SUPREME COURT OF KENTUCKY

File No. 2014-SC-000357-D
(2013-CA-001275)

ENCOMPASS INDEMNITY COMPANY — APPELLANT

vs.

RICHARD TRYON — APPELLEE

Appeal from Jefferson Circuit Court, Division 4
Civil Action No. 12-CI-04231
Hon. Charles L. Cunningham, Jr., Judge, Presiding

REPLY BRIEF FOR APPELLANT, ENCOMPASS INDEMNITY COMPANY

Submitted by:

WILLIAM B. ORBERSON
PATRICIA C. LE MEUR
JAMES C. WADE
PHILLIPS PARKER ORBERSON & ARNETT, PLC
716 West Main Street, Suite 300
Louisville, Kentucky 40202
Telephone: (502) 583-9900
COUNSEL FOR APPELLANT,
ENCOMPASS INDEMNITY COMPANY

It is hereby certified that copies of the within brief were served by mail this 9th day of July, 2015 upon: A. Thomas Johnson, Esq., 304 West Liberty Street, Louisville, KY 40202, Counsel for Appellee, Richard Tryon; Robert E. Stopher, Esq. and Robert D. Bobrow, Boehl Stopher & Graves, LLP, 400 West Market Street, Louisville, KY 40202, Counsel for Appellee, Philadelphia Indemnity Insurance Company; Hon. Charles L. Cunningham, Jr., Judge, Jefferson Circuit Court, Division 4, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, Trial Judge; and Samuel Givens, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601.

Patricia Le Meur

William B. Orberson
Patricia C. Le Meur
James C. Wade

STATEMENT OF POINTS AND AUTHORITIES

May It Please the Court:

I. The owned or available for regular use limitation on UIM coverage in the Encompass policy is admittedly unambiguous.

Encompass' UIM insuring agreement does not provide coverage to Tryon while occupying an owned vehicle that is not insured under the policy, and the UIM exclusions preclude coverage for injuries arising from his use of an owned or regularly available vehicle not insured under the policy. *See* Encompass Policy Underinsured Motorists Coverage, attached as Exhibit 2 to Appellant's brief. This unambiguous limitation precludes UIM coverage from Encompass for Tryon's accident while using his own motorcycle that was not insured under the Encompass policy.

Indeed, Appellee candidly admits that Encompass' UIM policy limitation is clear on its face. *See* Appellee's Brief at p.8. He does not argue that the policy is subject to multiple, inconsistent interpretations, but rather, he asserts that the plain language is contrary to case law and public policy. In short, there is no ambiguity in the policy language itself, and therefore, the doctrine of reasonable expectations is not triggered. *See Motorist Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 450 (Ky.1999); *Hendrix v. Fireman's Fund Ins. Co.*, 823 S.W.2d 937, 938 (Ky.App.1991). The only issue is whether the admittedly clear policy provision complies with applicable Kentucky law.

II. Appellees' arguments against enforcing Encompass' plain policy language on grounds that it does not specifically mention "motorcycles" are nothing more than a red herring.

The plain language of Encompass' UIM policy precludes coverage for any and all non-listed vehicles owned by Tryon or available for his regular use. This includes, but is not

limited to, his motorcycle on which he had the underlying accident. Case law interpreting and enforcing motorcycle exclusions is relevant here because it demonstrates the known high risk associated with motorcycle use as well as the consistent enforcement of UIM coverage limitations with respect to them. However, this unambiguous limitation would be similarly enforceable if Tryon were claiming UIM benefits for his injuries sustained while using an owned but not covered motor vehicle of any other type.

