THE STATE OF NEW HAMPSHIRE
SUPREME COURT

NO. 2017-0717

JOSEPH A. SANTOS

Plaintiff, Appellee

v.

METROPOLITAN PROPERTY AND
CASUALTY INSURANCE COMPANY

Defendant, Appellant

APPEAL FROM ROCKINGHAM COUNTY SUPERIOR COURT DECISION ON SUMMARY JUDGMENT MOTIONS

BRIEF OF APPELLANT METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY

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STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

I. Did the Superior Court err by denying Metropolitan Property and Casualty Insurance Company's Motion for Summary Judgment; and ruling that Metropolitan Property and Casualty Insurance Company is liable to plaintiff Joseph A. Santos for excess underinsured motorist benefits (UIM)? (Respondent's Motion for Summary Judgment and Memorandum of Law in Support of Respondent's Motion for Summary Judgment, App[1]. 016-044)

II. Did the Superior Court err by deciding underinsured motorist coverage in favor of Joseph A. Santos when the policy endorsement granting uninsured/underinsured motorist coverage includes a precondition to receiving benefits under the endorsement which was not met by Joseph A. Santos? (Respondent's Motion for Summary Judgment and Memorandum of Law in Support of Respondent's Motion for Summary Judgment, App. 016-044)

III. Did the Superior Court err by finding the policy ambiguous when the endorsement granting uninsured/underinsured motorist coverage includes a clear pre-condition to receiving benefits under the endorsement? (Respondent's Motion for Summary Judgment and Memorandum of Law in Support of Respondent's Motion for Summary Judgment, App. 016-044)

STATEMENT OF THE CASE

Plaintiff-Appellee, Joseph A. Santos, (hereinafter "Santos"), filed a petition for declaratory relief against Defendant-Appellant, Metropolitan Property and Casualty Insurance Company (hereinafter "MetLife") in relation to an accident that occurred on September 22, 2014 when Santos was operating a motorcycle. App. 001-006.

[1] As used in this brief "App." is an abbreviation for the Appendix and refers to the Appendix filed by the Appellant Metropolitan Group Property and Casualty Company.

Santos asserted that the alleged tortfeasor's liability limits with Electric Insurance Company in the amount of two-hundred and fifty thousand dollars ($250,000.00) per person were insufficient to compensate Santos for his damages and he therefore sought underinsured motorist coverage from MetLife who issued a policy to Santos. App. 002. MetLife denied the claim due to Mr. Santos's non-compliance with policy terms. App. 002, 014. The parties filed cross motions for summary judgment. App. 016-108. The trial court ordered that MetLife is liable to Santos for excess underinsured motorist benefits for bodily injury resulting from the September 22, 2014 motor vehicle collision. App. 109.

MetLife maintains that the trial court erred with respect to its denial of MetLife's motion for summary judgment and requests that the decision be reversed.

STATEMENT OF FACTS

Santos's action arose from an automobile accident that occurred on September 22, 2014 while Santos was operating a motorcycle owned by him. App. 002. Santos alleges that the collision occurred when an underinsured operator named John Beauregard turned directly in front of Santos. App. 002. Santos alleges he sustained severe and debilitating permanent injuries. App. 002. Beauregard carried liability insurance with limits of two hundred and fifty thousand dollars

($250,000.00) per person. App. 002. Santos carried insurance on the motorcycle with Allstate Insurance Company with coverage in the amount of twenty-five thousand dollars ($25,000.00) per person[2]. App. 002. Santos alleges his damages exceed Beauregard's limits with Electric Insurance Company. App. 002. MetLife issued a Personal Excess Liability Policy to Santos with underinsured motorist coverage with limits in the amount of one million dollars ($1,000,000.00). App. 001, 056-071. Santos made an underinsured motorist claim pursuant to the policy issued by MetLife. App. 002.

The MetLife policy includes endorsement M155 Excess Uninsured/Underinsured Motorist Coverage Endorsement. App. 042. Pursuant to the Endorsement as a precondition to receiving uninsured/underinsured motorist coverage, the policy owner (Santos) shall maintain an underlying policy with $100,000.00/$300,000.00 bodily injury limits. App. 042. Santos failed to maintain the underlying coverage required by the insurance contract under endorsement M155 and therefore MetLife denied Santos' underinsured motorist claim. App. 002.

SUMMARY OF ARGUMENT

The MetLife insurance policy issued to Santos includes an endorsement for excess uninsured/underinsured motorist

[2] Santos maintained insurance on his motor vehicles with Mt. Washington Assurance. The Mt. Washington Assurance policy did not afford any coverage for Santos' motorcycle. App. 045.

coverage. The endorsement unambiguously provides that as a precondition to receiving benefits under the endorsement, Santos shall maintain an underlying policy having uninsured/underinsured motorist coverage with split limits equal to or greater than $100,000/$300,000 or with a single limit of $300,000. Santos failed to maintain the required minimum limits. Thus, where Santos failed to satisfy the precondition to receiving benefits under the endorsement, there is no coverage available to Santos pursuant to the endorsement.

STANDARD FOR INTERPRETING INSURANCE POLICY LANGUAGE

"An insurance policy is a contractual obligation between the insured and the insurer." Concord Gen. Mut. Ins. Co. v. Green & Co. Bldg. & Dev. Corp., 160 N.H. 690, 694 (2010). Interpretation of insurance policy language, like any contract language, is ultimately a question of law for the court to decide. See Raudonis v. Ins. Co. of N. Am., 137 N.H. 57, 59 (1993). The court construes the policy, as would a reasonable person in the position of the insured based upon a more than casual reading of the policy as a whole. See Godbout v. Lloyd's Ins. Syndicates, 150 N.H. 103, 105 (2003). Policy terms are construed objectively. See id. The Court will construe insurance policy language with the purpose of honoring the reasonable expectations of the policyholder. See

Epping v. St. Paul Fire & Marine Ins. Co., 122 N.H. 248, 252 (1982).

Where the terms of the policy are clear and unambiguous, the language is accorded its natural and ordinary meaning. See Peerless Ins. v. Vt. Mut. Ins. Co., 151 N.H. 71, 73 (2004). Examination of "the parties' reasonable expectations of coverage[,]" Godbout, 150 N.H. at 105, is not necessary "when a policy is clear and unambiguous." Id.

The Court will not create an ambiguity simply to construe the policy against the insurer. Int'l Surplus Lines Ins. Co. v. Mfgs & Merchants Mut. Ins. Co., 140 N.H. 15, 20 (1995). The fact that the parties may disagree on the interpretation of a term or clause in an insurance policy does not create an ambiguity. Oliva v Vermont Mutual Insurance Co. et al, 150 N.H. 563 (2004). In addition, policy provisions are not ambiguous merely because it is difficult to apply the factual situation to the specific policy. Id.

Under no circumstances, will the court "perform amazing feats of linguistic gymnastics to find a term ambiguous." Catholic Med. Ctr. v. Executive Risk Indem., Inc., 151 N.H. 699, 701 (2005).

ARGUMENT

I. METLIFE DOES NOT OWE UNDERINSURED MOTORIST COVERAGE TO SANTOS BECAUSE SANTOS DID NOT SATISFY A CONDITION PRECEDENT TO COVERAGE

The MetLife excess policy issued to Santos consists of policy declarations, form MPL7501-000 and four endorsements. App. 027-042. Form MPL7501-000 contains the personal excess liability policy. App. 032-036. Form MPL7501-000 does not include any provision for uninsured or underinsured motorist coverage. App. 032-036. Uninsured/Underinsured motorist coverage is granted by way of Endorsement M155. App. 042. Endorsement M155 is titled: Excess Uninsured/Underinsured Motorist Coverage Endorsement. App. 042. The M155 Endorsement does not delete or replace any provision of the policy because prior to the addition of the endorsement, there is no mention of uninsured or underinsured motorist coverage in Form MPL7501-000.

