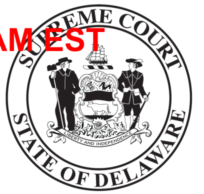
EFiled: Feb 12 2024 12:01AM EST
Filing ID 72012336
Case Number 431,2023



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK GINSBERG, Individually, and as Executor of the ESTATE OF LISA DAVIS, and RON ZOLADKIEWICZ, as Ad Litem Guardian of BRANDON ZOLADKIEWICZ, a Minor Child, Plaintiffs-Below, Appellants, v. HARLEYSVILLE WORCESTER INSURANCE COMPANY, n/k/a NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant-Below, Appellee.	)))))))))))))))))))	No. 431, 2023 On Appeal from the Superior Court No. N22C-08-165 VLM

<u>PLAINTIFFS-BELOW APPELLANTS' OPENING BRIEF ON APPEAL</u>

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Dated: February 12, 2024

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STATEMENT OF THE CASE

A. Nature of Proceedings

The Plaintiffs, Mark Ginsberg, individually, and as Executor of the Estate of Lisa Davis, and Ron Zoladkiewicz as Ad Litem Guardian of Brandon Zoladkiewicz, a Minor Child[1] (together, "Plaintiffs"), appealed the October 31, 2023 decision of the Superior Court of Delaware denying Plaintiffs' motion for summary judgment and granting the cross-motion for summary judgment of Defendant, Harleysville Worcester Insurance Company n/k/a Nationwide Property and Casualty Insurance Company ("Defendant"). This is Plaintiffs' Opening Brief on Appeal.

[1] Plaintiff, Brandon Zoladkiewicz, turned eighteen years old during the course of this action, and is therefore no longer a minor child.

B. Summary of Arguments

1. The trial court erred by determining that 18 Del. C. § 3902(c) prohibits stacking, notwithstanding the contrary language of an auto insurance policy and the rules of construction for insurance contracts.

2. Public policy justifications require Defendant to provide stackable uninsured motorist coverage where Defendant (a) failed to notify Plaintiffs that they could not stack uninsured benefits despite purchasing separate policies and paying separate premiums, (b) contracted to provide illusory excess uninsured coverage, and (c) charged premiums for non-existent uninsured coverage in violation of Plaintiffs' substantive due process rights.

C. Statement of Facts

The material facts are not in dispute. On September 28, 2020, Lisa Davis was driving her vehicle with her son, Brandon Zoladkiewicz, when they were struck by a vehicle operated by Jordan Griffith, who was uninsured and driving under the influence of alcohol. The collision caused the death of Lisa Davis, and seriously injured Brandon Zoladkiewicz. Ginsberg v. Harleysville Worcester Ins. Co., 2023 Del. Super. LEXIS 854, at *1-2 (Del. Super. Ct. Oct. 31, 2023).

At all times material, Plaintiff Mark Ginsberg was married to Lisa Davis. Mr. Ginsberg purchased an auto insurance policy from Defendant Harleysville Worcester Insurance Company, a Nationwide affiliate, bearing policy number PAAB82705 (the "Ginsberg Policy"), which provided uninsured motorist ("UM") benefits with coverage limits of 100/300. Id. Lisa Davis purchased a separate auto insurance policy from Harleysville Worcester Insurance Company, bearing policy number PAAB76109 (the "Davis Policy"), which also provided UM benefits with coverage limits of 100/300.[2] Id.

Mark Ginsberg, Lisa Davis, and Brandon Zoladkiewicz resided in the same household, such that they were all covered under the Ginsberg and Davis Policies as resident relatives.

[2] Mr. Ginsberg and Mrs. Davis purchased separate policies because they both had children from previous marriages who were insured under their respective policies.

The Ginsberg and Davis Policies contain a number of endorsements that modify the contractual terms.[3] Relevant here is Endorsement A2677 (A37-A40), which applies to uninsured and underinsured motorist coverage:

> **Other Insurance**
> If there is other insurance applicable under one or more policies or provisions of coverage that is similar to the insurance provided under this Part of the Policy:
>
> 1. Any insurance **we provide** with respect to a vehicle:
> a. You do not own, …; or
> b. Owned by you or any "family member", which is not insured for **this coverage** under **this Policy**;
> **shall be excess** over any collectible insurance providing such coverage on a primary basis.
>
> 2. If the coverage under this Policy is provided:
> a. On a primary basis ….
> b. On an **excess basis**, we will pay only our share of the loss that must be paid under insurance providing coverage on an excess basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage provided on an **excess basis**.

