COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS. SUPERIOR COURT
CIVIL ACTION NO. 06-701B

AMERICAN SPIRIT INSURANCE COMPANY, Plaintiff)
v.)
COMMERCE INSURANCE COMPANY, and MICHAEL LOPRESTI, Defendants)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT

I. STATEMENT OF UNDISPUTED FACTS
[SUPER. CT. R. 9(b)(5)]

a. The plaintiff, American Spirit Insurance Company, is an insurance company duly licensed by law to issue insurance policies in the State of New Jersey, with its principal place of business in Indianapolis, Indiana.

b. The defendant, Commerce Insurance Company, is an insurance company duly licensed by law to issue insurance policies in Massachusetts, having its principal place of business at 11 Gore Road, Webster, Massachusetts.

c. The defendant, Michael Lopresti, is a natural person who resides in Framingham, Massachusetts.

d. The plaintiff issued a policy of insurance to Robert and Patricia Speidel, policy no. SD1 1033637, in the State of New Jersey, effective 1/17/98 to 1/17/99, covering Speidel's

1988 Dodge Ram Wagon.

e. On January 25, 1998, Robert Speidel was operating his vehicle in Dexter, Maine, with the defendant Michael Lopresti as his passenger, when the Speidel vehicle was involved in an accident due to the fault of another vehicle, operated by Jason Taylor.

f. The defendant Lopresti collected the $16,666.66 in liability limits from the at-fault party's insurer, and has asserted claims for underinsured motorist benefits from plaintiff and the co-defendant, Commerce.

g. A true copy of Speidel's New Jersey automobile policy issued by the plaintiff American Spirit is appended hereto as Tab A. It provides for reduction for its limits for amounts received from an at-fault underinsured motorist, stating: "with respect to an accident with an underinsured motor vehicle, the limit of liability will be shall be reduced by all sums . . . paid because of the bodily injury . . . by or on behalf of persons or organizations who may be legally responsible." Tab A, Bates #31, at B.

h. The declaration page of the Speidel policy provides a limit of $250,000 per person Underinsured Motorist Bodily Injury. Tab A, Bates #1. Under the policy, Mr. Lopresti would be considered and insured ("any other person while occupying [Speidel's] covered auto"). Tab A, Bates #17, at B.2. He was not a named insured, that term refers to Robert and Patricia Speidel. See Tab A, Bates #13, at A.1.-2.

i. At the time of Mr. Lopresti's accident, he was a named insured on a Massachusetts Auto Policy, 6th Edition, providing $100,000 per person underinsured motorist

limits. Mr. Lopresti's insurance policy provided, as to Bodily Injury Caused by An Underinsured Auto, "We [Commerce] will pay damages to or for: . . . You [Mr. Lopresti] . . . while occupying an auto you do not own . . . If there are two or more policies which provide coverages at the same limits, we will pay only our proportional share."

j. The Speidel policy included a Uninsured (including Underinsured) Motorist Coverage Endorsement, ISO Form PP 04 80 (Ed. 10-96), which provided:

> LIMIT OF LIABILITY
>
> A. The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for all damages resulting from any one accident.
>
> However, subject to our [American Spirit's] maximum limit of liability for this coverage:
> 1. If:
> a. An insured is not the named insured under the policy;
> b. That insured is a named insured under one or more other policies providing similar coverage;
> c. All such other policies have a limit of liability for similar coverage which is less than the limit of liability for this coverage;
>
> then our maximum limit of liability for that insured, for all damages resulting from any one accident, shall not exceed the highest applicable limit of liability under any insurance providing coverage to that insured as a named insured.

Tab A, Bates #31, at A.1.

