IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

MICHELE DAVIS, SCOTT DAVIS, CHERYL GRAY, CHRISTOPHER GRAY, VIRGINIA MARIONI, PAULINE SILVESTRI and CHARLES SILVESTRI, on behalf of themselves and all others similarly situation, *et al.,*	:	
Plaintiffs,	:	C.A. No. S09C-09-012 (Consolidated)
v.	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.,*	:	
Defendants.	:	

Submitted: December 21, 2010
Decided: February 15, 2011

On Defendants' Combined Motions for Summary Judgment: **GRANTED**

MEMORANDUM OPINION

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J.Graves

PART I: PROCEDURAL AND FACTUAL BACKGROUND

This decision encompasses ten proposed class action lawsuits against nine insurance companies providing automobile insurance coverage for vehicles requiring Delaware insurance coverage.

All plaintiffs are represented by one attorney and the insurance companies all have multiple counsel. Defendant insurers all moved to dismiss plaintiffs' complaints. Due to the common complaints and the common defenses, the cases were consolidated for purposes of the Motions to Dismiss. Post briefing, plaintiffs unilaterally and without notice to the defendants or the Court, filed with the Court correspondence from the Insurance Commissioner of the State of Delaware ("Insurance Commissioner") and argued the contents of that correspondence supported plaintiffs' position. Defendants objected to the submission. In the interest of considering all potentially relevant information, however, I have not rejected or stricken the filing putting forth the Insurance Commissioner's position and I permitted defendants an opportunity to respond thereto. Due to the expansion of the record, the Motions to Dismiss must be considered as Motions for Summary Judgment.[1]

There are no material facts in dispute. All plaintiffs claim that defendant insurers improperly charge premiums for greater-than-minimum uninsured and underinsured motorist coverage (UM and UIM coverage, respectively; UM/UIM coverage, collectively) when two or more vehicles within the same household are insured under the same policy. Plaintiffs complain this practice constitutes

[1] Counsel were notified of this change in procedural posture by correspondence from the Court dated January 10, 2011.

"double dipping." Plaintiffs seek a declaratory judgment that defendant insurers' charging practice runs afoul of Delaware law and also allege the practice constitutes a breach of contract, a bad faith breach of contract, a breach of the duty of fair dealing, consumer fraud, and a violation of public policy. Plaintiffs seek a declaratory judgment clarifying the parties' rights, duties, status and other legal obligations under 18 *Del. C.* § 3902. Plaintiffs ask the Court to find defendant insurers' "regime of premium charges" is in violation of public policy. Plaintiffs also seek compensatory damages, punitive damages, attorneys' fees and costs. Defendants deny the charging and collecting of any improper or excessive premiums and specifically deny "double dipping." Defendants also argue for various reasons that plaintiffs' claims have no legal basis and that this Court does not have jurisdiction over insurance rate matters.

PART II: STANDARD OF REVIEW

The defendants have filed consolidated Motions to Dismiss. However, because the record has been supplemented with the opinion of the Insurance Commissioner and defendants' response thereto, it is appropriate for the Court to consider the pending motions as Motions for Summary Judgment.[2] In keeping with the requirements of Superior Court Civil Rule 12(b), all parties have been given a reasonable opportunity to present to the Court any and all material they consider pertinent to the pending motions.

Summary judgment is only appropriate where, viewing the facts in the light most favorable to the non-moving party, the moving party has demonstrated that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[3] The moving party

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[2] Super. Ct. Civ. R. 12(b); *see also Venables v. Smith*, 2003 WL 1903779 (Del. Super.).

[3] *Dambro v. Meyer*, 974 A.2d 121, 138 (Del. 2009).

bears the burden of establishing the non-existence of material issues of fact.[4] Once the moving party has met its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact.[5] Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.[6] If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, summary judgment must be granted.[7] If, however, material issues of fact exist, or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, summary judgment is inappropriate.[8]

PART III: SUBJECT MATTER JURISDICTION

Defendants argue the Court lacks jurisdiction over plaintiffs' claims because they are barred by the filed rate doctrine and plaintiffs' failure to exhaust their administrative remedies. Because both arguments involve the framework for review established in the Insurance Code, the Court will consider them together.

The Delaware Supreme Court has embraced the filed rate doctrine.[9] The filed rate doctrine "forbids a regulated entity from charging rates other than those filed with the regulatory agency and,

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[4] *Moore v. Sizemore,* 405 A.2d 679, 680 (Del. 1979).

[5] *Id.* at 681.

[6] Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986).

[7] *Burkhart v. Davies,* 602 A.2d 56, 59 (Del. 1991); *Celotex Corp., supra.*

[8] *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del. 1962).

[9] *See Brown v. United Water Delaware, Inc.*, 3 A.3d 272 (Del. 2010).

accordingly, prevents varying or enlarging the rights as defined by the tariff ... by either contract or tort of the carrier."[10]

UM/UIM insurance is a form of casualty insurance governed by Title 18 of the Delaware Code. Pursuant to statute, an automobile insurer's rates are prohibited from being excessive.[11] Chapter 25 of Title 18 of the Delaware Code governs the Insurance Commissioner's responsibilities in approving rates. The Code provides that rates "shall not be excessive, inadequate or unfairly discriminatory".[12] A corollary to that provision is the requirement that rates be reasonable in relation to the premium charged. Every insurer in Delaware is required to file with the Insurance Commissioner "every manual, minimum, class rate, rating schedule or rating plan and every other rating rule, and every modification of any of the foregoing which it proposes to use".[13] If the Insurance Commissioner does not have sufficient information to determine whether a filing meets the requirements of the Code, she *shall* require the insurer to file the information.[14] In support of a filing, an insurer may file any relevant information.[15] The filing and all supporting data must be made available to parties in interest for inspection.[16] The Insurance Commissioner shall disapprove

[10] *Id.* at 274 (internal quotation marks and citation omitted).

