

NORTH CAROLINA RATE BUREAU

POST OFFICE BOX 176010
RALEIGH, NORTH CAROLINA 27619-6010

JOHN W. WATKINS
General Manager

5401 SIX FORKS ROAD
RALEIGH, NORTH CAROLINA 27609-4435

TELEPHONE (919) 783-9790
FACSIMILE (919) 783-0355

JERRY G. HAMRICK
Workers Compensation Manager

F. TIMOTHY LUCAS
Personal Lines Manager

DAVID E. SINK, JR.
Accounting Manager

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CIRCULAR LETTER TO ALL MEMBER COMPANIES

Re: Selection/Rejection Forms -
Uninsured/Underinsured Motorists Coverages

Prior to November 5, 1991, North Carolina General Statute 20-279.21(b)(3) and (4) required that, absent a valid rejection, an automobile liability policy was required under certain circumstances to provide Uninsured Motorists (UM) and Combined Uninsured/Underinsured Motorists (UIM) bodily injury coverages at limits equal to the policy's bodily injury liability limits. Effective November 5, 1991, this statute was amended to require under those circumstances that insureds be given the option to purchase UM and UIM bodily injury coverages at limits up to one million dollars. Under the statute, rejection of these coverages must be made in writing by the named insured on a form promulgated by the Rate Bureau and approved by the Commissioner of Insurance.

As a result of this change in the coverage options that must be made available to insureds, the Rate Bureau in 1991 filed and obtained approval by the Commissioner of Insurance of revised UM/UIM Selection/Rejection Form NC 01 85 (Ed. 7-91) and new UM/UIM Selection/Rejection Form NC 01 86 (Ed. 7-91). Form NC 01 85 (Ed. 7-91) was designed and approved for use by companies with new or renewal policies. Form NC 01 86 (Ed. 7-91) was designed and approved for use by companies with renewal policies. The Rate Bureau's filing, as approved by the Commissioner of Insurance, specifically permitted companies to add explanatory language to the basic form. These forms were to be used with policies written on and after November 5, 1991.

Subsequent to November 5, 1991, State Farm Mutual Automobile Insurance Company, in renewing a policy, obtained from its insured a signed Form NC 01 86. (The insured had previously selected UM coverage and rejected UIM, and he made no changes when he executed Form NC 01 86.) The Form NC 01 86 used by the Company was the approved form including explanatory language added by the Company.

On these facts, the Supreme Court of North Carolina, in an opinion filed on April 9, 1999 in State Farm v. Fortin, 350 N.C. 264, 513 S.E.2d 782 (1999), held:

(a) that the State Farm version of renewal form NC 01 86 that [its insured] executed in January 1992 was not the form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of

Insurance. @=

(b) that ^Abecause [State Farm] failed to provide [the insured] with the proper selection/rejection form, form NC 01 85, at the time of the policy's renewal on 16 January 1992, there was no valid rejection of UIM coverage under the State Farm policy. @

The Supreme Court's opinion does not provide any explanation as to why it determined that the State Farm version of Form NC 01 86 was ^Anot the form promulgated by the Rate Bureau and approved by the Commissioner. @ The record before the Court contained a copy of the basic Form NC 01 86; this was attached to an affidavit from the Department of Insurance describing and attaching the approved selection/rejection forms. The State Farm version of this form appeared different from the ^Aapproved @ form because it added explanatory language regarding the coverage options. The record on appeal did not include the fact that the Commissioner had specifically approved the addition by companies of explanatory language to the basic form. It is thus possible that a different result would have been reached, and that the Court would have concluded that Form NC 01 86 was a ^Aproper @ form, if there had been evidence in the record that the addition to the form of explanatory language had been approved by the Commissioner.

The Bureau would caution any company faced with a similar issue in North Carolina to be aware of the need for creating a record during litigation which directly shows that the selection/rejection form (either Form NC 01 85 or Form NC 01 86) used by the company was a form promulgated by the Bureau and approved by the Commissioner, including the explanatory language. Copies of the approved forms filing may be obtained from the Insurance Department or the Rate Bureau.

However, this issue alone may not ultimately distinguish the decision reached in Fortin. The Court's further holding that the company had ^Afailed to provide its insured with the proper selection/rejection form, Form NC 01 85 @ makes it difficult to determine if the Court's ultimate holding would have been different even if the Court had been aware that the form used by the Company was a form promulgated by the Bureau and approved by the Commissioner. The Bureau believes that if the Court had found that the State Farm form was an approved form (including the explanatory language), the Court's inquiry should have been at an end under the controlling statute. Since the statute requires only that rejection be made on a form promulgated by the Bureau and approved by the Commissioner, a finding that the form used was promulgated by the Bureau and approved by the Commissioner should end the Court's inquiry and should result in the valid rejection of UIM coverage.

However, the Court's opinion in Fortin analyzes Form NC 01 86 and ultimately concludes that ^Abecause [the company] failed to provide [the insured] with the proper selection/rejection form, Form NC 01 85..., there was no valid rejection of UIM coverage under the [company's] policy. @ Read alone and out of context, this language could be construed to hold that a Selection/Rejection Form NC 01 86 executed by an insured may be insufficient as a matter of law, and that the Court will impose statutorily mandated UM or UIM limits (i.e., coverage equal to the highest limit of bodily injury coverage for any one vehicle under the policy up to a maximum of one million dollars).

The Rate Bureau encourages companies to consult with their counsel as to the best method for each company to address this situation. For those companies who use Form NC 01 85 on both new and renewal policies, companies litigating this issue should be careful to show that the addition of explanatory language to the basic form was approved by the Commissioner of Insurance. For those companies who have used (or continue to use) Form NC 01 86 on renewal business, please be aware as described above that Fortin could be read to hold that selection or rejection of UIM coverage limits on form NC 01 86 does not comply with statutory requirements and is ineffective.

Until such time as the Supreme Court reviews a Fortin situation and is faced with a record showing that Form NC 01 86, with explanatory language added, is a form promulgated by the Bureau and approved by the Commissioner, reliance on Form NC 01 86, either with or without explanatory language, presents some risk to companies in North Carolina. If you or your counsel have any questions concerning the selection or rejection of UM and UIM coverages in North Carolina, please do not hesitate to contact the Bureau.

Very truly yours,

John W. Watkins

General Manager

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