A40 (emphasis added). At the bottom of the same page, Endorsement A2677 contains a contradictory clause:

> **Two Or More Auto Policies**
> If this Policy and any other auto insurance policy issued to you or any resident of your household, by us or any company affiliated with us, apply to the same accident, the maximum limit of liability under the policies shall not exceed the highest applicable limit of liability under any one policy.

Id.

[3] The Ginsberg and Davis Policies are virtually identical in all respects.

For purposes of convenience, the relevant page of Endorsement A2677 (A40) is copied below.

Other Insurance

If there is other applicable insurance available under one or more policies or provisions of coverage that is similar to the insurance provided under this Part of the Policy:

1. Any insurance we provide with respect to a vehicle:
   a. You do not own, including any vehicle while used as temporary substitute for "your covered auto"; or
   b. Owned by you or any "family member", which is not insured for this coverage under this Policy;

   shall be excess over any collectible insurance providing such coverage on a primary basis.
2. If the coverage under this Policy is provided:
   a. On a primary basis, we will pay only our share of the loss that must be paid under insurance providing coverage on a primary basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage provided on a primary basis.
   b. On an excess basis, we will pay only our share of the loss that must be paid under insurance providing coverage on an excess basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage provided on an excess basis.

Arbitration

A. If we and an "insured" do not agree:
   1. Whether that "insured" is legally entitled to recover damages; or
   2. As to the amount of damages which are recoverable by that "insured";

   from the owner or operator of an "uninsured motor vehicle" or an "underinsured motor vehicle" then the matter may be arbitrated. However, disputes concerning coverage under this Part may not be arbitrated.

   Both parties must agree to arbitration. If so agreed, each party will select an arbitrator. The two arbitrators will select a third. If they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction.

B. Each party will:
   1. Pay the expenses it incurs; and
   2. Bear the expenses of the third arbitrator equally.

C. Unless both parties agree otherwise, arbitration will take place in the county in which the "insured" lives. Local rules of law as to procedure and evidence will apply. A decision agreed to by at least two of the arbitrators will be binding as to:
   1. Whether the "insured" is legally entitled to recover damages; and
   2. The amount of damages.

II. Part F – General Provisions

A. The **Our Right To Recover Payment** Provision of Part **F** is amended as follows:
   1. The provision does not apply to damages caused by an accident with an "underinsured motor vehicle".
   2. The provision is replaced by the following with respect to damages caused by an accident with an "uninsured motor vehicle":

      Our Right To Recover Payment

      If we make a payment under this Policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right up to the limits specified by the Delaware Financial Responsibility Law. That person shall do:

      1. Whatever is necessary to enable us to exercise our rights; and
      2. Nothing after loss to prejudice them.

      If we make a payment under this Policy and the person to or for whom payment is made recovers damages from another, that person shall:

      1. Hold in trust for us the proceeds of the recovery; and
      2. Reimburse us to the extent of our payment;

      up to the limits specified by the Delaware Financial Responsibility Law.

B. The **Two Or More Auto Policies** Provision is replaced by the following:

   Two Or More Auto Policies

   If this Policy and any other auto insurance policy issued to you or any resident of your household, by us or any company affiliated with us, apply to the same accident, the maximum limit of liability under all the policies shall not exceed the highest applicable limit of liability under any one policy.

ARGUMENT I

THE TRIAL COURT ERROENOUSLY DETERMINED THAT 18 DEL. C. § 3902(c) PROHIBITS STACKING, NOTWITHSTANDING THE CONTRARY LANGUAGE OF AN INSURANCE POLICY AND THE RULES OF CONSTRUCTION FOR INSURANCE CONTRACTS.

A. Question Presented

Whether the trial court erred by determining that 18 Del. C. § 3902(c) prohibits the stacking of UM/UIM coverage, notwithstanding the contrary language of an insurance policy, and the rules of construction for insurance contracts.[4]

B. Scope of Review

The Supreme Court "review[s] the Superior Court's decision on a motion for summary judgment *de novo*, applying the same standard as the trial court." Paul v. Deloitte & Touche LLP, 974 A.2d 140, 145 (Del. 2009). "Questions concerning the interpretation of contracts are questions of law, which [this Court] review[s] *de novo*." Id.

C. Merits of Argument

Defendant contracted to provide stackable UM coverage across Plaintiffs' separate policies. Defendant refuses to honor its commitment, hanging its hat on section 3902(c). The trial court essentially held that its hands are tied due to the language of section 3902(c). Plaintiffs ask this Court to reverse.

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[4] Preserved at A9; Ginsberg, 2023 Del. Super. LEXIS 854, at *15-20.