[11] 18 *Del. C.* § 2501; 18 *Del. C.* § 2502(a)(1).

[12] 18 *Del. C.* § 2503(2); 18 *Del. C.* § 2501.

[13] 18 *Del. C.* § 2504(a).

[14] 18 *Del. C.* § 2504(b).

[15] *Id.*

[16] *Id.*

a rate if it does not meet the requirements of the Code.[17] The Insurance Commissioner is required to specify the reason for disapproval and provide the insurer with the opportunity for a hearing on the matter.[18] Any person who is aggrieved with respect to any filing in effect may request a hearing before the Insurance Commissioner.[19] The Insurance Commissioner shall hold a hearing upon the issue with notice to all parties "[i]f the [Insurance] Commissioner finds that the application [for a hearing] is made in good faith, that the applicant would be so aggrieved if his/her grounds are established, and that such grounds otherwise justify holding such a hearing".[20] Any person negatively affected by any order or decision of the Insurance Commissioner concerning rates may appeal such order or decision to the Court of Chancery.[21]

Pursuant to 18 *Del. C.* § 2712(a), insurers must also submit all policy forms to the Insurance Commissioner. The Insurance Commissioner *must* disapprove a form if it contains or incorporates by

reference "any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract."[22] Any order of the Insurance Commissioner disapproving a policy form must state the grounds for the

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[17] 18 *Del. C.* § 2507.

[18] *Id.*

[19] 18 *Del. C.* § 2520(a).

[20] 18 *Del. C.* § 2520(b).

[21] 18 *Del. C.* § 2531.

[22] 18 *Del. C.* § 2713(2).

disapproval and "the particulars thereof in such detail as reasonably to inform the insurer thereof."[23]

The Insurance Commissioner has the power to conduct an examination or investigation of any company as she deems proper to determine whether a violation of the Insurance Code has occurred.[24] The Insurance Commissioner has jurisdiction to investigate and hear claims based on misrepresentations of benefits, advantages or conditions of any insurance policy.[25] The Court of Chancery has appellate jurisdiction over any order of the Insurance Commissioner finding an insurer engaged in misrepresentative or deceptive business practices.[26]

Defendants cite to a case out of Alabama, *Ex parte The Cincinnati Insurance Co.,*[27] that the Court finds very persuasive. In that case, the plaintiff claimed he (and others similarly situated) had been overcharged for unnecessary and illusory coverage. The plaintiff sought damages in the form of restitution or the return of monies paid for the allegedly illusory coverage. The defendant moved to dismiss arguing that the trial court lacked subject matter jurisdiction based on the filed rate doctrine and the plaintiff's failure to pursue administrative remedies through the insurance commissioner and the Department of Insurance. The plaintiff countered that he did not challenge the defendant's rates or rating systems but its "business practice" of applying those rates. The plaintiff also contended that the defendant's rates, approved by the insurance commissioner, did not provide the plaintiff (and others similarly situated) with sufficient notice of its challenged practice.

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[23] 18 *Del. C.* § 2712(c).

[24] 18 *Del. C.* § 317; 18 *Del. C.* § 318.

[25] 18 *Del. C.* § 2304(1)(a); 18 *Del. C.* § 2306; 18 *Del. C.* § 2307.

[26] 18 *Del. C.* § 2309.

[27] 2010 WL 2342418 (Ala.).

After considering the Alabama statutory scheme and the plaintiff's prayer for relief, the Court concluded the plaintiff was directly challenging the premiums and rates defendant applied to UM coverage pursuant to rates approved by the insurance commissioner. "Specifically, by alleging that [the defendant] 'overcharges' for UM coverage, [the plaintiff] claims that [the defendant's] rates are excessive – a matter squarely within the exclusive jurisdiction of the commissioner."[28] The court concluded that the filed rate doctrine required dismissal of the plaintiff's claims, as did the plaintiff's failure to exhaust his administrative remedies with the commissioner and the Department of Insurance.

Plaintiffs in this case note that they, unlike the plaintiff in *Ex parte Cincinnati Insurance Co.*, seek a declaratory judgment as to the legal interpretation of the UM/UIM statute. Plaintiffs assert only the Court may interpret the parties' rights and obligations under the UM/UIM statute and, therefore, the filed rate doctrine and exhaustion of administrative remedies do not bar their claims.

The filed rate doctrine "does not necessarily foreclose all avenues of injunctive relief."[29] A recognized exception to the exhaustion of administrative remedies is when the question raised is one requiring the interpretation of a statute.[30] Nevertheless, plaintiffs' claims do not revolve around the interpretation of Delaware's UM/UIM statute and are virtually identical to those claims presented in the *Ex parte The Cincinnati Insurance Co.* case. Moreover, in that case, the plaintiff did, in fact, seek a declaratory judgment that the imposition and collection of additional UM premiums was illusory and that the insurer's receipt and retention of such money was improper. The court found

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[28] *Id*. at *9.

[29] *McCray v. Fidelity Nat'l Title Ins. Co.*, 636 F. Supp.2d 322, 327 (D. Del. 2009).

