, at the time of the accident the injured person is not occupying a motor vehicle, she or he is entitled to select any one limit of uninsured motorist coverage for any one vehicle afforded by a policy under which she or he is insured as a named insured or as an insured resident of the named insured's household.***

In connection with the offer authorized by this subsection, ***insurers shall inform the named insured, applicant, or lessee, on a form approved by the office, of the limitations imposed under this subsection and that such coverage is an alternative to coverage without such limitations. If this form is signed by a named insured, applicant, or lessee, it shall be***

conclusively presumed that there was an informed, knowing acceptance of such limitations on behalf of all insureds…

Section 627.727(9), Florida Statutes (1999), lists five limitations that insurance companies may place on UM coverage. These five limitations do not include a provision that allows an exclusion of particular individuals from UM coverage. See *§ 627.727(9)(a)-(e), Fla. Stat.* (1999). An insurance policy may contain other general conditions affecting coverage or exclusions on coverage ***as long as the limitations are unambiguous and "consistent with the purposes of the UM statute***." *Flores v. Allstate Ins. Co.,* 819 So.2d 740 (Fla. 2002)[Emphasis supplied]. This statutory protection is not to be " 'whittled away' by exclusions and exceptions. *See Varro v. Federated Mutual Ins. Co.,* 854 So.2d 726 (Fla. 2nd DCA 2003); *Flores v. Allstate Ins. Co., supra.*; *Young v. Progressive S.E. Ins. Co.,* 753 So.2d 80 (Fla. 2000).

Finally, in interpreting Florida's UM statute, courts have developed certain terms of art that are important to understand here. Class I insureds are "named insureds" and resident relatives of "named insureds". Class II insureds are lawful occupants of the insured vehicle but who are not "named insureds" or resident relatives of "named insureds." See *Travelers Ins. Co. v. Warren,* 678 So.2d 324, 330 n.2 (Fla. 1996); *Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229, 238 (Fla. 1971); *Quirk v. Anthony*, 563 So. 2d 710, 713 n.2 (Fla. 2d DCA 1990), *approved*, 583 So. 2d 1026 (Fla. 1991).

V. Ambiguities in insurance policy language must be construed in favor of the insured and in favor of coverage.

It is well established that a contract of insurance should be construed so as to give effect to the intent of the parties and when there are uncertain or ambiguous terms in a policy they should be construed against the insurer and in favor of the insured. *Beebe v.*

American Ambassador Cas. Co., 659 So.2d 701 (Fla. 5th DCA 1995); *Prudential Property and Cas. Ins. Co. v. Swindal,* 622 So.2d 467 (Fla.1993); *Stuyvesant Ins. Co. v. Butler,* 314 So.2d 567 (Fla.1975); *Schutt v. Atlanta Casualty Companies,* 682 So.2d 679 (Fla. 1971). The UM statute consistently has been interpreted to provide the broadest possible protection to the injured party from the negligence of uninsured motorists, requiring a liberal construction to accomplish this purpose. *Salas v. Liberty Mutual Fire Ins. Co.,* 272 So.2d 1 (Fla.1973); *Ferrigno v. Progressive American Ins. Co.,* 426 So.2d 1218 (Fla. 4th DCA 1983); *Schutt v. Atlanta Casualty Companies, supra.*

As a fundamental proposition, where the language in an insurance policy is subject to differing interpretations, the policy language "should be construed liberally in favor of the insured and strictly against the insurer." *State Farm Fire & Cas. Co. v. CTC Dev. Corp.,* 720 So.2d 1072, 1076 (Fla.1998). *See Auto-Owners Ins. Co. v. Anderson,* 756 So.2d 29, 34 (Fla.2000). It is axiomatic that "[i]f the relevant policy language is susceptible to more than one reasonable interpretation, one providing coverage and the other limiting coverage, the insurance policy is ambiguous." *Auto-Owners,* 756 So.2d at 34. Policy provisions that tend to limit or avoid liability are interpreted liberally in favor of the insured and strictly against the drafter who prepared the policy, and exclusions to coverage are construed even more strictly against the insurer than coverage clauses. *See Id.*; *Flores v. Allstate Ins. Co., supra.*