In Hurst v. Nationwide Mut. Ins. Co., 652 A.2d 10 (Del. 1995), this Court explained: "The purpose of Section 3902 is to permit a risk adverse person to establish a fund to protect against losses caused by uninsured/underinsured motorists by contracting for supplemental coverage. Uninsured motorist coverage is 'personal to the insured and not vehicle specific.'" Hurst, 652 A.2d at 14 (citation omitted). The Court further held that "Section 3902 permits stacking the policy limits of uninsured coverage in the absence of an express prohibition." Id.

Delaware follows two rules of construction for insurance contracts. "First, where ambiguous, the language of an insurance contract is always construed most strongly against the insurance company which has drafted it. Second, 'an insurance contract should be read to accord with the reasonable expectations of the purchaser so far as the language will permit.'" Steigler v. Ins. Co. of N. Am., 384 A.2d 398, 400-01 (Del. 1978) (citations omitted). See also Hallowell v. State Farm, 443 A.2d 925, 926 (Del. 1982) (same).

For decades, this Court has recognized that insurance policies

> must be interpreted in a common sense manner, giving effect to all provisions so that a reasonable policyholder can understand the scope and limitation of coverage. **It is the obligation of the insurer to state clearly the terms of the policy**, just as it is the obligation of the issuer of securities to make the terms of the operative document understandable to a reasonable investor whose rights are affected by the document. Thus, if the contract in such a setting is ambiguous, the principle of *contra proferentem* dictates that the contract must be construed against the drafter.

> The policy behind this principle is that the insurer or the issuer, as the case may be, is the entity in control of the process of articulating the terms. The other party, whether it be the ordinary insured or the investor, usually has very little say about those terms except to take them or leave them or to select from limited options offered by the insurer or issuer. Therefore, it is incumbent upon the dominant party to make terms clear. **Convoluted or confusing terms are the problem of the insurer or issuer--not the insured or investor**.

Penn Mut. Life Ins. Co. v. Oglesby, 695 A.2d 1146, 1149-50 (Del. 1997) (emphasis added).

In the present case, the language of the Ginsberg Policy, at best, permits the stacking of UM benefits, and at worst, is ambiguous, such that stacking of UM benefits must be allowed.

The policies in issue include various endorsements that modify the contractual terms. Endorsement A2677 applies to UM/UIM coverage, and provides, in pertinent part:

> **Other Insurance**
> If there is other insurance applicable under one or more policies or provisions of coverage that is similar to the insurance provided under this Part of the Policy:
>
> 1. Any insurance **we provide** with respect to a vehicle:
> a. You do not own, …; or
> b. Owned by you or any "family member", which is not insured for **this coverage** under **this Policy**;
> **shall be excess** over any collectible insurance providing such coverage on a primary basis.

> 2. If the coverage under this Policy is provided:
>
> a. On a primary basis ….
>
> b. On an **excess basis**, we will pay only our share of the loss that must be paid under insurance providing coverage on an excess basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage provided on an **excess basis**.

A40 (emphasis added) (the "Other Insurance" clause).

At the bottom of the same page, Endorsement A2677 contains a contradictory clause:

> **Two Or More Auto Policies**
>
> If this Policy and any other auto insurance policy issued to you or any resident of your household, by us or any company affiliated with us, apply to the same accident, the maximum limit of liability under the policies shall not exceed the highest applicable limit of liability under any one policy.

A40 (the "Two or More Auto Policies" clause).

Under the facts of this case, the Other Insurance clause allows Plaintiffs to recover UM benefits from the Ginsberg Policy. The endorsement states, where there is other applicable insurance available, any insurance Defendant provides "with respect to a vehicle you do not own" or "owned by you or any 'family member', [sic] which is not insured for **this [UM] coverage** under **this Policy** shall be **excess** over any collectible insurance providing such [UM] coverage on a primary basis." A40 (emphasis added). Here, Lisa Davis's automobile is a "vehicle" "owned by … [a] family member" that was not insured for UM coverage under the Ginsberg Policy. Thus, the coverage in the Ginsberg Policy is necessarily excess.

The Other Insurance clause also distinguishes between primary and excess coverage. Specifically, the provision states, if the coverage under the Ginsberg Policy is provided "[o]n an excess basis," then Defendant "will pay only our share of the loss that must be paid under insurance providing coverage on an excess basis. Our share is the proportion that our limit of liability bears to the total of all applicable limits of liability for coverage provided on an excess basis." A40.