[30] *Ex parte The Cincinnati Ins. Co.*, 2010 WL 2342418, at *10.

that all of the plaintiff's claims were barred by the filed rate doctrine or, alternatively, the plaintiff's failure to exhaust his administrative remedies. Alabama's statutory language regarding the insurance commissioner's duty to review rates and insurance contracts is substantively the same as Delaware's and the complaints lodged by plaintiffs in this case substantively mirror those made by the plaintiffs in *Ex parte The Cincinnati Insurance Co.* Accordingly, I find the analysis of the Supreme Court of Alabama in *Ex parte The Cincinnati Insurance Co.* directly on point. The Insurance Code sets up a statutory scheme that provides adequate review of both rates and the substantive content of insurance contracts. The Insurance Commissioner is in a far better position than the Court to assess whether the rates charged by defendant insurers are improper and whether their business practices violate any provision of the Insurance Code. Although plaintiffs' claims do not explicitly challenge the rates imposed by defendant insurers, plaintiffs' underlying assertion is that the rates charged are unreasonable, given the benefits received. Because the Insurance Code gives the Insurance Commissioner the *affirmative responsibility* to determine the reasonableness of rates charged by insurers, the filed rate doctrine applies. Moreover, given the Insurance Commissioner's jurisdiction to review insurance contracts, as a whole, and ascertain whether the contents therein are in keeping with statutory requirements – among those requirements that the contract not violate any provision of the Insurance Code, including its ban on unfair or deceptive practices – plaintiffs have not exhausted their administrative remedies by filing a complaint with the Insurance Commissioner.

In sum, the Court accepts defendant insurers' argument that the Court does not have jurisdiction over plaintiffs' claims because they are barred by the filed rate doctrine or, alternatively, by plaintiffs' failure to exhaust their administrative remedies.

PART IV - A: THE ESSENCE OF THE COMMON CLAIM

If an appellate court finds I do have jurisdiction to hear plaintiffs' claims, defendants' Motions for Summary Judgment are granted on substantive grounds. Plaintiffs' claim that defendant insurers' charging practice runs afoul of Delaware law can best be illustrated by a hypothetical. Husband and wife have automobile insurance from one insurer for four vehicles they own. Husband, wife and their two children reside in the same household and drive these four vehicles.

Insurer must affirmatively offer UM/UIM coverage that mirrors the personal liability on the vehicles.[31] The minimum personal liability coverage that may be purchased under Delaware law is $15,000 per person and $30,000 per accident.[32] Therefore, the minimum UM/UIM coverage required is $15,000 per person and $30,000 per accident ($15,000/$30,000).[33]

If the insured purchases liability coverage higher than the minimum $15,000/$30,000, then the insurance company must offer the same amount of UM/UIM coverage up to $100,000 per person and $300,000 per accident ($100,000/$300,000).[34] An insured may opt out of UM/UIM coverage but only if the rejection is registered in writing.[35] If an insurer fails to offer affirmatively the

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[31] 18 *Del. C.* § 3902(a)(2) ("The amount of [UM/UIM] coverage to be so provided shall not be less than the minimum limits for bodily injury and property damage liability insurance provided for under the motorist financial responsibility laws of this State...."); *see also Travelers Indemnity Co. v. Lake*, 594 A.2d 38, 42 (Del. 1991) ("Section 3902 permits a Delaware motorist to 'mirror' his own liability coverage and take to the roads knowing that a certain amount of protection will always be available.") (internal quotation marks and citations omitted).

[32] 21 *Del. C.* § 2902(b)(2).

[33] 18 *Del. C.* § 3902(a)(2).

[34] 18 *Del. C.* § 3902(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 or $300,000 single limit, but not to exceed the limits for bodily injury liability set forth in the basic policy. Such additional insurance shall include underinsured bodily injury liability coverage.").

[35] 18 *Del. C.* § 3902(a)(1) ("No [UM/UIM] coverage shall be required in or supplemental

increased UM/UIM coverage available, it risks the post-accident reformation of the policy to permit the higher UM/UIM coverage.[36]

Delaware case law also holds that the UM/UIM insurance is "personal" to the insured and not vehicle specific.[37] This premise simply means the insured's UM/UIM coverage follows the insured regardless of the vehicle he or she may be occupying or driving when an accident occurs. The insured enjoys the coverage even as a pedestrian if he or she is injured by an uninsured motor vehicle.[38]

In the hypothetical case of husband, wife and their children, insurer offers

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to a policy when rejected in writing, on a form furnished by the insurer or group of affiliated insurers describing the coverage being rejected, by an insured named therein, or upon any renewal of such policy or upon any reinstatement, substitution, amendment, alteration, modification, transfer or replacement thereof by the same insurer unless the coverage is then requested in writing by the named insured. The coverage herein required may be referred to as uninsured vehicle coverage.").

[36] *State Farm Mutual Automobile Insurance Co. v. Arms* held:

> [I]t is clear that State Farm breached its section 3902(b) duty to offer increased uninsured motorist coverage to [the plaintiff] ... when he was issued a new policy. Accordingly, we conclude that State Farm's failure to observe that duty resulted in an implied extension of a continuing offer of additional uninsured motorist coverage to the extent of the lesser of $300,000 or the bodily injury limits in [the plaintiff's] policy. Because he had a 100/300 policy, we agree that the Superior Court properly revised his uninsured motorist coverage to an equivalent amount.

477 A.2d 1060, 1065-66 (Del. 1984) (citation omitted).

[37] *See Frank v. Horizon Assurance Co.*, 553 A.2d 1199 (Del. 1989); *Hurst v. Nationwide Mut. Ins. Co.*, 652 A.2d 10 (Del. 1995); *Castillo v. Clearwater Ins. Co.*, 2010 WL 4705132 (Del.).

[38] *See State Farm Mut. Auto. Ins. Co v. Washington*, 641 A.2d 449, 452 (Del. 1994) (observing the difference in risk to an insurer for purposes of liability coverage as compared to UM/UIM coverage; in the case of UM/UIM coverage, "the risk is defined by the negligence of the public at large").

$100,000/$300,000 UM/UIM coverage on each of the four household vehicles, matching their liability coverage. The family elects $100,000/$300,000 coverage on one vehicle and $15,000/$30,000 coverage on the other three vehicles. Insurer charges X dollars for one vehicle and Y dollars for the remaining vehicles.[39] An essential premise of plaintiffs' argument is that the amount charged for the $100,000/$300,000 coverage is greater than the cost for $15,000/$30,000 coverage.