The Endorsement M155 includes:

> The Personal Excess Liability Policy to which this endorsement applies, is <u>extended to provide</u> Excess Uninsured/Underinsured Motorists Coverage up to the limits shown in the declarations of the policy. (Emphasis added)

The Endorsement M155 sets forth a *precondition* to receiving benefits under the Endorsement. App. 042.

The Endorsement M155 includes:

> As a precondition to receiving the benefits under this Endorsement, **you** shall maintain the **underlying policy** of automobile insurance having uninsured/underinsured motorist coverage with split limits equal to or greater than $100,000.00/$300,000.00 bodily injury or with a single limit of $300,000.00 bodily injury; and
>
> The benefits of the Excess Uninsured/Underinsured Motorists Coverage shall apply only after the **underlying policy's** uninsured/underinsured motorists coverage limits and all other collectible uninsured/underinsured motorists benefits have been paid in full; and . . . App. 042.
>
> Section IV of the policy, Definitions includes:
>
> "Auto" means a land motor vehicle, recreational motor vehicle, motorcycle, trailer or semi-trailer, including attached machinery or apparatus. App. 035.

The precondition requires Santos to maintain the underlying policy of insurance having uninsured/underinsured motorist coverage with split limits equal to or greater than $100,000.00/$300,000.00 bodily injury or with a single limit of $300,000.00 of bodily injury. App. 042. Santos acknowledges that has not met the precondition and has admitted that he carried insurance on the motorcycle with Allstate Insurance Company with limits of just $25,000.00 per person and $50,000.00 per accident App. 002, par 10. The motorcycle coverage purchased by Santos from Allstate does not satisfy the precondition required by Endorsement M155. App. 042.

The Endorsement M155 also includes a second precondition that "the benefits of this Excess Uninsured/Underinsured

Motorists Coverage shall apply only after the underlying policy's uninsured/underinsured motorists coverage limits . . . have been paid in full." Whereas the required underlying policy limits of $100,000/$300,000 or a single amount of $300,000, will never be paid in full because Santos only maintained limits of $25,000.00, this pre-condition can never be satisfied under the circumstances of this case. Where Santos has not satisfied the preconditions to coverage, there is no underinsured motorist coverage available to Santos pursuant to the Endorsement M155.

In Krigsman v. Progressive Northern Insurance Co., 151 NH 643 (2005), the court examined a pre-condition to coverage. In Krigsman, the insured seeking coverage failed to submit to an examination under oath. The issue was whether submission to an examination under oath was a condition precedent to recovery under the policy. The Progressive Policy language examined in Krigsman requiring the examination under oath was "a person claiming coverage under this policy must:. . . allow us to take signed and recorded statements, including. . . examinations under oath." The Court concluded that a reasonable request for examination under oath is strictly construed as a condition precedent to the insurer's liability. Krigsman failed to submit to an examination under oath prior to filing suit which was a breach of the insurance contract.

The language in the MetLife Policy is far more compelling than the policy language in Krigsman which was found to be a pre-condition to coverage. The Endorsement M155 language includes "as a precondition to receiving the benefits under this Endorsement" the insured "shall maintain" the underlying policy. The endorsement specifies that maintaining the underlying policy is a precondition to receiving benefits under the endorsement; that the insured shall maintain the underlying policy; and that the benefits of the endorsement shall apply only after the underlying policy's limits have been paid in full. This language is clear and unambiguous. When the M155 Endorsement is read together with the entire policy it is clear that it is meant to deny coverage if the underlying insurance amounts are not met and that there is never any underinsured motorist benefits until the required underlying policy limits have been paid in full, hence the "precondition" and "shall maintain" and "shall apply only after" language.

Santos failed to satisfy the conditions precedent and therefore should not be allowed to recover underinsured motorist benefits.

II. THE POLICY ENDORSEMENTS DO NOT INCLUDE CONTRADICTORY LANGUAGE

Santos has argued that the policy includes contradictory language because the Amendatory Endorsements include prefatory language such as "deleted and replaced" and Endorsement M155 does not. The amendatory endorsements, M159, M190-00-0300 and M18-28-0300, do not raise any issue of ambiguity due to those endorsements including such language as "deleted and replaced." App. 037-038, 040-041. Such language would be expected in amendatory endorsements because these amendatory endorsements are amending/changing the policy form MPL7501-000.

The MetLife Endorsement M155 is a grant of uninsured/underinsured motorist coverage. Prior to Endorsement M155, there is no mention of Uninsured/Underinsured Motorist Coverage in the coverage form at all. See App. 032-036. The fact that Endorsement M155 does not include "delete and replace" language does not make it confusing or ambiguous. One would not expect Endorsement M155 to include "delete and replace" language because it does not "delete and replace" any language from the policy form. Rather, Endorsement M155 is the grant of uninsured/underinsured motorist coverage. The Endorsement M155 specifies that the policy is "extended" to

provide excess Uninsured/Underinsured Motorist Coverage up to the limits shown in the declarations of the policy. App. 042.

III. THE POLICY CONDITIONS DO NOT MAKE THE POLICY AMBIGUOUS

The policy includes at Section III Conditions:

> 4. **Changes.** This policy contains all the agreements between **you** and **us**. Its provisions may not be changed or waived except by endorsement issued by **us** . . . (App. 040)
>
> 7. **Maintenance of Underlying Insurance.** This policy requires you to have the types and amounts of insurance shown in the Declarations page. If **you** fail to maintain the **required underlying policies** for any reason, or if no insurance is available because an **insured** has breached a term or condition of any **underlying policy, we** will be liable only for the amount that **we** would have been liable for had **you** maintained the required insurance. **You** will be liable for the amount that would have been covered by the **underlying policy…** (App. 034)

Condition 7 does not render the policy ambiguous because the policy is amended by Endorsement M155 to extend the policy to provide excess uninsured/underinsured motorist coverage. The M155 Endorsement clearly and unambiguously requires the maintenance of the underlying amount of coverage as a "*precondition* to receiving the benefits under this endorsement." The endorsement further requires that the required underlying limits be paid before the excess uninsured/underinsured motorist coverage applies.

The policy specifies at Section III Conditions, paragraph 4, that its provisions may be changed by endorsement issued by

MetLife. Therefore, even if Condition 7 had any applicability, Condition 4 specifies that policy provisions may be changed or waived by endorsement. Endorsement M155 is an endorsement strictly for the uninsured/underinsured motorist coverage with conditions.

It is the general rule that an endorsement or rider attached to an insurance policy becomes and forms a part of the contract; that the policy and the endorsement or rider shall be construed together; and that where the provisions in the body of the policy and those in the endorsement or rider are in irreconcilable conflict the provisions contained in the endorsement or rider will prevail over those contained in the body of the policy. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Lumbermens Mutual Casualty Company, 385 F.3rd 47, 55 (2004). The purpose of an endorsement is, by definition, to change the terms of the policy. Ellis v. Royal Insurance Companies, 129 N.H. 326, 338 (1987).

Here there are no competing endorsements modifying the policy. There is a single, clear endorsement granting uninsured/underinsured motorists coverage. The Endorsment M155 unambiguously includes a precondition to receiving uninsured/underinsured motorist benefits under the endorsement.

