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INSURANCE LAW

I. Elements of an Effective Offer of Underinsured Motorist Coverage Determined

In 1978 the South Carolina General Assembly enacted section 56-9-831 of the South Carolina Code[1] requiring automobile insurance carriers to offer underinsured motorist coverage to its insureds. *State Farm Mutual Automobile Insurance Co. v. Wannamaker*[2] is the first South Carolina case to determine what constitutes an effective offer within the meaning of this section. By adopting the four-prong test formulated by the Minnesota Supreme Court in *Hastings v. United Pacific Insurance Co.*,[3] the supreme court placed South Carolina in line with the only other two states that have addressed this issue.[4] The court held that defendant State Farm Mutual Insurance Co. (State Farm) did not make a meaningful offer by sending plaintiff Wannamaker a renewal notice accompanied by a booklet describing underinsured motorist coverage. The court, by operation of law, provided Wannamaker with underinsured motorist coverage.

On August 19, 1984, Wannamaker, a South Carolina resident, received by mail from State Farm a renewal notice for his automobile liability policies and a stuffer booklet detailing underinsured motorist coverage. Wannamaker did not read the booklet, nor was he informed about underinsured motorist coverage when he went to his agent's office to renew his policies. Subsequently, Wannamaker's minor daughter was killed in an

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1. S.C. Code Ann. § 56-9-831 (Law. Co-op. Supp. 1986). This section was amended by 1987 S.C. Acts 155 and has been recodified at S.C. Code Ann. § 38-77-160 (Law. Co-op. Supp. 1987), effective June 4, 1987. The amended section merely deletes one sentence that states, "Coverage on any other vehicles may not be added to that coverage." Therefore, the new amendment will not affect the holding of this survey case.

2. 291 S.C. 518, 354 S.E.2d 555 (1987). The court also addressed the issue of whether an insured may stack underinsured motorist coverage when neither of the insured's vehicles is involved in the accident. Pursuant to S.C. Code Ann. § 56-9-831 (Law. Co-op. Supp. 1986), the court held that no stacking was allowed. *Id.* at 522, 354 S.E.2d at 557.

3. 318 N.W.2d 849 (Minn. 1982).

4. *Id.* at 849-53; Tucker v. Country Mut. Ins. Co., 125 Ill. App. 3d 329, 465 N.E.2d 956 (1984).

automobile accident that did not involve Wannamaker's insured vehicles. The driver responsible for the daughter's death did not have adequate insurance to compensate Wannamaker for his loss.[5]

The supreme court, in accord with *Garris v. Cincinnati Insurance Co.*,[6] held that section 56-9-831 places the burden of offering underinsured motorist coverage upon the insurer, reasoning that "the statute mandates the insured to be provided with adequate information, and in such a manner, as to allow the insured to make an intelligent decision of whether to accept or reject the coverage."[7] The court adopted the four-part test formulated in *Hastings*[8] as a reasonable standard by which to determine if the insurer has met its statutory burden.[9]

The supreme court found that State Farm did not make a verbal offer to Wannamaker when he renewed his policies at his agent's office. The court then quoted from the Minnesota Supreme Court decision of *Kuchenmeister v. Illinois Farmers Insurance Co.*,[10] which held that a vague message concerning underinsured motorist coverage printed on the bottom of a premium notice was not a meaningful offer.[11] The court concluded from this line of reasoning that State Farm did not make a meaningful offer, and therefore, the court provided underinsured motorist coverage by operation of law.

The first requirement of the *Hastings* test mandates that an "insurer's notification process must be commercially reasonable, whether oral or in writing."[12] Courts have recognized the mail as a commercially reasonable means of notification.[13] In fact, the

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5. Record at 7-8.

6. Garris v. Cincinnati Ins. Co., 280 S.C. 149, 311 S.E.2d 723 (1984).

7. 291 S.C. at 521, 354 S.E.2d at 556.

8. 318 N.W.2d 849 (Minn. 1982).

9. 291 S.C. at 521, 354 S.E.2d at 556. The South Carolina Supreme Court adopted the *Hastings* test as requiring that: "(1) the insurer's notification process must be commercially reasonable, whether oral or in writing; (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms; (3) the insurer must intelligently advise the insured of the nature of the optional coverage; and (4) the insured must be told that optional coverages are available for an additional premium." *Id.*

10. 310 N.W.2d 86 (Minn. 1981). The applicable Minnesota statute required the insurer to offer underinsured motorist coverage to its insured.

11. *Id.* at 88.

12. 291 S.C. at 521, 354 S.E.2d at 556.

