IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ANNE DUNLAP, DEBORAH DUNLAP, and **JAMES DUNLAP**,	)	
Plaintiffs,	)	C.A. No. 03C-12-168 PLA
v.	)	
STATE FARM FIRE AND CASUALTY COMPANY,	)	
Defendant.	)	

Submitted: May 3, 2004
Decided: June 15, 2004

UPON DEFENDANT'S RULE 12(b)(6) MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM
GRANTED.

ORDER

James J. Woods, Jr., Esquire, Connolly Bove Lodge & Hutz, LLP, Wilmington, Delaware, Attorney for Plaintiffs.

Daniel V. Folt, Esquire, Gary W. Lipkin, Esquire, Duane Morris, LLP, Wilmington, Delaware, Attorneys for Defendant.

ABLEMAN, JUDGE

Before the Court is a Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim, filed by defendant State Farm Fire and Casualty Company, seeking dismissal of a bad faith claim for delay in payment of benefits in a suit filed by Anne, Deborah and James Dunlap. As will be set forth more fully hereafter, the coverage provided by Defendant had not yet been triggered by the exhaustion of tortfeasor policy limits. Accordingly, the complaint fails to state a claim upon which relief may be granted.

Statement of Facts

The relevant facts are not in dispute. On August 7, 1998, Anne Dunlap was seriously injured in a collision between a car driven by Mark Cardillo ("Cardillo"), in which she was a passenger, and a Delaware Transit Corporation ("DART") bus driven by Monte Wood. As a result of the accident, Ms. Dunlap is partially paralyzed and has incurred hundreds of thousands of dollars in medical bills.

On August 4, 2000, the Dunlap family ("Plaintiffs") filed suit against Cardillo, DART, and the DART bus driver. The policy covering Cardillo's automobile had a single liability limit of $500,000.00. DART had a single limit of $300,000.00. The limits of the Cardillo policy were exhausted by payments to Anne Dunlap and to other claimants. By the fall of 2001, James J. Woods, Jr., Esquire, counsel for Plaintiffs, had negotiated a settlement with DART for payment of $175,000.00, but finalization of the agreement with DART did not

occur because counsel felt it was essential to obtain the written consent of State Farm Fire and Casualty Company ("Defendant") that acceptance of less than DART'S policy limits would not compromise any future underinsured motorist ("UIM") claim. Defendant advised Plaintiffs' counsel on December 18, 2001 that it declined to consent to a settlement with DART for less than the policy limits.

Unable to obtain Defendant's consent, Plaintiffs pursued their claim against DART, and DART's driver, at trial in September 2002. After trial, the jury found no negligence on the part of Monte Wood, the DART bus driver, and attributed the sole proximate cause of the accident to Cardillo.

Following the trial against DART, Defendant obtained permission for an IME of Plaintiff, Anne Dunlap. After examining Plaintiff on November 12, 2002, Dr. Richard A. Fischer confirmed her severe, permanent, and debilitating injuries. Defendant thereafter paid Plaintiffs $1 million in UIM benefits, representing the total policy limits available under all claimed coverages.

Contentions of the Parties

The crux of Plaintiffs' bad faith claim in this case is Defendant's refusal to acquiesce to their request for Defendant's consent to the proposed DART settlement. Plaintiffs contend that their counsel's assurance that Anne Dunlap's past, present, and future medical expenses and economic losses would exhaust all available policy limits, required Defendant to consent to DART's offer to settle for

less than the policy limits. Stated another way, Plaintiffs maintain that Defendant could not in good faith deny Anne Dunlap the opportunity to realize a $175,000.00 below-policy-limits settlement that Plaintiffs could have recovered from DART had the case not proceeded to trial and had the jury not exonerated DART of all liability in the matter. Plaintiffs submit that Defendant's refusal to consent to the settlement with DART, when that settlement made no difference to Defendant's ultimate liability, constituted bad faith refusal under the "willful and malicious" standard set forth in *Tackett v. State Farm Fire and Casualty Insurance Co.*[1] Plaintiffs therefore insist that the case is not ripe for dismissal, and that Defendant should not be permitted to avoid production of its file to enable Plaintiffs to bolster their claims that Defendant's action was "clearly without any reasonable justification."

Defendant disagrees with Plaintiffs' contentions and asserts that both Delaware statutory and decisional law control the outcome of this issue. Defendant argues that, when considered together, the language of the UIM provision contained in the insurance policy issued to the Plaintiffs, the statutory requirement of exhaustion of all limits of liability delineated in 18 *Del. C.* § 3902(b)(3), and the applicable case law, all clearly mandate that UIM coverage does not become effective until the limits of liability of <u>all</u> bodily injury bonds or

[1] *See Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254 (Del. 1995).

policies are fully exhausted. Thus, Defendant concludes, since Plaintiffs' UIM claim only ripened upon the resolution of their claims against DART, Defendant cannot, as a matter of law, be deemed to have acted willfully and maliciously in delaying payment of UIM benefits prior to that time.