In deciding the underlying case in favor of Santos, the lower Court found the reasoning of the Connecticut Supreme Court in Israel v. State Farm Mutual Auto Insurance Company, 789 A.2nd 974 (Conn 2002) persuasive. However, the holding in Israel was premised on a key factual finding that is not present here. In Israel, the insurance policy consisted of four parts: a nine page booklet entitled "Personal Liability Umbrella Policy," an addendum to that booklet entitled "Uninsured Motor Vehicle Coverage," a declarations page, and four pages of endorsements. The Umbrella booklet provided "YOUR DUTIES TO US. These are things you must do for us. We may not provide coverage if you refuse to. . . 4 maintain your underlying insurance. All insurance listed in the declarations must be maintained at all times." The addendum included "you must maintain underlying limits for uninsured motorist motor vehicle coverage equal to the limits listed in the declarations. If these underlying limits are not maintained, this coverage will not apply." The Court found these policy provisions ambiguous. Importantly, the Court rejected the defendant's argument that the uninsured addendum was an endorsement and therefore controlled the more general policy provisions. The court rejected the argument because the policy included endorsements that were explicitly labeled as endorsements. The endorsements were clearly and unambiguously

labeled as such which indicated to the reader that their terms supersede other terms in the policy. The Court held that in contrast the word endorsement did not appear in the uninsured addendum. The Israel case would have had a different outcome had the uninsured motorist addendum been labeled an endorsement.

Here, the MetLife policy clearly identifies the uninsured/underinsured motorist coverage as an endorsement. The top right hand corner of the page specifies "endorsement M155." Further the document is titled "Excess Uninsured/Underinsured Motorist Coverage Endorsement." Therefore, based on the reasoning in the Israel matter, the MetLife policy includes an endorsement that clearly and unambiguously indicates to the reader (Santos) that the terms of the endorsement supersede other terms in the policy.

Of significance, the Israel case was followed by the National Grange Mutual Insurance Company v. Santaniello case at 961 A.2nd 387 (2009). In National Grange the defendants tried to advance the argument that the policy provision they were relying on was not a proper endorsement and therefore did not amend the policy. The court held that the addendum at issue in the case was found to be an endorsement which clearly and unambiguously deleted a dealer plate coverage from the

policy. It was clear to the reader that the endorsement effectuated a change to the underlying policy.

The Endorsement M155 changed the policy consistent with the policy condition that allows for the policy provisions to be changed by endorsement which is consistent with the legal authority that endorsement provisions prevail over provisions contained in the body of the policy.

IV. CONDITIONS PRECEDENT ARE UPHELD EVEN IF APPLICATION OF THE CONDITIONS PRECEDENT AMOUNTS TO A FORFEITURE OF COVERAGE.

The New Hampshire Supreme Court has upheld a condition precedent that amounted to a forfeiture of coverage. In Krigsman v. Progressive Northern Insurance Co., 151 NH 643 (2005) submission to an examination under oath was found to be a condition precedent and failure to comply with the condition precedent resulted in a forfeiture of coverage. Courts in other jurisdictions have ruled similarly. In Haskins v. Occidental Life Ins. Co., 349 F. Supp. 1192, 1197 (Ark. 1972), the court ruled that if a proof of loss requirement was a condition precedent, then the insured would not be able to recover under the policy. In Bolivar County Bd. Of Supervisors v Forum Ins. Co., 779 F. 2d 1081, 1085 (1986) the court held that the policy clearly and expressly provided that the giving of notice "as soon as practicable" was a condition precedent to recovery. The court reasoned that in view of the

controlling Mississippi precedent, which the Court was bound to follow under Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), Forum Ins. Co. was not required to prove that it suffered actual prejudice from Bolivar County's unreasonably delayed notice. Id.

Similarly, the rule established by the great weight of authority is that where notice of the accident and forwarding of any 'demand, notice, summons or other process' are specifically made a condition precedent to any action against the insurer by the contract of insurance, the failure to give a reasonably timely notice of the accident or of the receipt of any 'demand, notice, summons or other process' will release the insurer from the obligations imposed by the contract, although no prejudice may have resulted. Viani v Aetna Ins. Co., 501 P. 2d 706, 712 (Idaho 1972), *overruled on other grounds*, Sloviaczek v Estate of Puckett, 565 P. 2d 564, 568 (Idaho 1977). See also Security Mut. Ins. Co. v. Acker-Fitzsimons Corp., 293 N.E. 2d 76, 78 (N.Y. 1972) (Failure to satisfy the notice requirement of the policy vitiates insurance coverage.)

Thus, although forfeitures may generally be disfavored, where the policy includes clear conditions precedent, the conditions must be upheld even where doing so amounts to forfeiture.

V. THE METLIFE POLICY COMPLIES WITH RSA 264:15

RSA 264:15 includes:

> Except as provided in paragraph I-a, no policy shall be issued under the provisions of RSA 264:14, with respect to a vehicle registered or principally garaged in this state, unless coverage is provided therein or supplemental thereto at least in amounts and limits prescribed for bodily injury or death for a liability policy under this chapter, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or drivers of uninsured motor vehicles, and hit-and-run vehicles because of bodily injury, sickness, or disease, including death resulting therefrom. When an insured elects to purchase liability insurance in an amount greater than the minimum coverage required by RSA 259:61, the insured's uninsured motorist coverage shall automatically be equal in amounts and limits to the liability coverage elected[3]. **For the purposes of this paragraph umbrella or excess policies that provide excess limits to policies described in RSA 259:61 shall also provide uninsured motorist coverage equal to the limits of liability purchased, unless the named insured rejects such coverage in writing.** Rejection of such coverage by a named insured shall constitute a rejection of coverage by all insureds, shall apply to all vehicles then or thereafter eligible to be covered under the policy, and shall remain effective upon policy amendment or renewal, unless the named insured requests such coverage in writing. (Emphasis added.)

Pursuant to Gisonni v State Farm Mut.Auto.Ins.Co., 141 N.H. 518, 520 (1996), the elective coverage provision in effect at the time of the accident at issue in this case, does not mandate complete mutuality between general liability and

[3] The elective coverage provision in effect from January 1, 2010 to September 10, 2015 follows:
When an insured elects to purchase liability insurance in an amount greater than the minimum coverage required by RSA 259:61, the insured's uninsured motorist coverage shall automatically be equal to the liability coverage elected.

uninsured motorist coverage. In Gisonni, the general liability policy covered losses in the United States, Canada and Mexico within fifty miles of the United States border, but limited uninsured motorist coverage to the United States and Canada. The court held that the elective coverage provision does not require an insured to purchase uninsured motorist coverage extending beyond the minimum territorial limit requirements even if the insured purchases general liability insurance extending beyond the minimum territorial limit.

After the Gisonni case, the court decided Swain v Employers Mutual Casualty Company[4], 150 N.H. 574 (2004). In light of Gisonni, the court held in Swain that the carrier was required to provide uninsured motorist coverage in an amount equal to the amount of general liability coverage but the scope of uninsured motorist coverage did not have to equal the scope of general liability coverage. Supra at 578.

Following the elective coverage provision in the statute is a sentence that requires where the excess policy provides excess limits that the uninsured motorist coverage equal the limits of liability purchased. The MetLife policy issued to Santos is an excess policy. The policy complies with the statute. See App. 028. It should be noted that RSA 264:15,

[4] Swain was decided under an earlier version of the statute which was also the version in effect at the time of the Santos accident.

both the prior and current versions, include the terms "amounts" and "limits" and "coverage". RSA 264:15 does not specifically address, or preclude, the precondition to coverage at issue in this case. But RSA 264:15 does recognize that policies affording coverage pursuant to the statute will have conditions. RSA 264:15 IV. Includes: "in the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage. . ." (emphasis added) Such language supports the argument that a policy may comply with the elective excess provision and still have policy conditions.