If an insurance policy is ambiguous, it must be construed in favor of the insured, particularly with respect to clauses limiting or excluding the insurer's liability. *General Star Indemnity Co. v. West Florida Village Inn, Inc.,* 874 So.2d 26 (Fla. 2d DCA 2004). If the policy language at issue is susceptible of more than one reasonable interpretation,

one providing coverage and the other limiting it, the policy is considered ambiguous. *Swire Pacific Holdings, Inc. v. Zurich Insurance Company,* 845 So.2d 161, 165 (Fla.2003).

VI. Travelers' Policy Language

Defendant created a unique arrangement for and with Siemens Corporation that provided liability coverage not only for Siemens Corporation and its company owned vehicles but also for certain employees enrolled in the Executive Insurance Program (EIP) as "named insureds" and their own personal vehicles ***at the employees' own expense*** by way of deduction of the premiums from their paychecks. (Travelers 000007-000010, 000058-000060)(James Parke – Pages 33-34). In denying Plaintiff's UM claim, Defendant interprets the policy of insurance as restricting UM coverage to a single named insured, Siemens Corporation, and any Class II operators or occupants of vehicles owned by Siemens Corporation. Under Defendant's interpretation of its insurance policy, the employees enrolled in the EIP and expressly defined as "named insureds" for liability coverage purposes, including while operating their own personal vehicles, would only be insured for UM purposes as Class II insureds and only covered when occupying vehicles owned by Siemens Corporation. Such EIP enrolled employees would not be covered for UM purposes when operating their own motor vehicles that were insured for liability coverage at their own expense. No UM rejection or selection form was obtained from the EIP enrolled employees. The only signed UM selection form was for lower limits and signed by a Siemens representative for Siemens owned vehicles only. (Steve Marrone

Pages 30-52)(James Parke Pages 18-24).[1] Defendant attempted to accomplish this objective through the use of an intricate system of symbols used to define the vehicles insured under different coverage types, including liability coverage, UM coverage and physical damage coverage. The pertinent policy terms were as follows:

Terms of Defendant Travelers' Insurance Policy:

The policy of insurance issued by Defendant to Siemens Corporation included the following terms pertinent to the analysis of coverage in this case. These terms are found in the ***Business Auto Coverage Form*** **(Travelers 000257-000281) and** ***Business Auto Coverage Part Declarations*** **(Travelers 000221-000225):**

A. Section I of Policy: "Covered Autos" Defined:

Section I – Covered Autos:

> Item Two of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos". The symbols entered next to a coverage on the Declarations designate the only "autos" that are covered "autos".

The numerical symbols used in the Declarations are different for liability coverage, UM coverage and physical damage coverage, as follows:

Liability Coverage:

For "liability" coverage, these include Symbol 8, Hired Autos, Symbol 9, Non-owned Autos, and Symbol 10. Symbol 10 is defined in the Declarations as follows:

> FOR PURPOSES OF THIS COVERAGE **THE NAMED INSURED ALSO INCLUDES ANY EMPLOYEE IDENTIFIED BY SIEMENS CORPORATION IN WRITING ON FILE** WITH THE CARRIER AT THE TIME OF AN ACCIDENT AS A PARTICIPANT IN THE SIEMENS

[1] A stamp at the bottom of the UM Selection Form supports this testimony and "Stacking of Uninsured Motorist Coverage is not available to non-individual named insured operating as a legal entity." (Travelers 000203-000204).