As this Court instructed in *Hodgkiss-Warrick*, an important public policy consideration underlying enforcement of the owned or regularly available limitation on UIM coverage is to shield insurers from exposure to substantial risks that they did not know of and for which they were paid no premium. *See State Farm Mut. Ins. Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875, 885-86 (Ky.2013). Thus, the justification for this limitation is to protect carriers from unknown and unknowable risk associated with owned but not covered vehicles, which otherwise would unfairly increase their exposure while the insureds deliberately choose not to pay for coverage. There is no question that motorcycles pose an even more substantial risk of injury, and thereby exposure, than do other enclosed vehicles. "It is common knowledge that motorcycle riders, as a class, are among the highest risk groups conceivable." *See Preferred Risk Mut. Ins. Co. v. Oliver*, 551 S.W.2d 574, 577 (Ky.1977). Subsequent Courts have cited to *Oliver* as they consistently took notice of the significantly increased risk associated with motorcycle use as compared to other vehicle types. *See Baxter v. Safeco Ins. Co. of America*, 46 S.W. 3d 577, 579 (Ky.App.2001); *Larkin v. United States Auto. Assn.*, 2011 WL 6260361 (Ky.App.); *Motorists Mut. Ins. Co. v. Hartley*, 2010-CA-00202-MR.

Inclusion of an owned or regularly available limitation on UIM coverage, as in the Encompass policy, is an appropriate and enforceable means of shielding against substantial unknown risk for which no premium is paid, whether the owned but not covered vehicle is a motorcycle or other motor vehicle. *See Hodgkiss-Warrick*, 413 S.W.3d at 885-86. As a corollary, insurance costs and premiums will be kept down, thus satisfying the MRVA's purpose of "guaranteeing the continued availability of affordable motor vehicle insurance." *Id.* at 881. Appellee spent some time musing about the evidentiary basis of the Court's statement in *Hartley* that failure to enforce the applicable UIM exclusion for Hartley's owned but not covered motorcycle "would ultimately raise premiums on all consumers to reflect the increased risk." *Hartley*, 2010-CA-00202 at p.11. This is not an open question, as demonstrated by the legislative decision to make otherwise mandatory coverages optional for motorcycle insurance and the judicial recognition of the unfair exposure associated with requiring insurers to provide coverage for unassessed risks they did not underwrite. *See* KRS §304.39-040; *Id.*, *Oliver*, 551 S.W.2d at 577; *Baxter*, 46 S.W.3d at 579. In fact, this Court has specifically noted that the use of owned or regularly available limitations on UIM coverage is a mechanism for containing insurance costs. *See Hodgkiss-Warrick*, 413 S.W.3d at 887.

III. The reasonable limitation contained in Encompass' UIM policy is enforceable with respect to Tryon's use of his owned and regularly available motorcycle.

Kentucky courts have consistently held that exclusions of owned or regularly available vehicles from UM and optional UIM coverages, such as that found in Encompass'

policy, are consistent with Kentucky public policy.[1] *See State Farm Mut. Ins. Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875 (Ky.2013); *Burton v. Kentucky Farm Bur. Mut. Ins. Co.*, 326 S.W.3d 474 (Ky.App.2004); *Murphy v. Kentucky Farm Bur. Mut. Ins. Co.*, 116 S.W.3d 500 (Ky.App.2002); *Baxter v. Safeco Ins. Co. of America*, 46 S.W.3d 577 (Ky.App.2001); *Motorist Mut. Ins. Co. v. Glass*, 996 S.W.2d 437 (Ky.1999); *Windham v. Cunningham*, 902 S.W.2d 838 (Ky.App.1995); *Pridham v. State Farm Mut. Ins. Co.*, 903 S.W.2d 909 (Ky.App.1995); *State Farm Mut. Ins. Co. v. Christian*, 555 S.W.2d 571 (Ky.1977); *Larkin v. United Services Auto. Assn.*, 2011 WL 6260361 (Ky.App.); *Arguelles v. Nationwide Investment Servs. Corp.*, 2012-CA-00495; *Motorists Mut. Ins. Co. v. Hartley*, 2010-CA-00202-MR; *Encompass Indem. Co. v. Halfhill*, 2013 WL 6800682 (W.D.Ky.2013).

