IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2006-CA-01852

POTOMAC INSURANCE COMPANY
OF ILLINOIS — DEFENDANT/APPELLANT

VS.

MARY GALE ADAMS, INDIVIDUALLY AND ON
BEHALF OF HER MINOR CHILDREN
MARY CATHERINE ADAMS
AND ANDREW EDWARDS ADAMS — PLAINTIFF/APPELLEE

APPEAL FROM THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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SUMMARY OF REPLY ARGUMENT

The clear mandate of the Texas standard UM/UIM endorsement form TE 04 09 D indicates the vehicles and the persons to which UM/UIM is applicable under the policy. UM/UIM benefits only apply to vehicles owned or leased by the named insureds. Written rejection of limited exceptions to UM/UIM coverage is not required.

ARGUMENT

I. TEXAS LAW IS APPLICABLE

The UM/UIM statutes in Texas and Mississippi differ, as do the courts' interpretations of them. For this reason, there is a conflict of law, and the choice of law issue must be addressed. As discussed in Appellant Potomac Insurance Company of Illinois' ("Potomac") initial brief, the "center of gravity" is unquestionably in Texas and therefore, Texas law governs the substantive issues in this case.

II. THE UM/UIM ENDORSEMENT LANGUAGE IS UNAMBIGUOUS

The UM/UIM endorsement clearly indicates what type of automobile would be covered and who is to be afforded coverage. The UM/UIM endorsement clearly defines all terms. It is difficult to imagine a more clear and distinct way of setting forth policy provisions. The endorsement is unambiguous and should be enforced as written.

When language of the policy is unambiguous, evidence outside the policy cannot be considered in interpreting the policy. Ms. Adams' brief began with the statement that Ms. Adams' employer advised her to reject liability and collision insurance when she rented automobiles on business trips because her employer was "[a]cting on its belief that the insurance coverage provided to it by Potomac Insurance Company of Illinois. . . covered its employees when they

rented automobiles in the course and scope of their employment." Brief of Appellee at p. 2. The "beliefs" of an employee of Ms. Adams' employer are parol evidence which cannot be considered in interpreting an unambiguous policy.[1] *Natl. Union Fire Ins. Co. of Pittsburg v. CBI Industries, Inc.*, 907 S.W.2d 517 (Texas 1995).

Actually, employees of Careington were covered by the subject policy in certain situations. The policy clearly provides collision damage to the rental car in the physical damage portion of the policy. Further, the policy provides liability coverage to a third party arising out of the operation of the rental car by an employee of Careington. However, the policy does not cover employees injured in rental cars in a UM/UIM situation.

What Ms. Adams does not tell the Court is that as a part of her employment agreement with Careington, Ms. Adams received a car allowance. (Supp. C. P. Vol. 1:28-29). The car allowance was a $450.00 per month payment to all traveling personnel of Careington to cover insurance (including uninsured motorist coverage), depreciation and wear and tear on their automobile. (C. P. Vol. 5: 611-14, C. P. Supp. Vol. 1: 91). Ms. Adams and all traveling personnel were required by Careington to provide proof of automobile insurance. Ms. Adams has received compensation from workers' compensation, from Mr. Yarbrough's automobile insurance carrier, and from her own personal automobile insurance carrier. The only coverage Ms. Adams is seeking from Potomac is underinsured motorist, the terms of which are clearly set forth in the endorsement.

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[1] In her brief Ms. Adams also refers to a memorandum from Ms. Burke to all traveling personnel. Ms. Adams attempts to make the argument that a memorandum from Melissa Burke somehow is in contradiction with Potomac's interpretation of the policy. This memorandum was written in November of 1997, more than 5 months after Ms. Adams' accident.

Where there is no ambiguity, the courts enforce the language of the contract, rather than considering the subjective thoughts and interpretations of the parties, which are irrelevant. The **belief** of a Careington employee as to Careington's coverage under Potomoc's policy cannot be considered as evidence in the face of the clear contract language which contradicts the employer's expectations.

The terms of the endorsement unambiguously preclude UIM coverage for an accident involving an employee not named as an insured in a rental vehicle.

III. MS. ADAMS IS NOT AN "INSURED" AS DEFINED BY THE "WHO IS AN INSURED" PROVISION OF THE UM/UIM ENDORSEMENT

The "Who is An Insured" provision is found on page two of the endorsement as paragraph C. This provision provides an insured is:

> 1. You and any **designated person** and any **family member** of either.
>
> 2. Any other person **occupying** a **covered auto**.
>
> 3. Any person or organization for damages that person or organization is entitled to recover because of bodily injury sustained by a person described in 1. or 2. above.

