

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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**Re: Daily Underwriters of America, as Subrogee of John
McDaniel v. Maryland Automobile Insurance Fund
C.A. No.: 07C-08-208 RRC**

Submitted: May 8, 2008
Decided: July 31, 2008

On Defendant's Motion to Dismiss.

GRANTED.

On Plaintiff's Motion for Default Judgment.

DENIED.

Dear Counsel:

In this action, Plaintiff insurance company Daily Underwriters of America ("Plaintiff") seeks subrogation against Defendant Maryland Automobile Insurance Fund ("Defendant" or "MAIF") for Personal Injury Protection benefits ("PIP benefits") that Plaintiff paid on behalf of Plaintiff's insured. Defendant has moved to dismiss this action on the grounds (among

others) that Defendant has insufficient contacts in Delaware for this Court to exercise personal jurisdiction over Defendant.

The Court must decide whether it can exercise jurisdiction over Defendant, pursuant to Delaware's long-arm statute, in a subrogation action, on the basis of a single tort committed in Delaware by Defendant's insured, despite the fact that Defendant is a nonresident insurer that does not issue policies in Delaware.¹

The Court holds that no act of Defendant has triggered any of the provisions of the long-arm statute, and furthermore, that Defendant has insufficient contacts in Delaware for the Court to exercise jurisdiction over Defendant. Defendant's motion to dismiss is therefore granted. Plaintiff's motion for default judgment is denied.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant Maryland Automobile Insurance Fund is a legislatively created agency of the State of Maryland. Its purpose is to provide automobile insurance to those Maryland residents who are unable to obtain insurance from commercial insurers.² The applicable Maryland statute, *Md. Code Ann. Insurance* § 20-601(a)(2)(i), precludes claims against Defendant from "an automobile insurer or other insurer that seeks by subrogation to recover payment for damages to a motor vehicle or real or other personal property, or injuries to individuals under any insurance coverages, including collision, fire, theft, medical payments, and uninsured motorist coverage."

On August 9, 2006, Defendant's insured, Addie Yelton, allegedly failed to remain at a stop sign on South du Pont Highway, near Harrington, Delaware, and Plaintiff's subrogor, John McDaniel, collided with Ms. Yelton's vehicle. Plaintiff subsequently paid \$10,885.15 in PIP benefits to its subrogor for the injuries he sustained in the accident.

¹ Because the resolution of this issue is dispositive of this motion, the Court does not reach the other issue presented in this motion, that is, which law controls: Delaware law, permitting insurers to subrogate from a tortfeasor's insurer, pursuant to 21 *Del. C.* 2118(g), or Maryland law, precluding insurers from such subrogation.

² To be eligible for a policy of insurance from Defendant, an individual must: 1) be domiciled in Maryland; 2) own, lease or rent a primary place of residence in Maryland, and regardless of the person's domicile, reside in the State for more than 1 year; 3) maintain a main or branch office or warehouse facility in Maryland, and base and operate motor vehicles intrastate in Maryland; 4) have filed as a State resident for income tax purposes; or 5) have a nonresident permit issued under Maryland's Transportation Article. *Md. Code Ann. Insurance* § 20-502 (2007).

Subsequently, and purportedly pursuant to 21 *Del. C.* 2118(g) (which permits an insurer to subrogate against a tortfeasor's insurer), Plaintiff filed a complaint in August 2007 in this Court against Defendant seeking recovery of the PIP benefits payments as well as court costs and prejudgment interest, for a total of \$12,813.03. Service was perfected on October 30, 2007, and Defendant's response to the complaint was due on or before November 19, 2007.

However, Defendant did not respond on or before that date. Indeed, Defendant ultimately received three extensions to file a responsive pleading from Plaintiff, the last of which ended on January 23, 2008, still without a responsive filing from Defendant. Plaintiff received an e-mail from Defendant's counsel on January 24, 2008, stating that Defendant would soon file a motion to dismiss. On February 28, 2008, Plaintiff filed a motion for default judgment, citing as grounds Defendant's failure to have filed a responsive pleading. Defendant did not file a response to the motion for default judgment, but eventually responded with this motion to dismiss on March 11, 2008.