Standard and Scope of Review

In assessing the merits of a motion to dismiss for failure to state a claim pursuant to Superior Court Civil Rule 12(b)(6), all well-pleaded facts in the complaint are assumed to be true.[2] "A complaint[,] attacked by a motion to dismiss for failure to state a claim[,] will not be dismissed unless it is clearly without merit, which may be either a matter of law or of fact."[3] Likewise, a complaint will not be dismissed for failure to state a claim unless "[i]t appears to a certainty that, under no set of facts which could be proved to support the claim asserted, would the plaintiff be entitled to relief."[4] That is to say, the test for sufficiency is a broad one. It is measured by whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.[5] If the plaintiff may recover, the motion must be denied. Similarly, when a defendant who attacks a complaint for failure to state a claim upon which relief could be granted, and who moves to dismiss the complaint, offers affidavits,

[2] *Laventhol, Krekstein, Horwath & Horwath, v. Tuckman*, 372 A.2d 168, 169 (Del. 1976).
[3] *Diamond State Tel. Co. v. Univ. of Del*., 269 A.2d 52, 58 (Del. 1970).
[4] *Id*.
[5] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978); *Klein v. Sunbeam Corp*., 94 A.2d 385, 391 (Del. 1952).

depositions, or other supporting documentation, in addition to pleadings, the motion will be considered a motion for summary judgment.[6]

Discussion

In their original complaint, Plaintiffs submitted affidavits in the form of three letters attached as exhibits. In view of the fact that Defendant has not offered affidavits, deposition testimony, documents, or other additional facts not presented in its pleadings, its motion shall be considered a motion to dismiss for failure to state a claim upon which relief may be granted under Superior Court Civil Rule 12(b)(6).

Having determined the appropriate form and content of Defendant's motion, the Court once again revisits the oft-litigated issues seemingly indigenous to the intent, meaning, and underlying functionality, of Delaware's uninsured/underinsured motorist insurance statute, 18 *Del. C*. § 3902. In doing so, it is essential that the Court address two questions in its examination of the case at bar. First, after assessing and determining the applicability and the impact of § 3902(b)(3), specific to Plaintiffs' bad faith complaint, the Court must conclude whether Defendant was obligated in any manner to assist the Plaintiffs in their settlement negotiations with DART prior to paying the $1 million in UIM benefits to the Plaintiffs. In other words, when the Plaintiffs negotiated a potential

[6] Venables v. Smith, 2003 WL 1903779, at *2 (Del. Super. Ct.); *Shultz v. Del. Trust Co*., 360 A.2d 576, 578 (Super. Ct. Del. 1976).

settlement with DART for $175,000.00, were the negotiations subject to Defendant's assurances that settling with DART for less than DART's $300,000.00 bodily injury limit would not jeopardize Plaintiffs' UIM claim with Defendant? Extending this one step further, the Court must address whether Defendant was obligated by law to sanction or acquiesce to such an agreement, in essence, to "bless" the negotiations in order to benefit the Plaintiffs' claim within the constructed meaning of 18 *Del. C*. § 3902(b)(3). Second, if by not cooperating with the Plaintiffs in allowing them to fully realize a $175,000.00 below-policy limits settlement with DART, did Defendant's conduct constitute bad faith as defined in *Tackett*, despite the fact that Defendant paid out the $1 million UIM benefit to Plaintiffs approximately three months after DART, and its driver, were exonerated from any tortfeasor liability at trial?

Over the years, the Delaware Supreme Court has grappled with the language of 18 *Del. C*. § 3902. In the Court's own words, "[w]e have attempted to follow the plain meaning of the unambiguous portions of the statute, and to interpret those portions that are ambiguous in a manner that gives effect to the legislative purpose of protecting people injured by tortfeasors carrying little or no insurance."[7] The Court went on to acknowledge that it recognized the difficulty in "[p]arsing this statute, and applying it in different fact patters . . . ."[8] In interpreting 18 *Del. C*. §

[7] *Deptula v. Horace Mann Ins. Co*., 842 A.2d 1235, 1236 (Del. 2004).
[8] *Id*.