In reviewing no.1, "You" refers to the named insured in the policy. Ms. Adams was not named as an insured. She is also not "any designated person," as there were no designated persons listed on the schedule of the endorsement. Finally, she is obviously not a family member of the insured. Therefore, she does not qualify for UM/UIM as an insured under No. 1.

With regard to No. 2, Ms. Adams was not occupying a "covered auto." On Page 3 of the endorsement, Item F, ADDITIONAL INFORMATION, it is stated that "the following are added as to the DEFINITIONS Section and have special meanings for UM/UIM insurance:

> A. **"Covered Auto"** means an **auto:**
>
> a. owned or leased by you or
>
> b. while temporarily used as substitute for an owned **covered auto** that has been withdrawn from normal use because of its breakdown, repair, servicing, **loss** or destruction.

(Emphasis added).

Part a. states owned or leased by "you." According to the policy:

> Throughout this policy the word "you" and "your" refer to the Named Insured shown in the Declarations.

(R.E. Tab. 6; C.P. Vol. 5: 672) (Emphasis added).

It is undisputed that the "Named Insured" is American Dental Benefits Group and affiliated companies as shown on the Named Insured endorsement. (R. E. Tab 6, C.P. Vol. 5: 625-27). The term "named insured" is a term of art referring to the insured listed on the Declarations page. *Old Amr. Country Mut. Fire Ins. Co. v. Sanchez*, 14 S. W. 3d 111 (Tex. 2002). Moreover, in her brief, Ms. Adams does not argue she was a "named insured." A "covered auto" must be an auto owned or leased by the named insured. Ms. Adams is not the named insured and therefore any auto owned or leased by her would not be a covered auto.

Ms. Adams makes the argument that if "named insured" did not include employees it "would mean that the insurance sold to Careington would mean absolutely nothing." Brief of Appellee at p. 17. This argument was clearly rejected in *Grain Dealers Mutual Ins. v. McKee, Burling v. Employers Mutual Cas. Co.*, and *Truck Ins. Exchange v. Chalfant*.

The decisive case on this appeal is *Grain Dealers Mutual Ins. Co. v. McKee,* 943 S.W.2d 455 (Tex. 1997). As in the case *sub judice*, the UIM endorsement in *Grain Dealers* contained the

exact same language as to "who is an insured." The sole shareholder of the corporation in *Grain Dealers* sought UM/UIM coverage for his daughter that occurred in a non-owned vehicle. The corporation, as in the instant case, did not name any "designated persons" in the space provided in the UM/UIM endorsement and did not list any automobiles to be covered. The Texas Supreme Court held that the daughter did not qualify as "you" or a "designated person" under the UM/UIM endorsement.

McKee argued that the "family member" language would be rendered a nullity if the Texas Supreme Court did not interpret the policy to cover family members. The Court held:

> Unlike a unique contract tailor-made to the interests peculiar to each party, the UM/UIM and PIP endorsements are standard forms crafted to accommodate a wide variety of insurance needs. Elections made by th the insured may invoke or render inert various provisions of insurance policy endorsements. For example, Future Investments could have named a designated person in the UM/UIM endorsement, which would have created coverage for the designee as well as the designee's family members. The corporation's failure to designate such a person rendered the policy language regarding a "designated person" and the person's "family" inapplicable in this instance, <u>but does not nullify the endorsements or create an ambiguity</u>.

Id. at 458-59 (footnote omitted)(emphasis added).

The illusory coverage argument is based on a faulty premise, namely that any interpretation of the UIM provision which did not provide coverage in this case would render it meaningless. To the contrary, a construction of the policy which excludes coverage for an employee while driving a rental vehicle would still provide substantial UIM coverage for the premium it paid. For instance, had Ms. Adams been driving a vehicle listed on the Auto Schedules as "owned" or one that was a "temporary substitute," she would have been covered under the terms of the policy.

The court in *Grain Dealers* went on to hold that its interpretation "merely restricts coverage to those who are insured." *Id.*

Ms. Adams' only attempt at distinguishing *Grain Dealers* is in a footnote where she argues that because she was an employee of the named insured, *Grain Dealers* does not apply. However, in *Burling v. Employers Mutual Casualty Co.*, 2005 Tex. App. LEXIS 372 (Jan. 19, 2005), the court held that *Grain Dealers* was applicable even where the claimant was an employee of the insured corporation. The Court's reasoning was that the employer could have named the employee as a "designated person" in the UIM endorsement, which would have created coverage for the employee. *Id.* at *6.

