**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF PENNSYLVANIA**

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| **THE STANDARD FIRE INSURANCE COMPANY,** | : | |
| **Plaintiff** | : | **CIVIL ACTION NO. 3:02-1372** |
| | : | **(MANNION, M.J.)** |
| **v.** | : | |
| **GERARD GRIESBAUM,** | : | |
| **Defendant** | : | |

## MEMORANDUM AND ORDER

## I. Procedural History and Background

Before the court are cross-motions for summary judgment filed by the parties in the above-captioned case. The defendant, Gerard Griesbaum, filed a motion for summary judgment on February 14, 2003. (Doc. No. 12). Additionally, he filed a brief in support that same day (Doc. No. 13), as well as a statement of material facts (Doc. No. 14) and exhibits (Doc. No. 16). The plaintiff, Standard Fire Insurance, filed its motion for summary judgment on February 18, 2003 (Doc. No. 17), together with a brief in support (Doc. No. 18) and a statement of material facts (Doc. No. 19).

On March 7, 2003, the defendant filed his brief in opposition to the plaintiff's motion for summary judgment (Doc. No. 20) and a response to the plaintiff's statement of facts (Doc. No. 21). Similarly, on March 12, 2003, the

plaintiff filed its brief in opposition to the defendant's motion for summary judgment (Doc. No. 22), a response to the defendant's statement of material facts (Doc. No. 23) and exhibits (Doc. No. 24). On April 28, 2003, oral argument on the cross-motions for summary judgment was held at which time both counsel forcefully presented arguments in support of their respective positions.

Most of the facts in the case are not in serious dispute. As set forth in the complaint (Doc. No. 1), this controversy arises under the provisions of a policy of automobile insurance issued by the Standard Fire Insurance Co. (hereinafter "Standard Fire") to the defendant Gerard Griesbaum under Policy No. 0313789811012. The policy in question covered a period from March 15, 2001 to September 15, 2001. (Doc. No. 1, Exh. A). During the pendency of the coverage, on August 14, 2001, Mr. Griesbaum was involved in a serious automobile accident on Route 61 North, near Pottsville, Schuykill County. (Doc. No. 1, p. 2; Doc. No. 13, p. 2). As a result of the serious injuries incurred during the accident, Mr. Griesbaum was life-flighted from the accident scene to St. Luke's Trauma Center in Bethlehem, Pennsylvania where he remained hospitalized for over ten (10) days. (Doc. No. 13, p. 2). In the crash, Mr. Griesbaum sustained "a broken and crushed right ankle, a fractured right pelvis, a broken left ankle, a broken left femur, and multiple rib fractures." (Id. at p. 3). Following the crash, Mr. Griesbaum, who had previously been employed as a pharmaceutical sales representative for

Aventis Pharmaceuticals, was confined to bed. Up until the time of the motions for summary judgment, it is alleged that Mr. Griesbaum was still unable to return to work. (Id. at 2-3).

At the time of the accident, Standard Fire provided coverage for three automobiles owned by Mr. Griesbaum. (Doc. No. 1, Exh. A). That policy, called for uninsured and underinsured liability limits of $100,000.00 per person for bodily injury and $300,000.00 per accident. Notably, the policy indicates that underinsured motorist coverage is "non-stacked". (Id.).

The driver of the other vehicle was insured by the Progressive Insurance Company who paid the policy limits of $100,000.00 to Mr. Griesbaum for his injuries. (Doc. No. 18, p. 4). Because it was determined that Mr. Griesbaum's injuries were in excess of the liability limits of the Progressive policy, Mr. Griesbaum made a claim against his own Standard Fire policy for underinsured benefits. Following a review by Standard Fire, they tendered the $100,000.00 allege to be the underinsured liability limits of his policy. (Doc. No. 18, p. 4; Doc. No. 13, p. 4).