3902, the Delaware Supreme Court has expressed an unremitting intent and desire to "provide clear and consistent direction to the trial courts and litigators," while acknowledging that the "courts cannot usurp the legislative function by rewriting the statute."[9]

It is well established that in construing the language of a statute, Delaware courts attempt to ascertain and give effect to legislative intent,[10] i.e., the "objective of statutory construction is to 'ascertain and give effect to the intent of the legislature.'"[11] In the construction of a statute, the Delaware Supreme Court has established as its standard the search for legislative intent.[12] Further, '[w]here the intent of the legislature is clearly reflected by unambiguous language in the statute, the language itself controls.'[13] That is to say, if a statute contains unmistakable language, no interpretation is required and the plain meaning of the words control.[14]

Interpretation of legislative intent and statutory construction requires that a court first examine the text of the statute in its context to determine if it is ambiguous.[15] By and large, a statute is ambiguous if it is "reasonably susceptible

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[9] *Id*.
[10] *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000); *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994).
[11] *Dir. of Revenue v. CNA Holdings, Inc., f/k/a Hoechst Celanese Corp.*, 818 A.2d 953, 957 (Del. 2003) (quoting *Ingram*, 747 A.2d at 547).
[12] *Cephas*, 637 A.2d at 23; *Sandt v. Del. Solid Waste Auth*., 640 A.2d 1030, 1032 (Del. 1994).
[13] *Sandt*, 640 A.2d at 1032 (quoting *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989)); *see also Streett v. State*, 669 A.2d 9, 12 (Del. 1995); *Cephas*, 637 A.2d at 23.
[14] *Ingram*, 747 A.2d at 547; *accord Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999); *Cephas*, 637 A.2d at 23; *Spielberg*, 558 A.2d at 293.
[15] *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998); *State v. Reynolds*, 669 A.2d 90, 93 (Del. 1995).

of two interpretations" or to evoking different conclusions.[16] A statute may also contain ambiguity, "[i]f a literal interpretation of the words of the statute would lead to a result so unreasonable or absurd that it could not have been intended by the legislature."[17] Therefore, in those instances where a statute's language lends itself to ambiguity, "[a] court must seek to resolve the ambiguity by ascertaining the legislative intent."[18] Concomitantly, in those instances when the language of a statute harbors no ambiguity and application of the literal meaning of its words would not be unreasonable, there is no basis for an interpretation of those words by the court.[19]

In a long-standing succession of case law, the Delaware Supreme Court has consistently recognized that the legislative purpose in mandating the availability of *uninsured* motorist coverage is to foster the "protection of innocent persons from the negligence of unknown or impecunious tortfeasors."[20] The Court has held that "[i]nsurance policy provisions designed to reduce or limit the coverage to less than that prescribed by the Delaware statute, 18 *Del. C.* § 3902, are void."[21] As a result, any limitation in the scope or degree of coverage that § 3902 affords, must be

[16] *CNA Holdings, Inc*., 818 A.2d at 957; *accord Newtowne Vill. Serv. Corp. v. Newtowne Rd. Dev. Co.,*772 A.2d 172, 175 (Del. 2001); *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd*., 492 A.2d 1242, 1246 (Del. 1985).
[17] *CNA Holdings, Inc*., 818 A.2d at 957; *accord Newtowne Vill. Serv. Corp.*, 772 A.2d at 175; *Snyder*, 708 A.2d at 241; *DiStefano v. Watson*, 566 A.2d 1, 4 (Del. 1989).
[18] *Snyder*, 708 A.2d at 241; *Acierno v. Worthy Bros. Pipeline Corp*., 656 A.2d 1085, 1088 (Del. 1995).
[19] *Snyder*, 708 A.2d at 241; *DiStefano*, 566 A.2d at 4.
[20] *Frank v. Horizon Assur. Co*., 553 A.2d 1199, 1201 (Del. 1989).
[21] *Id*. at 1201-02.

"specifically authorized by statute."[22] Contemporaneously, § 3902 also makes available to Delaware motorists the option to contract for *UIM* coverage as well.[23] With respect to UIM coverage, the Delaware Supreme Court also has acknowledged that the underlying principle and intent of 18 *Del. C*. § 3902 is to permit a risk-adverse person to create a fund to protect against losses caused by uninsured/underinsured motorists by acquiring add-on coverage beyond the minimum provided for in subsection (a), and to assure that the individual is aware of the extra coverage.[24]

A substantive assessment of the allegations contained within Plaintiffs' complaint reveals a unique set of procedural circumstances upon which Plaintiffs' claim of bad faith is predicated, which have not been presented for consideration to

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[22] *Id*. at 1204.

[23] Specifically, § 3902(b) provides:

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.

(1) Acceptance of such additional coverage shall operate to amend the policy's uninsured coverage to pay for bodily injury damage that the insured or his/her legal representative are legally entitled to recover from the driver of an underinsured motor vehicle.

(2) An underinsured motor vehicle is one for which there may be bodily injury liability coverage in effect, but the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident total less than the limits provided by the uninsured motorist coverage. These limits shall be stated in the declaration sheet of the policy.

(3) The insurer shall not be obligated to make any payment under this coverage until after the limits of liability under all bodily injury bonds and insurance policies available to the insured at the time of the accident have been exhausted by payment of settlements or judgments.