In interpreting the statute, the court must interpret legislative intent from the statute as written and not consider what the legislature might have said or add language that the legislature did not see fit to include. Petition of Michael Carrier, 165 N.H. 719 (2013). If the legislature saw fit to preclude insurers from including conditions precedent to coverage, it would have written such language in RSA 264:15. The legislature did not write in the statute that there cannot be policy conditions. Further, the legislature by referencing that payment pursuant to the statute will be subject to terms and conditions of coverage, has thereby recognized that there can be statutory compliance even when

the insurance policy include conditions. Here, the MetLife policy issued to Santos does not violate RSA 264:15.

CONCLUSION

For the foregoing reasons, the lower court decision should be reversed.

WHEREFORE, the Appellant MetLife respectfully requests that this Honorable Court:

A. Reverse the lower court's decision on the cross motions for summary judgment and enter judgment in favor of MetLife; and

B. Order such other and further relief as may be just.

Respectfully submitted,
METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY

By its attorneys,
DESMARAIS LAW GROUP, PLLC

Dated: March 1, 2018

By: _____

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATE OF SERVICE

Pursuant to New Hampshire Supreme Court Rule 16(10), the undersigned certifies that two copies of this Brief have been sent by first class mail to William Parnell, Esquire and Rory Parnell, Esquire, counsel of record for Joseph Santos.

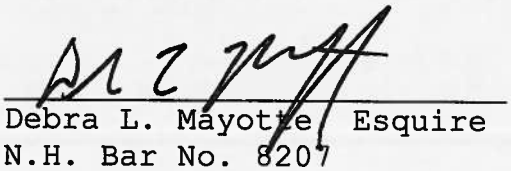
The undersigned further certifies that pursuant to New Hampshire Supreme Court Rule 16(7), that the original copy of the Brief and eight copies of this Brief have been filed with the Clerk of the New Hampshire Supreme Court. In addition, the Defendant-Appellant has submitted a C.D. with an electronic copy of the Defendant-Appellant's Brief in Portable Document Format (PDF) to this Court.

Pursuant to New Hampshire Supreme Court Rule 16(3)(h), the undersigned requests oral argument on behalf of Metropolitan Property and Casualty Insurance Company before the full court and designates Debra L. Mayotte, Esquire, to be heard. The undersigned estimates that oral argument will require (15) minutes.

A copy of the decision being appealed is included with this brief at the Addendum

Dated: March 1, 2018

Respectfully submitted,



Debra L. Mayotte, Esquire
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ADDENDUM

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss

JOSEPH A. SANTOS

v.

METROPOLITAN PROPERTY & CASUALTY INSURANCE COMPANY

218-2016-CV-596

FINAL ORDER

The matters before the court are the parties' cross-motions for summary judgment (Docket Documents 10 and 12).[1] Both motions are GRANTED IN PART and DENIED IN PART. More specifically, the court enters the following declaratory judgment:

1. Defendant Metropolitan Property & Casualty Insurance Company ("MetLife") is liable to plaintiff Joseph A. Santos for excess UIM benefits for bodily injury resulting from the September 22, 2014 motor vehicle collision, to the extent and in the amount that MetLife would have been liable if Santos had primary UIM coverage for the collision with policy limits of $100,000/$300,000.

2. The court does not opine on the substantive merits of Santos' UIM claim. The parties have not briefed, and the court has not been asked to decide (a) whether, and to what extent, the purportedly underinsured driver was at fault for the accident, (b) whether, and to what extent Santos may have been comparatively at fault, (c) whether, and to what extent other parties were also partially at fault within the meaning of

[1]The plaintiff's cross-motion for summary judgment is included in the same document as his objection to the defendant's motion for summary judgment. The better practice is to file these as two separate documents even if one document simply incorporates the facts and legal argument from the other. The reason for this is not a fondness for persnickety formalism, but rather a very practical concern for clarity in the court's docket sheets and files. Although this practice is not mandated by rule (as is the case in federal court, see Local rule 7.1(a)(1) of the U.S. District Court for the District of New Hampshire), it is nonetheless preferred.

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DeBenedetto v. CLD Consulting Engineers, 153 N.H. 793 (2006) or other applicable rule of apportionment, (d) whether Santos' recovery against would be reduced due to a failure to mitigate damages or for any other reason or (e) the nature, amount or scope of Santos' damages.

FACTS

I. Introduction

This matter is a declaratory judgment action to determine insurance coverage. See RSA 491:22, 22-a and 22-b. The insurance policy at issue is a MetLife "personal excess liability policy" that provides coverage similar to an umbrella policy. By virtue of an endorsement, the MetLife policy provides excess uninsured and underinsured motorist coverage ("UIM coverage"). Santos submitted a claim under his excess UIM coverage to recover for injuries he allegedly sustained in an accident with an underinsured drive.

The question presented in this case is whether Santos' coverage is defeated by his failure to maintain primary UIM coverage in the amount specified in the MetLife policy. MetLife insists that because Santos did not maintain sufficient primary coverage he has no right to excess coverage. Santos maintains that the lack of sufficient primary coverage merely limits MetLife's liability to damages in excess of the policy's "required underlying insurance limit," which in this case is $100,000. Thus, Santos opines that MetLife is liable for UIM damages in excess of $100,000, while MetLife insists that it has no liability at all.

II. The Accident And The Applicable Insurance Policies

On September 22, 2014, Santos was driving a motorcycle when he was allegedly struck by an SUV. Santos claims that the collision was result of negligence on the part of the other driver, John Beauregard. Santos alleges that he sustained serious and

debilitating injuries as a result of the collision. Although Beauregard was insured through Electric Insurance Company for $250,000 per person and $500,000 per accident, Santos claims that his damages exceed these policy limits.

Santos' motorcycle was insured by Allstate Insurance Company. However, his Allstate Policy limits were just $25,000/$50,000. Santos claims that his UIM damages exceed his Allstate UIM coverage.

Santos also had a $250,000/$500,000 auto policy issued by Mt. Washington Assurance. However, this policy was not triggered by the collision because the motorcycle that Santos was driving was a household vehicle that was not listed in the policy.

Finally, Santos had the MetLife policy at issue in this case which, as noted above, provides excess UIM coverage. The MetLife policy limit is $1,000,000 and the policy includes an insured retained limit (i.e. a deductible) of $500.

III. The MetLife Policy

In General: The MetLife policy is not a single document but rather a collection of interrelated and cross-referenced documents that must be read together including:

A. The declarations pages;

B. The underlying personal excess liability insurance policy form that (a) establishes excess liability coverage and (b) contains policy-wide exclusions, conditions and definitions; and

C. Five separate endorsements, including an endorsement for UIM coverage.

The Declarations Pages: Page 1 of the declarations pages states that the policy includes both (a) $1,000,000 in excess liability coverage and (b) $1,000,000 in excess

UIM coverage for which a separate premium was charged. The same page indicates that Santos and his wife own a 1987 Pontiac Grand Prix and a 1997 Ford F150. Santos' motorcycle is not listed in the declarations pages.

Page 1 of the declarations pages also cites to the five endorsements that are attached to the policy including, as applicable to this case, the endorsement that establishes UIM coverage.

Page 2 of the declarations pages lists the "required underlying insurance limits" that the insureds must retain. As indicated on page 2 of the declarations pages:

-If the primary auto/UIM carrier is MetLife, then the required underlying insurance limits for UIM coverage are $100,000/$300,000 and $10,000 property damage, or $300,000 single limit per occurrence.

