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

MARTHA E. CONVERSE and DAVID CONVERSE, husband and wife,	)	C.A. No. N11C-04-028 CLS
Plaintiffs,	)	
v.	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a foreign corporation	)	
Defendant.	)	

Date Submitted: July 1, 2013
Date Decided: October 29, 2013
On State Farm Mutual Insurance Company's Motion for Summary Judgment. **GRANTED.**

ORDER

Gary S. Nitsche, Esq. and Michael B. Galbraith, Esq., Weik, Nitsche, & Dougherty, Wilmington, Delaware, 19899. Attorneys for Plaintiffs.

Robert M. Greenberg, Esq., Tybout, Redfearn, & Pell, Wilmington, Delaware 19899. Attorney for State Farm Mutual Insurance Company.

Scott, J.

Introduction

Before the Court is Defendant State Farm Mutual Automobile Insurance Company's ("State Farm") Motion for Summary Judgment. State Farm's motion presents the issue of whether State Farm is the excess Underinsured Motorist ("UIM") insurer in this case and, if so, whether Plaintiffs are required to exhaust the primary UIM benefits before seeking excess UIM benefits. The Court has reviewed the parties' submissions. For the following reasons, State Farm's motion is **GRANTED.**[1]

Background

On June 20, 2007, Plaintiff Martha Converse was a passenger in a vehicle owned and operated by James Early ("Early vehicle"). The vehicle was struck by a vehicle driven by Patrick Lampart ("Lampart vehicle"). At the time of the accident, the Lampart vehicle was insured through a Massachusetts policy with Plymouth Rock Assurance Company ("Plymouth"). The Early vehicle was insured by a Massachusetts policy through Commerce Insurance Company ("Commerce") that contained UIM policy limits of $100,000 per person and $300,000 per accident. Plaintiffs held a personal automobile insurance policy with State Farm, issued in Delaware, containing the same UIM policy limits. On July 28, 2010, Plaintiffs

[1] Because the Court has granted State Farm's motion, the Court will not address State Farm's request that Plaintiffs' Response Brief be stricken for untimely filing.

signed a release with Plymouth and, in exchange, Plymouth paid its policy limit of $25,000 to Plaintiffs.[2]

On April 5, 2011, Plaintiffs filed this action against State Farm claiming that State Farm was liable for Patrick Lampart's negligence pursuant to 18 *Del. C.* § 3902, Delaware's Uninsured/Underinsured Motorist statute.[3]

Parties' Contentions

State Farm moves for summary judgment on the grounds that, under Delaware and Massachusetts law and the language of its policy, Commerce's UIM benefits are primary and the State Farm UIM benefits are excess. State Farm also contends that, since Plaintiffs failed to exhaust the Commerce UIM benefits, they are precluded from recovering from State Farm.

Plaintiffs do not challenge State Farm's contention that, generally, State Farm's coverage would be excess; however, Plaintiffs argue that, based on the language in the Commerce and State Farm policies and the operation of Delaware and Massachusetts law, State Farm becomes the primary UIM insurer by virtue of Plaintiffs' failure to obtain Commerce's consent to settle with the tortfeasor. Plaintiffs also cite to the public policy underlying Delaware's UIM statute and the fact they have purchased the State Farm UIM coverage to argue that they were not required to exhaust the Commerce limits before seeking benefits from State Farm.

[2] Def. Mot., at A6.
[3] David Converse seeks damages for loss of consortium.

Standard of Review

A motion for summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving part is entitled to summary judgment as a matter of law."[4] First, the moving party must show that there are no issues of material fact present.[5] Then, the burden shifts to the nonmoving party to show that issues of material fact exist.[6] When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party.[7]

Discussion

I. A False Conflict of Law Exists between Delaware and Massachusetts law.

As an initial matter, the Court must decide whether to apply Delaware or Massachusetts law to determine the priority of UIM insurers in this case.[8] As explained below, a false conflict exists, obviating the need to conduct a choice-of-law analysis, because the outcome would be the same under either Delaware or

[4] Super. Ct. Civ. R. 56; *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[5] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[6] *Hurtt v. Goleburn*, 330 A.2d 134, 135 (Del. 1974).
[7] *Austin ex rel. Austin v. Happy Harry's Inc.*, 2006 WL 3844076, *1 (Del. Super. Nov. 26, 2006).
[8] Plaintiffs have not asserted that the Court apply Massachusetts law to determine priority. Instead, Plaintiffs cite to Massachusetts law only to support their argument that they are precluded from recovering from Commerce based on the Commerce policy's consent-to-settlement provision.