(4) An insured who executes a release of a single tortfeasor owner or operator of an underinsured motor vehicle in exchange for payment of the entire limits of liability insurance afforded by the tortfeasor's liability insurer shall continue to be legally entitled to recover against that tortfeasor for the purposes of recovery against the insured's underinsurance carrier. An insured who executes a release of 1 of multiple tortfeasors shall have rights against that tortfeasor and the insured's underinsurance carrier determined in accordance with the Uniform Contribution Among Joint Tortfeasors Act and paragraph (3) of this subsection. DEL. CODE ANN. tit. 18, § 3902(b) (1999 & Supp. 2002).

[24] *Humm v. Aetna Cas. & Sur. Co*., 656 A.2d 712, 716 (Del. 1995).

this Court in the past. That is to say, the Court must consider *de novo* whether a UIM insurer is duty-bound to acquiesce to the negotiations of its insured with a potential tortfeasor, to resolve bodily injury liability claims between the insured and the tortfeasor, before the insured's UIM claim has actually ripened pursuant to the dictates of § 3902(b)(3). As such, the Court relies on the most recent, dispositive, case law encompassing the statutory interpretation of § 3902(b) for guidance.

In *Hurst v. Nationwide Mutual Insurance Co*.,[25] and subsequently, in *Sutch v. State Farm Mutual Automobile Insurance Co*.,[26] the Delaware Supreme Court held that the logical operation of § 3902 is reflected by its express terms as follows:

> First, an offer of uninsured coverage must be extended, not to exceed the basic policy limits. 18 *Del. C*. § 3902(b). Second, the damages recoverable for "bodily injury" from the uninsured carrier are quantified in Section 3902(b)(1) as the amount the insured is "legally entitled to recover from the driver of an underinsured motor vehicle." Third, Section 3902(b)(3) provides that the amount of any other "bodily injury" insurance available to the claimant must be exhausted (deducted) before the payment "for bodily injury" by the uninsured carrier pursuant to Section 3902(b)(1). Thereafter, to the extent that the innocently injured claimant has not been fully compensated for all the bodily injury damages that could legally be recovered from the uninsured/underinsured driver, the claimant is entitled to be paid for the uncompensated

[25] *Hurst v. Nationwide Mut. Ins. Co*., 652 A.2d 10 (Del. 1995).
[26] *Sutch v. State Farm Mut. Auto. Ins. Co*., 672 A.2d 17 (Del. 1996).

> bodily injuries, up to the full policy limits of the uninsured coverage. 18 *Del. C*. § 3902(b)(1) and (3).[27]

When considered in conjunction with one another, § 3902(b)(1) states that the additional uninsured coverage will pay for bodily injury damage that the insured is entitled to recover from the underinsured driver and that, thereafter, § 3902(b)(3) further specifically permits a set-off or diminution by requiring the "exhaustion" of other available insurance.[28]

In conducting its analysis, the Court in *Sutch* emphasized the relatedness and correlation among the individual subsections of § 3902(b) with respect to their collective focus and purpose. Specifically, the Court reaffirmed the intent and import of the statute, stressing that § 3902(b)(3) unequivocally provides that "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.*"[29] The Court further concluded that, "[o]nce the Section 3902 requirements have been satisfied, 'to the extent that the innocently injured claimant has not been fully compensated for all the bodily injury damages that could legally be recovered from the uninsured/underinsured driver, *the claimant is entitled to be paid for the uncompensated bodily injuries, up to the full policy limits*

[27] *Hurst*, 652 A.2d at 13-14; *Sutch*, 672 A.2d at 19.
[28] *Hurst*, 652 A.2d at 13.
[29] *Sutch*, 672 A.2d at 20 (citing 18 *Del C*. § 3902(b)(3)) (emphasis added).

of the uninsured coverage.'"[30]

In other words, § 3902(b)(1) correlates the operation of the offer of underinsurance coverage found in the introductory section of § 3902(b), to the amount the insured is legally entitled to receive from the underinsured driver, after making the deductions for other coverage as required by § 3902(b)(3). The language of § 3902(b), and of § 3902(b)(3), in particular, is unambiguously forthright in its description of the condition precedent that must occur before an insurer is obligated to make any payment of a UIM benefit, i.e., the limits of liability under all bodily injury bonds and insurance policies available to the insured have been exhausted by payment of settlement or judgments.

Webster's Dictionary defines the word "all" as "the whole number, amount, or quantity," "each and everyone," and "the utmost possible."[31] Within the context of § 3902(b)(3), the intrinsic meaning attributable to the definition of "all," as applied in conjunction with, and followed by, the word "available," connotes to this Court only one meaning. Each and every potential bodily injury bond and insurance policy that exists at the time of the accident, to which the insured, for whatever reason, may be able to lay claim, must first be exhausted through either payment of a settlement, or by decree of a judgment, before the insured's UIM coverage can become activated, and the UIM claim is ripe for consideration.

