THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

John Tucker and Pamela Tucker
Individually and as the Parents and Next Friends of
Katherine Tucker, a Minor

v.

United States Liability Insurance Company

Docket No.: 218-2010-CV-00833

ORDER ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

The plaintiffs, John Tucker and Pamela Tucker, Individually and as the Parents and Next Friends of Katherine Tucker, a Minor, have petitioned for declaratory relief, requesting that this Court find that they are entitled to receive excess uninsured motorist coverage in an amount equal to the liability limits of their umbrella policy issued by the defendant, United States Liability Insurance Company (hereinafter referred to as "USLIC"). The defendant disputes the amount of coverage available under its policy. Both parties have moved for summary judgment. After consideration of the pleadings, the parties' arguments, and the applicable law, the Court **GRANTS** the plaintiffs' Motion for Summary Judgment and **DENIES** the defendant's Motion for Summary Judgment.

Facts

The following facts are undisputed. On November 24, 2009, plaintiff Katherine Tucker ("Katherine"), while a pedestrian on Post Road in Greenland, New Hampshire, was struck by a motor vehicle operated by Michael Baillargeon. As a result of the accident, Katherine suffered severe, disabling, and permanent

17

injuries. Mr. Baillargeon was insured by Harleysville Insurance Company at the time of the accident, which offered its full policy limit of $100,000 to cover Katherine's injuries. Katherine's parents, John and Pamela, were insured for uninsured motorist coverage through Peerless Insurance ("Peerless"), which also offered its full policy limit of $250,000. The plaintiffs claim the harm caused to Katherine, including the value of medical care, exceeds the combined liability limits of the automobile policy covering the driver of the motor vehicle involved in the accident, Mr. Baillargeon, and the uninsured motorist coverage available to the Tuckers' through their automobile policy issued by Peerless. Thus, the plaintiffs seek to reach the coverage available to them under the policy provided by USLIC.

Prior to the accident, the Tuckers purchased a personal umbrella policy from the defendant. On its face, the umbrella policy, Policy #PCL 1150169 (the "Policy"), provides personal umbrella liability coverage in the amount of $1,000,000.00 and excess uninsured motorist coverage in the amount of $25,000.00 for each accident. Pets.' Mem. Supp. Summ. J, Ex. 2.

Following the accident, the Tuckers sought uninsured motorist coverage from USLIC in excess of the $25,000 as listed on the face sheet of the Policy, to wit, $1,000,000.00. The Tuckers, relying on RSA 264:15, I, urged USLIC to provide uninsured motorist coverage in an amount equal to the limits of liability purchased under the Policy. However, on March 29, 2010, by way of correspondence, USLIC notified the Tuckers of its reservation of rights to limit uninsured motorist coverage in excess of the underlying policy to $25,000. See

Pet., Ex. 1. Further, on April 16, 2010 and May 3, 2010, USLIC rejected any responsibility pursuant to RSA 264:15 to provide uninsured motorist coverage in an amount equal to the liability limits of the Policy. In USLIC's correspondence with the Tuckers, USLIC argued that the applicable relevant statute was RSA 405:24, I, which exempts foreign unlicensed companies that satisfy the provisions of RSA 405:26, and are approved by the insurance commissioner as unadmitted surplus lines companies, from statutory and regulatory provisions unless the statute specifically references unadmitted surplus lines companies. While USLIC does not deny coverage, it submits that the underinsured motorist coverage available to the Tuckers is limited to $25,000 in excess of the underlying automobile policy issued by Peerless. Thus, at issue in this case is the interplay between the uninsured/underinsured motorist statute, namely RSA 264:15, and the statute that exempts foreign surplus lines insurance companies from certain regulations, namely RSA 405:24.

Standard of Review

In ruling on a motion for summary judgment, the Court construes "the pleadings, discovery and affidavits," as well as the proper inferences therefrom, "in the light most favorable to the non-moving party to determine whether the proponent has established the absence of a dispute over any material fact and the right to judgment as a matter of law." Thomas v. Tel. Publ'g Co., 155 N.H. 314, 321 (2007) (citing Porter v. Coco, 154 N.H. 353, 356 (2006)). In general, the burden of establishing non-coverage under a liability insurance policy is on

the insurer. RSA 491:22-a; Robbins Auto Parts, Inc. v. Granite State. Ins. Co., 121 N.H. 760, 762 (1980).