When applied to the facts of this case, the Davis Policy represents primary coverage, whereas the Ginsberg Policy represents excess, or secondary, coverage. Thus, Plaintiffs may access the UM coverage of the Ginsberg Policy, since it is the only form of excess UM coverage available.

Plaintiffs acknowledge that the Two or More Auto Policies clause contradicts the Other Insurance clause. In short, the Two or More Auto Policies clause may be read to limit the total amount of UM/UIM coverage provided in two, separate policies, where such policies are issued by the same or affiliated insurance companies to residents of the same household. This clause, however, does not change the outcome of the case.

The trial court correctly found that "there is some ambiguity in the provision of additional coverage found in the 'Other Insurance' and 'Two or More Auto Policies' provisions." Ginsberg, 2023 Del. Super. LEXIS 854, at *16. In light of this ambiguity, the trial court determined that

> Because the contract provided two potentially conflicting provisions on the same page, **a consumer could have reasonably interpreted the language to mean that there was a right to excess coverage without any carveouts or exceptions**. **The contract appears to take away that right on the same page with its anti-stacking provision. The contract further has no express prohibition regarding that the two policies cannot be from the same company.** Under both the general endorsements, and the same Part C that speaks to the "Uninsured Motorists Coverage," the policies contain identical conflicting provisions.

Id., at *18 (emphasis added).

The trial court's holding that the Ginsberg Policy is ambiguous is consistent with decisions of courts in other jurisdictions that have interpreted analogous policy language.

For example, in Ritchie v. Allied Prop. & Cas. Ins. Co., 307 S.W.3d 132 (Mo. 2009), the applicable insurance policy contained two conflicting provisions. The "Limit of Liability" clause provided:

> The limit of liability shown in the Declarations for each person for Underinsured Motorists coverage is our maximum limit of liability for all damages for case, loss of services, or death arising out of 'bodily injury' sustained by any one person in any one accident.
> . . .
> The limit of liability shall be reduced by all sums: … [p]aid because of 'bodily injury or by or on behalf of persons organizations who may be legally responsible …

Id. at 136. The "Other Insurance" clause provided:

> If there is other applicable underinsured motorists coverage available under one or more policies or provisions of coverage:

> 1. Any recovery for damages may equal but not exceed the highest applicable limit for any one vehicle under this insurance or other insurance providing coverage on either a primary or excess basis….
> 2. Any coverage we provide with respect to a vehicle you do not own shall be excess over any other collectible underinsured motorist coverage.

Id. at 137.

The court explained that an "'ordinary person of average understanding,' reasonably could interpret this other insurance provision to mean that when an injured insured is occupying a non-owned vehicle and there are multiple underinsured motorist coverages, … then each of the underinsured motorist coverages are excess to the other, and, therefore, may be stacked." Ritchie, 307 S.W.3d at 138 (citation omitted). Accordingly, the court held that "the interplay between [the] limit of liability provision and [the] other insurance provision created ambiguity, as excess coverage was promised at one point and taken away at another." Id. (citation omitted).

Similarly, in Koller v. Liberty Mut. Fire Ins. Co., 2011 U.S. Dist. LEXIS 26512 (W.D. Mo. Mar. 15, 2011), the defendant insurer opposed the plaintiff insured's efforts to stack UIM benefits. The policy contained an anti-stacking provision, stating:

> The limit shown in the Schedule or in the Declaration … is our maximum limit of liability for all damages for bodily injury resulting from any one accident. This is the most we will pay regardless of the number of … Vehicles or premiums shown in the Schedule or in the Declarations.

Koller, 2011 U.S. Dist. LEXIS 26512, at *3-4. The policy also included an "Other Insurance" clause, providing: "Any insurance we provide with respect to a vehicle you do not own shall be excess over any collectible insurance providing coverage on a primary basis." Id., at *6. In construing the competing provisions, the court determined that the "policy [is] ambiguous as to the ability to stack when an insured is injured while operating a non-owned vehicle." Id., at *12.

The courts in both Ritchie and Koller held that the ambiguity of the respective policies must be interpretated in favor of the insureds, such that the insureds were permitted to stack UIM benefits.

In the present case, however, the trial court concluded that the ambiguity of the Ginsberg Policy does not matter because there is a "legal prohibition against stacking" *vis-a-vis* section 3902(c), and "[t]here is no outright contradiction that would render the anti-stacking provision inoperative." Ginsberg, 2023 Del. Super. LEXIS 854, at *19. In making these determinations, the trial court erred.