Massachusetts law.[9] Massachusetts case law suggests that Massachusetts courts would apply the priority laws of the foreign state, here Delaware, in cases where a foreign resident insured through a foreign, personal UIM policy is injured as a passenger in a vehicle insured by a Massachusetts resident through a Massachusetts UIM policy.[10]

In certain circumstances, a claimant seeking to recover UIM benefits may "stack" the policy limits from more than one UIM provider. "Stacking is where a claimant adds all available policies together to create a greater pool in order to satisfy his actual damages."[11] However, Massachusetts underinsurance benefits are governed by Mass. Gen. Laws ch. 175, § 113L(5), an anti-stacking provision prohibiting the "stacking of benefits [], and [requiring] automobile insurance policies [] to provide that any claimant injured while occupying a nonowned vehicle who had underinsurance coverage under his own automobile insurance policy could recover underinsurance benefits only under his own policy."[12]

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[9] *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1161 (Del. 2010).
[10] *See Hague v. Hanover Ins. Co.,* No. 95-6255, 1997 Mass. Super. Lexis 487 (Mass. Super. Ct. Jan 22, 1997); *Commerce Ins. Co. v. Doherty,* 2000 WL 33159241 (Mass. Super. Ct. Jan 22, 2000); *See also State Farm Mut. Auto. Ins. Co. v. Holyoke Mut. Ins. Co.*, 841 A.2d 68, 73 (N.H. 2004)(discussing *Hague* and *Doherty*); *But Cf. Dworman v. St. Paul Fire & Marine Ins. Co.*, 2007 WL 2367787, at *3 (Mass. Super. Ct. July 12, 2007)(applying Massachusetts law to a Massachusetts resident's out-of-state policy where the resident was injured in an accident caused by the resident in Massachusetts).
[11] *Cardin v. Royal Ins. Co. of Am.*, 394 Mass. 450, 456, 476 N.E.2d 200, 205 (1985) (quoting 12A Couch, Insurance Law § 45:651, at 207 (2d rev. ed. 1981)).
[12] *Arbella Mut. Ins. Co. v. Hughes*, 36 Mass. App. Ct. 926, 927, 628 N.E.2d 1305, 1307 (1994).

In situations similar to the facts here, the Massachusetts Superior Court has held the anti-stacking provision inapplicable where out-of-state policies are involved. In *Hague v. Hanover Ins. Co.,* No. 95-6255, 1997 Mass. Super. Lexis 487, (Mass. Super. Ct. Jan 22, 1997), a Virginia resident died after he was involved in an accident, caused by an underinsured driver, in Massachusetts as a passenger in a vehicle insured by a Massachusetts policy and driven and owned by Massachusetts residents. The Virginia resident was the covered by three Virginia insurance policies. In a suit brought by his administrators, the court determined that "the only reasonable construction to give to [Section 5] is to read it as referring and applying solely to Massachusetts policies, a path that avoids all the hazards of interfering with the various laws and insurance policies of other states."[13]

Once the court found that Section 5 permitted stacking of UIM benefits where an injured was also entitled to benefits from a personal out-of-state policy, the court considered whether the Massachusetts UIM insurer was primarily liable based on the law governing the out-of-state policies. The court found that, under Virginia law, the policy insuring the vehicle, the Massachusetts policy, was primarily liable.[14] The court revisited the same issues in *Commerce Ins. Co. v. Doherty*, 2000 WL 33159241 (Mass. Super. June 22, 2000) where it again held that the involvement of an out-of-state

[13] *Hague,* 1997 Mass. Super. Lexis 487 at * 19.
[14] *Id.* at *25-26.

policy barred the application of the anti-stacking provision.[15] Despite the fact that the accident occurred in Massachusetts, the court applied the foreign state's law because only one Massachusetts policy was involved and, thus, "Massachusetts had no substantial interest in [the] insurance policy claim."[16]

Plaintiffs were insured by State Farm under a Delaware personal insurance policy and the vehicle in which Plaintiff was injured in was covered by Commerce, the Massachusetts policy. Under the rationale in *Hague* and *Doherty*, Plaintiff would be permitted to stack the Commerce and State Farm UIM benefits since the State Farm policy is an out-of-state policy. However, just as the Massachusetts Superior Court looked to the law governing the out-of-state policies to determine priority in *Hague* and *Doherty*, this Court now looks to Delaware law, the law governing the State Farm policy, to determine which UIM insurer is primarily liable. Therefore, a false conflict of law exists since Massachusetts courts would likely look to Delaware law to determine priority in this case.