[30] *Id*. (quoting *Hurst*, 652 A.2d at 13-14) (citing 18 *Del. C*. § 3902(b)(1) and (3))) (alteration in original).
[31] WEBSTER'S II DICTIONARY 93 (2d ed. 1984).

Advancing the statutory analysis one step further, the Court notes that the legislative intent underlying the language contained in § 3902(b)(3) signifies that, in an instance such as this where there exists more than one potential tortfeasor, all potential tortfeasors' policies must be "exhausted," before an insured can exercise its supplemental underinsured bodily injury liability coverage. In *Sload v. Nationwide Mutual Insurance Co*., this Court examined the statutory definition of "underinsured motor vehicle" and determined that a comparison of the difference of limits between UIM coverage and bodily injury liability coverage under all applicable bonds and policies is not limited to accidents involving a single tortfeasor, but applies to multiple vehicle accidents involving multiple tortfeasors.[32] Failure to apply the broader meaning embraced by the term "underinsured motor vehicle" in those cases involving multiple tortfeasors, when there exists one or more undetermined, potentially underinsured, tortfeasor, would create an untenable outcome for insurers. An insurer would be required to pay UIM benefits prior to the resolution of all claims against the liable parties. In effect, UIM liability coverage would then be converted from supplemental

[32] *Sload v. Nationwide Mut. Ins. Co*., 723 A.2d 388 (Del. Super. Ct. 1998). In interpreting the meaning behind the underinsured motorist statute, 18 *Del. C*. § 3902(b), the Court stated, "[P]laintiffs' construction of the statute seems strained to me. A simple reading of the statute suggests inclusion of multiple tortfeasors in the definition of an underinsured motor vehicle. The statute clearly states that "the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident [must] total less than the limits provided by the uninsured motorist coverage." The Legislature's inclusion of the phrase "all bonds and insurance policies applicable at the time of the accident" evidences an intent, with regard to liability coverage, to focus on the totality of "the accident" and thus an intent to apply the statute to multiple tortfeasors. The phrase "underinsured motor vehicle," on the other hand, must necessarily apply to the vehicle in which the Plaintiffs were riding and to the availability of UIM coverage for such Plaintiffs." *Id*. at 389-90.

coverage to primary coverage, thereby undermining the aim and purpose allocated to UIM insurance coverage, as well as proving contrary to § 3902(b)'s legislative intent.[33] To put it succinctly, the intent of the legislature is clearly reflected by unambiguous language in the statute, and therefore, no interpretation is required and the plain meaning of the words control.

Bearing in mind § 3902(b)'s unmistakable intent to provide Delaware motorists with the option of purchasing supplemental, secondary, UIM insurance, coupled with § 3902(b)(3)'s unambiguous language conferring the condition precedent obligation to exhaust the limits of all bodily injury bonds and insurance policies, the Court finds that application of § 3902(b)(3) to Plaintiffs' circumstances results in only one conclusion. Plaintiffs' negotiations with DART for a potential settlement of $175,000.00, which they chose not to accept, and the subsequent trial that ensued, represented an unresolved, outstanding, bodily injury liability insurance policy claim "available" to the Plaintiffs that was yet to be "exhausted." Therefore, Defendant was not obligated to make a payment pursuant to the UIM

[33] *See Adams v. Delmarva Power & Light Co*., 575 A.2d 1103, 1107 (Del. 1990) (discussing the public policy rationale behind § 3902 of allowing an individual to protect himself against losses caused by underinsured motorists by purchasing supplemental UIM coverage); *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 43 (Del. 1991) (noting that the General Assembly enacted § 3902 to afford Delaware motorists the opportunity to purchase supplemental, not primary, insurance coverage to protect themselves from underinsured motorists).

coverage provided by Plaintiffs' policy because the UIM claim had not ripened, and such payment would violate the statute.

Moreover, not only was the Defendant not obliged to make a payment under Plaintiffs' UIM coverage, but Defendant was under no duty, by statute, law, or otherwise, to assist, acquiesce, ratify, or condone the on-going negotiations between Plaintiffs and DART. Plaintiffs' contentions that Defendant "improperly thwarted a very advantageous settlement with DART" and that Defendant "acted in bad faith, totally motivated by its own self-interest, by forcing the Dunlaps to give up the $175,000 offered by DART" are without merit. Ultimately, it was Plaintiffs' responsibility, and their selective choice, to make the decision either to accept an out-of-court settlement with DART for $175,000.00, or reject the settlement offer and bring a cause of action in tort against DART. In essence, Plaintiffs "hedged their bets" and chose to sue DART, unsuccessfully. It was not the Defendant's responsibility to sanction the negotiations, nor was it a requirement that it administer advice or exercise influence with regard to Plaintiffs' decision to accept the settlement or to litigate. Plaintiffs have attempted to shift the onus of an unsuccessfully construed course of action, and/or trial strategy, onto the Defendant, whose statutory obligation had not yet been triggered at the time of settlement negotiations.