Section 3902(c) does not stand for the proposition that stacking of UM/UIM coverages between policies issued by the same insurer is legally prohibited. Rather, this Court has interpreted section 3902(c) as reflecting "the General Assembly's apparent intent to **allow** … anti-stacking provisions that preclude stacking multiple policies issued by the same insurer." Bromstad-Deturk v. State Farm Mut. Auto. Ins. Co., 2009 Del. LEXIS 274, at *4 (Del. 2009) (emphasis added). Stated differently,

section 3902(c) applies to prevent the stacking of multiple policies issued by the same insurer where an insurance contract dictates as much, or is otherwise silent on the subject.

On the other hand, section 3902(c) cannot fairly be read to outright prohibit an insurance carrier from contracting with an insured to provide stackable or excess UM/UIM coverages under multiple policies issued by the same insurer. For example, if the Ginsberg Policy did not include anti-stacking language, Defendant would have no legitimate basis to oppose stacking here. "Parties to an insurance contract are free to agree upon any terms so long as that agreement is not inconsistent with a statutory prohibition or public policy."[5] O'Brien v. Progressive N. Ins. Co., 785 A.2d 281, 286 (Del. 2001). To conclude otherwise would undermine Delaware's fundamental policy of upholding parties' freedom of contract and ability to rely on the enforceability of their agreements.[6]

The trial court similarly erred by holding that, despite its ambiguity, the Ginsberg Policy contains "no outright contradiction that would render the anti-stacking provision inoperative." Ginsberg, 2023 Del. Super. LEXIS 854, at *16.

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[5] Indeed, Delaware drivers may purchase UM/UIM coverage "up to a limit of … $300,000," see 18 Del. C. § 3902(b), but routinely obtain coverage well above that amount.

[6] See Ascension Ins. Holdings, Ltd. Liab. Co. v. Underwood, 2015 Del. Ch. LEXIS 19, at *14-15 (Del. Ch. Jan. 28, 2015); ABRY Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032, 1059 n.66 (Del. Ch. 2006).

In so holding, the trial court overlooked the principle of *contra proferentem*, and the rules of construction for resolving ambiguities in insurance contracts. Generally, the principle of *contra proferentem* dictates that ambiguities in a contract "must be construed against the drafter." Penn Mut. Life Ins. Co., 695 A.2d at 1150. In the insurance setting, "where ambiguous, the language of an insurance contract is aways construed most strongly against the insurance company" because "an insurance policy is an adhesion contract." Steigler, 384 A.2d at 400-01 (Del. 1978). Furthermore, "an insurance contract should be read to accord with the reasonable expectations of the purchaser so far as the language will permit.'" Id. (internal citations omitted).

Here, the trial court agreed that the Ginsberg Policy is ambiguous. Contrary to the trial court's suggestion, Plaintiffs are not also required to establish that such ambiguity renders the anti-stacking provision inoperative. See e.g., Hallowell v. State Farm, 443 A.2d 925, 926 (Del. 1982) ("An ambiguity exists when the language in a contract permits two or more reasonable interpretations."). In applying the rules of construction, the ambiguity of the Ginsberg Policy must be construed against Defendant, and the Ginsberg Policy must be read to accord with the reasonable expectations of the Plaintiffs. Accordingly, Plaintiffs should be permitted to stack UM benefits under the Ginsberg Policy.

Plaintiffs would urge the Court to consider the fact that Defendant could have easily resolved the policy's ambiguity in one of two ways. First, Defendant could have included a sentence in the Other Insurance clause indicating that the provision does not apply to multiple policies issued by Defendant or its affiliates.[7] Instead, Defendant agreed to allow stacking of UM coverage so long as the stacked coverage was "excess."

Second, Defendant could have acted ethically and responsibly, and simply notified Mark Ginsberg prior to the time of contracting that he might not receive UM/UIM benefits under his own policy, despite his payment of a separate premium, because Defendant issued a similar policy to Lisa Davis, and the policies include anti-stacking provisions. This contention is discussed further in Argument II, *infra*.

In conclusion, Plaintiffs submit that there are only two reasonable interpretations of the subject policy in the context of stacking. One interpretation expressly permits the stacking of UM coverage by designating the stacked coverage as excess. See, e.g., St. Paul Fire & Marine Ins. Co. v. Metro. Prop. & Cas. Ins. Co., 2002 Del. LEXIS 211, at *5-6 (Del. 2002). The second interpretation promises excess UM coverage at one point and takes it away at another, rendering the policy

[7] In fact, Defendant included such a sentence in the "Other Insurance" section of a different endorsement in the Ginsberg Policy. Specifically, Endorsement A2669 (A41-A46) provides: "If more than one policy issued by us or a company affiliated with us applies on an excess basis to the same loss, we will pay only up to the highest limit of any one of them." A43.

ambiguous. See Ginsberg, 2023 Del. Super. LEXIS 854, at *18-19. See also Koller, 2011 U.S. Dist. LEXIS 26512 (W.D. Mo. Mar. 15, 2011); Ritchie, 307 S.W.3d 132 (Mo. 2009). Under either interpretation, stacking of UM benefits is permitted, and there is no law prohibiting the parties from contracting for such additional coverage. Accordingly, the trial court's decision should be reversed.

