

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

**STATE FARM MUTUAL ,)
AUTOMOBILE INSURANCE)
COMPANY (as subrogee of Tera)
& Nanette Robinson),)**

Plaintiff,)

v.)

C.A. No. N10C-01-122 (MJB)

**UNITED PARCEL SERVICE OF)
AMERICA, INC., and RICHARD)
WALLS,)**

Defendants.)

Submitted: January 31, 2012

Decided: April 30, 2012

Upon consideration of jurisdiction for this matter, **DISMISSED.**

OPINION AND ORDER

Amanda L.H. Brinton, Esquire, Wilmington, Delaware, Attorney for Plaintiff.

Nancy Chrissinger Cobb, Esquire, Chrissinger & Baumberger, Wilmington, Delaware, Attorney for Defendant.

BRADY, J.

Introduction

This is a personal injury action arising from a motor vehicle accident that occurred on February 16, 2005. Plaintiff alleges Defendant made an unsafe u-turn, causing his vehicle, a UPS truck, to strike Plaintiff's insured's vehicle. Pursuant to a policy for personal injury protection ("PIP") benefits, State Farm paid its insureds, Tera and Nanette Robinson, PIP benefits in the amount of \$54,955.13.¹ In this action, State Farm seeks judgment for \$54,955.13 against Defendants, plus interests and costs, claiming it is entitled subrogation.²

On December 20, 2011, the Court asked the parties to submit simultaneous memoranda on the issue of whether the Court has jurisdiction, or whether proper jurisdiction is conferred by 21 *Del. C.* § 2118, which mandates that certain disputes amongst insurers as to liability or amounts paid must be arbitrated by Arbitration Forums, Inc. ("AFI").³ State Farm submitted its memorandum on January 30, 2012, and UPS submitted its memorandum on January 31, 2012.

By its own rules, AFI excludes certain types of matters from compulsory arbitration. A self-insured entity, according to the Arbitration Forum Rules, is "an entity that meets the state requirements of being self-insured, one that assumes the risk directly for covering losses involving its property, or one whose deductible or retention is equal to or exceeds the amount of loss in dispute."⁴ Article 2.A of the Arbitration Forums, Inc. Reference Guide to Arbitration Forums' Agreements and Rules provides,

¹ Compl. ¶ 9.

² *Id.* ¶ 10.

³ See 21 *Del. C.* § 2118(g)(3); *infra* text accompanying note 11.

⁴ ARBITRATION FORUMS, INC., ARBITRATION FORUMS, INC. RULES 10 (Feb. 1, 2010), https://www.arbfile.org/af-static/res/Downloads/AF_Rules_020110.pdf.

if the amount of damages sought by the filing company is less than the responding insured's liability deductible or self-insured retention, arbitration would lack jurisdiction if this is raised and supported as an affirmative defense. An arbitrator can consider only an amount in excess of the insured's deductible or self-insured retention.⁵

State Farm submitted the claim at issue in this case to AFI on February 25, 2009. AFI determined it lacked jurisdiction because the deductible for the claim was \$5,000,000, "essentially making them a self-insured."⁶ The docket states, "The proper venue for this dispute is arbitration administered by the Insurance Commissioner."⁷ Not having submitted a request for arbitration with the Insurance Commissioner,⁸ State Farm filed its Complaint with this Court on January 15, 2010.⁹ Both State Farm and UPS now ask the Court to maintain jurisdiction.

Because 21 *Del. C.* § 2118(g)(3) requires that PIP coverage disputes between insurers or between an insurer and a self-insurer be arbitrated, and the Court declines to find that 21 *Del. C.* § 2118(j)(5) applies to the facts at hand, the Court lacks jurisdiction over this matter. Therefore, this case must be **DISMISSED**.

Parties' Contentions

State Farm calls the Court's attention to AFI's dismissal of this matter because UPS qualifies as a self-insured under AFI's rules, exempting it from arbitration with AFI. UPS advances the same argument. State Farm points out Delaware courts' acknowledgement of a jurisdictional disconnect between Courts and statutory arbitration,

⁵ ARBITRATION FORUMS, INC., REFERENCE GUIDE TO ARBITRATION FORUMS' AGREEMENTS AND RULES 13 (2009), https://www.arbfile.org/af-static/res/Downloads/Reference_Guide.pdf.

⁶ AFI Docket No. I019-00237-09-00 (May 8, 2009) (Pl.'s Ex. 6). The docket cites "rule 6-3," however no rule 6-3 exists in the 2009, 2010, or 2012 versions of the rules. See ARBITRATION FORUMS, INC., *Rules and Agreements*, <https://www.arbfile.org/webapp/pgStatic/content/pgDownloadRules.jsp>.