In addition, whatever course of action Plaintiffs chose to adopt, i.e., either accepting the settlement offer with DART, or proceeding to trial and succeeding or failing on the merits of the law suit against DART, was not outcome determinative with respect to Defendant's obligation to pay the $1 million UIM benefit to Plaintiffs. Ironically, both in their complaint, and in their memorandum in opposition to Defendant's motion to dismiss, Plaintiffs concede this fact.[34] Since DART was an insured, potentially liable, tortfeasor in this matter, any viable claim against it had to be settled beforehand. Despite Plaintiffs' hypothetical allegation of Defendant's ability to "get out of paying UIM benefits," there is no indication in the record that Defendant's conduct throughout these proceedings suggested such a stratagem.

Furthermore, in response to the decisions in *Hurst* and *Sutch*, the Delaware Supreme Court in *National Mutual Automobile Insurance Co. v. Peebles*, addressed the unresolved issue of whether the liability limits paid by a tortfeasor's insurer were to be subtracted from the limits of the insured's UIM coverage, or from the amount of the insured's total damages.[35] After closely examining the

[34] In their complaint, Plaintiffs state that, "[S]tate Farm would have to pay Anne the $1 Million UIM limit whether or not Monte Wood was found negligent." In their memo in opposition to Defendant's motion, Plaintiffs contend that, "[S]tate Farm's UIM exposure was the same regardless of whether the DART driver was found negligent. If he was, even 1%, he and DART would be responsible for all of Anne Dunlap's damages under joint and several liability, and DART's insurer would have paid its $300,000 policy limit. If he was not negligent, neither he nor DART were tortfeasors[,] and therefore[,] the only tortfeasor was Mark Cardillo, whose coverage State Farm concedes was exhausted. Further, "[t]he only way that State Farm would have been able to get out of paying UIM benefits would have been if the Dunlaps had settled with DART for less than DART's policy limit and State Farm later won a declaratory judgment action on the basis that such a settlement voided the UIM coverage."

[35] *Nat'l Mut. Auto. Ins. Co. v. Peebles*, 688 A.2d 1374 (Del. 1997).

statutory intent and public policy of § 3902(b) in its two prior opinions (*Aetna Casualty & Surety Co. v. Kenner*, 570 A.2d 1172 (Del. 1990) and *Hurst v. Nationwide Mutual Insurance Co*., 652 A.2d 10 (Del. 1995)), the Court held that, "[S]ection 3902(b) mandates that any reduction provided for by § 3902(b)(3) must be deducted from the total amount of the insured claimant's bodily injuries and not from the limits of the insured claimant's underinsurance coverage."[36] Thus, had Plaintiffs settled with DART for $175,000.00, this amount would have been set off against the total amount of Plaintiffs' bodily injuries claims, and not against their $1 million UIM policy limit. The record reflects that Plaintiffs' counsel was confident that Anne Dunlap's future losses would probably exceed all available policy limits, and he assured his clients accordingly. Therefore, admittedly, Plaintiffs would have received the full $1 million UIM coverage in any case. Plaintiffs' statement that, "[S]tate Farm interfered with a settlement that made no difference to State Farm's ultimate liability," simply underscores this fact.

Although the Court need not look any further than the definitive, unambiguous, language contained in § 3902(b)(3) in support of its findings, the content of the contractual language found in the UIM provision incorporated within the four corners of the Plaintiffs' insurance policy, as well as the case law from other jurisdictions, are equally dispositive and instructive in this matter.

[36] *Id*. at 1378.

Pursuant to 18 *Del. C*. § 3901, *et seq*., a policy of insurance providing for motor vehicle uninsured and/or underinsured coverage is a "casualty insurance contract." Except to the extent that statutory restrictions or public policy dictate a different result, contractual principles govern claims by an insured arising under uninsured/underinsured coverage.[37] Under Delaware law, the interpretation of contract language is treated as a question of law.[38] The language of the policy prescribes the scope of an insurance policy's coverage obligation.[39] "[W]hen the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning . . . ."[40] Plaintiffs' insurance policy adheres to the statutory language of § 3902 (b)(3), stating the following, "[t]here is no coverage until the limits of liability of all bodily injury liability bonds or policies that apply have been used up by payment of judgments or settlements." The contract language comports with the language of its statutory counterpart, thus solidifying the exhaustion requirement of all available bodily injury bonds and policies.

In addition to Delaware, at least eight other states have exhaustion statutes similar to § 3902(b)(3): Connecticut, California, Alaska, Illinois, New Jersey, New

[37] *Hurst*, 652 A.2d at 12-13.
[38] *Playtex FP, Inc. v. Columbia Cas. Co*., 622 A.2d 1074, 1076 (Del. Super. Ct. 1992).
[39] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co*., 616 A.2d 1192, 1195-96 (Del. 1992).
[40] *Hallowell v. State Farm Mut. Auto. Ins. Co*., 443 A.2d 925, 926 (Del. 1982).