13. *See* Tucker v. Country Mut. Ins. Co., 125 Ill. App. 3d 329, 465 N.E.2d 956

insured may not actually have received the notification as long as the method used is deemed commercially reasonable.[14] Moreover, personal notification by the insurer may not be required.[15] In the instant case, State Farm notified Wannamaker by mail, which seemingly is a commercially reasonable method. The first requirement apparently was satisfied.

According to the second requirement, "[T]he insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms."[16] This requirement may be satisfied by a statement advising the insured that underinsured motorist coverage is available for limits equal to the insured's bodily injury limits.[17] Although this requirement does not mandate "that all offers be given in numerical form to be satisfactory,"[18] the State Farm booklet did numerically indicate the available limits of underinsured motorist coverage. Clearly, State Farm met or exceeded the demands of the second requirement.

As in *Hastings*, the critical concern in the instant case was whether the booklet satisfied the third requirement. This third factor requires that the insurer "intelligibly advise the insured of the nature of the optional coverage."[19] Prior to concluding that the booklet was not a meaningful offer, the supreme court cited *Kuchenmeister*,[20] in which the Minnesota Supreme Court held that the following language failed to satisfy the third requirement: "Did you know that you may now have underinsured motorist and/or uninsured motorist coverage in amounts up to your bodily injury limits? If interested, contact your agent."[21] The State Farm booklet describes the policy limits of underinsured motorist coverage and explains the reasons for obtaining

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(1984); Squier v. Milwaukee Mut. Ins. Co., 356 N.W.2d 832 (Minn. Ct. App. 1984).

14. *See* Orolin v. Hartford Accident & Indem. Co., 585 F. Supp. 97, 100 (N.D. Ill. 1984). The applicable Illinois statute also required the insurer to offer its insured underinsured motorist coverage. *See also* Jacobson v. Illinois Farmers Ins. Co., 264 N.W.2d 804, 807-08 (Minn. 1978) (Minnesota statute required only that the insurer make underinsured motorist coverage *available*).

15. *Squier*, 356 N.W.2d at 835.

16. 291 S.C. at 521, 354 S.E.2d at 556.

17. *See* Henrickson v. Illinois Farmers Ins. Co., 364 N.W.2d 896, 899 (Minn. Ct. App. 1985); *See also Orolin*, 585 F. Supp. at 101-02.

18. Erickson *ex rel.* Erickson v. Allstate Ins. Co., 370 N.W.2d 427, 430 (Minn. Ct. App. 1985).

19. 291 S.C. at 521, 354 S.E.2d at 556.

20. 310 N.W.2d 86 (Minn. 1981).

21. *Id.* at 88.

such coverage. The booklet certainly provides more information than the *Kuchenmeister* notice. Because of the factual dissimilarity between the instant notice and the *Kuchenmeister* notice, the reasoning behind the court's decision seems inappropriate. The language contained within the State Farm booklet certainly seemed to "intelligibly advise the insured" of his options.

There may have been a doubt, however, as to the adequacy of the booklet's headline. The trial court had emphasized that the booklet was "lamely entitled 'Important Information About Coverages U and W.'" "This headline," continued the trial court, "obviously did not attract the attention of Wannamaker, for it is stipulated he did not read the stuffer."[22] The trial court then concluded that because the stuffer was not "calculated" to attract Wannamaker's attention, State Farm failed to fulfill its statutory burden.[23] By constrast, in an analogous case, an insert heading in bold print that was entitled "Important Information About Your Uninsured Motorist Limits" was held to satisfy the statutory burden.[24]

The conclusory nature of the court's decision makes difficult the determination of several questions relevant to this issue. It is unclear, for example, whether the court failed to find a meaningful offer because of the booklet's vague heading or because the booklet's language may have been too vague and confusing. Another unanswered question is whether there can ever be an effective offer if the insured is illiterate or so ignorant as to be unable to understand even the simplest written notice. Assuming the insured is literate and the notice is sufficiently descriptive, the decision does not address whether the insured has an affirmative duty to read. Provided the statutory requirement of an offer of underinsured coverage remains in effect, future litigation is inevitable on these issues.

The final requirement as formulated by the supreme court mandates that "the insured must be told that optional coverages are available for an additional premium."[25] State Farm clearly

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22. Record at 22.

23. *Id.* at 23.

24. Erickson *ex rel.* Erickson v. Allstate Ins. Co., 370 N.W.2d 427, 431 (Minn. Ct. App. 1985). The court applied the *Hastings* test to uninsured motorist coverage. The court also emphasized that the bold heading on the notice was followed by a straightforward description of uninsured motorist coverage.