> EXECUTIVE INSURANCE PROGRAM AND THOSE FAMILY MEMBERS RESIDENT IN THE PARTICIPANT'S HOUSEHOLD AND SHALL ALSO INCLUDE ANY OTHER EMPLOYEE FOR THE FIRST THIRTY (30) DAYS OF SUCH EMPLOYEE'S ENROLLMENT IN THE SIEMENS EXECUTIVE INSURANCE PROGRAM AS WELL AS THOSE MEMBER RESIDENT IN THE NEW PARTICIPANT'S HOUSEHOLD.[2]

Symbol 9, Non-owned autos are defined in the Business Auto Coverage Form as follows:

> Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. **This includes "autos" owned by your "employees"**, partners (if you are a partnership), members (if you are a limited liability company), or members of their households but only while used in your business **or personal affairs**.[3]

Underinsured Motorist Coverage:

For UM coverage, the Declarations designate symbols 2 and 13. Symbol 2 is defined in the Business Auto Coverage Form, Section I as follows:

> Owned "Autos" Only: Only those "autos" you own…

B. Section II of Policy: Liability Insurance Section:

Section II – Liability Coverage:

A. Coverage…

1. Who Is An Insured

The following are "insureds":

a. **You for any covered "auto"**.[4]

[2] Nothing in this symbol definition limits coverage to any particular vehicles.
[3] This language either affords coverage or is ambiguous as to covering employee owned vehicles when used for their personal affairs under the EIP.
[4] "You" is not defined, but EIP enrolled employees are expressly defined as named insureds in the declarations. It would be reasonable to include all "named insureds" as "you" under this language.

C. Section V of Policy: Definitions:

Section V – Definitions:

B. "Auto" means:[5]

1. A land motor vehicle, "trailer" or semi-trailer designed for travel on public roads; or

2. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged…

G. "Insured" means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.

D. Florida Uninsured Motorist Endorsement of Policy:

Endorsement: Florida Uninsured Motorist Coverage – Non-stacked

A. Coverage

1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle"…

B. **Who Is An Insured**

If the Named Insured is designated in the Declarations as:

[5] Nothing in this language excludes "motorcycles" and indeed similar policy language has been held to include "motorcycles". See *e.g. Dorrell v. State Fire & Casualty Co.*, 221 So.2d 5 (Fla. 3rd DCA 1969); *Reynolds v. State Farm Mutual Auto. Ins. Co.*, 437 So.2d 195 (Fla. 3rd DCA 1983); *Stadelman v. Johnson*, 842 So.2d 1001 (Fla. 4th DCA 2003); and *Sommerville v. Allstate Ins. Co*., 65 So.2d 558 (Fla. 2nd DCA 2011).

1. An individual, then the following are "insureds":

    a. **The Named Insured** and any "family members".[6]

    b. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" of destruction.

2. A partnership, limited liability company, corporation or any other form of organization, then the following are "insureds":

    a. **Anyone "occupying" a covered "auto"** or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.

    b. Anyone for damages he or she is entitled to recovery because of "bodily injury" sustained by another "insured".

E. Exclusion in Florida UM Endorsement of Policy:

C. Exclusions:

[6] EIP enrolled employees were expressly defined as "named insureds" in the Declarations for liability insurance, but Defendant contends that "Named Insured" in this UM section of the policy refers ONLY to Siemens Corporation. (Steve Marrone – Pages 35-39); (James Parke – Pages 27-29). This is impermissible under controlling case law and the Florida UM statute.

This insurance does not apply to:

…

4. "Bodily injury" sustained by:

a. An individual Named insured while "occupying" or being struck by a vehicle owned by the Named Insured that is not a covered "auto" for Uninsured Motorist Coverage under this coverage form;…[7]

F. Florida Uninsured Motorists Coverage Selection/Rejection Form:

Defendant provided Siemens Corporation with a selection/rejection form, and a Siemens Corporation's representative signed this form selecting lower limits of non-stacked UM coverage with limits of one hundred thousand ($ 100,000) dollars for each accident. This UM selection/rejection form was intended by Defendant to only apply to Siemens owned vehicles according to Defendant's corporate representative's testimony. This is because the symbols used for UM coverage in the declarations, symbols 2 and 13, provide that only autos "you" own are insured for UM coverage and Defendant interprets "you" for purposes of UM coverage to include only Siemens Corporation and not individual EIP enrolled employees. (Steve Marreno Pages 30-52);(James Parke – Pages 18-44). For liability coverage purposes, however, the Declarations specifically include individual employees enrolled in the EIP and their owned autos per symbols 9 and 10.

