EFiled: Apr 21 2014 11:51PM EDT
Filing ID 55331782
Case Number 25,2014

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| MARTHA E. CONVERSE and DAVID CONVERSE, wife and husband, | ) | No. 25, 2014 |
| Plaintiffs Below, Appellants, | ) | Court Below---Superior Court of the State of Delaware |
| v. | ) | in and for New Castle County |
| | ) | C.A. No. N11C-04-028 CLS |
| STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation, | ) | |
| Defendant Below, Appellee. | ) | |

# APPELLANTS' REPLY BRIEF

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Dated: April 21, 2014

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## ARGUMENT

### I. THE SUPERIOR COURT INCORRECTLY HELD THAT APPELLANTS ARE NOT ENTITLED TO UIM COVERAGE FROM THEIR PERSONAL STATE FARM POLICY UNTIL APPELLANTS EXHAUST PRIMARY UIM COVERAGE FROM THE COMMERCE INSURANCE POLICY

#### A. QUESTIONS PRESENTED

Whether the Superior Court erred in finding that the Commerce UIM coverage is primary and State Farm's UIM coverage is excess, and that Plaintiffs are not entitled to excess UIM coverage from State Farm until they have exhausted the Commerce UIM limits. These issues were raised below in State Farm's Opening Brief in Support of Summary Judgment (A7–A32); Plaintiffs' Answering Brief in Opposition to Summary Judgment (A127–A148); and State Farm's Reply Brief in Support of Summary Judgment (A149–A163).

#### B. SCOPE OF REVIEW

This appeal is from the trial court's grant of summary judgment, which is reviewed *de novo*. *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996). "A grant of summary judgment cannot be sustained unless there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006) (citing *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744-45 (Del. 1997)). In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party. *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

## C. MERITS OF ARGUMENT

The instant case involves an underinsured motorist ("UIM") coverage question concerning an automobile insurance policy purchased by the Plaintiffs Below, Appellants, Martha Converse and David Converse ("Plaintiffs"), from the Defendant Below, Appellee, State Farm Mutual Automobile Insurance Company ("State Farm"). The collision occurred in the Commonwealth of Massachusetts while Mrs. Converse was riding as a passenger in a vehicle operated by James Early ("Early") that was struck by a vehicle driven by Patrick Lampart ("Lampart") (A60-A61). Lampart's vehicle maintained bodily injury liability limits of $25,000 through Plymouth Rock Assurance Corporation ("Plymouth Rock"), who subsequently tendered its bodily injury liability policy limits to settle Plaintiffs' claim against its insured (A62). Plaintiffs' were covered by their personal Delaware automobile insurance policy with State Farm, which provided UIM coverage of $100,000 per person and $300,000 per accident (A125). The Early vehicle was insured under a Massachusetts automobile insurance policy issued by Commerce Insurance Company ("Commerce"), which provided UIM coverage of $100,000 per person and $300,000 per accident (A63). At the time the settlement was reached with Plymouth Rock, Plaintiffs were unaware that the Commerce policy contained a mandatory consent-to-settlement provision requiring an insured to first obtain Commerce's consent before settling a claim against a tortfeasor.

State Farm contends that its UIM coverage is excess over the primary UIM coverage available from the Commerce policy and therefore State Farm's obligation to pay UIM benefits is only triggered if Plaintiffs exhaust the UIM coverage from Commerce. However, a necessary concomitant to this syllogism is that UIM coverage under the Commerce policy must actually be "available" to Plaintiffs.

Consumers in the State of Delaware are entitled to receive the full amount of UIM coverage purchased without reduction, offset or limitation, consistent with Delaware's UIM statute, which provides, in relevant part:

> (b) Every insurer shall offer to the insured the option to purchase additional coverage for personal injury or death up to a limit of $100,000 per person and $300,000 per accident…. Such additional insurance shall include underinsured bodily injury liability coverage.
>
> (1) Acceptance of such additional coverage shall operate to amend the policy's uninsured coverage to pay for bodily injury damage that the insured or his/her legal representative are legally entitled to recover from the driver of an underinsured motor vehicle.
>
> (2) An underinsured motor vehicle is one for which there may be bodily injury liability coverage in effect, but the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident total less than the limits provided by the uninsured motorist coverage. These limits shall be stated in the declaration sheet of the policy.
>
> (3) The insurer shall not be obligated to make any payment under this coverage until after the limits of liability under all bodily injury bonds and insurance policies available to the insured at the time of the accident have been exhausted by payment of settlement or judgments.