Additional facts that are not reasonably in dispute are that Standard Fire initiated a correspondence to Mr. Griesbaum sometime in 1995 titled "Pennsylvania Rejection of Underinsured Motorist Protection." (Doc. No. 1, Exh. A). This document is the main controversy in this case. The upper portion of this one page document is titled "Rejection of Underinsured Motorist Protection". The lower part is titled "Rejection of Stacked Underinsured

Coverage Limits". Both sections have a location for a signature of the named insured and a place for a date. At the bottom, left, of the document, the named insureds are identified as Gerard and Sandra Griesbaum, their policy number and their current policy period, which at that time, was September 15, 1994 to March 15, 1995. [1] The rejection of stacked underinsured coverage limits form is signed by Gerard Griesbaum and dated February 16, 1995.

While Mr. Griesbaum does not have a recollection of signing the form, significantly, he does not contest that the signature and the date on the form were placed their by him. (Doc. No. 28, pp. 10, 12, 24, and 34; Doc. No. 16, Exh. A, ¶ 19; Doc. No. 24, Exh. B, pp. 18-20). During his deposition, the defendant testified as follows concerning his recollection of specific conversations with any insurance agent or company concerning "stacked" or "unstacked" coverage:

> A: ". . .I can't say with all certainty that I've never had a conversation. That's too broad. . . I cannot say specifically that I had any kind of conversation with anybody. Did I have generally, might have. . .Yeah, may have." (Id. , pp. 22-23).

It also appears undisputed that Mr. Griesbaum did not affirmatively request Standard Fire to send him the "Rejection of Stacked Underinsured

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[1]The above referenced form has the name "Aetna" on it. It appears that Standard Fire was a wholly owned subsidiary of Aetna at that time. Sometime later, the Traveler's Property and Casualty Insurance Co. purchased Aetna and assumed Standard Fire. This acquisition, or change in ownership, has no legal effect upon the issues before the court.

Coverage Limits" form that is in question in this case. In other words, he did not affirmatively write or call his agent nor the insurance company requesting that Form No. 19167-A[2] be sent to him. (Doc. No. 13, p. 4; Doc. No. 28, p. 5). If Mr. Griesbaum had initiated such a request, a change order form would be prepared and generated. Standard Fire's review of the record and policy does not indicate that a change order form was requested by Mr. Griesbaum. (Doc. No. 16, Exh. C, p. 36).

On the contrary, it appears that there is no real dispute that Standard Fire initiated the contact with Mr. Griesbaum by mailing him the "rejection of stacked underinsured coverage limits" form in early 1995. Standard Fire did this because its parent company Aetna had determined that the present forms in use might be inadequate under applicable Pennsylvania Law. More specifically, an Aetna memorandum dated January 12, 1995 states, in part,

> Recent Pennsylvania litigation involving Uninsured Motorist (UM) and Underinsured Motorist (UIM) coverages provided a catalyst for us to review our procedures regarding the entire process for rejecting and selecting the various Pennsylvania coverages, limits, and options. Based on this review, we have decided to modify all of the forms used in this process. We have also determined that it would be prudent to obtain new signed rejection forms for those who have rejected UM and/or UIM in total, and/or rejected the Stacked UM and/or Stacked UIM via Option Selection form 17084. This form has been in use since 5/1/91. Approximately 20,000 or 18% of the policies in force are effected.

(Doc. No. 26, Exh. A).

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[2]Aetna's Pennsylvania rejection of underinsured motorist protection form in 1995.

As a result of this notification from Aetna, "mass mailings" were sent to insureds who had previously rejected stacked UM and/or UIM coverage in order to have new forms signed that complied with present Pennsylvania law. "The new rejection forms were accompanied by a cover letter and a self-addressed stamped envelope explaining the rejection forms and requested response within thirty (30) days." (Doc. No. 26, ¶9). The new rejection form complying with Pennsylvania law was mailed at Standard Fires' instance to Mr. Griesbaum. Mr. Griesbaum signed, dated and returned the rejection form to Standard Fire on or about February 16, 1995. (Doc. No. 1, Exh. A; Doc. No. 26, ¶12, and Exh. D).