Thus, Defendant attempted to issue liability coverage to Mr. Lefevere on his personal vehicles as an EIP enrolled employee without commensurate UM coverage and without a deliberate, knowing, and informed rejection of UM or selection of lower limits

[7] As mentioned above, the language of the policy is ambiguous at best and must be interpreted as affording coverage to any vehicles owned by any "named insured" including EIP enrolled employees such as Lefevere and his motorcycle.

or other restrictions on UM coverage. The selection form signed by a Siemens representative selecting lower limits was signed only on behalf of Siemens and applied only to Siemens owned vehicles by Defendant's own admission. (James Parke – Pages 22-23).[8]

G. Physical Damage Coverage:

Under the Business Auto Coverage Part Declarations, physical damage, i.e. coverage for damage caused to insured vehicles, used the "covered auto" symbol 11. Symbol 11 is defined as "AUTOS SPECIFICALLY DESCRIBED ON THE MONTHLY EXECUTIVE FLEET LIST FURNISHED TO AND ON FILE WITH THE CARRIER…" The testimony of Defendant's corporate representatives is undisputed that this "list" references a spreadsheet of all the employees enrolled in the EIP and a vehicle designated in that spreadsheet. Mr. Lefevere referenced a 2012 Dodge Challenger. (Travelers 00027)(Steve Marrone – Pages 40-46)(James Parke – Pages 25-26).[9]

VII. Argument

Kristof Lefevere was a "named insured" under Defendant's Business Auto Policy and Executive Insurance Program and therefore a Class I Insured for UM Coverage entitled to UM coverage in the same amount as his personal liability coverage.

There can be no doubt that Kristof Lefevere was a "named insured" under the terms of the liability insurance policy. For "liability" coverage, these include Symbol 8, Hired Autos, Symbol 9, Non-owned Autos, and Symbol 10. Symbol 10 is defined in the Declarations as follows:

[8] A stamp at the bottom of the UM Selection Form supports this testimony in that it states "Stacking of Uninsured Motorist Coverage is <u>not</u> available to non-individual named insured operating as a legal entity." (Travelers 000203-000204).

[9] The vehicles identified in the EIP list on file were only pertinent for purposes of determining what autos owned by EIP enrollees were covered for physical damage coverage. The designated symbol 11 limiting coverage to those vehicles was only used in the policy terms for physical damage coverage. (Steve Marrone – Pages 40-46). Nothing in the policy language limits liability or UM coverage, rather than physical damage coverage, to vehicles on this list.

> FOR PURPOSES OF THIS COVERAGE **THE NAMED INSURED ALSO INCLUDES ANY EMPLOYEE IDENTIFIED BY SIEMENS CORPORATION IN WRITING ON FILE** WITH THE CARRIER AT THE TIME OF AN ACCIDENT AS A PARTICIPANT IN THE SIEMENS EXECUTIVE INSURANCE PROGRAM AND THOSE FAMILY MEMBERS RESIDENT IN THE PARTICIPANT'S HOUSEHOLD AND SHALL ALSO INCLUDE ANY OTHER EMPLOYEE FOR THE FIRST THIRTY (30) DAYS OF SUCH EMPLOYEE'S ENROLLMENT IN THE SIEMENS EXECUTIVE INSURANCE PROGRAM AS WELL AS THOSE MEMBER RESIDENT IN THE NEW PARTICIPANT'S HOUSEHOLD.[10]

In addition, Symbol 9, Non-owned autos are defined in the Business Auto Coverage Form as follows:

> Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. **This includes "autos" owned by your "employees"**, partners (if you are a partnership), members (if you are a limited liability company), or members of their households but only while used in your business or **personal affairs**.[11]

For UM coverage, the Declarations designated symbols 2 and 13. Symbol 2 is defined in the Business Auto Coverage Form, Section I as follows:

> Owned "Autos" Only: Only those "autos" you own…[12]

Under liability coverage, "autos" owned by Kristof Lefevere were included as covered under liability coverage,[13] and under UM coverage, "autos" owned by Kristof Lefevere were included as insured "autos." "You" is not specifically defined in the

