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June 22, 2005

Mr. Paul L. Stritmatter
Stritmatter Kessler Whelan Withey
200 Second Ave. W.
Seattle, WA 98119

Re: *Adams UIM Claim*
Our File No. 167-803

Dear Mr. Stritmatter:

Truck Insurance Exchange ("Truck") has asked us to provide this letter explaining its coverage position with respect to underinsured motorist ("UIM") claims arising from injuries suffered by Ethel Adams as a result of a March 23, 2005 motor vehicle collision, and also to respond further to your May 10 letter to William Harper. As a result of its investigation to date, Truck has made the following coverage determinations:

(1) Ms. Adams qualifies as an "insured" for UIM coverage under Truck business auto policy 60219-36-15 and commercial umbrella policy number 60246-82-34. Each policy provides a \$1 million limit for all claims arising from any one accident. The total amount of UIM coverage under both policies is \$2 million.

(2) Ms. Adams is not entitled to UIM coverage for claims based on the fault of Michael Testa. Truck concludes the Testa's conduct causing the collision was intentional and therefore does not satisfy the business auto policy definition of "accident." Testa's conduct does not give rise to a UIM claim for that reason. Because umbrella UIM coverage follows form with the business auto policy, Truck is denying UIM coverage under both policies for any UIM claim based on Testa's conduct.

(3) Ms. Adams is entitled to UIM coverage for claims based on the negligence of any other driver involved in the collision. Farmers will continue its investigation of the collision in order to make a determination regarding possible negligence by drivers other than Testa.

TRUCK'S UNDERSTANDING OF THE CLAIM FACTS

Truck's understanding of the facts and circumstances of the March 23 collision that caused Ms. Adams' injuries as set forth below is based primarily on review of media and police reports, and also the review of the Information filed by the prosecutor's office in support of criminal charges against Testa. (Copies of those

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materials are enclosed with this letter.)

On March 26, 2005, Ms. Adams was driving a company car while acting in the course and scope of her employment as an employee of Edgewood Dental Laboratory. Earlier that day Testa had gone to a pawn shop and was told that the jewelry he wanted to pawn was worthless. Testa telephoned his girlfriend, Elizabeth Campo, from the pawnshop and became angry on the phone with her. Afterwards he verbalized a threat about killing Campo to the pawnshop employee.

Campo telephoned the pawn shop after Testa had left and was told about the threat. She decided to drive from the home she shared with Testa in Edmonds to her sister's home in Ballard. While driving in opposite directions on Aurora Avenue (Campo southbound and Testa northbound), Testa spotted Campo. Testa reversed direction and began chasing Campo, bumping her vehicle with the truck he was driving.

Campo made a left turn into a parking lot against a red light and Testa followed, continuing to bump her vehicle in the parking lot. Campo eventually left the parking lot and began traveling northbound on Aurora, with Testa following and continuing to bump or ram her vehicle as they drove. Campo finally lost control of her vehicle, which overturned into the southbound lanes on Aurora Avenue. Witnesses stated that it appeared that Testa was trying to push Campo vehicle into the oncoming southbound traffic. Five additional vehicles were then involved in a variety of collisions, one of which was the vehicle driven by Adams.

According to the Police Traffic Collision Report, the Adams vehicle was struck by the Campo vehicle. The Adams vehicle also impacted a vehicle driven by Dominguez Moran. The Collision Report notes that the Adams vehicle caught fire, which was extinguished by a citizen at the scene.

The King County Sheriff Incident Report describes more detailed witness accounts of the incident. Initial reports were that a grey Toyota pickup (Testa) and a white Ford pickup (Campo) were ramming one another on Aurora Avenue. By the time officers arrived on the scene, the multiple car collision involving Adams had occurred. The consensus of the witness reports described in the Incident Report appears to be that Testa was following Campo and repeatedly ramming her vehicle. A portion of the incident was caught on a video surveillance camera at a car dealership. Truck is seeking, but has not yet obtained, a copy of that video tape.

Testa apparently claimed to police at the scene that Campo was his girlfriend and had stolen his truck. (According to the Collision Report, the vehicle driven by Campo is registered to Darryl Wayne Moss of North Bend.) A newspaper report states that Testa also claimed that Campo was the one who had initiated the incident by chasing him and swerving into his vehicle. Nonetheless, Testa's version of events with himself as the victim of Campo's aggressive driving does not appear to be credible.

Testa has been charged with first degree assault under RCW 9A.36.011 with respect to the injury caused to Campo in the collision, and vehicular assault under RCW 46.61.522 with respect to the injury caused to Ms. Adams.

TRUCK POLICIES

Truck issued policy number 60219-36-15 including business auto coverage to Edgewood Dental Laboratories as named insured. The policy includes UIM coverage with limits of \$1 million. The business auto policy includes a CA 21 34 07 02 Washington Underinsured Motorist Coverage endorsement. The UIM endorsement extends UIM coverage as follows:

A. Coverage

1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "Underinsured motor vehicle". The damages must result from "bodily injury" or "property damage" sustained by the "insured" caused by an "accident". The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "underinsured motor vehicle".