Plaintiffs' theory is that, because UM/UIM coverage is personal or travels with the insured, plaintiffs need only carry $100,000/$300,000 coverage on one household vehicle and the statutory minimum on any other household vehicle. By offering and receiving premiums for coverage for $100,000/$300,000 on more than one household vehicle, defendant insurers are providing illusory coverage thereby receiving excessive premiums. This practice is unfair, plaintiffs complain, because only one vehicle at the higher coverage limit is necessary to provide the higher protection. Plaintiffs argue that insurers are getting something-for-nothing; that is, insurers are receiving additional premiums for greater-than-minimum coverage when they do not assume additional risk on the additional vehicles.

Insurers counter that the entire basis of plaintiffs' theory is faulty because the household

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[39] Attached hereto as Appendix A is a table setting forth the number of household vehicles and the charges for the UM/UIM coverage for each of the plaintiffs in the ten cases consolidated before the Court for this Motion for Summary Judgment. The amount may be expressed on a per vehicle basis (*i.e.*, in the case of State Farm) or on a lump sum basis (*i.e.*, in the case of Donegal).

policy that provides for the higher UM/UIM coverage on each vehicle provides the higher coverage limits to non-relative permissive users and occupants. Insurers agree that under the Court's hypothetical there is no additional benefit to the insured and his or her family because the highest coverage is personal regardless of which vehicle a family member may be operating at the time of an accident. Insurers argue that the benefit to an insured and therefore the increased risk to the insurer for higher UM/UIM coverage is for those persons occupying the vehicle that are not a part of the insured's family; *i.e.*, permissive drivers or guests. As to a permissive driver or guest, the insurance coverage is based upon the UM/UIM coverage for the specific vehicle he or she occupies. The Court agrees.

The Delaware Code requires UM/UIM insurance for all occupants of the vehicle at a minimum level or at a level that mirrors liability coverage. The insured and his household members may have additional personal coverage up to the highest UM/UIM coverage on any vehicle insured under the policy because that coverage is "personal" to them. The household members are the ones contracting with the insurer for coverage. The coverage is personal to the household members because they, personally, chose and purchased higher policy coverage. All of the policies before the Court distinguish between the insured and his or her household members from third party permissive drivers and guests.[40] The Court concludes the UM/UIM coverage is *not* personal to a third party

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[40] A common example of the definition of an "insured" under the UM/UIM coverage portion of a policy is contained herein: "We will pay damages, including derivative claims, which are due by law to you or a relative from the owner or driver of an uninsured motor vehicle because of bodily injury suffered by you or a relative, and because of property damage." Nationwide Auto Policy Declarations, attached hereto as Appendix B, at p. U1.

driver or guest. To allow a third party driver or guest to obtain the higher coverage than the insurance limits on the vehicle he occupies by considering coverage on a vehicle to which he is a legal stranger as "personal" to the third party would turn contract law on its head.

Frank v. Horizon Assurance Co.[41] held that the coverage on a higher insured vehicle was available to an insured even if that vehicle was not involved in the collision or accident from which injuries resulted because the coverage is *personal to the insured*. There is, however, nothing in *Frank* to suggest this personal coverage somehow becomes personal to third parties.

Plaintiffs argue that in any multi-vehicle policy the insured need only have one vehicle insured at $100,000/$300,000 with the remaining vehicles insured at the statutory minimum of $15,000/$30,000. But an insured can opt out of UM/UIM coverage if done so in writing.[42] As plaintiffs frame the issue, an insured would not need or want *any* UM/UIM, including the statutory minimum, on a household vehicle so long as at least one household vehicle carried the maximum coverage. An insured could opt out of all UM/UIM coverage on the other household vehicles and not only would the insured get the higher benefits of the coverage on a vehicle not involved in the accident but so would third parties.[43]

Plaintiffs' theory of the case also defies business common sense. Pursuant to plaintiffs' position, the higher coverage on a single vehicle provides the higher coverage on *all* occupants and users of *all* household vehicles. While this is true as to the insured as defined by the policy, because

[41] 553 A.2d 1199 (Del. 1989).

[42] 18 *Del. C.* § 3902(a)(1).

[43] Whether or not any insurer would enter into such an insurance contract seems doubtful but that is not the issue before the Court.

it is personal coverage, the insurer's risk is known and limited to those persons covered by the policy definition.[44] In the above hypothetical, the insured would include husband, wife, and their two children. Theoretically, three vehicles could be involved in accidents that would trigger their personal coverage based upon the maximum insurance only on the fourth vehicle ($100,000/$300,000). The insurer can assess this risk of the personal coverage and make a business decision as to the appropriate premium to charge for such coverage. But the plaintiffs would have the insurer provide the same coverage for every other potential third party user and guest for the same premium, or up to sixteen additional insureds, using the Court's hypothetical and assuming one household driver per vehicle and four passengers per vehicle. If the insurer must provide the higher coverage for all of these third parties then certainly the insurer would charge a higher premium for the potential risk posed by this example. This fact simply means that even if the insurer had to provide the higher coverage because it was somehow personal to the third party occupants, the insurer would charge a higher premium regardless if that premium was on the single vehicle with $100,000/$300,000 coverage or spread out among all the household vehicles.[45] This reality, in turn,

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[44] *See* Nationwide Auto Policy Declarations, attached hereto as Appendix B, at p. U1.

[45] Whether the expanded costs to the insured are carried on one vehicle or divided among multiple vehicles, the bottom line is the risk exposure and premiums charged should be in line. This question is not to be answered by a judge or jury. Nevertheless, I note the premiums for the multi-vehicle households do not appear out of balance regardless of whether the premium is charged on a per vehicle basis or in a lump sum basis.

takes us back to defendant insurers' argument that the Court lacks subject matter jurisdiction because this area is the Insurance Commissioner's bailiwick; this argument was considered *supra*, Part III.

