IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MIRIAM ZEVALLOS, Civ. 17-00189-RM-CBS

Plaintiff,

v.

ALLSTATE PROPERTY AND CASUALTY COMPANY,

Defendant.

RECOMMENDATION REGARDING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Magistrate Judge Craig B. Shaffer

This matter comes before the court on Defendant Allstate Property and Casualty Company's (hereinafter "Allstate")[1] Motion for Judgment on the Pleadings (doc. #32), filed on March 2, 2017. Judge Moore referred the motion to this Magistrate Judge pursuant to a Memorandum. Doc. #33. Allstate argues that Plaintiff Miriam Zevallos's claims for Uninsured and Underinsured Motorists ("UM/UIM") benefits are barred by a release that she executed with Allstate in 2014 and that the Colorado Supreme Court's decision in *Calderon v. American Family Mutual Insurance Co.*, 383 P.3d 676 (Colo. 2016) can be applied only prospectively. Ms. Zevallos filed her Response (doc. #37) to the motion on March 23, 2017, which was followed by Defendant's Reply (doc. #38) on April 6, 2017. On May 3, 2017, I heard oral argument. Doc. #43 (transcript). The court has also received from Allstate three notices of

[1] Plaintiff originally sued three Allstate entities but later dismissed the other two. Doc. #34.

supplemental authority. Docs. #44-46. For the following reasons, I recommend granting the motion and dismissing this action.

I. BACKGROUND

Since a 2007 amendment, section 10-4-609 of the Colorado insurance code has provided:

> The amount of the [Uninsured Motorist/Underinsured Motorist] coverage available pursuant to this section shall not be reduced by a setoff from any other coverage, including, but not limited to, legal liability insurance, medical payments coverage, health insurance, or other uninsured or underinsured motor vehicle insurance.

C.R.S. § 10-4-609(1)(c). Plaintiff alleges that despite this statute, "Defendants uniformly reduce amounts paid to their insureds under their Uninsured Motorist/Underinsured Motorist ('UM/UIM') coverages by setoffs from their medical payments ('MedPay') coverages under their respective automobile policies." Doc. #5, Complaint ¶ 16.

> Plaintiff Zevallos was insured by Allstate with a policy of insurance that included $5,000.00 of MedPay coverage and $50,000/$100,000 of UM/UIM coverage [the "Policy."] This policy constitutes a contract. Zevallos was injured by an underinsured motorist on August 20, 2012. As a result of her injuries, … Zevallos submitted claims under her MedPay and UM/UIM coverages. Allstate paid MedPay benefits on … Zevallos's behalf. Allstate paid … Zevallos UM/UIM benefits of $2,700.00.

Doc. #5, Complaint ¶¶ 20-25 (paragraph breaks omitted).

Allstate alleges that the $2700 it paid to Plaintiff was in settlement of Plaintiff's claim for UM/UIM benefits under the Policy. Doc. #31, Answer ¶ 25. In consideration of the settlement payment, on September 26, 2014, Plaintiff released Allstate from

> any and all liability and from any and all contractual obligations whatsoever under the coverage designated above [underinsured motorist insurance – Coverage SU] of [the Policy] . . . and arising out of bodily injury sustained by Miriam Zevallos due to an accident on or about the 20th day of August, 2012.

Doc. #31-2, Answer Ex. B (Release) at 2. [2]

Plaintiff alleges that "[i]n reaching the $2,700.00 UM/UIM benefit number, Allstate explicitly subtracted the $5,000.00 in MedPay coverage from its evaluation." Doc. #5, Complaint ¶ 26. With respect to this assertion, Allstate "admits only that, in evaluating Zevallos's underinsured motorist claim, Allstate Property considered, pursuant to the express terms and conditions of the Policy, among other things, the amount paid in Medical Payment benefits as an offset in establishing a range of settlement value." Doc. #31, Answer ¶ 26.