[10] Note that this policy language does not limit liability coverage to vehicles on the EIP "list" but merely states it covers employees identified as named insureds on the EIP list on file.
[11] Again, this language either affords coverage or is ambiguous as to whether it covers employees' personal vehicles when used for personal purposes, particularly given the inclusion of employees as "named insureds" for liability coverage purposes.
[12] Construing the policy in favor of the insured, "you" would include all "named insureds" including EIP enrolled employees such as Lefevere.
[13] Defendant does not dispute that Mr. Lefevere was covered for liability coverage in his own vehicle. (Steve Marrone – Pages 40-41). Coverage was not expressly limited to vehicles on the EIP "list".

policy; therefore, it must be interpreted as all "named insureds" under the policy, which includes Kristof Lefevere under the above provisions. Having defined Kristof Lefevere as a "named insured", a Class I insured, under the policy, Defendant was required to treat Kristof Lefevere as a Class I insured for purposes of UM coverage. Defendant was required to obtain from Kristof Lefevere a knowing and informed rejection of UM coverage or a knowing selection of UM limits lower than the liability insurance limits. Defendant failed to accomplish either, and Plaintiff is entitled to UM limits equal to the liability insurance limits Mr. Lefevere purchased, i.e. two million ($ 2,000,000) dollars.

Defendant's interpretation of its policy language excluding UM coverage for a particular insured, i.e. EIP employees such as Kristof Lefevere, and/or for a particular vehicle insured under the liability coverage provisions of the policy, i.e. autos owned by EIP employees, is void as a violation of the Florida UM Statute.

Nothing in Florida's UM statute permits an insurer to provide certain identified automobiles and/or persons with liability coverage, and yet exclude those same automobiles and/or persons from any UM coverage under the policy. This is a violation of Florida's UM statute.

Defendant attempted to restrict UM coverage available to employees enrolled in the EIP by a complicated and often ambiguous effort to define "covered autos" so as to provide liability coverage to such employees and their vehicles, but not UM coverage. This is impermissible under Florida law. The courts of Florida have invalidated similar schemes. In *Sommerville v. Allstate Ins. Co.*, 65 So. 3d 558, 562-63 (Fla. 2d DCA 2011), the Second District Court of Appeals addressed these principles in a case in which the insurer excluded UM coverage in a business policy by defining "covered autos" more narrowly in the UM coverage provisions than in the liability coverage provisions, stating as follows:

> In *Varro,* we held that a policy excluding UM coverage for only some insureds violated the UM statute. 854 So.2d at 729. We observed that limitations on UM coverage under section 627.727(9) "do not include a provision that allows an exclusion of particular individuals from UM coverage." *Id.* at 728. We stated that a "policy may contain other general conditions affecting coverage or exclusions on coverage as long as the limitations are unambiguous and 'consistent with the purposes of the UM statute.' " *Id.* at 728–29 (quoting *Flores v. Allstate Ins. Co.,* 819 So.2d 740, 745 (Fla.2002)). Because the limitation on particular individuals was unambiguous, we examined whether it was contrary to the UM statute's purposes. *Id.* at 729. We held that "[u]nder section 627.727(1**), an insured may reject UM coverage 'on behalf of all insureds under the policy,' but the statute does not allow rejection of UM coverage on behalf of only some insureds.**..." *Id.* at 729.
>
> Similarly, the UM limitation on particular vehicles here is unambiguous. Under section 627.727(1), a named insured may reject UM coverage or select lower UM limits for all insured vehicles, but section 627.727(1) does not provide for rejection of UM coverage for only some vehicles. *See Mosca v. Globe Indem.,* 693 So.2d 674, 675 (Fla. 4th DCA 1997). In *Mosca,* the Fourth District held that **insurers may not limit UM coverage by defining "covered autos" more narrowly in the UM context than for liability coverage. If a policy purports to do so, the liability definition of "covered autos" will determine UM coverage. *Id.*** (approving *Ropar v. Travelers Ins. Co.,* 205 Ga.App. 249, 422 S.E.2d 34 (1992) (applying Florida law and holding UM policy's definition of "covered autos" could not be narrower than liability policy's definition)). **Because the policy here purports to limit UM coverage by defining "covered autos" more narrowly in the UM provisions than in the liability provisions, its liability definition of "covered autos" determines UM coverage. Accordingly, the trial court erred in relying on the narrower definition of "covered auto" in granting summary judgment.**