[15] *Doherty*, 2000 WL 33159241 at * 3.
[16] *Id.*

II. Under the general principle in Delaware, Commerce is the Primary UIM Insurer and State Farm is Excess.

In Delaware, UIM coverage of a vehicle is primary over personal UIM coverage.[17] In *Carrington v. Assurance Co. of America, Inc.,* 1998 WL 733757 (Del. Super. 1998), a plaintiff was injured while he was a passenger in a vehicle driven in Pennsylvania. Plaintiff was eligible for UIM benefits under the policy covering the vehicle and under a personal policy. The Court stated that the "general principle" is that "when there are two UIM carriers potentially responsible for a claim, the carrier which insures the vehicle [] is primary over the carrier which insures the individual ."[18] Therefore, under Delaware law, Commerce is primarily liable as the UIM insurer of the vehicle involved in the accident and State Farm is secondarily liable as Plaintiffs' personal UIM insurer.

Plaintiffs argue that, under Massachusetts and Delaware law, their violation of Commerce's consent-to-settle provision would preclude them from recovering from Commerce and that such preclusion would render State Farm's coverage primary. The consent-to-settlement provision in the Commerce policy states:

> 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

[17] *St. Paul Fire & Marine Ins. Co. v. Metro. Prop. & Cas. Ins. Co.*, 794 A.2d 601 (Del. 2002), 2002 WL 511570, at *1 (TABLE)(discussing *Krutz v. Harleysville,* 766 F.Supp. 219, 255 (D.Del.1991)); *Garnett v. Liberty Mut. Fire Ins.*, 2007 WL 241345 (Del. Super. Jan. 30, 2007).

[18] *Carrington*, 1998 WL 733757 at *1.

> judgment resulting from a lawsuit brought without our written consent. We will not, however, unreasonably without our consent.[19]

First, the Court notes that Plaintiffs did not submit any facts to show that Commerce has actually enforced its consent-to-settlement provision or that the Commerce benefits are, in fact, currently unavailable. Even assuming that Plaintiffs cannot recover UIM benefits from Commerce, Plaintiffs' unexplained failure to obtain Commerce's consent prior to settlement does not justify a departure from the general principle that the UIM insurer of the vehicle is primary.[20]

III. The Language of State Farm's Other Insurance Provision Demonstrates that State Farm's UIM Coverage is Excess.

In addition to the general principle that the vehicle's UIM insurer is primary, the Court will also consider the language of the "other insurance" provisions in the policies to determine which insurer is primary and which is excess.[21] "Excess" and "pro rata" clauses are "other insurance" clauses which "limit the carrier's

[19] Def. Mot., at A30-32.
[20] The cases submitted by Plaintiffs, *Kent v. Nationwide Property & Cas.Ins. Co.,* 884 A.2d 1092 (Del. Super. 2004), *State Farm Mut. Auto. Ins. v. Patterson,* 7 A.2d 454 (Del. 2010), and *Kennedy v. Encompass Indem. Co.*, 2012 WL 4754162 (Del. Super. Sept. 28, 2012), are distinguishable from the facts here. In those cases, the courts held that plaintiffs were permitted to seek uninsured benefits from their insurer because they failed to meet a verbal threshold requirement required under New Jersey law. In this case, Plaintiffs do not assert that coverage is unavailable based on statutory or other similar grounds; instead, Plaintiffs argue that coverage is unavailable based on their own failure to obtain Commerce's settle.
[21] *See Carrington,* 1998 WL 733757 at *1-2.

obligation when other insurance may cover the claim."[22] An excess clause "attempts to limit the insurer's obligation by providing that the primary coverage it provides will be excess to other primary coverage," while a pro rata clause "seeks to limit the insurer's obligation by providing it will share costs pro rata with other primary carriers."[23] An excess clause of one policy is typically given effect over a pro rata clause.[24]

The State Farm policy contains the following excess provision:

> If an ***insured*** as defined in item 1, 2, or 3 of the definition of ***insured*** sustains ***bodily injury*** while occupying a vehicle which is not owned ***by you, your spouse*** or any ***relative***, our limit of liability applies as excess to any other coverage available from a policy covering the vehicle ***occupied*** or its driver.
>
> If coverage from more than one insurer applies as excess, we will pay our share. […][25]

The Commerce policy contains a pro rata clause which states that "if there are two or policies which provide coverage at the same limits, we will only pay our proportionate share."[26] Based on the language of the other insurance clauses, State Farm's UIM coverage is excess and Commerce's is secondary.