Analysis

RSA 264:15 requires that all automobile policies issued with respect to a vehicle registered or principally garaged in New Hampshire, and under the provisions of RSA 264:14, contain uninsured motorist coverage. Further, the statute specifically provides that:

> 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. 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.

RSA 264:15.

The plaintiffs have alleged, and USLIC has conceded, that neither John Tucker, Pamela Tucker, nor Katherine Tucker executed an RSA 264:15 written waiver of uninsured motorist benefits relative to the Policy. USLIC has submitted that the insurance retail agent checked off and signed "Do not include any optional coverages." For the purposes of this motion, however, the Court finds that the fact that the retail agent checked off and signed "Do not include any optional coverages" does not amount to a written waiver of uninsured motorist benefits by any of the plaintiffs. USLIC has not provided the Court with any case law or arguments that conclude otherwise.

Further, the Court finds that RSA 264:15 specifically states that when an insured elects to purchase an umbrella policy that includes automobile coverage

as described in RSA 259:61, the umbrella policy limit shall *automatically* provide uninsured motorist coverage equal to the limits of liability purchased, unless the insured waives this provision in writing. Here, the Tuckers purchased a $1,000,000 liability limit umbrella policy. Therefore, the Court finds that the Tuckers are entitled to umbrella coverage for uninsured motorist coverage up to $1,000,000 under RSA 264:15.

USLIC, however, argues that because it was an approved unadmitted surplus lines insurance company, which satisfied the requirements of RSA 405:24, it is exempt from any statutory or regulatory provision—including the uninsured motorist statute that requires uninsured motorist coverage limits to automatically equal the liability coverage limits if an insured elects to purchase liability insurance in an amount greater than the minimum coverage required by RSA 259:61—unless the statute or regulation specifically references unadmitted surplus lines companies.

RSA 405:24, which took effect on August 25, 2008, six months prior to the issuance of the Policy, provides in pertinent part:

> Foreign unlicensed companies that satisfy the provisions of RSA 405:26 and are approved by the commissioner as unadmitted surplus lines companies are not subject to any statutory or regulatory provision unless the statute or regulation specifically references unadmitted surplus lines companies; provided however, unadmitted surplus lines companies shall be subject to RSA 417:1 through RSA 417:22.

RSA 405:24, I. RSA 405:26 requires that a surplus lines insurer be approved by the Insurance Commissioner, maintain a surplus to policyholders of at least

$500,000.00, and not have been in an impaired condition within the 24 months preceding issuance of the policy.

It is undisputed that USLIC satisfied the provisions of RSA 405:26 and it was an unadmitted surplus lines company authorized to conduct business in New Hampshire when the Policy was issued to the Tuckers. See Resp't's Memo Supp. Summ. J, Ex. 2 (New Hampshire Ins. Dept., List of Eligible Surplus Lines Insurers, Eff. Nov. 17, 2009 (listing USLIC as an unauthorized insurer currently qualified as eligible surplus lines insurer in New Hampshire)).

Since USLIC was an unadmitted surplus lines company, USLIC argues that pursuant to RSA 405:24, the underinsured motorist statute—which requires the uninsured motorist coverage limit to equal the liability coverage limit if the insured purchases higher liability coverage limits than required by law—does not apply to the Policy issued by USLIC. It argues that RSA 264:15 does not apply to USLIC because the statute does not make any explicit reference that requires unadmitted surplus lines companies to adhere to the uninsured motorist statute.

The Tuckers claim that RSA 405:24 does not apply to an automobile umbrella Policy, and therefore, the requirements of the uninsured motorist statute apply to the Policy issued by USLIC and the uninsured motorist coverage limits of the Policy should automatically equal the limits of liability. The Tuckers further argue that applying RSA 405:24, which would exempt USLIC from a majority of regulatory statutes when issuing a wide variety of insurance policies, would lead to an absurd result that the legislature did not intend.