In *Truck Ins. Exchange v. Chalfant*, 192 S. W. 3d 813 (Tex. App. Ct. 2006), the president of an insured corporation argued, as Ms. Adams does herein, that "as a matter of law the liability insurance for both specifically described autos and non-owned autos is equally applicable for uninsured/underinsurance coverage." The president, Chalfant, was utilizing his personal vehicle in the course and scope of his employment at the time of the accident. The trial court found the president of the company was entitled to UIM coverage. The appellate court, however, held Chalfant could not recover because he did not meet the definition of an insured.

Chalfant argued that the policy should be interpreted to provide "UM/UIM coverage of the same autos that are covered by liability insurance - - 'both owned and identified vehicles as well as rental and non-owned vehicle, i.e. vehicles owned by the insured's employees.'" *Id.* at 818. The Court disagreed. It held that the fact that liability coverage would apply to certain non-owned autos "is no indication that UM/UIM coverage would be provided to the occupants of such non-owned autos." (emphasis added). *Id.*

In *Chalfant*, the Texas Court of Appeals affirmed that insurance companies are permitted to limit the scope of coverage by designating who are insureds. In her brief, Ms. Adams does not mention or distinguish the *Chalfant* case.

It is absolutely inaccurate that UIM coverage is applicable without qualification as to whom the coverage applies. The endorsement at issue here clearly indicates which type of automobile would be covered and who is to be afforded coverage in the event of a UIM situation.

IV. EXCLUSIONARY CLAUSES IN UM/UIM ENDORSEMENTS ARE VALID

Texas courts have uniformly held that exclusionary clauses in UM/UIM endorsements are valid. In *Texas Farmers Ins. Co. v. McKinnon* 823 S.W.2d 345 (Tex. App. Ct. 1991), plaintiff sought UM/UIM coverage for injuries which occurred while she was occupying a vehicle owned by her but not scheduled for coverage by the defendant. The Texas Appeals Court held that the exclusionary clause was not "an invalid denial of coverage as required by Article 5.06-1 of the Insurance Code." *Id* at 347. The court reversed the trial court's judgment of underinsured motorist benefits.

As Ms. Adams does in this case, the Plaintiff in *McKinnon* relied on *Stracener v. U. S. Auto Ass'n.*, 777 S.W.2d 378 (Tex. 1989). The *McKinnon* court held: "We do not believe Stracener to be on point with the exclusion issue." 823 S.W.2d at 347. And in *Conlin v. State Farm Mutual Auto Ins. Co.*, 828 S.W.2d 332 (Tex. App. Ct. 1992), the Court ruled that the insurer and insured can agree that only certain vehicles will be covered.

Ms. Adams relies on *Bilbrey v. American Automobile Ins. Co.*, 495 S.W.2d 375 (Tex. App. Ct. 1973). However, Ms. Adams failed to note that in *Bilbrey* the court stated: "he is entitled to collect under the endorsement unless the exclusions and conditions of the policy abridge

this provision." *Id* at 376. Unlike the policy in *Bilbrey,* which did not contain exclusions in the UIM endorsement, the instant policy DOES contain exclusions in the UIM endorsement.

Ms. Adams has not cited one legal authority for her proposition that it is contrary to public policy under all circumstances for insurers to limit UIM coverage. No court in Texas has ruled that the type of exclusion in the UIM policy issued to Careington by Potomac is against public policy or in contradiction of the state insurance laws. Ms. Adams' position would require global UIM coverage in every policy regardless of what the insured and insurer bargained for in the contract.

V. WRITTEN REJECTION IS NOT REQUIRED

It is illogical for Ms. Adams to argue that a written UM/UIM rejection was required in this case because Ms. Adams' employer selected rather than rejected UM/UIM coverage. The reason that there is no UM/UIM coverage for Ms. Adams is because the type of UM/UIM coverage bargained for and received by Ms. Adams' employer did not cover Ms. Adams or the vehicle she was riding in on the day of the subject accident.

CONCLUSION

While it is unfortunate that Ms. Adams was involved in this accident, this does not justify holding Potomac liable for an obligation it never contracted to assume. For the reasons stated herein, Potomac Insurance Company respectfully requests the lower court's grant of summary judgment to Ms. Adams be reversed and summary judgment be rendered to Potomac Insurance Company on Ms. Adams' claim for underinsured motorist coverage.

Respectfully submitted,

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CERTIFICATE

I, Brenda Bethany, of counsel for Potomac Insurance Company of Illinois, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing pleading to:

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THIS, the 14 day of March, 2008.

BRENDA B. BETHANY

C84-102897:rlj