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[22] *Deutsche Bank Trust Co. Americas v. Royal Surplus Lines Ins. Co.*, CIV.A. 06C-09-261JAP, 2012 WL 2898478, at *16 (Del. Super. July 12, 2012) *appeal denied,* 49 A.3d 1192 (Del. 2012) and *appeal denied,* 49 A.3d 1193 (Del. 2012).
[23] *Id.*
[24] *See Krutz v. Harleysville Mut. Ins. Co.*, 766 F. Supp. 219, 224 (D. Del. 1991)(citing 7A Am.Jur.2d *Automobile Insurance* § 434).
[25] Def. Mot., A58-A59 (italics and bold in original)(underlining supplied).
[26] *Id*. at A31.

Plaintiffs also argue that their failure to obtain Commerce's consent renders State Farm's excess provision inapplicable based on the plain meaning of "any other coverage available." "[T]he terms of an insurance contract are to be read as a whole and given their plain and ordinary meaning."[27] Reading the policy as a whole, the Court does not agree that State Farm's excess provision should be interpreted to mean that State Farm's limit of liability does not apply as excess where available coverage is rendered unavailable by Plaintiffs' own failure to obtain the coverage.[28]

IV. Plaintiffs are Not Entitled to Excess UIM Coverage from State Farm until Exhausting Primary UIM Coverage from Commerce.

Section 3902(b)(3) of Delaware's UI/UIM Statute states:

> 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.

The Delaware Supreme Court recognizes the goal of the statute is to protect innocent persons from impecunious tortfeasors."[29] However, the Court has also interpreted § 3902(b)(3) to mean that UIM carriers are not obligated to pay their insured until after they exhaust all available liability

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[27] *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 291 (Del. 2001).
[28] The Court also notes that § 3902(b)(2)'s definition of an "underinsured motor vehicle" refers to policies applicable at the time of the accident." Thus, the Court's interpretation of State Farm's policy language is consistent with the statute. *See Kent v. Nationwide Property & Cas. Ins. Co.*, 844 A.2d 1092, 1096 (Del. Super. 2004).
[29] *Hurst v. Nationwide Mut. Ins. Co.*, 652 A.2d 10, 12 (Del. 1995)(citing *Frank v. Horizon Assur. Co.,* Del.Supr., 553 A.2d 1199, 1201 (1989)).

insurance policies.[30] Therefore, the Court finds that exhaustion of the Commerce UIM limits is required before State Farm is obligated to pay UIM benefits under its policy.[31]

Conclusion

The Court finds that Commerce's UIM benefits are primary and that State Farm's UIM benefits are excess. The Court also finds that Plaintiffs cannot receive excess UIM coverage, if any, from State Farm, until they have exhausted Commerce's UIM coverage. Therefore, State Farm's motion is **GRANTED.**

The Court will schedule a status conference with the parties to determine whether the granting of State Farm's motion disposes of the case since the exhaustion of the Commerce UIM limits and damages in excess of those limits have not been established at this stage. The Court's decision to hold a conference is prompted by *Masten v. Nationwide Mut. Ins. Co.* In *Masten,* this Court refrained from deciding whether a secondary UIM insurer's excess payments should be reduced by the payments made by a primary UIM insurer because the plaintiff's

[30] *Dunlap v. State Farm Fire & Cas. Co.,* 878 A.2d 434, 439-440 (Del. 2005).
[31] In *Masten v. Nationwide Mut. Ins. Co.*, 1993 WL 19651 (Del. Super. Jan. 12, 1993), a case involving two UIM insurers, this Court held that § 3902(b)(3)'s exhaustion requirement did not apply. However, the Court also reviewed the language of the insurance policy at issue to determine whether the policy itself required exhaustion. Here, State Farm's policy contains the following provision: "THERE IS NO COVERAGE UNTIL THE LIMITS OF LIABILTY OR ALL BODILY INJURY LIABILTY BONDS AND POLICIES THAT APPLY HAVE BEEN USED UP BY PAYMENTS OF JUDGMENTS OR SETTLEMENTS." Def. Mot., at A56.(emphasis in original). Therefore, exhaustion is also required under State Farm's policy language.

damages had not yet been established at the time of the Court's consideration of a motion for partial summary judgment.[32]

IT IS SO ORDERED.

/s/CalvinL. Scott
Judge Calvin L. Scott, Jr.

[32] *Masten,* 1993 WL 19651 at *3, n.2.