York, North Carolina, and Oregon.[41] In a similar fashion, each holds to the tenet that all available liability coverage must first be "used up" or "exhausted," before UIM insurance would come into effect or be applicable. This Court's determination that the language of § 3902(b)(3)'s exhaustion clause is unambiguous is consistent with cases from other jurisdictions that have construed nearly identical language, either in the context of a UIM policy, a UIM statute, or both.[42]

Based on the Court's conclusion that Defendant's conduct complied with the statutory requisites set forth in 18 *Del. C*. § 3902(b), it follows, *a priori*, that Defendant's actions do not constitute "bad faith" within the parameters established in *Tackett*. Admittedly, if a claim arises concerning a breach of the terms of an insurance policy contract agreement, whether it concerns a dispute over coverage, or an exclusion or delay in payment of a claim, the remedy is properly one for

[41] *See* Conn. Gen. Stat. Ann. § 38a-336(b) (2000); Cal. Ins.Code § 11580.2(p)(3) (2001); Ala. Stat. 28.20.445(e)(1) (1995 & Supp. 2000); 215 Ill. Comp. Stat. Ann. 5/143a 2(7) (2000); N.J. Stat. Ann. § 17:28.1 1(e) (1994 & Supp.2000); N.Y. Ins. Law § 3420(f)(A)(2) (2000); N.C. Gen.Stat. § 20- 279.21(b)(4) (1999); Or.Rev.Stat. § 742.504(4)(d) (1999).

[42] *See Robinette v. Am. Liberty Ins. Co*., 720 F.Supp. 577, 580 (S.D. Miss. 1989); *Birchfield v. Nationwide Ins*., 875 S.W.2d 502, 503 (Ark. 1994); *Farmers Ins. Exch. v. Hurley*, 90 Cal. Rptr. 2d 697, 701 (Cal. Ct. App. 1999); *Continental Ins. Co. v. Cebe-Habersky*, 571 A.2d 104, 106 (Conn. 1990); *Lewis v. State Farm Mut. Auto. Ins. Co*., 857 S.W.2d 465, 466-67 (Mo. Ct. App. 1993); *Fed. Ins. Co. v. Watnick*, 607 N.E.2d 771, 774 (N.Y. 1992).
See also Danbeck v. Am. Family Mut. Ins. Co., 629 N.W.2d 150, 156 (Wis. 2001) (holding that the exhaustion clause requiring an insurer to pay UIM benefits only after liability policies have been exhausted by payment of judgments or settlements unambiguously required the insured to exhaust the tortfeasor's liability limits by payment of full policy limits in order to trigger the duty to pay UIM benefits); *Pa. Mfrs.' Ass'n Ins. Co. v. Gordon*, 1993 WL 427372, at *5 (E.D. Pa.) (holding that the policy language "[w]e will pay all sums the 'insured' is legally entitled to recover as damages from the owner or driver of an 'uninsured motor vehicle' only after all liability bonds or policies have been exhausted by judgments or payments" was both "clear and unambiguous" and, that since the plaintiff had not satisfied the exhaustion clause, the insurer was not yet liable for UIM benefit payments).

breach of contract.[43] The implied obligations of good faith and fair dealing underlying all contractual obligations are breached in those instances where an insurer fails to investigate or process a claim or delays payment in bad faith.[44] Pursuant to the standard set forth in *Casson v. Nationwide Insurance Co*., "[i]n order to establish "bad faith" the plaintiff must show that the insurer's refusal to honor its contractual obligation was *clearly without any reasonable justification*."[45] The ultimate question in determining if an insurer's denial of benefits or liability coverage constituted actionable, lack-of-good-faith dealings, or, in the alternative, the presence of bad faith on the part of the insurer, is if there existed a set of facts or circumstances known to the insurer at the time the insurer denied liability or payment, which created a *bona fide dispute*, and therefore, a meritorious defense to the insurer's liability.[46]

In the Court's judgment, § 3902(b)(3)'s "exhaustion" requirement provided more than a "reasonable justification" for Defendant to delay payment of UIM benefits to Plaintiffs. There existed at that time a "set of circumstances creating a bona fide dispute" between Plaintiffs and Defendant as Plaintiffs attempted first, to negotiate a settlement with DART, then second, sued DART in tort for negligent

[43] *Tackett*, 653 A.2d at 264.
[44] *Merrill v. Crothall-American, Inc*., 606 A.2d 96, 101 (Del. 1992).
[45] *Casson v. Nationwide Ins. Co*., 455 A.2d 361, 369 (Del. 1982) (emphasis added); *see also Tackett*, 653 A.2d at 264.
[46] *Casson*, 455 A.2d at 369 (emphasis added).

conduct. It was not until after the issue of DART's potential tortfeasor liability was resolved by jury verdict that the Defendant's UIM obligations became due. Thus, Defendant's actions are beyond reproach because Defendant justifiably relied on a "meritorious defense" in delaying payment of the $1 million UIM benefit to Plaintiffs. When viewed in this light, the Court need not venture any further to inquire as to whether the Defendant knew, or did not know, the extent of Anne Dunlap's injuries/claims, or whether Defendant possessed insufficient medical records necessary to determine the extent of Anne's present and future losses.