Case law from the Delaware Supreme Court and Superior Court has established that UM/UIM coverage is personal to the insured; that is, higher coverage on one vehicle on a multi-vehicle policy provides personal coverage not only on the remaining vehicles but personally follows the defined insureds to accidents not even involving any of the vehicles covered by the policy. Personal pertains to the person purchasing the coverage.[46] Case law permits this personal coverage to be reformed to the maximum amount permitted by law in the event the insurer did not offer the insured the opportunity to purchase the higher coverage.[47] Nothing in these consolidated cases before the Court suggests that a third party stranger to the insurance contract who is a permissive driver or guest would have the right to reform the contract to allow the third party higher coverage. Indeed, Delaware courts have held otherwise. In *Garnett v. One Beacon Insurance Co.*, the plaintiff was an occupant in a vehicle owned by the insured.[48] The plaintiff was injured as the result of a hit-and-run motor vehicle collision. The plaintiff sought reformation of an insured's policy to provide UM benefits. Judge Cooch held the plaintiff did not have standing to seek reformation. There was "no contract but only a right to create a contract. That right belongs to the person who contracted for the insurance in the first place, not to someone who would be covered under the policy if the

[46] *See Cropper v. State Farm Mut. Auto. Ins. Co.*, 671 A.2d 423, 426 (Del. Super. 1995) ("Once uninsured motorist coverage is purchased, *the insurance consumer* is entitled to secure the full extent of the benefit which the law requires to be offered.") (emphasis added).

[47] *Arms*, 477 A.2d at 1065-66.

[48] 2002 WL 1732371 (Del. Super.)

contracting party exercises that right."[49] Judge Cooch relied upon another Superior Court case, *Menefee v. State Farm Mutual Automobile Insurance Co.*,[50] in his decision. In *Menefee*, a permissive third party driver sought a declaratory judgment that the UM/UIM coverage on the vehicle that she was driving was equal to the liability coverage on the vehicle instead of UM/UIM coverage provided by the policy. The plaintiff's argument was premised on case law finding an insurer is deemed to have left a continuing offer of coverage outstanding unless and until the insurer complies with the statutory requirement that it offer additional UM coverage. The court observed:

> It thus appears that the purpose of [§ 3902(b)] is to promote informed decisions on uninsured motorist coverage. This is why the remedy is a continuing offer of greater coverage, which the contracting party may choose to accept or reject. Although it would seem highly unlikely that a contracting party would ever reject such an offer after a collision with an uninsured motorist, the possibility of rejection might be greater when the injured person is a third party. There might be, at least in theory, countervailing considerations, such as the cost of the premiums for the period for which the additional coverage would be retroactively provided and the effect of a claim on later premiums.[51]

The court ultimately concluded that the defendant insurer had not violated a right of the plaintiff by failing to comply with the statute and, therefore, the plaintiff did not have standing to sue.

The Court of Chancery has also found third party beneficiaries do not have standing to seek to reform an automobile insurance policy to provide for UM/UIM benefits at a higher rate due to a

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[49] *Id.*, at *4 (quoting *Menafee v. State Farm Mut. Auto. Ins. Co.*, 1986 WL 6590 (Del. Super.)).

[50] 1986 WL 6590 (Del. Super.)

[51] *Id.*, at *2 .

violation of the defendant insurer's obligation to offer additional coverage.[52]

[52] *Malone v. United States Fid. & Guar. Co.*, 1987 WL 18107 (Del. Ch. 1987).

Plaintiffs' approach *would* permit a third party to so reform the policy. However, the above-cited cases clearly recognize there is a difference between the benefits to the named insured and the benefits to others who may have coverage as third party beneficiaries.

Plaintiffs also argue that by limiting third party permissive users to the UM/UIM vehicle policy limits the Court is impermissibly treating those insureds in the vehicle as "class one" persons and the third party users as "class two" persons. Class one persons would be those persons who are named insureds who may obtain the advantage of higher UM/UIM coverage carried on another household vehicle. Class two persons would be those persons injured in an accident who are limited to the vehicle-specific UM/UIM coverage limits.

Plaintiffs contend that Judge Herlihy rejected such classifications in *State Farm Mutual Automobile Insurance Co. v. Harris*.[53] *Harris* involved the purchase of insurance by a union and the question before the court was whether or not a business agent fell within the definition of an "insured" under the union's policy. If so, "stacking"[54] would be permitted because the union had purchased separate policies of insurance for its two vehicles. Judge Herlihy found the policy to be ambiguous[55] and ultimately decided the business agent was an expected insured. His rejection of classifications of insureds was limited to the facts of that case. Those facts are not present here and Judge Herlihy's comments regarding the appropriateness of classification are not implicated in the cases pending before the Court. Judge Herlihy noted, "A 'class one' insured is entitled to stack but a

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[53] 1996 WL 280770 (Del. Super.).

[54] "Stacking" is the ability of an insured to add the insurance coverage provided under one policy to that provided under another policy to obtain higher coverage.

[55] Judge Herlihy so found because the term "person" as used in the policy to define the insured did not apply when the insured is an unincorporated association.

'class two' person cannot. This Court *at this point* sees no need to create such classifications nor any current Delaware authority to do so."[56] I find the statute and case law do permit classification in the area of UM/UIM coverage. As noted *supra*, minimum insurance is required by statute unless rejected in writing. Case law treats a person acquiring UM/UIM coverage as acquiring it personally. Thus, the insured may have the benefit of his or her personally purchased higher insurance. A permissive occupant who is injured must rely on the insurance purchased for the vehicle he or she occupies. Moreover, the case law rejecting a third party's standing to reform an insurance policy to provide for higher UM/UIM coverage supports classification in this area.