Finally, defendant argues that even if all of the above facts are correct, that the copy of the rejection of stacked underinsured coverage limits submitted in the course of this litigation by the plaintiffs has a diagonal line through it. It appears from the xeroxed copies that this line was made with a pen or pencil. As such, the defendant states in paragraph 18 of his affidavit:

> 18. I have reviewed the rejection/waiver of stacked underinsured benefits form produced by Standard Fire Insurance Company/Aetna in his case dated February 16, 1995. While my signature does appear on that form, I believe the line through the form represents an abrogation, that is, I believe the line was drawn through the form to indicate that I did not want to reject or waive stacked benefits. (emphasis added)(Doc. No. 16, Exh. A, ¶ 19).

The plaintiff on the other hand argues that the diagonal line is merely a "processing mark" used to signify that the change at some point was entered

into their computer. In an affidavit submitted by John Barlow, the plaintiff identified this as Aetna's "Standard Practice" at the time in question. (Doc. No. 26, ¶¶ 15-19).

**II. Summary Judgment Standard**

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

The Supreme Court has stated that:

> ". . . [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof."

Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

The moving party bears the initial responsibility of stating the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. Id. The moving party can

discharge that burden by "showing . . . that there is an absence of evidence to support the nonmoving party's case." Id. at 325.

Issues of fact are genuine "only if a reasonably jury, considering the evidence presented, could find for the nonmoving party." Childers v. Joseph, 842 F.2d 689, 693-94 (3d Cir. 1988)(citations omitted). Material facts are those which will effect the outcome of the trial under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court may not weigh the evidence or make credibility determinations. Boyle v. County of Allegheny, 139 F.3d 386, 393 (3d Cir. 1998). In determining whether an issue of material fact exists, the court must consider all evidence and inferences drawn therefrom in the light most favorable to the nonmoving party. Id. at 393.

If the moving party meets his initial burden, the opposing party must do more than raise some metaphysical doubt as to material facts, but must show sufficient evidence to support a jury verdict in its favor. Id.

**III Discussion**

Title 28 U.S.C. § 2201 (Declaratory Judgments) states in pertinent part:

> (A) In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

This declaratory judgment action is based upon diversity jurisdiction as noted by Standard Fire in its complaint. (Doc. No. 1). More particularly, it is alleged in the complaint that Standard Fire is a corporation organized or existing under the laws of the state of Connecticut and that the defendant Gerard Griesbaum is an individual and resident of the Commonwealth of Pennsylvania. (Doc. No. 1, ¶¶ 1-2). Additionally, the allegations in the complaint indicate that this diversity jurisdiction is pursuant to 28 U.S.C. § 1332 and the amount in controversy, is believed to be in excess of $75,000.00. (Doc. No. 1, ¶ 4). As such, in this diversity action state law governs. Erie Railroad Co. v. Thompkins, 304 U.S. 64 (1938). In the instant case, Pennsylvania state law is applicable.

Title 75 Pa.C.S. § 1738 governs stacking of uninsured and underinsured benefits available to motor vehicle operators; it provides for the waiver of such coverage; and additionally supplies the proper language for the forms necessary to waive that coverage. See § 1738(a)-(e). The benefit of a "stacked" policy is that it allows an insured to add together the liability limits from each covered vehicle included on the declaration page. The endorsement page on the Griesbaums' policy shows the name of both insureds, Gerard and Sandra Griesbaum, identifies three (3) vehicles, a 1991 Chevrolet S-10 Blazer, a 1996 Toyota Avalon XL, and a 1996 Honda Accord LX. Had Mr. Griesbaum not waived stacked coverage, his liability limits would be increased from the $100,000.00 coverage for each accident to

$300,000.00, as he could have "stacked" the $100,000.00 coverage on each vehicle. In giving up stacked coverage, an insured essentially gambles that the benefit from his decrease in premiums will outweigh the risk of the need to use that additional insurance coverage at some point in the future.