-If the primary auto/UIM carrier is not MetLife, then the underlying limits for UIM coverage are $250,000/$500,000 bodily injury and $10,000 property damage or $300,000 single limit per occurrence.

The Underlying Policy Form: Section I of the policy form establishes personal liability coverage. This section does not address UIM coverage. Section II establishes exclusions from coverage. Section III establishes conditions of coverage. Section IV provides definitions for many of the terms that are used in Sections I, II, and III.

The UIM Endorsement: The UIM Endorsement (MetLife Endorsement M155) is captioned "Excess Uninsured/Underinsured Motorists Coverage Endorsement." The entire endorsement is half a page long. It relies on the underlying policy form definitions. This much is clear because the endorsement does not contain its own set of definitions but rather follows the convention used in the policy of placing certain terms in

bold font, thereby directing the reader's attention to the definitions in Section 4 of the policy form.

Likewise, the UIM endorsement does not contain its own full set of conditions of coverage. Instead, it is limned by the general conditions in Section 3 of the Policy form. Those conditions include many of the basic, universal and anodyne rules governing insurance coverage which are certainly applicable to excess UIM coverage, such as:

-A requirement that insured provide notice of the claim (Section III, Item 1);

-A contractual limit on liability for damages per occurrence per the policy limits (Section III, Item 2);

-A contractual right of subrogation for all amounts paid (Section III, Item 10);

-Procedures for amending and cancelling the policy (Section III, Item 4-6);

-A prohibition on assignment of the policy without MetLife's assent (Section III, Item 8); and

-A clear notice that the MetLife policy provides excess coverage and a brief explanation of what this means (Section III, Item 3);

IV. The Condition At Issue

The Policy Form Language: One of the general conditions of coverage in Section III of the policy form has particular relevance to this case and, therefore, is recited below verbatim:

> Section III, Item 7: Maintenance of Underlying Insurance. This policy requires **you** to have the types and amounts of insurance shown in the Declarations page. If **you** fail to maintain the **required underlying policies** for any reason, of if no insurance is available because an **insured** has breached a term or condition of any **underlying policy**, **we** will be liable only for the amount that **we** would have been liable for had **you** maintained the required insurance. **You** will be liable for the amount that would have been covered by the underlying policy.

This policy condition imposes an obligation on the insured and provides a contractual remedy for the insured's breach of that obligation. The obligation is straightforward: The insured must maintain a certain amount of primary coverage. However, the insured's breach of this obligation will not result in a complete forfeiture of coverage. Rather, MetLife must still provide coverage. But, it will only have to cover damages in excess of the amount of primary insurance that the insured was required to carry.

The UIM Endorsement Language: The UIM endorsement contains additional language regarding primary insurance coverage:

> As a precondition to receiving the benefits under this endorsement, **you** shall maintain the **underlying policy** of automobile insurance having uninsured/underinsured motorists coverage with split limits equal to or greater than $100,000/$300,000 bodily injury; and
>
> the benefits of this Excess Uninsured/Underinsured Motorists Coverage shall apply only after the **underlying policy's** uninsured/underinsured motorists coverage limits and all other collectable uninsured/underinsured motorists benefits have been paid in full; and
>
> the Excess Uninsured/Underinsured Motorists Coverage is subject to all of the terms and conditions of the uninsured/underinsured coverage provided in the **underlying policy**.

This provision of the UIM endorsement clearly changes the required amount of primary coverage from that stated in the declarations pages. MetLife argues that the language also modifies the general condition in the policy form regarding the consequence of having insufficient primary coverage. Seizing on the phrase "*as a precondition to receiving the benefits under this endorsement,*" MetLife argues that even a one dollar gap in primary coverage will result in a total loss of excess UIM coverage.

Santos argues that this "precondition" language must be read in conjunction with the general condition which establishes a less draconian consequence for failure to maintain sufficient primary coverage. Thus, Santos argues that violation of this precondition will result in coverage for damages in excess of the required amount of primary insurance. Accordingly, Santos argues that even though he did not maintain an applicable $100,000/$300,000 primary UIM policy, he is nonetheless entitled to MetLife excess UIM coverage for damages for bodily injury in excess of $100,000.

LEGAL ANALYSIS

I. Summary Judgment Standard

The parties' cross-motions for summary judgment are controlled by RSA 491:8-a and Superior Court Civil Rule 12(g). In the familiar words of the statute, a moving party is entitled to summary judgment only if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a,III; see, e.g., Town of Barrington v. Townsend, 164 N.H. 241, 244 (2012); State v. North of the Border Tobacco, 162 N.H. 206, 212 (2011). In making this determination, the court must construe the parties' affidavits and other appropriately considered submissions in the light most favorable to the non-movant. North of the Border Tobacco, 162 N.H. at 212; Porter v. Coco, 154 N.H. 353, 356 (2006). This means that the court must take all reasonable inferences from the evidence in the non-movant's favor.

A factual dispute is "material" only if it affects the outcome of the litigation. Panciocco v. Lawyers Title Insurance, 147 N.H. 610, 613 (2002); Horse Pond Fish & Game Club v. Cormier, 133 N.H. 648, 653 (1990). A factual dispute is "genuine" only if

"the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party." Rojas-Ithier v. Sociedad Espanola de Auxilio Mutuo y Beneficiencia de Puerto Rico, 394 F.3d 40, 43 (1st Cir. 2005) (construing F.R.Civ. P. 56(a).

When, as in this case, the parties have filed cross-motions for summary judgment, the court applies the foregoing standards to each motion. Conant v. O'Meara, 167 N.H. 644, 648 (2015); see also, Libertarian Party of New Hampshire v. Gardner, 126 F. Supp. 3d 194, 199 (D.N.H. 2015) (applying F.R.Civ.P. 56 and noting that, "[s]n cross motions for summary judgment, the standard of review is applied to each motion separately."); Washington International Insurance Co. v. Ashton Agency, Inc., 2012 WL 5194857, at *2 (D.N.H. Oct. 19, 2012) ("[T]]he fact that opposing parties file cross-motions for summary judgment does not mean that one of the moving parties will prevail.").

II. Insurance Coverage Disputes—In General

Pursuant to RSA 491:22-a, the insurance carrier bears the burden of establishing a lack of coverage. Exeter Hospital, Inc. v. Steadfast Insurance Company, ___ N.H. ___, 166 A.3d 1073, 1076 (June 22, 2017); Great American Dining, Inc. v. Philadelphia Indemnity Insurance Co., 164 N.H. 612, 616 (2013); M. Mooney Corp. v. U.S. Fidelity & Guaranty Company, 136 N.H. 463, 466 (1992).

The interpretation of an insurance policy is a question of law. Exeter Hospital, 166 A.2d at 1076; Northern Security Insurance Company v. Connors, 161 N.H. 645, 649 (2011). The court must "construe the language of an insurance policy as would a reasonable person in the position of the insured based upon a more than casual reading

of the policy as a whole." Northern Security, 161 N.H. at 649; Colony Insurance Company v. Dover Indoor Climbing Gym, 158 N.H. 628, 630 (2009); Philbrick v. Liberty Mutual Fire Insurance Company, 156 N.H. 389, 390 (2007). Where the terms of the policy are clear and unambiguous, the court must give the language its natural and ordinary meaning. Northern Security, 161 N.H. at 649 (citing Colony Insurance, 158 N.H. at 630). But, "if the policy is reasonably susceptible to more than one interpretation and one interpretation favors coverage, the policy will be construed in favor of the insured and against the insurer." Id. "This rule reflects the fundamental principle of contract law that doubtful language is to be construed most strongly against the party who used it in drafting the contract." Trombly v. Blue Cross/Blue Shield of New Hampshire-Vermont, 120 N.H. 764, 771 (1980) (internal quotation marks and citation omitted). After all, "it is the insurer who controls the language of the policy and, therefore, any resulting ambiguity should be resolved in favor of the insured." Id.