II. CONTENTIONS OF THE PARTIES

Defendant contends that Delaware courts cannot exercise jurisdiction over Defendant because none of the provisions of Delaware's long-arm statute apply, and because Defendant does not have the "minimum contacts" necessary such that this Court can exercise jurisdiction over it.

In response, Plaintiff argues that 10 *Del. C.* § 3104(c)(3) (a provision of Delaware's long-arm statute, discussed *supra*) applies because "Defendant's insured committed a tort within the state." Plaintiff argues that Defendant has the requisite "minimum contacts" in Delaware due to this fact. Plaintiff also maintains and that Plaintiff is entitled to reimbursement payments from Defendant pursuant to 21 *Del. C.* 2118(g), even though this action concededly would not be allowed in the Maryland courts. Alternatively, Plaintiff contends that Defendant's motion to dismiss should in any event be denied as untimely because it was not filed within the time period extended by Plaintiff to Defendant after the statutory deadline had passed.

III. STANDARD OF REVIEW

A. Motion to Dismiss

When deciding a motion to dismiss, “all factual allegations of the complaint are accepted as true.”³ The test for sufficiency for judging a motion to dismiss is “whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.”⁴ Therefore, dismissal will only be warranted when “under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted.”⁵

When personal jurisdiction is challenged by a motion to dismiss, the plaintiff has the burden to show a basis for long-arm jurisdiction.⁶ This burden is met by a *prima facie* showing that jurisdiction is conferred by the statute.⁷ Delaware’s long-arm statute provides, in pertinent part:

- (c) ... [A] court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent:
 - (1) Transacts any business or performs any character of work or service in the State;
 - (2) Contracts to supply services or things in this State;
 - (3) Causes tortious injury in the State by an act or omission in this State;
 - (4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State;
 - (5) Has an interest in, uses or possesses real property in the State; or
 - (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.⁸

³ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

⁴ *Id.*.

⁵ *Hedenberg v. Raber*, 2004 WL 2191164, at *1 (Del. Super.).

⁶ *Simpson v. Thiele*, 344 F. Supp. 7 (D. Del. 1972).

⁷ *Harmon v. Eudaily*, 407 A.2d 232 (Del. Super. 1979).

⁸ 10 Del. C. § 3104(c).

B. Motion for Default Judgment

Superior Court Rule 55(b) provides, in pertinent part, that the court may grant default judgment “[w]hen a party against whom a judgment for affirmative relief is sought, has failed to appear, plead or otherwise defend as provided by these Rules...” Entry of default judgment is within the discretion of the Court.⁹ Disposing of a case by default judgment is generally viewed with disfavor.¹⁰

IV. DISCUSSION

The Court first addresses, as a threshold matter, whether Defendant is subject to the jurisdiction of the Court. The Court engages in a two-step analysis when deciding whether it may exercise personal jurisdiction over a nonresident party.¹¹ First, the Court must determine whether any of the provisions of Delaware’s long-arm statute apply. Second, it is necessary to determine whether the nonresident party has “certain minimum contacts with [Delaware] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice,” thus comports with the Due Process Clause of the 14th Amendment.¹²

The Court holds that none of the provisions of Delaware’s long-arm statute apply, and that therefore this Court cannot exercise jurisdiction over Defendant pursuant to Delaware law. Furthermore, Defendant has not established “minimum contacts” within Delaware; therefore, the Court is constitutionally barred from exercising jurisdiction over Defendant.

Delaware’s long-arm statute is to be construed liberally, favoring the exercise of jurisdiction.¹³ Nevertheless, “[i]f [a] statute as a whole is unambiguous and there is no reasonable doubt as to the meaning of the

⁹ See, e.g., *In re Cartee, Inc. v. Severin Builders, Inc.*, 1997 WL 529589 (Del. Super.) (denying default judgment, and noting that the Court has “discretion to determine when default judgment is an appropriate remedy for the failure to submit a timely affidavit of defense”).