II. STATEMENT OF LEGAL ELEMENTS

a. "A declaratory judgment in an action provides an appropriate means of deciding a dispute concerning the meaning of language in an insurance policy." Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc., 407 Mass. 675, 685 (1990). "The responsibility of

construing the language of an insurance contract is a question of law for the trial judge, and then for the reviewing court." Cody v. Connecticut Gen. Life Ins. Co., 387 Mass. 142, 146 (1982). See Ruggerio Ambulance Serv., Inc. v. National Grange Mut. Ins. Co., 430 Mass. 794, 797 (2000); Vergato v. Commercial Union Ins. Co., 50 Mass. App. Ct. 824, 826 (2001).

b. The enforcement of an insurance policy issued by an insurer licensed to issue policies in New Jersey to a New Jersey insureds, Robert and Patricia Speidel, would seem to be a matter governed by the substantive law of the State of New Jersey. In approaching a choice of law question, Massachusetts courts use a functional analysis to determine the applicable substantive law, the first step of which is to "apply the substantive law of the state which has the more significant relationship to the transaction in the litigation." Hendricks & Assoc. Inc. v. Daewoo Corp., 923 F.2d 209, 213 n.3 (1st Cir. 1991); Bushkin v. Raytheon, 393 Mass. 622 (1985). Three sections of the Restatement (Second) Conflict of Laws (1971) are relevant to this analysis: §193, which sets forth choice of law principles applicable to disputes concerning insurance contracts; §188, which sets forth principles pertinent to disputes involving questions of contract; and §6, which is a general statement of principles underlying all rules regarding choice of law. The Restatement is structured such that, when faced, as here, with a conflict of laws question involving insurance contracts, the first step is to ascertain whether the provisions of § 193 will resolve the matter; if not, the next step is to employ the principles set forth in § 188 to ascertain which State has a more significant

relationship to the issues,[1] using in that analysis the factors set forth in § 6.[2] Section 193 provides that the rights created by a contract of insurance are to be determined by the local law of the State that the parties to the insurance contract understood would be the principal location of the insured risk during the term of the policy, unless some other State has a more significant relationship under the principles of § 6. Restatement (Second) Conflict of Laws § 193 (1971). The principal location of the insured risk is emphasized because location often has an "intimate bearing" on the nature of the risk, and may determine the terms and conditions of the contract. Id. § 193 comment c. Therefore, in our analysis of which State's law to apply, the courts are to give greatest weight to the location of the insured risk, provided that the risk can be located principally in one State. Id. § 193 comment b. Clarendon National Ins. Co. v. Arbella Mutual Ins. Co., 60 Mass. App. Ct. 462, 466 (2004).

c. The notion of Massachusetts' courts looking to foreign state laws when construing an auto insurance policy is not novel, and in Kahn v. Royal Ins. Co., 429 Mass. 572

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[1] The factors to be considered under Restatement (Second) of Conflicts of Laws §188(2) are: (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties.

[2] Where the §188 contacts do not persuade the court which state has the most significant relationship to the transaction, the court must proceed to consideration of "choice-influencing factors" set out in §6(2) of the Restatement, which include (a) the needs of interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in determination and application of the law to be applied. Bushkin, 393 Mass. 622, 634 (1985), quoting R.A. Leflar, American Conflicts Law, at 195 (3d Ed. 1977).

(1999), the SJC applied foreign state law because that foreign state had more of an interest even though the accident occurred and its participants were in Massachusetts. Accord, Chase v. Hartford Accident & Indemnity Co., 52 Mass. App. Ct. 22 (2001) (court applied New Hampshire law where policies were issued and insured auto was registered, in deciding coverage limits for accident to passenger in Massachusetts accident).

d. The American Spirit insurance policy contains a "step-down" clause. The effect of the "step-down" clause is to reduce the amount of American Spirit's underinsured coverage limit to the amount of claimant's policy in which he is a named insured.

e. The "step-down" clause has been found enforceable and unambiguous in numerous decisions. Most recently, in Pinto v. New Jersey Mfrs. Ins. Co., 183 N.J. 405, 874 A.2d 520, 2005 NJ LEXIS 596 (2005), the New Jersey Supreme Court stated:

> [W]e find the language of the step-down clause enforceable. Our case law recognizes the legitimacy of step-down provisions even though they may result in differential treatment of similar plaintiffs based on the existence of other available insurance. See Magnifico v. Rutgers Cas. Ins. Co., 153 N.J. 406, 418 [710 A.2d 412, ___](1998).