ARGUMENT II

PUBLIC POLICY CONSIDERATIONS JUSTIFY THE STACKING OF UM COVERAGE WHERE DEFENDANT (1) FAILED TO NOTIFY PLAINTIFFS THAT THEY COULD NOT STACK UM BENEFITS, (2) CONTRACTED TO PROVIDE ILLUSORY EXCESS UM COVERAGE, AND (3) CHARGED PREMIUMS FOR NON-EXISTENT UM COVERAGE.

A. Question Presented

Whether public policy justifications require Defendant to provide stackable UM coverage where Defendant (1) failed to notify Plaintiffs that they could not stack UM/UIM benefits despite purchasing separate policies and paying separate premiums, (2) contracted to provide illusory excess UM coverage, and (3) charged premiums for non-existent UM coverage in violation of Plaintiffs' substantive due process rights.[8]

B. Scope of Review

The Supreme Court "review[s] the Superior Court's decision on a motion for summary judgment *de novo*, applying the same standard as the trial court." Paul v. Deloitte & Touche LLP, 974 A.2d 140, 145 (Del. 2009).

C. Merits of Argument

Strong public policy considerations require the Court to reverse the trial court's decision and conclude that Defendant must provide UM coverage. First,

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[8] Preserved at A14-15; A25; A32; Ginsberg, 2023 Del. Super. LEXIS 854, at *20-24.

Defendants failed to notify Plaintiffs that they could not stack UM coverage under separate policies, for which they paid separate premiums, because the policies were issued by the same insurance company. Defendant's failure to notify Plaintiffs of this exclusion, especially in the face of contradictory policy language, violates public policy.

In Banaszak v. Progressive Direct Ins. Co., 3 A.3d 1089 (Del. 2010), this Court "recognized that the insurance industry employs '[i]ts own obscure terminology, which, despite efforts toward plain language policies, is nevertheless difficult for the typical consumer to understand fully.'" Id. at 1094 (quoting State Farm v. Arms, 477 A.2d 1060, 1065 (Del. 1984)). Accordingly, this Court held that,

> **To honor the legislative intent and to fulfill the obligations of § 3902 by providing a disclosure mechanism for informed insurance decisions**, the insured must know "[a]ll of the facts reasonably necessary for a person to be adequately informed to make a rational, knowledgeable and meaningful determination." Without understanding what uninsured or underinsured motorist coverage entails, [plaintiff] did not have all of the pertinent facts and could not make an informed decision on automobile insurance coverage."

Banaszak, 3 A.3d at 1094-95 (emphasis added) (citation omitted).

The legislative intent and obligations of section 3902 require an insurer to provide the insured with all of the facts reasonably necessary to allow the insured to make an informed decision about purchasing insurance coverage. The disclosure requirement of section 3902(b), which obligates an insurer to offer an insured the option to purchase additional UM coverage, necessarily requires an insurer to

explain that such additional UM coverage will not be accessible if multiple policies are purchased from the same or affiliated insurance companies.

In the absence of such information, the offer of additional UM/UIM coverage is rendered meaningless in cases where insureds or resident-relatives have two or more policies with the same/affiliated insurers, and at least one of those policies provides additional UM/UIM coverage. Indeed, where an insurer already provides a policy containing additional UM coverage to an insured or resident-relative, it would make more sense for the insurer **not** to offer additional UM coverage when selling multiple policies to the same household. Otherwise, the insured or resident-relative would simply be wasting money by paying twice for coverage that they already have.

Perhaps more importantly, in the absence of a disclosure that multiple UM/UIM policies with the same carrier cannot be stacked, insureds are actually deprived of the opportunity to purchase excess UM/UIM coverage, in violation of section 3902(b). The instant case represents a perfect example.

Plaintiff Mark Ginsberg accepted the Defendant's statutorily-required offer to purchase excess UM coverage so that he could protect himself and his family from the risk posed by uninsured drivers. Despite purchasing additional UM coverage, Mr. Ginsberg was not actually able to avail himself of that coverage, thereby frustrating the essential purpose and benefit of the offer altogether.