Defendant seeks to exclude UM coverage here with precisely the same approach: defining UM covered autos more narrowly than autos covered autos under the liability coverage. Similarly, in *Mosca v. Globe Indem.*, 693 So. 2d 674 (Fla. 4th DCA 1997) the named insured's employee sought underinsured motorist (UIM) benefits under garage policy for injuries while driving a customer's vehicle. The trial court entered summary judgment denying benefits. The employee appealed. The District Court of Appeal held

that the employee was entitled to UIM benefits, even though policy defined covered auto only as automobiles owned by the named insured. In yet another business auto policy case, an employee who sustained bodily injury in an automobile accident brought an action against employer's insurer for UM benefits, seeking a declaration that policy was applicable. The trial court rendered summary final judgment against the employee, and he appealed. The District Court of Appeal held that: (1) the clear and unambiguous language in employer's automobile policy entitled employee to uninsured motorist coverage for bodily injury sustained at the hands of uninsured motorist during employee's course and scope of employment with named insured, regardless of fact that employee was not occupying a vehicle owned or insured by employer at time of the accident, and (2) the clear and unambiguous language of the policy as written provided for $3,000,000 coverage limit per occurrence. See *Lee v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 469 So. 2d 849 (Fla. 3d DCA 1985). Business policies must, therefore, comply with the coverage mandates of the Florida Uninsured Motorist Statute.

To the extent that Defendant's policy could be interpreted as excluding UM coverage for Kristof Lefevere, a "named insured" under the liability provisions of the policy, by defining "covered autos" and the availability of UM coverage more narrowly than in the liability coverage section, such provisions are void as a violation of Florida's UM statute. Plaintiff is entitled to UM benefits under the policy language even if Defendant's policy language can be interpreted to exclude UM coverage because Plaintiff was occupying his own motorcycle on his own personal time. It is a violation of Florida's UM statute to exclude UM coverage where liability coverage would have been available, as here, under the EIP and the liability insurance provisions making Kristof

Lefevere a named insured and autos owned by him covered for liability insurance purposes.

The UM selection form signed by Siemens Corporation was signed only for Siemens owned vehicles and Siemens Corporation, not Mr. Lefevere and his personal vehicles. A separate Written UM selection form signed by Kristof Marcel Lefevere was required to accomplish a knowing and voluntary selection of UM coverage in lower limits than his liability coverage for accidents occurring in his own automobile or motorcycle because the EIP enrollment created a separate contract of personal liability insurance for which Kristof Lefevere personally paid premiums.

The Siemens Corporation representative signed the UM selection form for Siemens Corporation and Siemens' owned vehicles only. Defendant's corporate representative has acknowledged that the selection form signed by Siemens was only for Siemens and its own vehicles. (James Parke – Pages 22-23). The liability coverage of two million ($ 2,000,000) dollars issued to Kristof Lefevere ***at his own personal expense*** upon being enrolled in the EIP program insured vehicles owned by Kristof Lefevere and not owned by Siemens Corporation. (Travelers 000007-000010, 000058-000060)(James Parke – Pages 33-34). This created a separate insurance contract with each EIP enrolled employee, including Kristof Lefevere. To obtain a knowing selection of UM coverage with lower limits or restricted coverage permitted by the statute, an approved UM selection form had to be obtained from each EIP enrolled employee, including Lefevere. No UM selection form was obtained for Mr. Lefevere. The only UM form obtained was a UM selection form signed by a Siemens Corporation representative electing UM policy limits lower than the liability coverage for "covered autos" owned by Siemens. (James Parke – Pages 22-23). Since there was no UM selection form obtained for Mr. Lefevere's own liability coverage purchased at his own expense and for autos he owned, the UM benefits must be in the amount of the liability coverage provided by the policy as