¹⁰ *Keystone Fuel Oil Co. v. Del-Way Petro.*, 364 A.2d 826, 828 (Del. Super. 1976) (“[a] trial on the merits is considered superior to a default judgment”).

¹¹ *Hoechst Celanese Corp. v. National Union Fire Ins. Co.*, 1991 WL 190313, at *1 (Del. Super.).

¹² *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹³ *Waters v. Deutz Corp.*, 460 A2d 1332 (Del. Super. 1983).

words used, the court's role is limited to an application of the literal meaning of those words.”¹⁴

Delaware's long-arm statute is unambiguous as applied to Defendant. Defendant has not itself, or through an agent or representative: 1) transacted business or work in Delaware; 2) contracted to supply services or things in Delaware; 3) caused tortious injury in Delaware;¹⁵ 4) had property in Delaware; or 5) contracted to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made.

When Defendant challenged jurisdiction in this case, the burden shifted to Plaintiff to make a prima facie showing that the long-arm statute applies. Plaintiff has not done so here. The Court notes that Plaintiff did not specifically assert in its complaint or in its response to the motion to dismiss which one of the six provisions 10 *Del. C.* §§ 3104(c)(1)-(6), was applicable. However, at oral argument on this motion Plaintiff's counsel stated that it was 10 *Del. C.* § 3104(c)(3) that applies,¹⁶ which section provides that jurisdiction obtains if the party, itself or through an agent, “[c]auses tortious injury in the State by an act or omission in this State.” The Court disagrees; neither Defendant nor any agent or representative caused tortious injury in Delaware. Plaintiff has failed to make a prima facie showing that this provision, or any of the long-arm provisions, applies, and dismissal of the case is therefore appropriate.

Notwithstanding the inapplicability of all of the provisions of the long-arm statute in this case, Defendant additionally lacks the “minimum contacts” necessary for the Court to maintain jurisdiction over Defendant.

The reach of Delaware's long-arm statute can extend only so far as the Constitution of the United States permits. When deciding a question of jurisdiction over a nonresident, “the Constitutional touchstone remains whether the defendant purposefully established ‘minimum contacts’ in the forum State.”¹⁷ The Delaware Supreme Court has recognized that “the minimum contacts which are necessary to establish jurisdiction must relate to some act by which the defendant has deliberately created continuing obligations between himself (itself) and the forum.” As noted in a leading treatise, “[i]n deciding whether the minimum contacts required for in

¹⁴ *Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007) (citing *In re Adoption of Swanson*, 623 A.2d 1095, 1096-97 (Del. 1993))

¹⁵ It is this provision, as discussed *supra*, upon which Plaintiff relies to establish this Court's jurisdiction over Defendant.

¹⁶ Oral Argument Tr. at 14 (May 8, 2008).

¹⁷ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

personam jurisdiction exist, the court must consider whether the insurer's contacts were the result of a deliberate and purposeful act on the part of the insurer, or whether the contacts were compelled by the unilateral actions of the insured."¹⁸

In this case, the sole "contact" Plaintiff has alleged is Defendant's insured's unilateral act of driving into Delaware and allegedly committing a tort here. The second question is whether this action of Defendant's insured is sufficient to constitute "minimum contacts" with Delaware on the part of Defendant.

Courts from at least two other states have addressed this issue, with both courts concluding that they could not exercise jurisdiction over the Maryland Automobile Insurance Fund in their respective states.

In *Colmon v. Maryland Automobile Insurance Fund*, a resident of Pennsylvania brought an action against MAIF in Pennsylvania to recover first-party benefits for injuries she received in an accident occurring in Pennsylvania in a vehicle insured by MAIF.¹⁹ MAIF maintained, as it has in this case, that a non-Maryland court could not exercise jurisdiction over MAIF. Pennsylvania's Court of Common Pleas agreed, and, in affirming that decision, the Superior Court of Pennsylvania noted that "[u]nilateral activity in the forum state by others having a relationship with a nonresident defendant cannot satisfy the requirement that a defendant have minimum contacts with the forum state."²⁰

In *New York Central Mutual Insurance Company v. Johnson*, an individual insured by MAIF and another individual insured by New York Central Mutual Insurance Company were involved in an automobile accident in the state of New York. New York Central Mutual Insurance Company sought to add MAIF to a claim it had originally filed solely against MAIF's insured.²¹ The New York Supreme Court, Appellate Division, held that New York Central Mutual Insurance Company could not do so, because "the unilateral act of [MAIF's] insured of driving into New York does not satisfy the requirement that [MAIF] have contact with or purposefully avail itself of

¹⁸ 16 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 228:22 (3d ed. 1999).