In order for Mr. Ginsberg to have been able to make an informed decision about purchasing insurance coverage, Defendant was required to notify Mr. Ginsberg that he would not actually receive any additional UM coverage unless he purchased such coverage from a different, unaffiliated insurance carrier. The absence of such notice deprived Mr. Ginsberg of the opportunity to obtain the additional insurance protection he reasonably believed he had purchased, and which was required to be offered under section 3902(b).

The second public policy concern relates to the Defendant's use of language in an insurance contract that would lead an insured to reasonably believe he could stack UM/UIM coverages under separate policies where one of the coverages is deemed excess. As the trial court observed, at best, Defendant knowingly offered insurance with "ambiguous 'excess language'" that would cause an insured to reasonably believe he could stack UM/UIM coverages between different policies. Ginsberg, 2023 Del. Super. LEXIS 854, at *23. At worst, Defendant sold separate insurance policies to the same household containing "excess coverage" for UM/UIM that Defendant knew could not be honored as a matter of law.[9] Id. In either case, the language utilized in Defendant's insurance contracts violates public policy by frustrating the reasonable expectations of the insured. As a result, the Court should

[9] In making this argument, Plaintiffs still maintain their position in Argument I *supra* that section 3902(c) does not legally prohibit an insurer from contracting with an insured to provide stackable UM coverages under multiple policies.

require Defendant to honor the Plaintiffs' reasonable expectations and provide UM coverage under the Ginsberg Policy.

Notably, this is not the first time our courts have raised concerns about the inequitable nature of section 3902(c). In Bromstad-Deturk v. State Farm, 2009 Del. LEXIS 274 (Del. 2009), this Court held that 18 Del. C. § 3902(c) permitted the insurer to include anti-stacking clauses preventing the plaintiff from stacking UIM benefits under three policies from the same carrier, but cautioned:

> We suggest, however, that **because consumers** like Bromstad-Deturk **may not fully comprehend the significance of an anti-stacking provision**, the General Assembly might consider amending § 3902 **to require insurers to notify consumers** that they would be able to stack multiple policies from different, unaffiliated insurers. **Adding a notice requirement** to § 3902, **would serve to encourage consumers to evaluate the pros and cons** of choosing to ensure multiple vehicles through one insurer.

Bromstad-Deturk, 2009 Del. LEXIS 274, at *4-5.

The troubling facts of this case require the Court to take more meaningful action beyond merely suggesting that the General Assembly consider amending section 3902 to include a notice requirement. Unlike in Bromstad-Deturk, the Defendant here issued policies that misled Plaintiffs to believe that they purchased certain excess coverage, despite such excess coverage not actually existing. Accordingly, the Court should either infer a notice requirement under 3902(b), requiring insurers to explain that UM/UIM coverage is not stackable between multiple policies from the same/affiliated insurance companies, or otherwise hold

that anti-stacking provisions are void as against public policy where an insurer utilizes contractual language leading an insured to reasonably believe he purchased stackable UM/UIM coverage across multiple policies issued by the same carrier.

Given that nearly fifteen (15) years have passed since this Court's warning in Bromstad-Deturk, it is incredible that insurance companies, such as Defendant, have continued to pocket hefty premiums for multiple policies, without notifying insureds that they are precluded from stacking the coverages purchased, but they would be entitled to receive such additional coverage by simply purchasing multiple policies from unaffiliated carriers. Any reasonable consumer equipped with such knowledge would opt for additional coverage by purchasing policies from unaffiliated insurance companies. The decision of Defendant and other insurance companies alike to **not** provide such notice to consumers is contemptible, and unequivocally self-interested. Such conduct must not be condoned by our State's highest court.

The third public policy concern relates to issues of unconscionability and unconstitutionality of anti-stacking provisions and section 3902(c).[10] Plaintiffs argued before the trial court that, as a general matter, section 3902(c) is both fundamentally unfair and patently illogical, insofar as it conditions UM/UIM

[10] The trial court wisely observed that the Defendant's policies, and the text of 3902(c), implicate substantive due process concerns to the extent they allow insurers to charge premiums for non-existent UM coverage. Ginsberg, 2023 Del. Super. LEXIS 854, at *23 n.73 (citing Hardy v. Progressive Specialty Ins. Co., 67 P.3d 892 (Mont. 2003)).

stacking solely upon whether the subject policies are issued by the same or different insurance carriers. Plaintiffs are aware of no stated rationale for this rule. In fact, the only reasonable explanation that Plaintiffs can discern for 3902(c) is that policyholders may receive discounted premiums when obtaining multiple policies from the same or affiliated insurers, and in those instances, the stacking of UM/UIM coverage would arguably constitute a benefit for which policyholders did not pay. However, our courts have applied 3902(c) to invariably permit anti-stacking provisions, regardless of the premiums paid or discounts received by policyholders. This blanket endorsement of anti-stacking under 3902(c) has unconscionably robbed policyholders of the contractual benefits for which they paid.