required by *§ 627.727(2), Fla. Stat.* The Florida Legislature has long required insurers issuing motor vehicle insurance policies in Florida to provide uninsured/underinsured motorist coverage unless the insured has expressly rejected the coverage in writing. *§ 627.727(10), Fla. Stat.* Unless the insured otherwise elects, the amount of UM coverage is not less than the amount of liability coverage purchased by the named insured. *§ 627.727(2), Fla. Stat*. See *Giddes v. Glens Falls Ins. Co.*, 2003 U.S. Dist. LEXIS 25112, 17 Fla. L. Weekly Fed. D 445 (M.D. Fla. May 22, 2003)*;* See also *Kimbrell v. Great American Ins. Co.*, 420 So.2d 1086 (Fla. 1982).

Plaintiff has been unable to find any existing case law involving an executive insurance program on a business policy of the unusual type created by Defendant here, i.e. where certain employees were permitted to enroll into a motor vehicle insurance program in which they were covered ***at their own expense*** for accidents in their own personal vehicles in the same amount of liability coverage as the employer's business auto liability policy limits. (Travelers 000007-000010, 000058-000060)(James Parke – Pages 33-34). One case that is distinguishable from these facts, however, should be brought to the attention of the Court. In *Germany v. Darby*, 157 So. 521 (Fla. 1st DCA 2015), a Hinson Oil Company employee was bound by the lower UM limits selected by a corporate representative named insured under the policy. *Germany* is distinguishable in that it involved a work related accident in an employer owned vehicle. No additional personal liability coverage plan for employees is identified in *Germany.* In Mr. Lefevere's case, the accident happened in Mr. Lefevere's own vehicle and while Defendant's corporate representative selected lower limits on its own company vehicles, the policy also provided that each EIP enrolled employee was a "named insured" and that

their own personal vehicles would be covered in the same limits as Defendant's liability insurance policy. Those employees were then required to pay their own premiums for that coverage. Plaintiff submits that under this insurance contract structure where Defendant proposed to provide both business liability coverage and personal liability coverage to employees who elected to enroll in the EIP, each EIP enrolled employee was contracting for a separate primary personal liability insurance contract and was entitled to a separate statutory knowing rejection or selection process as to his or her own personal vehicles under the policy's terms. Otherwise, the policy and purpose of the Florida UM statute is thwarted.

Section 627.727(1), Fla. Stat. mandates that a primary policy include UM coverage unless an informed, knowing, written rejection of such coverage is made by the insured on the proper form. The purpose of this is "to assure that an insured appreciates the availability of UM coverage and makes a knowledgeable and deliberate decision to accept or reject it." *Travelers Ins. Co. v. Quirk,* 583 So. 2d 1026, 1029 (Fla. 1991); *O'Brien v. State Farm Fire & Casualty Co.,* 999 So.2d 1081 (Fla. 1st DCA 2009). Motor vehicle liability insurers are required by Florida law to offer uninsured motorist coverage to each of its insureds. *Collins v. Government Employees Insurance Co.,* 922 So.2d 353 (Fla. 3rd DCA 2006). It is important to note that uninsured motorist coverage was created by Florida statute and insurers must strictly follow the statutory requirements. *Id.*

It must also be brought to the Court's attention that effective June 14, 2013, *§ 627.727(9), Fla. Stat.* was amended to state that if a non-stacking form is executed by a named insured or applicant it shall be conclusively presumed that there was an informed,

knowing acceptance of such limitations "on behalf of all insureds".[14] House Bill 341 was passed in June 2013 in response to the holding in *Travelers Commercial Ins. Co. v. Harrington,* 154 So.3d 1106 (Fla. 2014) which held that the *§ 627.727(9), Fla. Stat.* governing non-stacking selection forms did not permit one named insured in a family automobile insurance policy to select non-stacking UM coverage on behalf of all resident relatives, distinguishing subsection (1) of the statute governing UM rejection forms which did permit a named insured to reject UM coverage on behalf of all named insureds. See *House of Representatives Staff Analysis, H.B. 341* and *Harrington, Id.* In *Harrington,* the Florida Supreme Court had held that the named insured mother's selection of non-stacking coverage did not bind daughter to such UM coverage limitations.