The interpretation of a statute is a question of law. MacPherson v. Weiner, 158 N.H. 6, 9 (2008). When examining the language of a statute, the Court must "ascribe the plain and ordinary meaning to the words used." Id. The Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. The Court "interpret[s] a statute to lead to a reasonable result and review[s] a particular provision, not in isolation, but together with all associated sections" and the overall statutory scheme. Id.; see also In re Athena D., __ N.H. __ 2011 WL 2601425 *2 (2011) (stating that the Court must "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result").

When statutory language is ambiguous, we examine the statute's overall objective and presume that the legislature would not pass an act that would lead to an absurd or illogical result. Soraghan v. Mt. Cranmore Ski Resort, Inc., 152 N.H. 399, 401 (2005) (citing Marceau v. Concord Heritage Life Ins. Co., 149 N.H. 216, 220 (2003)); Favazza v. Braley,160 N.H. 349, 351 (2010). If statutory language is ambiguous, the Court may consider legislative history. See Prof'l Firefighters of N.H. v. Local Gov't Ctr., 159 N.H. 699, 703 (2010); see also State v. Gallagher, 157 N.H. 421, 424 (2008) (stating that if a literal reading of a statute would lead to an absurd result, the Court may consider "indicia of legislative intent, such as legislative history"). The "goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be

advanced by the entire statutory scheme." Id. (citing State v. Whittey, 149 N.H. 463, 467 (2003)).

A review of New Hampshire case law on uninsured motorist coverage reveals the following. In 1957, New Hampshire was the first state in the country to require that every automobile policy issued in the state contain uninsured motorist coverage. McCaffery v. St. Paul Fire & Marine Ins. Co., 108 N.H. 373, 375 (1967). The overall goal of New Hampshire's uninsured motorist coverage statute "is to promote a 'public policy of placing insured persons in the same position that they would have been if the offending uninsured motorist had possessed comparable liability insurance' by broadening protection for those injured in accidents involving uninsured motorists." Miller v. Amica Mut. Ins. Co., 156 N.H. 117, 124 (2007) (quoting Swain v. Employers Mut. Cas. Co., 150 N.H. 574, 579 (2004)). The uninsured motorist statute has "been liberally construed to accomplish [its] legislative purpose of protecting persons in automobile accidents from losses which, because of the tortfeasors' lack of liability coverage, would otherwise go uncompensated." Charest v. Union Mut. Ins. Co. of Providence, 113 N.H. 683, 686 (1973).

In 1969, the New Hampshire legislature amended its uninsured motorist statute to permit an insured to purchase more than the statutory minimum coverage. Courtemanche v. Lumbermens Mutual Cas. Co., 118 N.H. 168, 172 (1978) (citing Act of July 2, 1969, 418:1, (1969) N.H. Laws 672 (codified at RSA 268:15-a I (Supp. 1975)). "The act evinces a legislative intent to allow a person

to protect himself against injury from uninsured motorists to the extent that he protects himself against liability." Id. (citing N.H.S. Jour. 1199 (1969)).

Currently, the uninsured motorist statute states that "[w]hen an insured elects to purchase liability in an amount great than the minimum coverage required by RSA 259:61, his uninsured motorist coverage shall automatically be equal to the liability coverage selected." RSA 264:15, I. "RSA 264:15, I, requires that uninsured motorist coverage be provided with the *same* monetary limits as are provided under a policy for general liability coverage." Raudonis v. Ins. Co. of North America, 137 N.H. 57, 61 (1993) (emphasis added).