These owned or available for regular use limitations on UIM coverage have been enforced by Kentucky courts for years, and, despite amending KRS §304.39-320 in 1988, 1990, and 1998, the legislature has taken no action to supercede or abrogate those decisions.

"It is a generally recognized rule of statutory construction that

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[1] Courts throughout this country have rejected arguments that owned or regular use exclusions are unenforceable in UIM or UM policies. *Hall v. Patriot Mut. Ins. Co.*, 942 A.2d 663 (Me.2007); *Progressive Paloverde Ins. v. Arnold*, 16 N.E.3d 993 (In.App.2014); *Government Employees Ins. Co. v. Bertran*, 120 A.D.3d 684 (N.Y.Sup.2014); *Government Employees Ins. Co. v. Comer*, 18 A.3d 830 (Md.App.2011); *USAA Cas. Ins. Co. v. Cook*, 84 A.D.3d 825 (N.Y.Sup.2011); *Erie Ins. Exchange v. Baker*, 972 A.2d 507 (Pa.2009); *Eichelman v. Nationwide Ins. Co.*, 711 A.2d 1006 (Pa.1998); *Nationwide Mut. Ins. Co. v. Viti*, 850 A.2d 104 (R.I.2004); *Bush v. Shelter Mut. Ins. Co.*, 412 S.W.3d 336(Mo.App.2013; *Williams v. GEICO Government Employees Ins. Co.*, 32 A.2d 1195 (Pa.2011); *De Smet Ins. Co. of South Dakota v. Pourier*, 802 N.W.2d 447 (S.D.2011); *Bonin v. Verret*, 15 So.3d 1236 (La.App.2009); *Van Ert v. State Farm Mut. Ins. Co.*, 758 N.W.2d 36 (Neb.2008); *Lager v. Miller-Gonzalez*, 896 N.E.2d 666 (Oh.2008).

> when a statute has been construed by a court of last resort and the statute is substantially reenacted, the Legislature may be regarded as adopting such construction." *Commonwealth v. Trousdale,* 297 Ky. 724, 181 S.W.2d 254, 256 (1944). Further, "the failure of the legislature to change a known judicial interpretation of a statute [is] extremely persuasive evidence of the true legislative intent. There is a strong implication that the legislature agrees with a prior court interpretation when it does not amend the statute interpreted." *Rye v. Weasel,* Ky., 934 S.W.2d 257, 262 (1996).

Hughes v. Com., 87 S.W.3d 850, 855-56 (Ky. 2002); *see also Hodgkiss-Warrick*, 413 S.W.3d at 882. Indeed, Appellee's *Amicus* ignores the legislative imprimatur on the line of cases culminating in the *Hodgkiss-Warrick* decision. Likewise, Tryon ignores it and effectively argues that the entire line of decisions from *Pridham* to *Hodgkiss-Warrick* must be overruled.

Encompass, on the other hand, has not and does not seek to overturn decades of case law. This is not a "stacking" case, and the *Chaffin v. Kentucky Farm Bur. Ins. Co.*, 789 S.W.2d 754 (Ky.1990), line of cases is simply inapplicable. It is not necessary to overrule those cases in order to enforce the reasonable coverage limitations in the Encompass UIM policy.

Unlike the policies in *Chaffin*, *Hamilton v. Allstate Ins. Co.*, 789 S.W.2d 751 (Ky.1990), and *Allstate Ins. Co. v. Dicke*, 862 S.W.2d 327 (Ky.1993), Encompass' policy does not eliminate an item of coverage that Tryon purchased or otherwise provide illusory coverage. By the plain language of Encompass' policy, UIM coverage for Tryon's use of his motorcycle, an owned vehicle regularly available for his use, was never provided. Thus, stacking is simply not an issue.