Insurers argue that Judge Ableman's decision in *Lewis v. American Independent Insurance Co.*,[57] should end the debate as she recognized that, by making premium payments for insurance coverage on multiple vehicles under the same policy, the insured derived multiple benefits. As in *Harris*, the ruling by Judge Ableman must be considered in the context of the issue before the court at the time. Judge Ableman denied the defendant insured's application to stack UM/UIM coverage based upon the language of 18 *Del. C.* § 3902(c). She rejected the insured's argument that, if stacking is unavailable, then the premiums for UM/UIM on multiple vehicles insured under the same policy are not worth the price paid. This finding is helpful to insurers but, because the anti-stacking statute controlled that case's outcome, Judge Ableman's language is dicta. Her comments were limited to the rejection of the argument that payment of multiple UM/UIM premiums entitled one to get additional coverage by way of stacking.

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[56] *Harris*, 1996 WL 280770, at *5 (emphasis added).

[57] 2004 WL 1426964 (Del. Super.).

All of the above leads the Court to reject plaintiffs' argument that defendant insurers' practice of offering and providing greater-than-minimum UM/UIM coverage on more than one household vehicle violates Delaware law. In summary, the following principles apply to UM/UIM coverage under Delaware law:

(a) The insured and his relatives residing in his household have UM/UIM for personal injuries caused by any uninsured or underinsured driver. This coverage is personal and does not require one of the insured's vehicles to be involved in the accident causing the personal injuries.

(b) UM/UIM coverage for other persons provides benefits while the persons occupy the insured's automobile. Here, there is a direct connection to a requirement that the insured's automobile be involved in the accident.

It is reasonable to limit a third party's UM/UIM coverage to the UM/UIM coverage on the involved vehicle. Moreover, it is *unreasonable* to insert third party permissive users into the shoes of the insured.[58] The policies clearly differentiate coverage between the class of users. The classification of insureds simply recognizes that the person purchasing the policy and his household relatives are acquiring greater-than-minimum coverage that is personal and would even provide coverage if the insured were a pedestrian but injured by an uninsured motor vehicle. Delaware law and public policy permit this classification.

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[58] *See Harris*, 1996 WL 280770, at * 4 (discussing reasonable expectation of the parties); *Ruggiero v. Montgomery Mut. Ins. Co.*, 2004 WL 1543234, at * 3 (Del. Super.) (contemplating the insured's reasonable expectation of coverage); *Garnett*, 2002 WL 1732371.

Plaintiffs' position defies basic tenets of contract law, insurance law, and common sense. The bottom line is that an insurer's provision of increased policy coverage for "other persons" is not illusory and provides a meaningful benefit to the insured.

PART IV - B: PLAINTIFFS' "IN THE ALTERNATIVE" ARGUMENT

Plaintiffs also argue that if the Court accepts defendant insurers' theory that they are, in fact, providing a meaningful benefit to plaintiffs, plaintiffs have nevertheless successfully pled claims of bad faith breach of contract and statutory consumer fraud. Plaintiffs contend insurers need to disclose explicitly the nature of the benefit received by the purchase of additional UM/UIM coverage on more than one household vehicle. Specifically, plaintiffs argue defendants must inform consumers that the additional coverage would only benefit non-household members. The Court finds plaintiffs' contention without merit. The policies submitted to the Court clearly state that a permissive user or guest passenger is entitled to UM/UIM coverage in the limits applicable to the vehicle from which his status as an insured arises. Plaintiffs have not identified any specific misrepresentation or omission by the defendant insurers. Communication regarding the extent of coverage provided is best left to the interaction between the customer, the insurance company, and the Insurance Commissioner. The Court will not interfere, absent extraordinary circumstances. Traveling down this path would create a nightmare of ever-expanding required "disclosures" for every policy of insurance.

In sum, should an appellate court conclude this Court has jurisdiction over plaintiffs' complaints, defendants' Motions for Summary Judgment are granted on their merits because the Court rejects plaintiffs' claim that insurers provide illusory UM/UIM coverage.

PART V: CONCLUSION

For the reasons set forth herein, defendant insurers' Consolidated Motions for Summary Judgment are granted on procedural or, in the alternative, substantive grounds.

IT IS SO ORDERED.

APPENDIX A

PREMIUMS CHARGED

Policyholder	**Vehicle 1**	**Vehicle 2**	**Vehicle 3**	**Vehicle 4**	**Vehicle 5**
***Davis, et al. v. State Farm Mutual Automobile Insurance Co.*; C.A. No. S09C-09-012**					
Michele & Scott Davis	$30.02 for 100/300 on 1997 Ford F150	$33.58 for 100/300 on 1993 Chevy Tahoe			
Cheryl & Christoper Gray	$62.81 for 100/300 on 2006 VW Rabbit	$62.81 for 100/300 on 2007 Chevy Equinox			
Virginia Marioni	$62.81 for 100/300 on 2001 Acura MDX	$62.81 for 100/300 on 2004 Chevy Avalanche			
Pauline & Charles Silvestri	$31.60 for 100/300 on 2004 Chrysler Sebring	$33.58 for 100/300 on 2005 Chrysler Sebring	$33.58 for 100/300 on 2002 Mercury Mountaineer	#33.58 for 100/300 on 1998 Dodge Ram	$33.58 for 100/300 on 1993 Chevy Corvette
***Codding v. Donegal Mutual Insurance Co.*; C.A. No. S09C-11-009**					
Cathy & John Codding	$75 for combined single limit 300K/accident on 2007 Pontiac GT	$75 for combined single limit 300K/accident on 2003 Dodge Ram	$75 for combined single limit 300K/accident on 1999 Honda Civic		