25. 291 S.C. at 521, 354 S.E.2d at 556. The *Hastings* court, by contrast, stated that

satisfied this requirement. The State Farm booklet "contained a table which set forth the semi-annual premium for each available level of Underinsured Motorist Coverage up to $100,000/$300,000."[26]

Apparently, the *Wannamaker* court held that the State Farm booklet did not constitute meaningful offer because the booklet did not adequately advise the insured of his options. As a result, the court provided Wannamaker underinsured motorist coverage by operation of law. The court's holding may be interpreted to indicate that unless an insurer's notification is clearly written and designed to attract the insured's attention, the insurer will fail to satisfy its statutory obligation. Such a subjective standard by its very nature creates uncertainty. Until this confusion is resolved, insurers would be well advised to notify its insureds personally and carefully document such notification.[27] Uncertainty will persist until the supreme court upholds a written notification, thereby providing a model for insurers to follow.

G. Scott Lutz

II. INSURER MUST SHOW CAUSAL CONNECTION BETWEEN A LOSS AND AN EXCLUSION TO LIMIT COVERAGE OF POLICY

South Carolina Insurance Guaranty Association v. Broach[28] is the South Carolina Supreme Court's most recent and most definitive statement on insurance policy exclusions. South Carolina insurers should be aware of the decision since it firmly rejects the majority rule[29] by holding that an insurer must show a causal connection between a loss and an exclusion before the exclusion will limit coverage under the policy.

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the insured must be informed that underinsured motorist coverages "are available for a relatively modest increase in premiums." 318 N.W.2d at 853. The South Carolina Supreme Court thus apparently sought to avoid litigation concerning the question of whether a particular premium was "relatively modest."

26. Brief of Appellant at 10.

27. Personal notification is recommended as the safest method despite decisions stating that personal notification is not required. *See, e.g.*, Orolin v. Hartford Accident & Indem. Co., 585 F. Supp. 97, 100 (N.D. Ill. 1984); Squier v. Milwaukee Mut. Ins. Co., 356 N.W.2d 832, 835 (Minn. Ct. App. 1984). In *Wannamaker* the court specifically stated that had State Farm orally notified the insured, its statutory burden would have been satisfied. 291 S.C. at 521, 354 S.E.2d at 556.

28. 291 S.C. 349, 353 S.E.2d 450 (1987).

29. *See* cases cited *infra* note 31.

Appellee Broach's aircraft was lost at sea while being flown by a licensed student pilot. The student pilot, however, had not obtained approval from his instructor prior to takeoff, contrary to the provisions of the exclusionary clause of the aircraft insurance policy.[30] Hence, the appellant insurer denied coverage. The United States District Court, holding that the insurer had failed to show a causal connection between the exclusion and the loss, found in favor of Broach. On appeal the Fourth Circuit Court of Appeals certified to the South Carolina Supreme Court the question of the necessity of a causal connection.

The court, in a brief but unwavering opinion, expressly rejected the majority rule exemplified in *Di Santo v. Enstrom Helicopter Corp.*[31] that an insurance exclusion remains effective despite the lack of a causal relationship between the provision and the loss. Instead, the court embraced what it called the "modern trend," which it claimed developed from a line of South Carolina cases ruling that liability cannot be avoided unless the loss is actually a result of some or all of the exclusionary provisions in automobile and life insurance policies.[32] In 1977 the rule was applied in an aircraft insurance case, *South Carolina Insurance Co. v. Collins.*[33] The rationale was that "when the parties made

30. This policy does not apply . . . to any occurrence or to any loss or damage occurring while the aircraft is operated in flight by other than the pilot or pilots set forth under Item 7 of the Declarations." Item 7 of the Declarations stated, "Only the following pilot or pilots holding valid and effective pilot and medical certificates with ratings as required by the Federal Aviation Administration for the flight involved will operate the aircraft in flight: See Endorsement #2." Endorsement #2 stated, in the relevant part, that a student pilot must be under the direct supervision of a properly qualified FAA certified flight instructor who must specifically approve each flight of the student prior to takeoff. 291 S.C. at 350, 353 S.E.2d at 450-51.

31. 489 F. Supp. 1352 (E.D. Pa. 1980). *Di Santo* cited other holdings supporting the majority view: Hollywood Flying Serv., Inc. v. Compass Ins. Co., 597 F.2d 507 (5th Cir. 1979); Arnold v. Globe Indem. Co., 416 F.2d 119 (6th Cir. 1969); Bruce v. Lumbermens Mut. Casualty Co., 222 F.2d 642 (4th Cir. 1955); Aetna Casualty & Sur. Co. v. Urner, 264 Md. 660, 287 A.2d 764 (1972); Macalco, Inc. v. Gulf Ins. Co., 550 S.W.2d 883 (Mo. Ct. App. 1977); Omaha Sky Divers Parachute Club, Inc. v. Ranger Ins. Co., 189 Neb. 610, 204 N.W.2d 162 (1973). 489 F. Supp. at 1364-65.