18 *Del. C.* § 3902(b). The legislative intent of section 3902 is "to compensate

insured motorists injured by financially irresponsible drivers who failed to purchase insurance and whose personal financial resources were insufficient to satisfy damage claims." *State Farm Mut. Auto. Ins. Co. v. Arms*, 477 A.2d 1060, 1063 (Del. 1984). "The overriding purpose of section 3902 is to 'fully compensate innocent drivers.'" *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 439 (Del. 2005) (citing *Deptula v. Horace Mann Ins. Co.*, 842 A.2d 1235, 1237 (Del. 2004)). UIM coverage is designed to place the insured in the same position he or she would have been in had the tortfeasor carried the same liability coverage which the insured carried, up to the maximum amount permitted by statute. *Brown v. Comegys*, 500 A.2d 611 (Del. Super. 1985).

State Farm's policy contains an "other coverage" clause limiting the application of its UIM coverage "as excess to any other coverage *available* from a policy covering" a non-owned vehicle being occupied by an insured at the time of injury (A113) (emphasis added). State Farm correctly notes that the term "available" is not defined in its policy but attempts to restrict its definition to simply mean "legally valid." However, undefined terms in an insurance policy should be given their ordinary, common meaning. *Johnston v. Tally Ho, Inc.*, 303 A.2d 677, 679 (Del. Super. 1973). "Available" is defined as "able to be used or obtained; at someone's disposal."[1] By its plain terms, State Farm's "other insurance" provision

[1] *Available Definition*, Oxford Dictionary, Oxford University Press,

only applies if there is other UIM coverage actually "available." It follows then, that if there is no UIM coverage available to Plaintiffs from the Commerce policy, then the State Farm's "other insurance" provision is inapplicable and State Farm's UIM coverage is primary. Nothing in the "other insurance" provision can be read to rebut this conclusion. *See St. Paul Fire & Marine Ins. Co. v. Metro. Prop. & Cas. Ins. Co.*, 2002 WL 511570 (Del.). UIM coverage under the Commerce policy was not "available" to Plaintiffs due to the lack of Commerce's prior written consent to the settlement with Plymouth Rock. The lack of written consent and notice operates as a complete bar to Plaintiffs' UIM claim under Massachusetts law.

State Farm contends that Plaintiffs have not provided any evidence in support of their argument that UIM benefits cannot be recovered under the Commerce insurance policy (A157). The Commerce policy requires as a condition precedent to coverage that an insured must obtain Commerce's consent-to-settle with the tortfeasor. The relevant Commerce policy language states:

> We must be given sufficient notice of claim to conduct a reasonable investigation and attempt settlement before arbitration can be filed. If an injured person settles a claim as a result of an accident covered under this Part, we will pay that person only if the claim was settled with our consent. We will not be bound under this Part by any judgment resulting from a lawsuit brought without our written consent. We will not, however, unreasonably withhold our consent.

(A88). Plaintiffs were unaware of the existence of this requirement when they

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http://www.oxforddictionaries.com/definition/english/available.

accepted Plymouth Rock's offer to tender its policy limits.

In Massachusetts, an insured must receive an insurer's permission before any settlement can be entered, regardless of the number or status of potential tortfeasors. *Aetna Cas. & Sur. Co. v. Poirier*, 356 N.E.2d 452, 454 (Mass. 1976) (settlement with third party absent consent of insurer resulted in forfeiture of benefits even when the third party was later found not liable). A consent-to-settlement provision is valid in the UM/UIM provisions of a Massachusetts policy. *MacInnis v. Aetna Life & Cas. Co.*, 526 N.E.2d 1255, 1257 (Mass. 1988).

