

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LANE

JEFFREY L. ALLEN

Plaintiff,

v.

MUTUAL OF ENUMCLAW INSURANCE
COMPANY,

Defendant.

Case No. 16-06-17533

ORDER

THIS MATTER came before the Court on Plaintiff's Motion for Summary Judgment [OJIN 10] and Defendant's Motion for Summary Judgment [OJIN 17]. The Court reviewed the Memoranda of Law submitted by counsel, heard arguments of counsel and took the matter under advisement.

The Court makes the following findings and conclusions. The Court reviewed applicable statutes and case law, including *Country Mutual Insurance Company v. Elissa K. White and Richard Forum and CC Services, Inc.*, and *Western Protectors Insurance Company*, ___ Or App ___ (slip opinion May 2, 2007). The Honorable David Brewer issued an opinion in that case which dealt with the question of whether an insured was entitled to "stack" underinsured motorist (UIM) coverage of two motor vehicle insurance policies wherein the insured was injured while in a nonowned vehicle. The insurance policy in that case contained an "other insurance" provision similar to the provision in the case before this Court. In *Country Mutual*, both the insured and the insurance company filed cross-motions for Summary Judgment seeking a declaration whether the UIM coverage "stacked" and whether or not, based upon that determination, the insurance company owed benefits to the insured. In that case the trial court granted the insured's motion for partial summary judgment and denied the insurer's cross-motion. The Oregon Court of Appeals affirmed the decision of the trial

court. In his opinion, Judge Brewer set out the applicable statutory coverage provision, ORS 742.504(9) (a). The Court of Appeals held that under that statute.

“A UIM policy can, with respect to bodily injuries suffered by an insured while occupying a nonowned vehicle, provide that its coverage is excess, but only over the combined applicable limits of liability of all other similar insurance coverage. That is, UIM coverage can include both an excess provision and an antistacking clause.”

In its analysis, the Court of Appeals then set out the “other insurance” provision of the insurer’s policy. That provision is comprised of three sentences which are nearly identical to the “other insurance” provision before this Court. The opinion, in detail, sets out both the insured’s arguments and insurer’s arguments regarding the construction of that provision. The arguments as set out are similar to those arguments submitted by counsel in this case.

The interpretation of a provision in an insurance policy is a question of law, *Hoffman Construction Co. v. Fred S. James & Co.*, 313 Or 464. The Court of Appeals held in *Country Mutual*, that the “other insurance” provision did not comport with ORS 742.504(9)(a);

“First, [insurer’s] provision does not track the antistacking framework set out in the statute.....[T]he statute authorizes a policy provision that permits recovery for bodily injury suffered by an insured while occupying a nonowned vehicle only to the extent that the subject coverage is in excess of ‘the sum of the applicable limits of liability of all’ other similar insurance coverage. [The insured’s] self-proclaimed antistacking sentence, on the other hand, merely purports to set the maximum limit of liability under all similar policies at the highest limit provided by any one of such policies....Second, the antistacking (second) sentence of the ‘other insurance’ provision of the policy does not contextually conform with the excess (third) sentence of that provision. The statute provides that the pertinent excess determination is made with reference to the combined liability limits of all ‘similar’ other insurance coverage. [The insured’s] excess sentence, by contrast, which contains the provision’s only reference to nonowned vehicles, refers to any other ‘collectible insurance,’ not similar insurance.”

In his Opinion, Judge Brewer concludes by stating:

“...when read as a whole, the ‘other insurance’ provision does not embody the antistacking provision that is authorized by the statute where an insured suffers bodily injury while occupying a nonowned vehicle.”

The Court finds that the “other insurance” provision and the circumstances of the parties are similar to the facts presented by the Court of Appeals in *Country Mutual*, and therefore based upon this review,

IT IS HEREBY ORDERED that Plaintiff’s Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment is denied.

Dated this 2nd day of May, 2007.

LAUREN S. HOLLAND, Circuit Court Judge