¹⁹ *Colmon v. Maryland Automobile Insurance Fund*, 574 A.2d 628 (Pa. Super. 1990) (noting that Pennsylvania's long-arm statute extends to the furthest reach permitted by the Constitution of the United States).

²⁰ *Id.* at 629.

²¹ *New York Central Mutual Insurance Company v. Johnson*, 260 A.2d 638 (N.Y.A.D. 2 Dept. 1999).

New York such that it can be deemed to be transacting business under New York's long-arm statute.”²²

In response to these cases, Plaintiff argues that these otherwise apposite Pennsylvania and New York decisions are “not controlling.” Plaintiff urges the Court find controlling this Court's 1991 decision in *Tri-State Motor Transit Co. v. Intermodal Transportation Inc.*,²³ and its 2002 decision in *State Farm v. Dann*.²⁴

Tri-State involved a multi-vehicle accident occurring on the Delaware Memorial Bridge. A bus and a tractor trailer collided on the bridge, and another vehicle then collided with the wreck. This third vehicle was owned Intermodal Transportation, Inc. (“Intermodal”), which was insured by Allied Fidelity Insurance Company (“Allied Fidelity”). By the time suit was filed against Intermodal, Allied Fidelity had become insolvent. However, Allied Fidelity “did business” in Ohio; as a result, the Ohio Insurance Guarantee Association (“OIGA”), an agency created by Ohio to provide insurance in cases where an insurer that has done business in Ohio becomes insolvent, was called upon to “step into the shoes” of the Allied Fidelity.²⁵

The issue in *Tri-State* was whether the Court could exercise jurisdiction over OIGA.²⁶ In holding that it could exercise jurisdiction over OIGA, the *Tri-State* Court noted that

in fulfilling the obligations of insolvent insurers, (insuring automobiles that operate in Delaware and every other State), the OIGA subjects itself to the risks associated with the insolvent insurance company's obligations to its insureds. By stepping into the shoes of Allied Fidelity Insurance Company, OIGA, although not an insurance company, becomes entirely responsible for the risks and obligations of Allied and, thus, provides coverage for liability as if the now defunct insurance company were solvent.²⁷

²² *Id.* at 639.

²³ *Tri-State Motor Transit Co. v. Intermodal Transportation*, 1991 WL 1172907 (Del. Super.).

²⁴ *State Farm Mutual Automobile Insurance Company v. Dann*, 794 A.2d 42 (Del. Super. 2002).

²⁵ *Tri-State*, 1991 WL 1172907, at *6.

²⁶ The ability of the *Tri-State* Court to exercise jurisdiction over Intermodal and Allied Insurance was apparently unchallenged.

²⁷ *Id.* at *5.

The *Tri-State* Court went on to observe that

it was foreseeable that Intermodal, a transportation corporation, engaged in interstate transportation, could be involved in an accident in any of those states, including Delaware. It was clearly foreseeable that Intermodal would be haled into Court as a result of its tortious conduct on the roads of Delaware or in any other state.