In 2007, RSA 264:15 was amended by SB 38 to require written rejection of uninsured motorist coverage in a personal umbrella policy. In discussing SB 38, the legislature made clear that the bill's purpose was to "protect the consumer and eliminate confusion over automobile coverage when an umbrella policy is purchased." Pet. Mem. Supp. Summ. J, 11 (quoting Ex. 8 at 10–11 (Hearing on SB 38, Before the N.H. Senate, Feb. 8, 2007 (statement of Senator Betsi DeVries))). The bill was meant to provide "absolute verification of uninsured motorist coverage in umbrella policies." Id. (quoting Ex. 8 at 13 (Hearing on SB 38, Before N.H. House Committee on Commerce, April 25, 2007 (statement by Jim Townsend, Esq.))). Finally, the May 10, 2007 Statement of Intent for SB 38 states in part that the bill "clarifies that if an insured elects to raise his liability coverage, the insured 'uninsured motorist coverage' shall *automatically* rise to an equal amount. It further states if this is not desired by the insured then this must be in writing." Id. at 14 (emphasis added).

If an insured purchases an umbrella policy with liability limits that exceed the minimum limits required by law, the Court finds that the legislature intended that the uninsured motorist coverage in that policy would automatically equal the liability limits. The legislature clearly intended this provision to apply to all umbrella automobile policies issued in New Hampshire.

The Court now turns to discuss whether RSA 405:24 has any effect on umbrella automobile policies issued in the state and to determine whether USLIC is exempt from the statutory provisions of RSA 264:15. The Court finds that USLIC is not exempt from the provisions of the uninsured motorist statute.

Generally, surplus lines insurance insures against liability for unusual risks that fall outside of traditional markets and are typically unavailable through state-authorized carriers. The Tuckers cite to Holmes Appleman on Insurance 2d § 2.17, which describes surplus lines insurance as follows:

> Surplus lines insurance is often a source of last resort for the placement of liability or property insurance on unusual risks. These are generally risks that do not fall within the general parameters of traditional markets. Resort to the surplus market may also lie where the insured is unable to obtain insurance from admitted insurers within the state. Upon a showing that no such traditional coverage is available from admitted carriers, the insured may obtain the required coverage from non-admitted carriers. Accordingly, the insured will generally be charged a substantial premium commensurate with the unusual or riskier nature of the risks assumed.

Id.; see also New Hampshire Ins. Dep't, Surplus Lines Information, NH RSA 405 *available at* http://www.nh.gov/insurance/companies/surpluslines/documents/sl_

information_2010.pdf (last visited November 22, 2011) (stating that "[s]urplus lines policies usually cover such things as carnival rides, go-carts, jewelry, art, empty buildings, officer/director liability, antiques, etc. (no life and health)").

The current version of RSA 405:24 was amended by HB 1279. During the hearing on HB 1279 in the New Hampshire Senate Committee on Commerce, Labor, and Consumer Protection, the legislature was assured by the New Hampshire Insurance Department that HB 1279 would only apply to insurance polices covering unusual risks that a regulated or admitted carrier would not insure against. Attorney Chiara Dolcino of the New Hampshire Insurance Department made clear that surplus lines companies insure "risks that no insurance company will insure." Pet. Mem. Supp. Summ. J, 14 (quoting Ex. 9 at 11–12 (Hearing on HB 1279, Before the N.H. Senate Committee on Commerce, Labor, and Consumer Protection, April 1, 2008 (statement of Chiara Dolcino, Esq. of N.H. Ins. Dept.))). New Hampshire regulates surplus lines insurance in a different manner because of the types of risks that surplus lines insurance carriers insure against. See id. Attorney Dolcino further stated that:

> And essentially, the surplus lines companies are regulated through the producers. We impose on the producers, through statute, an obligation to make sure that, number one, that there is no policy in the regulated market that's available, and it insures that the producers providing that information to the consumer, that this is not a regulated policy; it's not covered by the guaranty fund, and those sorts of things. Really, none of the statutes would apply to surplus lines companies, other than the ones that we've referenced here, and other than the ones that specifically talk about surplus lines.

Id. The committee did not discuss whether uninsured motorist coverage or RSA 264:15 would be affected by HB 1279. Further, it was made clear that surplus

lines policies are only issued when "there is no policy in the regulated market that's available." Id. David Withers, also from the New Hampshire Insurance Department, testified that "surplus lines are in their own little world." Id. As the plaintiffs here pointed out in their pleadings, the USLIC policy they received had virtually the same coverage and cost as policies issued by regulated carriers in New Hampshire, including Liberty Mutual and Amica.