The fairest and most logical application of 3902(c) would involve an assessment of whether policyholders paid separate premiums for their policies, and if so, whether the policyholders received discounted premiums for purchasing multiple policies from the same or affiliated insurers. In the absence of discounted premiums, the fact that the same insurer provides multiple policies to an insured or persons living in the same household should have no bearing on the ability of policyholders to stack the UM/UIM coverage for which they paid.

Insurers are collecting premiums on statutorily required insurance coverage. Permitting an insurer to deny recovery under separate policies, while receiving full premiums, means the insurer profited under the insurance statute to the insured's

detriment. Such an outcome could not possibly have been the intention of the Legislature. An insurance policy that contains language defeating coverage for which the insurer has received valuable consideration is against public policy and conflicts with the reasonable expectations of the insured.

For the same reasons articulated above, at least one court in another jurisdiction determined that the state's motor vehicle insurance statute was unconstitutional to the extent it allowed insurers to charge premiums for illusory coverage.

In Hardy v. Progressive Specialty Ins. Co., 67 P.3d 892 (Mont. 2003), the Supreme Court of Montana was tasked with resolving the following question: "Given that the Montana Supreme Court has determined that underinsured motorist coverage is personal and portable, is it against public policy in Montana to charge separate premiums for that coverage for separate vehicles insured on the same policy if the insured can only collect one amount of coverage?" Hardy, 67 P.3d at 897-98.

The Hardy court analyzed the state's motor vehicle statute, which at the time, prevented the stacking of UIM coverage between multiple policies issued by the same insurance carrier. The statute read, in relevant part:

> (1) Unless a motor vehicle liability policy specifically provides otherwise, the limits of insurance coverage available under each part of the policy must be determined as follows, regardless of the number of motor vehicles insured under the policy, the number of policies issued by the same company covering the insured, or the number of separate premiums paid:

> . . . .
> (c) the limits of the coverages specified under one policy or under more than one policy issued by the same company may not be added together to determine the limits of the insurance coverage or coverages available under the policy or policies for any one accident.

Hardy 67 P.3d at 898 (quoting Mont. Code Ann. § 33-23-203 (1997)).

The court explained,

> [w]hile the state may have a legitimate interest in [maintaining affordable] insurance rates, we fail to understand how [the statute], which allows insurers to charge premiums for non-existent coverage, is rationally related to the stated objective. That contention simply defies logic.… Charging consumers for non-existent coverage is the antithesis of affordable coverage. [The statute] permits the insurance industry to deprive Montanans of their hard earned money for no consideration. There is no legitimate objective for doing so.

Hardy, 67 P.3d at 899 (citations omitted). Accordingly, the court held that the statute

> is not rationally related to the stated objective of maintaining affordable insurance in Montana, nor any other 'permissible legislative objective' that we can imagine, and constitutes an arbitrary and capricious action. Consequently, [the statute], to the extent that it allows charging premiums for illusory coverage, violates substantive due process and is unconstitutional.

Id. (citations omitted).

Importantly, a few years after the Hardy decision, the Montana Legislature amended the State's motor vehicle insurance statute to clarify that anti-stacking provisions are permitted only where the premiums charged actuarially support the limiting of coverage:

> (c) the limits of the coverages specified under one policy or under more than one policy issued by the same company may not be added together to determine the limits of insurance coverages available under the policy or policies for any one accident **if the premiums charged for the coverage by the insurer actuarially reflect the limiting of coverage separately to the vehicles covered by the policy and the premium rates have been filed with the commissioner**.

Mont. Code Ann. § 33-23-203(1)(c) (2023) (emphasis added).

The public policy and due process concerns discussed in Hardy are persuasive in the context of 18 Del. C. § 3902(c) and the facts of this case. For decades, our courts have invariably endorsed the anti-stacking language of section 3902(c) and corresponding anti-stacking provisions of insurance policies. The enforcement of section 3902(c) has unconscionably and unconstitutionally robbed policyholders of the contractual benefits for which they paid good and valuable consideration. The Legislature would not have intended to create a law that allows insurance companies to charge premiums for illusory coverage.

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully requests that the Court reverse the decision of the trial court, and remand the case with instructions to enter judgment in favor of Plaintiffs.

Respectfully submitted:

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