III. Analysis

A. Introduction

The question presented in this case is whether the MetLife policy language is ambiguous regarding the consequences of maintaining insufficient primary UIM coverage. On the one hand, the UIM endorsement's use of the phrase "*precondition of coverage*" suggests that the failure to maintain sufficient primary coverage is fatal to UIM coverage. Read in isolation, this language would clearly defeat coverage in this case.

But the "precondition of coverage" language cannot be read in isolation and must instead be read in conjunction with the rest of the policy. See, e.g., Preferred National

Insurance Company v. Docusource, Inc., 149 N.H. 759, 766 (2003) ("[A]n endorsement attached to a policy must be read together with the entire policy[.]"); National Union Fire Insurance Company of Pittsburgh v. Lumbermens Mutual Casualty Company, 385 F.3d 47, 55 (1st Cir. 2004) (noting the "general rule" that "the policy and the endorsement or rider shall be construed together."); 2 Couch on Insurance § 18:19 ("When properly incorporated into the policy, the policy and the rider or endorsement together constitute the contract of insurance and are to be read together to determine the contract actually intended by the parties.")

The general conditions in the policy form, and more particularly Section III, Item 7, state that the failure to maintain the required amount of primary coverage will not defeat coverage, but will rather limit coverage to that which is in excess of the required amount of primary coverage. Thus, the court must decide whether (a) the endorsement language supersedes and replaces Section III, Item 7, in which case Santos would not be entitled to coverage or, alternatively, (b) the endorsement language supplements rather than supplants Section III, Item 7, in which case Santos would be entitled to coverage because, at the very least, the coexistence of these two provisions would create an ambiguity as to coverage. See, Northern Security, 161 N.H. at 649 (ambiguous provisions in insurance policies must be resolved in favor of coverage if there is a reasonable construction that creates coverage).

B. The "Precondition Of Coverage" Language In The Endorsement Does Not Supersede Or Replace Section III, Item 7 Of The Policy Form

A longstanding cannon of insurance policy construction militates in favor of finding that the exclusionary language in an endorsement supersedes and replaces

contrary language in the underlying policy form. See, National Union Fire Insurance Company of Pittsburgh, 385 F.3d at 55 (noting the "general rule" that "where the provisions in the body of the policy and those in the endorsement or rider are in irreconcilable conflict the provisions contained in the endorsement or rider will prevail over those contained in the body of the policy."); United States v. Clean Harbors of Natick, 1995 WL 40029, at *5 (D.N.H. Jan. 17, 1995) (noting "the established principal that where an endorsement follows a policy, the language within the endorsement must be construed in such a manner as superseding any preceding inconsistent or irreconcilable language within the policy."); Ellis v. Royal Insurance Companies, 129 N.H. 326, 338 (1987) (finding that the endorsement controlled because "the purpose of an endorsement is, by definition, to change the terms of the policy, and . . .the endorsement . . . most clearly to the matter at issue here.").

However, this cannon is a convenient interpretative aid rather than an end in itself. The categorical imperative in contract interpretation is to ascertain the intent of the parties as expressed in the contract, regardless of whether the contract is one for insurance or otherwise. See e.g. Exeter Hospital,166 A.3d at 1076 ("The fundamental goal of interpreting an insurance policy, as in all contracts, is to carry out the intent of the contracting parties."); Trombly, 120 N.H. at 770 ("In general, the rules governing the construction and interpretation of written contracts apply with equal force to insurance policies. Thus, in interpreting contracts, the fundamental inquiry centers on determining the intent of the parties at the time of agreement." (internal citation omitted)); Maville v. Peerless Insurance Company, 141 N.H. 317, 319 (1996); Weaver v. Royal Insurance

Company of America, 140 N.H. 780, 781 (1996); Coakley v. Maine Bonding and Casualty Company, 136 N.H. 402, 409 (1992). See generally, Couch, §22:1:

> The formulated or technical rules of construction are helpful in giving effect to the true intent of the parties expressed in the written contract, determining a reasonable construction, prohibiting alteration of the contract, and so on. From the standpoint of good construction, however, they are of no merit where applied by rote to fortify a result since they then obscure the real standards of construction.

(footnote omitted).

There are three compelling reasons in this case why the "precondition of coverage" language in the endorsement should not be read to supersede and replace the language in Section III, Item 7 of the coverage form. The court addresses each of these reason in turn.

1. The Presumption Of Consistent Usage And Meaningful Variation: MetLife strictly followed a convention of *expressly* stating whether the language in its endorsements superseded, replaced, modified or amended the policy form. See e.g., Endorsement M190-00-0300 ("Under section III-Conditions, Item 6, Cancellation, the second paragraph is deleted and replaced by . . ."); Endorsement C116NH ("[A]ny other policy definitions and provisions designating an insured under this policy[] are amended, whenever appearing. . ."); Endorsement M180-28-030 ("Under Section III-Conditions: Item 4, Changes is deleted and replaced by . . ." and "Item 9, Premium is deleted and replaced by . . ."). Thus, the attorneys and insurance coverage specialists who drafted the MetLife policy used consistent language when they intended for an endorsement provision to supplant rather than supplement the policy form.

The UIM endorsement contains no similar language referencing Section III, Item 7 of the policy form. This absence is striking when the UIM endorsement is compared

to the other endorsements. Presumably, given MetLife's consistent use of express language elsewhere, if it intended for the "precondition of coverage" language to negate Section III, Item 7, it would have said so in words instead of relying on inferences from the white spaces between the words. See, e.g., In re Failla, 838 F.3d 1170, 1176 (11th Cir. 2016) ("The presumption of consistent usage instructs that a word or phrase is presumed to bear the same meaning throughout a text and that a material variation in terms suggests a variation in meaning." (internal quotation marks and bracketing omitted)); Novella v. Westchester County, 661 F.3d 128, 142, 52 (2d Cir. 2011) (noting the presumptions of consistent usage and meaningful variation); GPIF-I Eq. Co., Ltd. v. HDG Mansur Investment Services, Inc., 2013 WL 3989041, at *3 (S.D.N.Y. Aug. 1, 2013) (noting that "the presumptions of consistent usage and meaningful variation" are "settled principles of contract construction . . . which follow from the duty to construe the contract as a whole rather than in isolated provisions."); United States v. Castleman, 134 S. Ct. 1405, 1417 (2014) (applying the presumption of consistent usage in the context of statutory construction).

2. Forfeitures Are Disfavored: There is a cannon of construction that, while certainly not dispositive, militates in favor of a construction that favors coverage. While an insurance contract may contain conditions precedent to coverage, a complete forfeiture of coverage must be explained in unambiguous language and, even then, may be unenforceable if it is unreasonable or unjust. See, e.g., Couch, §22:34:

> The courts will enforce a forfeiture where there has been a plain violation of a condition of the policy and it is the clearly expressed intent of the parties that forfeiture be the consequence of such a violation.
>
> However, even if a forfeiture clause in an insurance policy is so plain and definite as not to be subject to construction, it may be subject to the rule

> that when the strict enforcement of a provision of a policy will result in unreasonable and unjust forfeitures or an absurd result, the courts will refuse to enforce the strict meaning of the language of the policy.