32. *See* Johnson v. South State Ins. Co., 287 S.C. 259, 341 S.E.2d 793 (1986); Outlaw v. Calhoun Life Ins. Co., 238 S.C. 199, 119 S.E.2d 685 (1961); Young v. Life & Casualty Ins. Co. of Tenn., 204 S.C. 386, 29 S.E.2d 482 (1944); Smith v. Sovereign Camp Woodmen of the World, 204 S.C. 193, 28 S.E.2d 808 (1944); Bailey v. United States Fidelity & Guar. Co., 185 S.C. 169, 193 S.E. 638 (1937); McGee v. Globe Indem. Co., 173 S.C. 380, 175 S.E. 849 (1934).

33. 269 S.C. 282, 237 S.E.2d 358 (1977).

the contract of insurance, they were not inserting a mere arbitrary provision, but that it was the purpose of the insurance company to relieve itself of liability from accidents caused by the excluded condition."[34]

The reasoning seems valid on the surface, but the opinion does not stand up to closer scrutiny. The "modern trend" embraced so readily by the court is not modern at all. It is based almost entirely on automobile and life insurance cases from the 1930s and 1940s. Furthermore, the jurisdictions following this so-called trend are few,[35] and there is no indication that the statistics are changing.

There may be a strong public policy argument for allowing the recovery of benefits in some cases, such as when the policy exclusion is based on laws or circumstances that the insured could not reasonably be expected to understand or foresee.[36] This policy argument, however, should not apply to aircraft cases because the insured easily can control access to the aircraft and thereby ensure that policy provisions are met.

In *Collins*[37] the court justified itself by deciding that the purpose of an exclusionary clause is to prevent accidents arising from the precluded circumstances. The court assumed that, otherwise, the exclusion would be arbitrary. This assumption is unsound. The insurer is justified in its desire to limit its liability to situations that are reasonably foreseeable; these limitations will be reflected in the premium paid. In this sense, then, the exclusions are not arbitrary but are the result of objective calculation. Therefore, a ruling against an exclusion that is clear and unambiguous would result in a judicial rewriting of the contract. This approach ignores factors such as risk-spreading, predictability, and the cost of litigation over the causation question.[38]

At the federal level, the Fourth Circuit Court of Appeals has sided with the insurer on this issue. In *Bruce v. Lumberman's Mutual Casualty Co.*[39] the United States District Court held, and the Fourth Circuit affirmed,[40] that the insurer need not

34. *Id.* at 291, 237 S.E.2d at 361-62.
35. Di Santo v. Enstrom Helicopter Corp., 489 F. Supp. 1352. (E.D. Pa. 1980).
36. *E.g.*, Reynolds v. Life & Casualty Ins. Co., 166 S.C. 214, 164 S.E. 602 (1932).
37. 269 S.C. 282, 237 S.E.2d 358 (1977).
38. *Di Santo*, 489 F. Supp. at 1365.
39. 127 F. Supp. 124 (E.D.N.C. 1954).
40. 222 F.2d 642 (4th Cir. 1955).

show a causal connection between a breach of an exclusion and an accident so long as the insurance contract does not contravene public policy and the terms of the policy are plain and unambiguous. This same result was reached by a variety of state courts.[41]

The South Carolina Supreme Court, however, deemed unpersuasive the overwhelming number of cases opposing its view. "Only their number, and not their reasoning, lends support to a reversal here."[42] Yet the majority's reasoning appears more logical than that of the South Carolina court. An insurance policy is a contract. It is made at arm's length by parties each offering some form of consideration. Each party is free to bargain for what it wants to include as terms of the contract. When a term is clearly understandable and legally sound, the court's duty is to construe the term as it is incorporated into the contract, not to interpret it to avoid hardship to a party. If a party or a court finds the practice of using aircraft insurance policy exclusions repugnant, its proper forum for challenging their propriety is the South Carolina Legislature. Therefore, the court's holding, that the insurer needs to show a causal connection between the exclusion and Broach's loss, resulted in a blatant rewriting of a plain and unambiguous term in the insurance contract.

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41. *See, e.g.*, National Union Fire Ins. Co. of Pittsburg v. Estate of Meyer, 192 Cal App. 3d 866, 237 Cal. Rptr. 632 (1987); Security Mut. Casualty Co. v. O'Brien, 99 N.M. 638, 662 P.2d 639 (1983); Bellefonte Underwriters Ins. Co. v. Alfa Aviation, Inc., 61 N.C. App. 544, 300 S.E.2d 877 (1983); Ochs v. Avemco Ins. Co., 54 Or. App. 768, 636 P.2d 421 (1981).

42. South Carolina Ins. Co. v. Collins, 269 S.C. 282, 292, 237 S.E.2d 358, 362 (1977).