⁷ AFI Docket No. I019-00237-09-00 (May 8, 2009) (Pl.'s Ex. 6).

⁸ See Pl.'s Mem. & Def.'s Mem.

⁹ See Compl.

particularly that the arrangement can create a situation where “insurance companies seeking to exercise PIP subrogation rights . . . have no recourse within this State,”¹⁰ and that arbitration decisions leave parties without a right of appeal while the no fault statute confers an unequivocal right to appeal *de novo* to the Superior Court.¹¹

UPS notes that State Farm, as a claimant, opted not to file for arbitration by the Insurance Commissioner under § 2118(j), which, UPS posits, makes arbitration optional.¹² UPS submits that, as a practical matter, the parties would likely appeal an Insurance Commissioner’s decision to this Court anyway.

Discussion

Title 21, Section 2118 of the Delaware Code requires insurance for all motor vehicles registered in Delaware. Section 2118(g)(3) provides:

Disputes among insurers as to liability or amounts paid pursuant to paragraphs (1) through (4) of subsection (a) of this section shall be arbitrated by the Wilmington Auto Accident Reparation Arbitration Committee or its successors. Any disputes arising between an insurer or insurers and a self-insurer or self-insurers shall be submitted to arbitration which shall be conducted by the Commissioner in the same manner as the arbitration of claims provided for in subsection (j) of this section.¹³

AFI is the successor to Wilmington Auto Accident Reparation Arbitration Committee.¹⁴

Paragraphs (1) through (4) of subsection (a) include indemnity from legal liability for injury or property damage, and compensation for medical costs and lost wages.¹⁵ Since

¹⁰ Pl.’s Mem. at 4-5 (citing *Zurich Am. Ins. Co. v. St. Paul Surplus Lines, Inc.*, 2009 Del. Ch. LEXIS 202, *26-31 (Del. Ch. 2009); see *infra* Discussion.

¹¹ *Id.* at 5.

¹² Def.’s Mem. 3.

¹³ 21 *Del. C.* § 2118(g)(3).

¹⁴ *Williams v. AAA Mid-Atlantic Ins. Grp.*, 2011 WL 5299239 (Del. Super. Mar. 14, 2011).

¹⁵ *Id.*

the subject of the present case is recovery of amounts paid as personal injury protection benefits, the claims fall squarely within § 2118(g)(3).

Title 21, Section 2118(j) *requires* insurers and self-insurers¹⁶ to “submit to arbitration . . . any claims for losses or damages within the coverages required under paragraph (2) subsection (a)”¹⁷ of § 2118.¹⁸ Subprovisions (1) through (4) of Subsection (j) specify that arbitration be administered by the Insurance Commissioner and that the Commissioner select a panel of three arbitrators, one of whom must be an attorney licensed to practice in Delaware, and that the Commissioner promulgate all rules necessary to implement the arbitration program.¹⁹ Subprovision (5) states, “[t]he right to require such arbitration shall be purely optional and neither party shall be held to have waived any of its rights by any act relating to arbitration and the losing party shall have the right to appeal de novo to the Superior Court”²⁰ Subprovisions (6) through (8) address costs, payments, and reimbursements.²¹

Although no Delaware Court has yet addressed the issue of who the optional right addressed in § 2118(j)(5) belongs to, Delaware Courts have, in interpreting the provision for other reasons, read the right to belong to the claimant. In *Devaney v. Nationwide Mutual Ins. Co.*,²² the Supreme Court analyzed whether evidence of arbitration pursuant to § 2118 is admissible at a trial.²³ In finding it is inadmissible, the Court contemplated § 2118’s objective, stating that Subsection 2118(j) “establishes an arbitration procedure

¹⁶ See § 2118(j)(9).

¹⁷ § 2118(a)(2) pertains to “[c]ompensation for injured persons for reasonable and necessary expenses incurred within 2 years from the date of the accident.” 21 *Del. C.* § 2118(a)(2).

¹⁸ 21 *Del. C.* § 2118(j) (emphasis added).

¹⁹ *Id.*

²⁰ 21 *Del. C.* § 2118(j)(5).

²¹ 21 *Del. C.* § 2118(j).

²² 679 A.2d 71 (Del. 1996).