(footnotes omitted); see also James v. Pennsylvania Gen. Ins. Co., 306 S.E.2d 422, 425 (Ga. Ct. App. 1983) ("A crucial principle is that insurance policies are construed so as to avoid forfeitures and to provide coverage." (internal quotation marks, bracketing and citation omitted)); AVEMCO Ins. Co. v. Chung, 388 F. Supp. 142, 147 (D. Haw. 1975) ("Forfeiture of insurance coverage is so disfavored that the courts are always prompt to seize hold of any circumstance to uphold the validity of a policy." (internal quotation marks and citation omitted)); Builders Ins. v. Tenenbaum, 757 S.E.2d 669, 675 (Ga. Ct. App. 2014) (noting that forfeitures of insurance coverage are disfavored); Axis Surplus Insurance Company v. Caribbean Beach Club Association, Inc., 164 So. 3d 684, 687 (Fla. Ct. App. 2014) (noting that forfeitures of coverage are abhorred); Hakim v. Massachusetts Insurers' Insolvency Fund, 675 N.E.2d 1161, 1165 (Mass. 1997) ("[E]xclusions from coverage are to be strictly construed").

If the "precondition of coverage" language is construed to supersede and replace Section III, Item 7, it would result in a complete forfeiture of UIM coverage even when (a) the insured actually maintains primary UIM coverage (as in this case), and (b) that primary UIM coverage applies to the collision (as in this case), and (c) the UIM damages stemming from the collision are not otherwise excluded from MetLife's excess UIM coverage (as in this case), so long as (d) the primary coverage falls one dollar short of the required amount. An alternative construction of the endorsement avoids forfeiture by (a) recognizing the insured's obligation to maintain sufficient primary UIM coverage but (b) imposing as a remedy for a violation of that obligation that MetLife's

coverage will be limited to the amount it would be required to pay if the insured actually had the required amount of primary UIM coverage.

3. The Backdrop Of RSA 264:15: Finally, the court reads this New Hampshire insurance policy against the backdrop of pertinent New Hampshire statutory law. RSA 264:15 requires New Hampshire umbrella and excess policies that provide liability coverage for auto claims to also provide UIM coverage equal to the "limits of liability:"

> Except as provided in paragraph I-a,[2] no policy shall be issued under the provisions of RSA 264:14, [3] with respect to a vehicle registered or principally garaged in this state, unless coverage is provided therein or supplemental thereto at least in *amounts and limits* prescribed for bodily injury or death for a liability policy under this chapter, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or drivers of uninsured motor vehicles, and hit-and-run vehicles because of bodily injury, sickness, or disease, including death resulting therefrom. When an insured elects to purchase liability insurance in an amount greater than the minimum coverage required by RSA 259:61,[4] the insured's uninsured motorist coverage shall automatically be equal in *amounts and limits* to the liability coverage elected. For the purposes of this paragraph *umbrella or excess policies that provide excess limits to policies described in RSA 259:61 shall also provide uninsured motorist coverage equal to the limits of liability purchased*, unless the named insured rejects such coverage in writing. Rejection of such coverage by a named insured shall constitute a rejection of coverage by all insureds, shall apply to all vehicles then or thereafter eligible to be covered under the policy, and shall remain effective upon policy amendment or renewal, unless the named insured requests such coverage in writing.

(emphasis added).

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[2]That paragraph has to do with commercial policies and has no application to this case.

[3]That statute governs New Hampshire auto policies generally.

[4]That minimum coverage under that statute is $25,000/$50,000.

Even if this statute permits MetLife to offer excess auto coverage with different exclusions for UIM coverage than for liability coverage (and this is a debatable point in light of the statute's use of the word "limits" and the New Hampshire Supreme Court's holdings in Swain v. Employers Mutual Casualty Company, 150 N.H. 574, 580 (2004)),[5]

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[5]Swain was decided under an earlier version of the statute. Like the present version of the statute, the earlier version required auto policies with the statutory minimum coverage to provide UIM coverage in the same "*amounts and limits.*" RSA 264:15 (2004). However, auto policies that provided higher optional liability coverage were only required to offer UIM coverage in an equal "*amount.*" Id. In Swain, the court held that this difference in language allowed for "optional" policies with different exclusions for liability and UIM coverage. In other words, under Swain the scope of "optional" liability coverage could be broader than the scope of "optional" UIM coverage. See also, Gisonni v. State Farm Mutual Auto Insurance Company, 141 N.H. 518, 521(1996). The Legislature amended the statute in 2015 (after the accident in this case) to require carriers to provide "optional" UIM coverage in the same "amounts and limits" as "optional" liability coverage. 2015 N.H. Laws 237:1; See, House Record, March 6, 2015 at p. 393 (committee report noting that the amendment:

> address[es] an issue created when the NH Supreme Court delivered its 2004 opinion in Swain. The opinion states that the liability limits and the uninsured motorist limits only have to be *equal in scope of coverage* when an insured selects minimum coverage limits when purchasing a policy. But if an insured selects coverage above the minimum limits then the liability limits and the uninsured motorist limits have to be *equal in dollar amounts. HB 479 clarifies that equality in scope of coverage and dollar amounts applies whether the insured elects minimum limits or higher limits.*

(emphasis added)).

The statutory language relating to umbrella and excess policies was added in 1991 and always used the word "limits," and the phrase "limits of liability" rather than "amount." Therefore, even prior to the 2015 amendment that "overruled" Swain, the statute arguably required parity in scope of coverage between excess liability and excess UIM coverage. It is true that this reading of the pre-2015 version of the statute (i.e. the version in existence at the time of the accident), would lead to the odd situation in which excess liability policies were required to provide excess UIM coverage equal in scope and amount to the excess liability coverage while carriers could write "optional" policies that did not offer the same parity in scope of coverage. However, the alternative reading of the statute would lead to the equally odd situation in which (a) the

Continued on next page

one would expect that a carrier intending to avoid parity would spell this out expressly in the policy.

For these reasons, the court finds that the "precondition of coverage" language in the endorsement does not supersede and replace Section III, Item 7 of the policy form and must, therefore, be read in conjunction with the policy form language.

C. The Policy Is, At The Least, Ambiguous As To The Consequences For Maintaining Less Than The Required Amount Of Primary UIM Coverage

As a general principle, when different provisions of the same insurance policies conflict, the inconsistency must be read in the insured's favor. Kelly v. Prudential Property & Casualty Insurance Company, 147 N.H. 642, 643 (2002) ("When an ambiguity arises from conflicting provisions of a policy, we resolve the inconsistency in favor of the insured."). Thus, the court must resolve any tension between the "precondition of coverage" language in the UIM endorsement and Section III, Item 7 of the policy form in the insured's favor.

In determining whether an ambiguity exists this court is guided, to some extent at least, by the Connecticut Supreme Court's opinion in Israel v. State Farm Mutual Auto Insurance Company, 789 A.2d 974, 977 (Conn 2002). The Israel case arose from nearly identical facts as this case. In Israel, as in this

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word "limits" would have two directly contrary meanings in the same paragraph and (b) the post-2015 version of the statute would then treat excess policies differently than "optional" policies, seemingly in the of contrary Legislative intent.