f. In addition to the Pinto case, similar "step-down" provisions have been upheld in Christafano v. New Jersey Mfrs. Ins. Co., 361 N.J. Super. 228, ___, 2003 N.J. Super. LEXIS 211, at *10, 824 A.2d 1126, ___ (App. Div. 2003) (identical provision to one in Speidel's policy was declared "clear and unambiguous" and effectively limited UM/UIM coverage to the level of insurance selected by the named insured on his own policy), Botti v. CNA Ins. Co., 361 N.J. Super. 217, 824 A.2d 1120, 2003 NJ Super. LEXIS 210(App. Div. 2003), and Aubrey v. Harleysville Ins. Cos., 140 N.J. 397, 405, 658 A.2d 1246, ___ (1995).

g. In Magnifico, the court summarized the effect of the step-down clause: "if an insured is not a named insured under the policy in question but is a named insured under [his] own policy, then the limit of liability under the subject policy will not exceed the highest applicable limit of liability under the named insured's policy." Id., 153 N.J. 406, 418, 710 A.2d 412, ___ (1998).

h. Under New Jersey law, an underinsured vehicle is defined by statute:

> A motor vehicle is underinsured when the sum of the limits of liability of all bodily injury and property damage liability bonds and insurance policies available to a person whom recovery is sought for bodily injury or property damage is, at the time of the accident, less than the applicable limits for underinsured motorist coverage afforded under the motor vehicle insurance policy held by the person seeking that recover.

N.J.S.A. 17:28-1.1(e).

i. The New Jersey Supreme Court has approved of the proposition that an insurer may reduce its maximum UM/UIM exposure by incorporating appropriate limiting language in the insurance contract. See French v. N.J. School Bd. Ins. Group, 149 N.J. 478, 493, 694 A.2d 1008, ____ (1997) (". . . an insurance company is not forbidden to limit UIM coverage for family members or employees who have other insurance.").

j. In Botti v. CNA Ins. Co., 361 N.J. Super. 217 (App. Div. 2003), the court held a step-down clause, pertinent to an uninsured/underinsured endorsement, was enforceable and was triggered by the claimant having "named insured" status on another policy. The Botti court tested the step-down clause against several well-ingrained legal principles. The court held the clause was clear and without ambiguity, and the clause did not frustrate any

potential beneficiary's objectively reasonable expectations of coverage. Id., at 226-227. It stated:

> We [find] no ambiguity in construing the term "named insured" or the provisions of the step-down clause. It is important to distinguish the concept of "named insured" and "insured." An automobile insurance policy ordinarily sets in the "declarations" section the term "named insured," followed by specific names of either a natural person or legally cognizable entity. Logically, a legal entity does not have "relatives" or "family members." Nevertheless, the term "maned insured" is self-defining. The term refers only to names so appearing on the declaration. John Harrington, Annotation, Who is "Named Insured" Within the Meaning of Automobile Insurance Coverage, 91 A.L.R.3d 1280, 1284-85 (1979).

Id., at 226.

k. The New Jersey underinsured motorist statute, N.J.S.A. 17:28-1.1 (c), governs the distribution of UIM coverage available under more than one policy, and provides the recovery "shall be prorated between the applicable coverages as limits of each as the limits bear to the total of the limits."

III. ARGUMENT

AS AN "INSURED" AND NOT A "NAMED INSURED," MR. LOPRESTI IS LIMITED TO RECOVER UNDERINSURED BENEFITS EQUAL TO THE AMOUNT ON HIS OWN POLICY

There is no doubt Mr. Lopresti was not a named insured on American Spirit's automobile policy issued to Robert and Patricia Speidel in New Jersey in 1998. Under American Spirit's policy, an insured is subject to a "step-down" provision in its policy. This clause does not give the claimant the benefit of coverage he did not pay for himself, rather it

limits the claimant to that amount of benefits he chose to purchase to protect himself.[3] In New Jersey, underinsured motorist in excess of the compulsory limit of 15/30 is optional insurance, and insurers are free to limit optional coverages so long as they are enforceable in court.

The terms of the New Jersey policy are enforceable under New Jersey law, which has the most significant interest in the application of its law to this case. The policy was issued in New Jersey, the Speidels lived in New Jersey and their Ram Wagon was garaged there.