Tri-State is distinguishable from the instant case. Intermodal committed a tort in Delaware, and for that reason Intermodal clearly fell under Delaware's long-arm statute.²⁸ Allied Fidelity's policy with Intermodal evidently extended coverage into Delaware, which also made it subject to long-arm jurisdiction.²⁹ OIGA, by being obligated by statute to "step into the shoes" of Allied Fidelity (and thus, for the purposes of jurisdiction, being identical to Allied Fidelity), was therefore similarly subject to long-arm jurisdiction. It was "foreseeable" that OIGA would be subject to jurisdiction in Delaware when the insolvent insurer was subject to jurisdiction in Delaware. Thus, in *Tri-State*, jurisdiction was premised squarely on the long-arm statute. In contrast, MAIF falls under none of the provisions of Delaware's long-arm statute. MAIF is not analogous to OIGA because it is not statutorily obligated to subject itself to subrogation suits; indeed, it is statutorily immune from such suits.³⁰ Thus, long-arm jurisdiction is absent in this case, and "foreseeability" is also absent due to Maryland's statutory limitations on subrogation actions against MAIF.

Plaintiff asserts that this Court's decision in *Dann* is particularly on point. In *Dann*, a Maryland resident rear-ended the vehicle of a Delaware resident. The Delaware resident's insurance company paid PIP benefits on her behalf, and then sought subrogation in Delaware from the Maryland resident's out-of-state insurer, which claimed that this Court could not exercise personal jurisdiction over it because it did not have sufficient contacts in Delaware. In allowing the Delaware insurance company to subrogate from the nonresident insurance company, and relying in part upon this Court's decision in *Tri-State*, the *Dann* Court held that a single tort committed by an insurance company's insured can cause the insurance company to be subject to the jurisdiction of Delaware courts. The Court

²⁸ 10 Del. C. §§ 3104(c)(3). Intermodal is therefore analogous to Addie Yelton, who would also have been subject to the jurisdiction of this Court should this action have been filed directly against her.

²⁹ For example, 10 Del. C. §§ 3104(c)(2), (5).

³⁰ It is noteworthy that OIGA is "statutorily empowered to sue *and be sued*." *Tri-State*, 1991 WL 1172907, at *3 (emphasis added).

noted that “Delaware’s long-arm statute is a ‘single act’ statute, meaning that jurisdiction can be imposed on a non-resident defendant who engages in a single act in the forum state.”³¹ The *Dann* Court reasoned that the nonresident insurer should reasonably have foreseen that it would be haled into Court in Delaware, because “[t]he very nature of liability insurance contemplates that an insured will leave the confines of the state in which it was purchased and venture onto out-of-state roads on which motor vehicle accidents can and do occur.”³²

Dann is distinguishable. Unlike the insurer in *Dann*, MAIF could not reasonably have foreseen that it would be haled into court in Delaware in an action for subrogation. Maryland law specifically precludes such an action from obtaining in Maryland against Defendant. The fact that courts from other jurisdictions have held for Defendant in factually similar cases adds to Defendant’s inability to foresee such a circumstance. Furthermore, and although the Court agrees that Delaware’s long-arm statute is a “single act”³³ statute, there is not a single act of Defendant that falls into any of the enumerated provisions of the long-arm statute.

Thus, Defendant neither falls under any provision of Delaware’s long-arm statute, nor, in any event, does Defendant have the “minimum contacts” necessary for this Court to maintain jurisdiction over it.

Finally, the Court, exercising its discretion, denies Plaintiff’s motion for default judgment. The Court notes that disposing of a case by default judgment is viewed with disfavor.³⁴ While the Court does not condone Defendant’s untimely response, the Court holds that Defendant’s untimeliness does not warrant entry of default judgment. This is not a case where a party took no action; Defendant made regular efforts to remain in contact with Plaintiff, the legal issues are not uncomplicated, and Plaintiff was aware that Defendant was preparing to file its motion to dismiss. Defendant, by communicating with Plaintiff and by filing this motion to dismiss, in essence was “otherwise defend[ing]” as required by Rule 55(b) under the particular circumstances of this case.

³¹ *Dann*, 794 A.2d at 47 (citing *Transportes Aeros de Angola v. Ronair, Inc.*, 544 F. Supp 858 (D. Del. 1982).

³² *Id.* at 48.

³³ *Id.*

³⁴ *Keystone*, 364 A.2d at 828.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is **GRANTED**, and Plaintiff's Motion for Default Judgment is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

oc: Prothonotary