A review of the pleadings, depositions, and affidavits show that there is no real dispute as to the following material facts:

1. Gerard Griesbaum is the first named insured on Standard Fire Policy No. 0313789811012; (See Rupert v. Liberty Mutual Ins. Co., 566 Pa. 387 (2001));
2. Standard Fire sent a rejection of stacked underinsured coverage limits to all its insureds who did not have stacked coverage, as a result of a concern about (then) recent litigation in Pennsylvania concerning the wording of their rejection form;
3. Form 19166-A supplied by Standard Fire (Aetna) containing the rejection of stacked underinsured coverage limits complied with the Pennsylvania state law concerning the requirements for a proper rejection including the appropriate language, the signature of the first named insured, and a dated document;
4. Mr. Griesbaum never affirmatively requested Standard Fire (Aetna) send him a Pennsylvania Rejection of Underinsured Motorist Protection form in 1995;
5. Mr. Griesbaum does not have a clear recollection of receiving,

signing or returning the rejection of stacked underinsured coverage limits form;

6. Nonetheless, Mr. Griesbaum admits that the February 16, 1995 rejection of stacked underinsured coverage limits form was signed by him and dated by him, both in his handwriting;

7. The signed form was returned to Standard Fire;

8. Standard Fire complied with the rejection of stacked underinsured coverage limits signed by Mr. Griesbaum on February 16, 1995 when it issued his next renewal on March 15, 1995;

9. The defendant's policy declaration sheet contained language indicating that underinsured motorist (bodily injury), was "non-stacked coverage";

10. Each policy from 1995 through the date of the accident also included a specific endorsement declaring underinsured motorist (bodily injury) was non-stacked coverage;

11. Standard Fire continued to offer a reduced premium as a result of Mr. Griesbaum's rejection of stacked underinsured coverage through the date of the accident;

12. Mr. Griesbaum received the benefit of a reduction in his insurance rate as a result of his selection of the non-stacked coverage;

13. As a result of a waiver of stacked underinsurance coverage, Standard Fire's liability would be limited to $100,000.00 for each

accident pursuant to Policy Section 4(d)(9) and endorsement A37042, in effect between March 15, 2001 and September 15, 2001;

14. Mr. Griesbaum was severely injured in the accident of August 14, 2001.

The above facts, without more, would be sufficient to find a valid waiver of stacked coverage by Mr. Griesbaum under Pennsylvania law.

The remaining argument, however, offered by the defendant as an issue of material fact is whether or not the diagonal line drawn through the rejection form is indicative of some rejection on behalf of Mr. Griesbaum of the non-stacked coverage. In this regard, the defendant argues that, at the very least, this diagonal line through the page noted above causes some "ambiguity" as to the intent of Mr. Griesbaum. The defendant is correct that traditional principles of insurance policy interpretation control the inquiry into coverage. The policy language must be tested by what a reasonable person in the position of the insured would have understood the words to mean. Imperial Casualty and Indemnity Co. v. High Concrete Structures, Inc., 858 F.2d 128, 131 (3d Cir. 1988). Ambiguous language must be construed to provide coverage. Id. Nevertheless, a court should be careful not to create a ambiguity and likewise it should avoid rewriting the policy language in such a way that it conflicts with the plain meaning of the language. Id.

"A provision of the contract of insurance is ambiguous if reasonably

intelligent persons, considering it in the context of the whole policy, would differ regarding its meaning." Carey v. Employee Mutual Casualty Co., 189 F.3d 414, 420 (3d Cir. 1999)(citing State Farm Mutual Auto Insurance Co. v. Moore, 375 Pa.Super. 470, 475-476 (1988)). While the diagonal line is probably not "policy language", the court believes that the above cases discussing ambiguity in an insurance contract are analogous and provide significant insight into the necessary approach.