Moreover, Encompass' admittedly unambiguous coverage limitation for owned or

regularly available vehicles comports with public policy. Tryon's arguments to the contrary are specious. *See Hodgkiss-Warrick*, 413 S.W.3d at 884. While the MVRA does mandate certain levels of liability insurance coverage, it "evinces no similar policy mandating UIM coverage. It requires only that UIM coverage be made available and allows its availability to be made subject to reasonable terms and conditions." *Id.* Specifically, the UIM statute provides that UIM coverage shall be made available to insureds, upon request and "subject to terms and conditions not inconsistent with this section," for uncompensated damages the insured "may recover on account of injury due to a motor vehicle accident." KRS §304.39-320. Appellees' arguments notwithstanding, the statutory limitation of underinsured motorist coverage to damages arising from a motor vehicle accident does not obviate the "legislative recognition that the limits and terms of the statute's general outline of required coverage would of necessity be specifically defined by 'reasonable terms and conditions' in the policies of the various insurance carriers." *Oliver*, 551 S.W.2d at 577. A reasonable limitation on UIM coverage, such as the owned or available for regular use limitation here, is specifically permitted by statute and does not eliminate the personal and portable nature of UIM coverage. *See* KRS §304.39-320; *Baxter*, 46 S.W.3d at 578-79.

Beyond cavil, it is reasonable that the insured, who has the most control over the amount of coverage purchased, not to be permitted to expose insurers to risks that they never knew existed and had no opportunity to assess or underwrite. "Regardless of the potential for such incentives [potentially inducing purchase of less liability coverage on one vehicle in reliance on UIM coverage on another vehicle], the exclusion also addresses the fact that without it an insurer is apt to be exposed to substantial risks of which it was not apprised and

for which it was paid no premium." *Hodgkiss-Warrick*, 413 S.W.3d at 885-86. Like Hodgkiss-Warrick, Tryon had no control over the amount of liability insurance available on the tortfeasor's vehicle. However, he had full control of the amount of UIM coverage he elected to purchase for his use of his motorcycle. *See Baxter*, 46 S.W.3d at 579 ("The insured has the greatest degree of control over the amount of insurance he obtains."). Tryon elected to purchase the limits of $25,000/$50,000 in UIM coverage on his motorcycle through his policy with Nationwide, even though he decided to purchase $100,000/$300,000 in UIM coverage on the Lexus he insured with Encompass. There is no basis in statute or case law to allow him to shift the consequences of his deliberate decisions surrounding his purchases of UIM coverage to Encompass, which in clear terms did not provide UIM coverage for Tryon's use of his other owned or regularly available vehicles.

Further, Tryon's attempt to distinguish *Hodgkiss-Warrick* on grounds that the decision applied only to a resident relative's use of a regularly available vehicle also fails. The detailed public policy analysis contained in that opinion applies with equal force to the Encompass UIM provisions. Appellee's attempts to distinguish the facts fall flat. This Court relied on a number of prior decisions, the facts of which all differed. *See Hodgkiss-Warrick*, 413 S.W.3d at 882. Determining that the reasonableness of the limitation must be assessed as a general matter rather than based on an insured's particular circumstances, the Court stated

> Although the Pennsylvania case law, as does ours, presents a variety of factual scenarios, it includes cases, in which one household vehicle, the vehicle the insured occupied when *injured*, was excluded from UIM coverage under the policy insuring another household vehicle, and the exclusion was

upheld.

Id. at 866. Here, the vehicle in which Tryon was injured was excluded from UIM coverage under the Encompass policy insuring another household vehicle, his Lexus, and the exclusion should be upheld.