Plaintiff submits that this amendment to the UM statute does not bind Mr. Lefevere to the non-stacking coverage selected by the Siemens corporate representative expressly for Siemens Corporation and Siemens owned vehicles only. This case is distinguishable from *Harrington* and from the intent of the newly amended UM statute. *Harrington* involved a family automobile insurance policy and the instant case involves essentially two separate contracts of liability insurance: the business auto coverage provided to all Siemens owned vehicles and the personal liability coverage provided to employees who elected to enroll ***at their own expense*** in the EIP offered by Defendant and Siemens Corporation. In such a case, the only way to assure that the individual enrollees in the EIP were given the opportunity to make a deliberate and knowing rejection of UM or selection of lower UM limits or non-stacking UM coverage for their

[14] *2013 Fla. Sess. Law Serv. Cha. 2013-195 (C.S.H.B. 341).* Defendant's policy was issued after the effective date of this amendment to the UM statute.

own personal liability coverage would be to present the offer to each EIP enrolled employee for this separate personal liability coverage on their own personal vehicles purchased by those employees by way of deduction of the premiums from their paychecks. Otherwise, EIP enrolled employees would never know that they had a statutory right to UM coverage on their own personal vehicles.

Alternatively, the language of Defendant's policy of insurance, the UM selection forms utilized by Defendant, and the Defendant's business practice of providing separate EIP liability insurance coverage for employees and their own personal vehicles ***at their own personal expense*** created an ambiguity that must be resolved in favor of the insured. Where such ambiguity exists, UM coverage must be provided in limits equal to the liability coverage afforded Mr. Lefevere in the amount of two million ($ 2,000,000) dollars. These principles of insurance policy interpretation are as true for business auto insurance policies as for family automobile insurance policies when it comes to UM coverages and the treatment of ambiguities in insurance policies. See e.g. *Ellsworth v. Insurance Co. of North America*, 508 So.2d 395 (Fla. 1st DCA 1987).

There is no evidence that there was a deliberate, informed and knowing rejection of UM coverage by Kristof Lefevere or a deliberate, informed and knowing selection of lower limits on his own personal vehicle liability insurance. Plaintiff is entitled to UM coverage in the same policy limits amount as the liability insurance coverage afforded to the EIP enrolled employees' personal vehicles under the policy: Two million ($ 2,000,000) dollars.[15]

[15] The only signed form was a UM selection form signed by a Siemens corporate representative selecting lower limits of one hundred thousand ($ 100,000) dollars for UM coverage for vehicles owned by Siemens and Siemens Corporation, only, as named insured. The minimum UM benefits to which Plaintiff is entitled is the amount of UM limits selected by the Siemens Corporation representative when signing that UM

PRAYER FOR RELIEF BY PARTIAL SUMMARY JUDGMENT

For the foregoing reasons, Plaintiff moves this Honorable Court for partial summary judgment finding under the insurance policy terms that Plaintiff is eligible for two million ($ 2,000,000) in UM coverage and reserving jurisdiction to award attorneys fees pursuant to *§ 627.428, Fla. Stat.,* and costs, as well as for a determination of liability and damages by jury trial.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically on Eugene P. Murphy, Esq., Robinson & Cole LLP, 777 Brickwell Avenue, Suite 1370, Miami, FL 33131, emurphy@rc.com, and Robin F. Hazel, Esq., Robinson & Cole LLP, 777 Brickwell Avenue, Suite 1370, Miami, FL 33131, rhazel@rc.com, this 6th day of May, 2016.

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selection form electing limits of one hundred thousand ($ 100,000) for the company and its vehicles. While Plaintiff contends that a knowing an deliberate rejection or selection could not have occurred as to Plaintiff's own personal vehicles under the personal liability coverage purchased by Mr. Lefevere without his signature upon a proper form approved by the OIR, the very lowest UM limits applicable to the accident that killed Mr. Lefevere would be those limits selected by the Siemens Corporate representative for Siemens owned vehicles, i.e. one hundred thousand ($ 100,000) dollars.