As counsel for the defendant emphasized at oral argument, the court must look at the "totality of the circumstances". (Doc. No. 28, p. 12). When reviewing the "totality of the circumstances", it is clear that the defendant has offered no proof, by deposition, affidavit or otherwise, to identify who, or under what circumstances, the diagonal line had been drawn across the rejection of stacked underinsured coverage limits form, signed by him. To the contrary, the best the defendant can aver is merely a guess that he "believe(s)" the processing line reflects a striking or rejection of his request to waive stacked underinsured coverage. Unfortunately, Mr. Griesbaum has not and apparently cannot state how, when or who placed the diagonal mark on the rejection form. What is certain is that Mr. Griesbaum did not place the mark on the paper himself for purposes of indicating his rejection of what appears to be an otherwise valid and appropriate rejection of stacked coverage. (Doc. No. 24, Exh. B, pp. 18-19).

As the Third Circuit has often noted, a court must be careful not to

create an ambiguity or rewrite the policy language in such a way that it conflicts with the plain meaning of the language. Lucker Manufacturing v. Home Insurance Co., 23 F.3d 808, 814 (3d Cir. 1994)(citing Imperial Casualty and Indemnity Co., supra. 858 F.2d at 131).

It is also noteworthy that the non-stacked coverage continued over six years from 1995 up until the date of the accident, August 14, 2001. During this time, Mr. Griesbaum paid reduced premiums for non-stacked underinsured benefits. However, under "Pennsylvania law (it) is clear that the payment of lower premiums for non-stacked benefits should not, in and of itself , operate as a waiver of stacked uninsured benefits." (Emphasis added)(Doc. No. 28, p. 12)(Citing Breuninger v. Pennland Insurance Co., 450 Pa.Super. 149 (1996)).

In contrast to the defendants complete lack of knowledge as to the origin or meaning of the diagonal line drawn through the rejection forms[3], the plaintiff has submitted an uncontroverted affidavit from John H. Barlow. (Doc. No. 26). In that affidavit, Mr. Barlow, an underwriter for Aetna, Travelers' and Standard Fire during the years in question, states that "For decades, it was Aetna's standard practice that once it processed coverage selection forms (like in the ones in question here) and entered that information from the forms

[3]The defendant also apparently signed and dated a "rejection of stacked uninsured coverage limits" form the same day and in the same manner (See Doc. No. 1, Exh. A). However, that is not at issue in this proceeding.

into Aetna's computer system, the processor would draw a line through the form to indicate the form was ready to be filmed onto microfiche and stored." (Id. at ¶ 15). Further, Mr. Barlow testified that "Aetna's practice of putting a line through a coverage selection form once it was processed continued to be used by Aetna personnel that had been Travelers' employees after Travelers bought out Aetna." (Id. at ¶ 16). Finally, Mr. Barlow states "During my employment with Aetna and with Travelers, virtually every processed coverage form that I have viewed has had a processing line drawn through it." ( Id. at ¶ 19).

A review of the document and the processing line, appear completely consistent with the sworn affidavit of John H. Barlow and what he described as standard corporate practice. That averment, together with the failure of the defendant to offer anything more than his "belief", a metaphysical doubt at best, as to what the processing line might be, is insufficient to meet his burden in this summary judgment proceeding. See Fed.R.Civ. P. 56(e); Boyle v. County of Alleghany, 139 F.3d 393 (3d Cir. 1998); Maldonado v. Ramirez, 757 F.2d 48, 51 (3d Cir. 1987).

Based on the foregoing, **IT IS HEREBY ORDERED THAT**:

1. The plaintiff's motion for summary judgment (Doc. No. 17) is **GRANTED** to the extent that Standard Fire's liability for underinsured coverage is capped at the $100,000.00 dollar non-stacked amount listed in Gerard Griesbaum's Policy No.

0313789811012, effective March 15, 2001 until September 15, 2001; and,

2. The defendant's motion for summary judgment (Doc. No. 12) is **DENIED.**

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MALACHY E. MANNION
United States Magistrate Judge

Dated: July 7, 2003
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