In 1996, the Insurance Service Office (an organization that develops policy forms used by a majority of auto insurers) submitted a new endorsement that changed the contents of UIM coverage, PP 04 80 10 96. The endorsement provided that the named insured was entitled to the limit of UIM coverage set forth on the declarations page (whether an occupant of the insured vehicle or any other vehicle). However, any other occupant of the insured vehicle who owned a personal vehicle or resided with a family member who owned a vehicle would be limited to the UIM coverage on the personal or family vehicle. In other words, the host vehicle would still be required to provide primary UIM coverage to all occupants, but the

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[3] In 1988 auto insurance reform law the General Court enacted an anti-stacking provision, G.L. c. 175, §113L(5). As interpreted by the Massachusetts trial courts, this provision only prevents stacking of two Massachusetts policies. For instance, in Commerce Ins. Co. v. Doherty, 2000 Mass. Super. LEXIS 502, a passenger, who had his own auto policy issued in Massachusetts and was injured while a passenger in a vehicle insured by a policy issued in Virginia, was not prohibited for combining or stacking his Massachusetts policy with his host driver's Virginia policy. Accord, Hague v. Hanover Ins. Co., 6 Mass. L. Rptr. 449, 1997 Mass. Super. LEXIS 487 (passenger who had his own policy in Virginia could collect benefits from his host vehicle's UIM policy issued in Massachusetts).

amount of coverage would be "stepped-down" to the limits on the personal or family vehicle. Gerald Baker, Underinsured Motorist Coverage: Step-Down Clauses, New Jersey Law Journal, Jan. 24, 2005 (Am. Lawyer Media).

Accordingly, where a passenger seeks to recover damages under the UIM provision of the car owner's insurance policy in which the passenger was injured, an "insurer[] is free to modify the insurance policy language to limit the UIM coverage of [the] passenger[] and others who are named insureds under other insurance policies." Pinto v. N.J. Mfrs. Ins. Co., 183 N.J. 405, 412-413.

The American Spirit automobile policy was issued to Robert Speidel, and he was the "named insured" of that policy. His passenger, Michael Lopresti, is not the "named insured," rather as a passenger he is considered an "insured." The American Spirit policy clearly and validly distinguishes between "named insureds" and other "insureds," and the benefits available to these different classes of insured persons.

A recent case is analogous. In Morrison v. American Int'l. Ins. Co., 381 N.J. Super 532, 887 A.2d 166, 2005 NJ Super. LEXIS 355 (2005), the underinsured claimant was not a named insured on AIG's policy, which was issued to her parents. The policy contained a "step-down" clause which provided for a limited recovery for persons other than named insureds to the statutory minimum of 15/30. Since the claimant had already collected more than that from her underinsured tortfeasor, she was not entitled to any recovery. The Morrison court affirmed a trial court ruling the clause was unforceable and unambiguous. Id.

Mr. Lopresti chose to purchase $100,000 in underinsured motorist coverage from Commerce. If he were driving his own vehicle or riding as a passenger in any vehicle insured by a Massachusetts auto policy, he would have been limited to that $100,000. As it was, when he was involved in the crash in Maine while occupying the Speidel vehicle, that vehicle provided for $250,000 per person limits for named insureds and the amount which insureds purchased for themselves on their own UIM policy. The New Jersey courts have reviewed "step-down" clauses and found them to be unambiguous and enforceable.

The application of New Jersey law limiting the plaintiff to the amount of UIM coverage purchased by him is in accord with Massachusetts public policy expressed in G.L. c. 175, §113L(5), that is, a passenger "may recover only from the policy providing the highest limits of [underinsured] motorist coverage on which such person is the named insured . . ." The intent is to prohibit stacking and provide benefits only for which the insurance purchaser paid a premium on his own policy.

IV. CONCLUSION

For all the foregoing reasons, the court should enforce all give full effect to the American Spirit "step-down" clause, and issue an order for judgment declaring the rights of the parties providing the defendant, Mr. Lopresti, is entitled to receive from any arbitration award in his favor up to $83,333.34 ($100,000.00 in underinsurance coverage, an amount equal to that purchased by him from Commerce, minus $16,666.66, the amount previously received from him by the at-fault motorist).

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