Finally, at the time both parties presented their oral arguments before this Court, Plaintiffs relied on the Court's previous holding in *Beck v. Isaacs*,[47] for the proposition that this Court had formerly recognized an exception to the "exhaustion" requirement outlined in § 3902(b)(3). Plaintiff's reliance on *Beck* is misplaced as *Beck* is distinguishable from the case *sub judice* for several reasons. First, the cause of action in *Beck* did not concern a claim of bad faith, nor was the issue of ripeness of an *underinsured* claim pursuant to § 3902(b)(3) challenged. Rather, *Beck* dealt with the interpretation and application of § 3902(a)(4), not § 3902(b)(3), in the scenario involving the denial of an *uninsured* motorist claim by

[47] *Beck v. Isaacs*, 2003 WL 22852623 (Del. Super. Ct.).

an uninsured motorist carrier where there was one "known and identifiable tortfeasor" and "one unknown and unidentifiable tortfeasor" involved.

The primary issue in *Beck* was whether the plaintiff could recover from her uninsured motorist insurance carrier, State Farm Mutual Automobile Insurance Company, for damage and injuries caused by one tortfeasor, who was a known operator of a motor vehicle, Frank H. Isaacs, and another tortfeasor, who was an unidentified driver and owner of another "noncontact motor vehicle." Plaintiff demanded judgment against the carrier, in contract, pursuant to 18 *Del. C*. § 3902, and also in tort, alleging that State Farm was jointly, severally, and individually, liable, as a tortfeasor along with Isaacs. The Court held that the plaintiff had a cognizable cause of action against State Farm pursuant to 18 *Del. C*. § 3902.[48] The Court also found that it did not need to reach the determination of whether State Farm may be considered a joint tortfeasor, in addition to plaintiff's contractual claim against State Farm.[49]

In addressing the remaining issue in *Beck*, i.e., whether the plaintiff may seek recovery against State Farm at that time, or whether the plaintiff must wait until all other available policy proceeds had been exhausted, the Court sought guidance in its earlier decision, *Brown v. Comegys*,[50] which was based on similar

[48] *Beck*, 2003 WL 22852623, at *2.
[49] *Id*.
[50] *See Brown v. Comegys*, 500 A.2d 611 (Del. Super. Ct. 1985).

circumstances. In both *Comegys* and *Beck*, the Court found that, for purposes of pursuing recovery under their uninsured motorist coverages against their uninsured motorist carriers *for the damages and injuries attributable to the negligence of an unidentified driver and owner of another "noncontact motor vehicle*," the plaintiffs did not have to delay pursuing recovery under 18 *Del. C*. § 3902 until they had exhausted recovery against another tortfeasor.[51] The Court's holdings in both instances were predicated on a clarification of 18 *Del. C*. § 3902(a)(4) concerning the insurers' rights of subrogation, thereby decreeing that insurers' attempts to stall litigation, create separate causes of action, or deny uninsured motorist liability coverage until claims against another responsible tortfeasor are settled, violates the statutory purposes of § 3902. In other words, in those situations, the uninsured motorist carriers could not assert that the claims made against them, relating to damages and injuries causally related to unknown and unidentifiable tortfeasors, could be reduced by the amount which the plaintiffs may potentially recover from the known tortfeasors/defendants. Therefore, the actions against the uninsured motorist carriers could not be delayed until the recovery from the known tortfeasors had been exhausted. This conclusion is decidedly distinct, and unrelated, to the case at hand.

[51] *Beck*, 2003 WL 22852623, at *3; *Comegys*, 500 A.2d at 614.

In summation, Plaintiffs' complaint of bad faith dealings, allegedly committed by the Defendant, fails to state a claim upon which relief may be granted. As both a matter of law and fact, the claim is decisively without merit. In addition, Defendant is entitled to relief by dismissal of Plaintiffs' complaint because the complaint fails to embrace the requisite "certainty" required to substantiate the "set of facts which could be proved to support the claim asserted." As Plaintiffs may not recover under any "reasonably conceivable set of circumstances susceptible of proof," the Court finds that it is required to grant Defendant's motion.

Conclusion

For all of the foregoing reasons, Defendant's Rule 12(b)(6) Motion to Dismiss For Failure to State a Claim is **GRANTED**.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

cc: James J. Woods, Jr., Esquire
Daniel V. Folt, Esquire
Gary W. Lipkin, Esquire
Prothonotary