IV. The *Marley* and *Dupin* decisions do not mandate the outcome sought by Tryon.

Tryon's reliance on the decisions in *State Farm Mut. Auto. Ins. Co. v. Marley*, 151 S.W.3d 33 (Ky.2004), and *Dupin v. American States Ins. Co.*, 17 S.W.3d 538 (Ky.App.2000) is simply misplaced. The *Marley* case dealt with the applicability of an exclusion in a personal liability umbrella policy as it applied to the insured's automobile liability coverage. *See Marley*, 151 S.W.3d at 34. That Court concluded that enforcing the exclusion would have violated the mandatory liability provisions of the MVRA. *Id.* at 36. This Court in *Hodgkiss-Warrick* limited the reach of the *Marley* decision by holding that it speaks solely to liability coverage:

> In sum, *Marley* speaks solely to liability insurance applicable to motor vehicle accidents and its statement of Kentucky public policy must be read accordingly and not as some overarching pronouncement applicable to any and all optional, non-liability coverages such as the underinsured motorist coverage at issue here.

Hodgkiss-Warrick, 413 S.W.3d at 884-85. AS the Court stated, *Marley* is inapplicable to non-liability coverages, such as the UIM coverage at issue here.

Dupin is similarly distinguishable, as the determination of whether an owned or regularly available UIM limitation was enforceable turned on the definition of "motor vehicle." *Dupin*, 17 S.W.3d at p.540.The vehicle at issue in that case was a farm tractor,

which is specifically excluded from various statutory definitions of "motor vehicle." *Id.* at p. 541. The *Dupin* Court noted that if the claimant had been operating a "motor vehicle" he owned but did not have UIM coverage for, he would have no coverage under the policy. However, the Court found that the claimant was not occupying a "motor vehicle" while operating his tractor, and therefore the exclusion did not apply. *Id.* at 541-542; *see also Halfhill*, 2013 WL 6800682 (W.D.Ky.) (Enforcing an owned or available for regular use exclusion identical to the one in this case). If anything, *Dupin* actually supports Encompass' position that its UIM limitation is enforceable pursuant to Kentucky public policy.

V. Appellees' assertion that Encompass' policy language agreeing to comply with Kentucky law precludes enforcement of the UIM provisions is another red herring.

Encompass' policy is in complete accord with Kentucky law. Neither the statement that Encompass will comply with Kentucky law nor the choice of law provision has any relevance to the determination of this case. Encompass would have to comply with Kentucky law regardless of whether its policy contains those statements. Appellees' assertion that their presence in the policy somehow precludes enforcement of the UIM provisions rings hollow. That such an argument would even be made is a tacit admission of the weakness of Appellees' position.

VI. The reasonable limitation contained in Encompass' UIM policy is enforceable now, as a matter of existing law.

Encompass' UIM policy, including its limitation with respect to non-covered vehicles owned by Tryon or available for his regular use, is enforceable pursuant to existing statute, case law, and public policy. Further, as discussed above, enforcement of this insurance

contract does not require a departure from or invalidation of the *Chaffin* line of cases. In the absence of any *stare decisis* issues , there is simply no basis for holding that the owned or regularly available limitation on UIM coverage is not enforceable in this case. Thus, Appellees' argument that the limitation should be enforced only prospectively is without merit. Accordingly, the admittedly unambiguous Encompass UIM policy provisions should be enforced as written and with respect to Tryon.

VII. Conclusion

After all the briefing has been completed, there is no question that, in accordance with long-standing Kentucky statutory and case law, Encompass' admittedly clear and unambiguous policy terms must be enforced as written. Tryon is not entitled to UIM benefits from Encompass for injuries arising from his use of his owned and regularly available motorcycle. Appellees have put up smoke screens and diversions in an attempt to misdirect this Court. Appellees have not, however, demonstrated any legal basis for voiding controlling policy language or ignoring governing Kentucky law. Respectfully, Encompass Indemnity Company requests that this Court reverse the Court of Appeals decision and reinstate the Trial Court Order granting summary judgment in its favor.

Respectfully submitted,

William B. Orberson
Patricia C. Le Meur
James C. Wade
PHILLIPS PARKER ORBERSON & ARNETT, PLC
716 West Main Street, Suite 300
Louisville, Kentucky 40202
Telephone: (502) 583-9900
Facsimile: (502) 587-1927
Counsel for Appellee, Encompass Indemnity Company