However, the court need not resolve this statutory question because it instead finds that the policy language itself is ambiguous and, therefore, must be read in the insured's favor.

case, the court considered an umbrella policy that consisted of a policy form establishing personal excess liability coverage and a separate addendum that establishing excess UIM coverage. As in this case, the policy form contained language that simultaneously (a) required the insured to maintain a certain amount of primary insurance coverage and (b) provided that excess coverage would still exist if this condition were violated:

> We may not provide coverage if you refuse to . . . maintain your underlying insurance. All insurance listed in the Declarations must be maintained at all times. The limits listed in the Declarations are the minimum you must maintain. *If the required underlying limits are not maintained, you will be responsible for the underlying limit amount of any loss. . .*"

Israel, 789 A.2d at 976 (emphasis in Israel but not in the policy itself). As in this case, the UIM addendum contained language that required the insured to maintain the required amount of primary coverage as a condition of excess coverage:

> You must maintain underlying limits for uninsured motorist motor vehicle coverage equal to the limits listed in the Declarations. *If these underlying limits are not maintained, this coverage will not apply.*

Id. (emphasis in Israel, but not in the policy itself).

As in this case, the insured in Israel failed to maintain the required amount of UIM insurance at the time he was injured in a collision with an underinsured driver. As in this case, the insured argued that he was nonetheless entitled excess UIM coverage to the extent his damages exceeded the amount of primary insurance he was required to maintain. As in this case, the carrier argued its insured's failure to maintain the required amount of primary UIM coverage relieved the carrier of all obligations.

The Connecticut Supreme Court had no difficulty in finding that the umbrella policy was ambiguous with respect to the consequence of failing to maintain the required amount of primary UIM coverage:

> The "Your Duties to Us" provision of the umbrella booklet and the "Coverage U" [UIM] section of the uninsured addendum provide the defendants with inconsistent remedies for the plaintiff's failure to maintain the requisite underlying insurance on his automobile. The first provision indicates that in the event of an insured's failure to maintain underlying coverage, the insured will be responsible for any loss up to the amount of the required underlying coverage before the umbrella coverage takes effect. The latter provision provides that the insured forfeits umbrella coverage completely if he or she does not maintain the requisite underlying coverage.
>
> The language of the policy does not resolve this conflict in any manner that is comprehensible to a lay insured. It simply is unclear from the language of the policy whether the provision of the umbrella booklet or the section of the uninsured addendum is controlling in the event of an insured's failure to maintain the necessary underlying coverage. Thus, it is not possible to give effect to both of these provisions in a manner that resolves the ambiguity created by the policy language. Leaving a layperson to sort out the ambiguities and misleading inconsistencies in the present policy is precisely the problem that the rules of insurance policy construction were designed to avoid. We therefore conclude that the conflict between the language in the "Your Duties to Us" provision of the umbrella booklet and the language in the "Coverage U" [UIM] section of the uninsured addendum renders the policy ambiguous.

Israel, 789 A.2d at 977-978 (internal citation, quotation marks and bracketing omitted). The Connecticut Supreme Court resolved the ambiguity in the insured's favor and found that the insured was entitled to excess UIM coverage under the policy. Id.

This court finds the reasoning of the Connecticut Supreme Court in Israel to be largely persuasive.[6] Accordingly, the court concludes that (a) the MetLife policy provides excess UIM coverage to Santos for the collision, and (b) MetLife is only liable to Santos to the extent and in the amount that MetLife would have been liable if Santos had primary UIM coverage for the collision with policy limits of $100,000/$300,000.

October 24, 2017

Andrew R. Schulman,
Presiding Justice

[6]In Israel, the Connecticut Supreme Court relied on the fact that the UIM coverage was established via an "addendum" rather than an "endorsement." This allowed the court to side step the cannon of construction that generally favors language in an endorsement over contradictory language in the underlying policy form. This court cannot similarly side step the issue. In this case the document establishing UIM coverage is captioned as an endorsement. However, this court finds the Connecticut Supreme Court's distinction between "addendums" and "endorsements" to be unhelpful in determining the intent of the parties. Regardless of the caption, the document establishing UIM coverage is (a) an add-on to the policy form and (b) part of the parties' contract. For the reasons discussed above, this court has given thoughtful consideration to the cannon of construction favoring endorsement language, but concluded that the wooden application of this cannon to this case would subvert, rather than enforce the intent of the parties.

Revised Statutes Annotated of the State of New Hampshire
Title XXI. Motor Vehicles (Ch. 259 to 269) (Refs & Annos)
Chapter 264. Accidents and Financial Responsibility (Refs & Annos)
Motor Vehicles (Refs & Annos)

Effective: September 11, 2015

N.H. Rev. Stat. § 264:15

264:15 Uninsured or Hit-and-Run Motor Vehicle Coverage.

Currentness

I. Except as provided in paragraph I-a, no policy shall be issued under the provisions of RSA 264:14, with respect to a vehicle registered or principally garaged in this state, unless coverage is provided therein or supplemental thereto at least in amounts and limits prescribed for bodily injury or death for a liability policy under this chapter, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or drivers of uninsured motor vehicles, and hit-and-run vehicles because of bodily injury, sickness, or disease, including death resulting therefrom. When an insured elects to purchase liability insurance in an amount greater than the minimum coverage required by RSA 259:61, the insured's uninsured motorist coverage shall automatically be equal in amounts and limits to the liability coverage elected. For the purposes of this paragraph umbrella or excess policies that provide excess limits to policies described in RSA 259:61 shall also provide uninsured motorist coverage equal to the limits of liability purchased, unless the named insured rejects such coverage in writing. Rejection of such coverage by a named insured shall constitute a rejection of coverage by all insureds, shall apply to all vehicles then or thereafter eligible to be covered under the policy, and shall remain effective upon policy amendment or renewal, unless the named insured requests such coverage in writing.

I-a. No commercial motor vehicle liability policy issued under the provisions of RSA 264:14 shall be required to provide coverage for motor vehicles that are not owned by the policyholder for the protection of persons insured thereunder who are legally entitled to recover damages from owners or drivers of uninsured motor vehicles, and hit-and-run vehicles because of bodily injury, sickness, or disease, including death resulting therefrom.

II. In the event of insolvency on the part of the liability insurer which prevents such insurer from paying the legal liability of its insured within the limits of the coverage provided, if no other insurance applies, uninsured motorist coverage shall provide for no less than $25,000 coverage for injury to or destruction of property in any one accident.

III. An insurer's extension of coverage, as provided in paragraph II, shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motor vehicle coverage is in effect and where the liability insurer of the tort-feasor has been declared to be insolvent by a court of competent jurisdiction as of the accident date, or has been declared to be insolvent by a court of competent jurisdiction within 3 years after the accident date. Nothing herein contained shall be

construed to prevent any insurer from extending coverage under terms and conditions more favorable to its insureds than is provided hereunder.

IV. In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer; provided, however, with respect to payments made by reason of the extension of coverage described in paragraphs II and III, the insurer making such payment shall not be entitled to any right of recovery against such tort-feasor in excess of the proceeds recovered from the assets of the insolvent insurer of said tort-feasor.

V. Every document tendered to settle a claim for bodily injury which may be the subject of coverage under this section shall prominently contain the following language, which shall be read and signed by the releasing party or parties:

WARNING

"IF YOU SIGN THIS RELEASE YOU MAY FORFEIT YOUR RIGHT TO UNINSURED MOTORIST INSURANCE BENEFITS FROM YOUR OWN AUTOMOBILE INSURANCE POLICY. CONSULT WITH YOUR INSURANCE AGENT, YOUR AUTOMOBILE INSURANCE COMPANY, OR YOUR ATTORNEY BEFORE SIGNING."

I certify that I have read the above warning and fully understand it.

_____

Signature

Notes of Decisions containing your search terms (0) View all 82

[N.H. Rev. Stat. § **264:15**, NH ST § **264:15**

Updated with laws current through Chapter 4 of the 2018 Reg. Sess., not including changes and corrections made by the State of New Hampshire, Office of Legislative Services

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