The UIM endorsement does not define "accident." The Business Auto Coverage Form supplies the following definition of "accident":

- A. "Accident" includes continuous or repeated exposure to the same conditions resulting in "bodily injury" or "property damage".

Truck also issued Commercial Umbrella Policy number 60246-82-34 to Edgewood Dental Laboratories as named insured. The liability limit is \$1 million for any one loss and in the aggregate. The umbrella policy includes an E3336 Endorsement Adding Uninsured/Underinsured Motorists Coverage - Following Form Coverage endorsement which provides as follows:

2. We will indemnify the insured for sums recoverable under Uninsured Motorists Coverage or Underinsured Motorists Coverage (hereafter referred to as UM/UIM) but only to the extent coverage is provided in "underlying insurance." Our obligation to indemnify the insured under this endorsement applies only to compensatory damages the insured is legally entitled to recover under such UM/UIM coverage, and then only for damages in excess of the "retained limit."

COVERAGE ANALYSIS

As stated at the outset, Truck has determined that Ms. Adams qualifies as an "insured" for UIM coverage under the business auto policy issued to Edgewood Dental Laboratories. UIM coverage under the umbrella policy follows form with the underlying business auto policy and depends on the extent to which the underlying policy provides coverage. As such, the availability of UIM coverage under either policy depends on whether the business auto policy UIM coverage applies, with the umbrella UIM endorsement merely serving to increase the applicable UIM limit from \$1 million to \$2 million.

UIM coverage does not apply to any claim based on Testa's conduct, however, based on Truck's conclusion that Testa's conduct causing the collision was intentional and thereby does not satisfy the business auto policy definition of "accident."

The UIM insuring agreement in the business auto policy extends coverage for injuries caused by an "accident," including continuous or repeated exposure to conditions. Washington courts apply the following definition to the term "accident" when used in an insurance policy:

[A]n accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs which produces or brings about the result of injury or death. The means as well as the result must be unforeseen, involuntary, unexpected and unusual.

See *Roller v. Stonewall Ins. Co.*, 115 Wn.2d 679, 684, 801 P.2d 207 (1990) (citations omitted). Thus, the common meaning of "accident" does not depend on the perspective of the injured insured, but instead essentially depends on the intent of the person causing the injury or damage.

Based on the information concerning Testa's conduct as described above, Truck concludes that he acted intentionally in ramming Campo's vehicle, causing it to overturn and pushing it into the southbound lanes of Aurora Avenue, and thereby causing the multiple vehicle collision that resulted in injury to Ms. Adams. Testa's conduct does not satisfy the applicable definition of "accident." Truck is denying coverage for UIM claims based on Testa's conduct for this reason.

Nonetheless, Truck is not denying UIM coverage with respect to the possible negligence of any other driver involved in the collision whose conduct may have been a proximate cause of Ms. Adams' injuries. Truck as of yet has not obtained information sufficient to make a determination regarding the negligence of any driver other than Testa. Truck intends to continue its claim investigation and will advise you when it makes a liability determination with respect to other drivers involved in the collision. Any information you may wish to provide Truck to aid its consideration of whether the negligence of any driver other than Testa caused Ms. Adams' injuries will be given full consideration.

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Truck recognizes that due to the fact that Testa acted intentionally there may be issues concerning the extent of liability that would be imposed on any merely negligent drivers under Washington law. Truck's potential liability to Ms. Adams does not exceed the liability of any negligent drivers (minus appropriate credits for any available liability insurance). Truck is specifically reserving the right to seek segregation of the damages caused by Testa from damages caused by any merely negligent tortfeasors, as contemplated in *Tegman v. Accident & Medical Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003).

Turning to your May 10 letter to Bill Harper, my understanding is that he has already forwarded you copies of the business auto and commercial umbrella policies issued to Edgewood Dental Laboratories. This letter explains the factual basis for Truck's determination that Testa's conduct causing the collision was not an "accident." I have enclosed copies of the documents on which that determination was based. Truck has not yet made a determination that Testa's acts alone are the only proximate cause of Adams' injuries.

Truck has hired an investigator, Gary Swanson, who formerly was a trooper with the Washington State Patrol. You are not authorized to make direct contact with Mr. Swanson. Mr. Swanson has met at the accident scene with the investigating officer from the King County Sheriff's Department, J.D. Leach, but did not obtain any documents from him. Mr. Swanson has obtained a copy of a King 5 TV news broadcast that includes video of the scene after the accident had taken place, but has been unable to obtain the surveillance camera video that was referenced in news reports. He has not yet interviewed any witnesses. Truck has photographs of the vehicle driven by Ms. Adams. It has not made any "findings" with respect to causation of the collision based on those photographs or otherwise.

Please allow me to state that no waiver of any applicable privileges, whether under work product doctrine or attorney-client privilege is intended by way of disclosure of the above information to you in response to your May 10 letter. Truck will continue its claim investigation and does not intend any waiver of rights other than as specifically stated in this letter. Nor is waiver of any policy rights held by your client intended by Truck.

I will be happy to discuss this matter with you at your convenience if you have any questions about Truck's coverage determination or this letter.

Very truly yours,

MERRICK, HOFSTEDT & LINDSEY, P.S.


Ronald S. Dinning

RSD:rsd