<table>
<tr><td colspan="6">Vernot v. IDS Property Casualty Insurance Co.; C.A. No. S09C-12-009</td></tr>
<tr><td>Julie & James Vernot</td><td>$50 for 100/300 on 2002 Saab 9-3</td><td>$50 for 100/300 on 1008 Subaru Tribeca</td><td></td><td></td><td></td></tr>
<tr><td colspan="6">Osberg v. Encompass Insurance Co. of America; C.A. No. S09C-11-041</td></tr>
<tr><td>Lisa & Michael Osberg</td><td>$542 total for 100/300 on all four vehicles:
1995 Honda Civic</td><td>2006 Jeep Wrangler</td><td>2008 Chevy Trailblazer</td><td>2007 Pontiac G6</td><td></td></tr>
<tr><td colspan="6">Collette v. Nationwide Mutual Insurance Co.; C.A. No. S10C-04-010</td></tr>
<tr><td>Regina Collette</td><td>$104.70 for 100/300 all vehicles:
2004 Toyota Solara</td><td>2005 Toyota Tacoma</td><td></td><td></td><td></td></tr>
<tr><td colspan="6">Case: Yerger v. Harleysville Preferred Insurance Co.; C.A. No. S09C-10-009</td></tr>
<tr><td>Richard Yerger</td><td>$123 for combined single limit of 500K on 2005 Dodge Durango</td><td>$123 combined single limit 500K on Chevy Super Sport Roadster</td><td></td><td></td><td></td></tr>
<tr><td colspan="6">Henning, et al. v. Hartford Underwriters Insurance Co.; C.A. No. S10C-02-018</td></tr>
<tr><td>Ann & Gerald Henning</td><td>$50 for 100/300 on 2006 Lincoln Town Car</td><td>$50 for 100/300 on 1987 Chevy El Camino</td><td>$50 for 100/300 on 1997 Chevy Camaro</td><td>$50 for 100/300 on 1995 Ford Taurus</td><td></td></tr>
<tr><td>Vincent Buono</td><td>$46 for 100/300 on 2006 Nissan Altima</td><td>$46 for 100/300 on Nissan Pathfinder</td><td>$46 for 100/300 on Plymouth Neon</td><td></td><td></td></tr>
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<table>
<tr><td colspan="6">Morris v. Nationwide General Insurance Co.; C.A. No. S10C-04-011</td></tr>
<tr><td>Laura & Jeffrey Morris</td><td>$202.80 for 300/300 all vehicles:
2007 Kia Sedona</td><td>2010 Kia Forte</td><td>2006 Chevy Silverado</td><td></td><td></td></tr>
<tr><td>Donna Smits</td><td>$168.60 for 300/300 on all vehicles:
2002 Dodge Stratus</td><td>2004 Dodge Stratus</td><td></td><td></td><td></td></tr>
<tr><td colspan="6">Ardis, et al. v. Travelers Commercial Insurance Co.; C.A. No. S10C-02-011</td></tr>
<tr><td>Ann Ardis & Phillip Mink</td><td>$81 for 100/300 on 2000 Honda Odyssey</td><td>$81 for 100/300 on 1996 Toyota Camry</td><td></td><td></td><td></td></tr>
<tr><td colspan="6">Wlodarczyk v. Allstate Insurance Co.; C.A. No. S10C-02-003</td></tr>
<tr><td>Lynne & Stanley Wlodarczyk</td><td>$27.25 for 50/100 on 2005 Dodge Grand Caravan</td><td>$23.25 for 50/100 on 2004 Dodge Ram</td><td>$23.25 for 50/100 on 2005 Dodge Neon</td><td>$23.25 for 50/100 on 2009 Chevy Malibu</td><td></td></tr>
</table>

NATIONWIDE AUTO POLICY DECLARATIONS

These Declarations are a part of the policy named above and identified by policy number below. They supersede any Declarations issued earlier. Your policy provides the coverages and limits shown in the schedule of coverages. They apply to each insured vehicle as indicated. Your policy complies with the motorists' financial responsibility laws of your state only for vehicles for which Property Damage and Bodily Injury Liability coverages are provided.

Policy Number:
52 07 G 598960

Issued:
AUG 06, 2009

Policyholder:
(Named Insured)
JEFFREY AND LAURA
MORRIS
16 CARRIAGE LANE
NEWARK, DE
19711-2044

Policy Period From:
SEP 06, 2009 to MAR 06, 2010 but only if the required premium for this period has been paid and only for six month renewal periods if renewal premiums have been paid as required. This policy is initially effective at (1) the time the application for insurance is completed, or (2) 12:01 a.m. on the first day of the policy period, whichever is later. Each renewal period begins and ends at 12:01 a.m. standard time at the address of the named insured stated herein. This policy cancels at 12:01 a.m. at the address of the named insured stated herein.

IMPORTANT MESSAGES:
NOTICE: THE COVERAGES YOU HAVE SELECTED, AS SHOWN IN THIS DECLARATIONS, ARE SUBJECT TO THE EXCLUSIONS, LIMITATIONS, AND CONDITIONS OF COVERAGE DETAILED IN YOUR POLICY. IN SOME CASES YOUR COVERAGE MAY BE LIMITED TO THE MINIMUM LIMITS OF COVERAGE REQUIRED BY THE DELAWARE FINANCIAL RESPONSIBILITY LAW OR THE DELAWARE MOTORISTS PROTECTION ACT. ON THE DATE THIS DECLARATIONS WAS ISSUED, THOSE LIMITS ARE:

AUTO LIABILITY: $15,000 PER PERSON, $30,000 PER OCCURRENCE FOR BODILY INJURY
$10,000 FOR PROPERTY DAMAGE

NO-FAULT: $15,000 PER PERSON, $30,000 PER OCCURRENCE FOR BODILY INJURY
$10,000 FOR DAMAGE TO PROPERTY OTHER THAN A MOTOR VEHICLE

IT IS IMPORTANT THAT YOU READ YOUR POLICY CAREFULLY.