It appears from legislative history that the legislature had no intent to change the RSA 264:15 mandate for uninsured motorist coverage in umbrella policies by passing HB 1279. Further, it appears that the legislature did not intend for surplus lines companies to compete with regulated or admitted carriers, including carriers that issue motor vehicle umbrella policies.

As discussed supra, surplus lines policies are often a source of last resort for insuring unusual risks. Surplus lines policies are to be used if the risk cannot be underwritten or placed with an admitted insurer. See Holmes Appleman on Insurance 2d § 2.17; see also Piermout Iron Works v. Evanston Ins. Co., 963 A.2d 818, 823–26 (N.J. 2009) (stating that "surplus lines insurance involves . . . risks which insurance companies authorized or admitted to do business in this State have refused to cover by reason of the nature of the risk" and that surplus lines insurers take on these types of risk because the State places less onerous conditions on surplus lines carriers).

On the contrary, umbrella policies that insure motor vehicles do not insure against abnormal or extreme risks. Rather, motor vehicle umbrella policies insure against normal everyday day risks and are easily procurable by authorized

insurers within the state of New Hampshire. See generally Mt. Hawley Ins. Co. v. Total Building Systems, Inc., 2008 WL 2757076 *1 n.2 (D. Ariz. 2008) (stating that "'surplus lines' insurance products are those products that are 'not readily procurable' from insurers authorized to offer insurance by the State").

In New Hampshire, an insurance company must be incorporated in the state and licensed through the insurance commissioner to transact business with New Hampshire customers. See Grand China, Inc. v. United National Ins. Co., 156 N.H. 429, 432 (2007) (citing RSA 402:10–12; RSA 405:1). The state does allow "several types of foreign, unlicensed insurers, including surplus lines insurers [to] become authorized to offer policies through licensed and properly appointed producers." Id. (citing RSA 405:1-12; 17-b; 24; RSA 406B:16. However, "[t]hese producers may only offer policies from foreign insurers upon satisfying the insurance commissioner that the needed coverage is unavailable through an admitted insurer." Id. (citing RSA 405:17-b; 24).

In this case, the Court is aware of the parallel proceeding in the Rockingham County Superior Court, docket no. 218-2011-CV-00200, entitled John and Pamela Tucker, Individually and as p/n/f of Katherine Tucker, a minor v. Bergeron Insurance, Inc. d/b/a D.B. Warlick & Co. & CRC Insurance Services, Inc., d/b/a Southern Cross Underwriters & United States Liability Ins. Co. While the parties have not disclosed any documentation of an effort made by USLIC to place the Tuckers' personal umbrella policy with an admitted/regulated carrier, this does not affect the Court's analysis.

The Court finds that applying RSA 405:24 and exempting USLIC from the provisions of the uninsured motorist statute would lead to an absurd and illogical result. It does not appear that the legislature intended for an insurer to be able to escape the provisions of the uninsured motorist statute solely because that insurer issues surplus lines policies. Since the uninsured motorist statute is to be liberally construed, and finding that the legislature's historical stance of providing uninsured motorist coverage in an amount equal to the liability limits is based soundly in public policy, the Court finds that the Policy issued to the Tuckers is not exempt from the provisions of the uninsured motorist statute.

An umbrella policy that insures a family's vehicles does not present an unusual risk that could not be placed with an admitted/regulated carrier. There is nothing in the record that discloses the plaintiffs were an unusual risk that would make it unlikely that an umbrella policy could be placed with an admitted/regulated carrier. It is the Court's determination that the legislature did not intend to exempt uninsured motorist coverage under RSA 405:24. The Court finds that the uninsured motorist coverage limits of the Tucker's umbrella Policy must automatically equal the liability limits of the Policy. See RSA 264:15. Therefore, the Court holds that the Tuckers are entitled to the policy limit of $1,000,000.00 of uninsured motorist coverage under the Policy.

So **Ordered**.

DATED: November 30, 2011

Kenneth R. McHugh
Presiding Justice