Like Commerce, State Farm's policy contains a "consent-to-settlement" exclusion, disclaiming coverage for an insured who, without State Farm's written consent, settles with any person who may be liable for the insured's bodily injury (A113). However, unlike the Commerce policy the "consent-to-settlement" provision in State Farm's policy does not apply in the UIM context (A113). The rationale behind this is clear because an insured is required to exhaust all applicable liability insurance as a condition precedent to recovering UIM benefits and this Court has expressly limited an insurer's statutory right of subrogation against an underinsured motorist to the amount of coverage required by the Financial Responsibility Law. *Home Ins. Co. v. Maldonado*, 515 A.2d 690 (Del. 1986). In Massachusetts, however, an insurer's subrogation rights are not limited to the policy limits of a tortfeasor's liability insurance coverage. The Massachusetts UM/UIM

statute provides that an insurer making a payment under UM/UIM coverage "shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made." Mass. Gen. Laws ch. 175, § 113L(4). "A release of the tortfeasor from any obligation in return for a settlement amount, prior to the insurer's having made any payment to the injured party, defeats the insurer's right to repayment." *Lighter v. Lumbermens Mut. Cas. Ins. Co.*, 683 N.E.2d 297, 299 (Mass. App. Ct. 1997). An insurer's loss of its subrogation rights due to an insured's untimely notice of a UM/UIM claim constitutes a material prejudice to the insurer such that the UM/UIM coverage us forfeited. *Byron v. Nationwide Ins. Co.*, 1998 WL 374919 (Mass. Super.), *aff'd*, 735 N.E.2d 1278 (Mass. App. Ct. 2000). Delaware Courts have reached similar results when considering "consent-to-settlement" provisions. *See, e.g., Hall v. Allstate Ins. Co.*, 1985 WL 1137299 (Del. Super.); *Bryant v. Federal Kemper Ins. Co.*, 542 A.2d 347 (Del. Super. 1988); *Dukes v. Allstate Indem. Co.*, 1992 WL 332079 (Del. Super.); *Allstate Ins. Co. v. Fie*, 2006 WL 1520088 (Del. Super.); *WSFS v. Stewart Guar. Co.*, 2012 WL 5450830 (Del. Super.); & *U-Haul Co. of Pennsylvania v. Utica Mut. Ins. Co.*, 2013 WL 1726192 (D. Del.).

*Hall v. Allstate* dealt with a settlement and release of a tortfeasor that violated a "consent-to-settlement" provision of an insurance policy. 1985 WL 1137299. The

Court held that the insurer was not freed from liability on its policy in the absence of a showing that the breach caused the insurer to suffer prejudice. *Id.* at *9. The court further held that when a breach was shown, a rebuttable presumption of prejudice arose. *Id.* The burden then shifted to the party seeking to impose liability to demonstrate lack of prejudice by competent evidence. *Id.* Prejudice to the insurer in the context of a violation of a "consent-to-settlement" provision was the loss of subrogation rights against the tortfeasor released by the settlement. *Id.* at *8.

Analogously, in *Dukes v. Allstate*, the Court applied Virginia law, which recognizes the validity of consent-to-settle clauses, and granted summary judgment in favor of the insurer because of the insured's violation of the consent-to-settle provision in the context of a UIM claim. 1992 WL 332079. The court also found that the insurer was prejudiced by the insured's settlement for the tortfeasor's policy limits undermined the insurer's ability to look beyond the tortfeasor's insurance policy and to the personal assets of the tortfeasor in order to recover any amount paid to its insured. *Id.* at *3.

Based upon the foregoing, it is clear that under Massachusetts law, the lack of Commerce's written consent to settle with the tortfeasor precludes Plaintiffs from claiming UIM benefits under the Commerce policy as a matter of law. Since UIM coverage under the Commerce policy was not "available" to the Plaintiffs, the "other insurance" provision of the State Farm policy and 18 *Del. C.* § 3902(b)(3) are

inapplicable. As a result, State Farm's policy is primary because it contains the only UIM coverage available to the Plaintiffs.

Since the Legislative intent of 18 *Del. C.* § 3902 is to protect insureds injured by underinsured motorists, the objective of the statute would be promoted by allowing Plaintiffs to seek recovery for UIM benefits under their personal State Farm insurance policy. Conversely, allowing the Superior Court's determination to stand will ensure that Plaintiffs are without any recourse to pursue UIM benefits for the injuries caused by an underinsured motorist.

## CONCLUSION

WHEREFORE, the Plaintiffs Below, Appellants respectfully request that this Court reverse the decision of the Superior Court since it constitutes legal error.

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Dated: April 21, 2014