EFFECTIVE SEP 06, 2009

-REMOVED SMARTRIDE DISCOUNT

SEE ENCLOSED NOTICE FOR PREMIUM DETAIL

INSURED VEHICLE(S) & SCHEDULE OF COVERAGES

1. 2007 KIA SEDONA L — **ID #KNDMB233276121343**

Coverages	Limits Of Liability	Six Month Premium
COMPREHENSIVE	ACTUAL CASH VALUE LESS $ 250	$ 38.50
COLLISION	ACTUAL CASH VALUE LESS $1,000	$ 96.80
PROPERTY DAMAGE LIABILITY	$ 100,000 EACH OCCURRENCE	$ 64.30
BODILY INJURY LIABILITY	$ 300,000 EACH PERSON $ 300,000 EACH OCCURRENCE	$ 143.80
PERSONAL INJURY PROTECTION AND DAMAGE TO PROPERTY OTHER THAN MOTOR VEHICLE	$ 15,000 PER PERSON $ 30,000 PER OCCURRENCE	$ 50.50
	TOTAL	$ 393.90

LIENHOLDER-CHASE AUTO FINANCE — LIEN EXPIRES ON JAN 06, 2012

3. 2010 KIA FORTE EX — ID #KNAFU4A26A5047623

Coverages	Limits Of Liability	Six Month Premium
COMPREHENSIVE	ACTUAL CASH VALUE LESS $ 250	$ 64.20
COLLISION	ACTUAL CASH VALUE LESS $1,000	$ 238.80
PROPERTY DAMAGE LIABILITY	$ 100,000 EACH OCCURRENCE	$ 240.10
BODILY INJURY LIABILITY	$ 300,000 EACH PERSON $ 300,000 EACH OCCURRENCE	$ 506.50
PERSONAL INJURY PROTECTION	$ 15,000 PER PERSON $ 30,000 PER OCCURRENCE	$ 162.30
AND DAMAGE TO PROPERTY OTHER THAN MOTOR VEHICLE		
	TOTAL	$1,211.90

4. 2006 CHEV SILVERAD — ID #1GCEK19B26E148303

Coverages	Limits Of Liability	Six Month Premium
COMPREHENSIVE	ACTUAL CASH VALUE LESS $ 250	$ 39.70
COLLISION	ACTUAL CASH VALUE LESS $1,000	$ 85.80
PROPERTY DAMAGE LIABILITY	$ 100,000 EACH OCCURRENCE	$ 65.30
BODILY INJURY LIABILITY	$ 300,000 EACH PERSON $ 300,000 EACH OCCURRENCE	$ 141.80
PERSONAL INJURY PROTECTION	$ 15,000 PER PERSON $ 30,000 PER OCCURRENCE	$ 40.80
AND DAMAGE TO PROPERTY OTHER THAN MOTOR VEHICLE		
	TOTAL	$ 373.40

POLICY COVERAGES

Coverages	Limits Of Liability	Six Month Premium
UNINSURED MOTORISTS -BODILY INJURY	$ 300,000 EACH PERSON $ 300,000 EACH OCCURRENCE	$ 202.80
-PROPERTY DAMAGE	$ 10,000 EACH OCCURRENCE LESS $250 DED	
	TOTAL	$ 202.80

INSURED DRIVERS:

#	Driver Name		Birth Date	Marital Status
01	JEFFREY	MORRIS	07/08/57	MARRIED
02	LAURA	MORRIS	04/28/63	MARRIED
03	MATTHEW	D MORRIS	05/10/91	SINGLE

APPLIED DISCOUNTS:

3 YEAR ACC FREE	PASSIVE RESTRAINT	DEFENSIVE DRIVER	MULTI CAR
LONG TERM CUSTOMER	MULTI LINE		AFFINITY
NEW VEHICLE	GOOD STUDENT		5 YEAR ACC FREE

Policy Form & Endorsements: V007F 3398

Office Use: PU251156
JUL 28, 2009 TERR: 033 $ 0.00

Issued By: NATIONWIDE GENERAL INSURANCE COMPANY **Home Office - Columbus, Ohio**
Countersigned At: WILMINGTON, DEL. **By:** JOHN J KOZIOL CLU LU

Uninsured Motorists

(for bodily injury and property damage caused by uninsured and underinsured motorists)

ADDITIONAL DEFINITIONS APPLICABLE TO THIS COVERAGE

"UNINSURED MOTOR VEHICLE" – See definition in COVERAGE AGREEMENT section.

"PROPERTY DAMAGE" – See definition in COVERAGE AGREEMENT section.

Coverage Agreement

YOU AND A RELATIVE

We will pay damages, including derivative claims, which are due by law to **you** or a **relative** from the owner or driver of an **uninsured motor vehicle** because of **bodily injury** suffered by **you or a relative,** and because of **property damage.** Damages must result from an accident arising out of the:

1. ownership;
2. maintenance; or
3. use;

of the **uninsured motor vehicle.**

OTHER PERSONS

We will also pay damages, including derivative claims, which are due by law to other persons who:

1. are not a named insured or an insured household member for Uninsured Motorists coverage under another policy; and
2. suffer **bodily injury** while **occupying:**
   a) **your auto.**
   b) a **motor vehicle you** do not own, while it is used as a temporary substitute for **your auto. Your auto** must be out of use because of:
      (1) breakdown;
      (2) repair;
      (3) servicing;
      (4) loss; or
      (5) destruction.
   c) a **private passenger auto** newly acquired by **you** to which the Auto Liability coverage of this policy applies. The coverage applies only during the first 30 days **you** own the vehicle, unless it replaces **your auto.**

PROPERTY COVERED

Coverage for **property damage** applies to the following property:

1. **your auto,** including its loss of use.
2. **your auto's** contents which are owned by **you** or a **relative.**
3. **your auto's** contents which are owned by any other person. However, such contents are covered only while their owner is **occupying your auto.**
4. property **you** or a **relative** own while it is contained in any of the following:
   a) a **motor vehicle you** do not own, while it is used in place of **your auto** for a short time. **Your auto** must be out of use because of:
      (1) breakdown;