²³ *Id.* at 72.

available to any party claiming entitlement to PIP benefits. The claimant’s decision to seek arbitration is ‘purely optional’ and neither party waives ‘any of its rights by any act relating to arbitration’²⁴ Similarly, in *Gorum v. Geico Indem. Co.*,²⁵ this Court decided whether “an arbitration panel’s decision precludes parties from relitigating the issues determined at arbitration.”²⁶ In finding it did not, the Court stated “21 *Del. C.* § 2118(j) establishes an arbitration procedure to any party claiming entitlement to personal injury protection benefits. Under the statute, such arbitration is ‘purely optional’ and ‘neither party shall be held to have waived any of its rights by any act relating to arbitration’”²⁷

UPS asks the Court to find that State Farm exercised an option, under § 2118(j)(5), not to require UPS to arbitrate the parties’ dispute. However, State Farm’s insurance contract for PIP benefits in accordance with § 2118 was with Tera and Nannette Robinson.²⁸ Therefore, Tera and Nanette Robinson would be the claimants whose decision to seek arbitration is “purely optional.”²⁹ UPS cites to *New Hampshire Ins. Co. v. State Farm Ins. Co.*³⁰ as support for its position. This Court interpreted § 2118 as making the courts available to self-insurers.³¹ In *New Hampshire Insurance*, State Farm’s two claims were both arbitrated through AFI, and the issue before the Court was whether New Hampshire Insurance could appeal *de novo* from AFI’s judgment.³² The access to the courts to which the decision refers is clearly an access by right of appeal

²⁴ *Id.* at 74 (citing § 2118(j)(5)).

²⁵ 2011 WL 7063293 (Dec. 8, 2011).

²⁶ *Id.* at *2.

²⁷ *Id.*

²⁸ Compl. ¶ 4.

²⁹ *Devaney v. Nationwide Mutual Ins. Co.*, 679 A.2d 71, 74 (Del. 1996).

³⁰ 643 A.2d 328 (Del. Super. 1993).

³¹ *Id.* at 331.

³² *Id.* at 329.

from an arbitration decision.³³ The case does not provide a basis for an insurer to choose not to attend mandatory arbitration.³⁴

Section 2118(j)(5) cannot serve as a means for insurers disputing PIP coverage to avoid arbitration required by § 2118(3)(g). There is simply no basis within § 2118 or case law to find that § 2118(j) applies to the circumstances of this case, especially in light of the fact that § 2118(g) speaks directly to a situation where an insurer is subrogated to the rights of persons for whom benefits are provided and insurers dispute liability or amounts of PIP benefits paid.³⁵

The Court realizes the holding it is bound to apply places the parties within a jurisdictional chasm. The Court's position is one Delaware Courts have acknowledged before. In *Zurich Am. Ins. Co. v. St. Paul Surplus Lines, Inc.*,³⁶ the Court of Chancery reviewed an arbitral award for § 2118(g)(3) arbitration of PIP claim. In setting forth the court's limited scope of review, Chancellor Parsons interpreted that, in § 2118(g)(3), the Legislature intended that "insurer-to-insurer subrogation claims based on Delaware-issued PIP insurance policies be heard in Delaware by [AFI]."³⁷ He acknowledged a "perplexing" conundrum, that § 2118(g)(3) could require a court to dismiss a claim in favor of arbitration, however AFI may deny jurisdiction under its own rules, leaving insurance companies without recourse in this state.³⁸ He concluded, "whether or not the

³³ *Id.* at 331 ("The issue here is the right of the parties to an arbitration to appeal.").

³⁴ *See id.* at 329-330.

³⁵ 21 *Del. C.* § 2118(g).

³⁶ 2009 Del. Ch. LEXIS 202, *26-31 (Del. Ch. 2009).

³⁷ *Id.* at *28.

³⁸ *Id.* at *36; *see also id.* at *2-*3 ("[AFI] appears to employ certain internal rules under which an arbitrator has authority to refuse to take jurisdiction over a subrogation claim where the underlying accident occurred in a state other than the one where relief is being sought. Consequently, because the Delaware Legislature has cut off access to the courts and the arbitral forum with which the State has contracted to decide PIP insurance subrogation claims has refused to hear this case, it appears that under the current system, insurance companies seeking to exercise PIP subrogation rights

Arbitral Award at issue in this case is contrary to the legislative intent of *Section 2118(g)(3)*, the arbitrator did not exceed his authority or abusing the case based on [AFI's] internal rules.”³⁹

The scenario Chancellor Parsons foresaw in *Zurich* is the one before this Court, except that the parties attempted arbitration with AFI before filing this action. The Court must resign to the same conclusion reached in *Zurich*, that AFI's authority to refuse certain cases creates an “unfortunate dilemma” that suggests “the need for some type of systemic modification.”⁴⁰

Conclusion

For all the foregoing reasons, this Court lacks jurisdiction over the present matter. Therefore, it is **DISMISSED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

pertaining to Delaware insureds arising from accidents outside of Delaware have no recourse within this State.”)

This Court has declined to decide, because the issue is not squarely before it, whether AFI may, by its own internal procedures, decline to hear a matter which has been legislated to fall exclusively within their jurisdiction.

³⁹ *Id.* at *36-37.

⁴⁰ *Id.* at *2-*3.