Plaintiff further alleges that "Allstate confirmed this subtraction on June 11, 2014, in a letter regarding … Zevallos' claim." Doc. #5, Complaint ¶ 27. Plaintiff did not attach the referenced letter to the Complaint, but Allstate attaches it to its Answer. Doc. #31-3. The letter states among other things:

> Based on the information provided, your office has submitted approximately $69,663.63 in medical bills to date. Of the amount submitted, I considered $68,737 in the evaluation based on usual and customary charges. Because of the non-duplication of benefits clause, the specials were reduced by $5000 that was paid under Medical Payments coverage.
>
> Additionally, I evaluated Ms. Zevallos' non-economic damages in the amount of $28,000, making the total evaluation $91,737. Even if I allowed the entire amount of specials, $69,663.63, her evaluation is still within the amount settled by the underlying $100,000.00.

Doc. #31-3 (letter dated June 11, 2014 from Allstate to Plaintiff's counsel).

[2] The court can consider the attachments to the answer without converting to summary judgment. *Park Univ. Enter's, Inc. v. Am. Cas. Co. of Reading*, 442 F.3d 1239, 1244 (10th Cir. 2006), *abrogated on other grounds by Magnus, Inc. v. Diamond State Ins. Co.*, 545 F. App'x 750, 753 (10th Cir. 2013); *Gee v. Pacheco*,627 F.3d 1178, 1186 (10th Cir. 2010) (documents referenced in and central to the Complaint, no dispute of authenticity).

On November 7, 2016 – more than two years after Plaintiff agreed to settle her claim with Allstate – the Colorado Supreme Court issued *Calderon*. In that case, the insured obtained a judgment against his insurer for UM/UIM benefits, and the trial court reduced that amount by $5,000 to offset what the insurer had paid in MedPay benefits. *Calderon*, 383 P.3d at 676. The Colorado Supreme Court held that although Section 10-4-609(1)(c) could be read "in isolation" as prohibiting offsets for MedPay from either the amount of UM/UIM coverage "available under the policy in the abstract, or [the amount actually paid] in a particular case," the latter is the best construction. *Id.* at 678. Thus "section 10–4–609(1)(c) bars the setoff of MedPay payments from the amount actually paid pursuant to UM/UIM coverage." *Id.* Insurers cannot use non-duplication of benefits clauses to setoff MedPay benefits from UM/UIM benefits. *Id.* at 679-80.

Four days after *Calderon* issued, Plaintiff filed her complaint in state court on behalf of herself and a putative class. Doc. #5, Complaint. Allstate removed the case based on federal jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(1)(B), (5); Doc. #1 at 9.

II. ANALYSIS

A. Standard for Rule 12(c) Motions for Judgment on the Pleadings

Defendant moves pursuant to Fed. R. Civ. P. 12(c), which provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "A motion for judgment on the pleadings is designed to dispose of cases where material facts are not in dispute and judgment on the merits can be rendered based on the content of the pleadings and any facts of which the court will take judicial notice." *Hamilton v. Cunningham*, 880 F. Supp. 1407, 1410 (D. Colo. 1995) (citations omitted). The court applies the same standard of review to a motion for judgment on the pleadings under Rule 12(c) as it does to a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

Colony Ins. Co. v. Burke, 698 F.3d 1222, 1228 (10th Cir. 2012); *Concaten, Inc. v. Ameritrak Fleet Solutions, LLC*, 131 F. Supp. 3d 1166, 1171 (D. Colo. 2015), *aff'd*, 669 F. App'x 571 (Fed. Cir. 2016), *cert. denied*, 137 S. Ct. 1604 (2017). Thus, in deciding a Rule 12(c) motion, the court accepts as true all well-pleaded material allegations of the opposing party's pleadings and "grants all reasonable inferences from the pleadings in favor of the same." *Colony Ins.*, 698 F.3d at 1228.

B. Interpretation of Releases

"A release is the relinquishment of a vested right or claim to a person against whom the claim is enforceable." *Neves v. Potter*, 769 P.2d 1047, 1049 (Colo. 1989). It "is an agreement to which general contractual rules of interpretation and construction apply." *Bunnett v. Smallwood*, 793 P.2d 157, 159 (Colo. 1990). "A court is to construe a release to effectuate the manifest intention of the parties." *CMCB Enters., Inc. v. Ferguson*, 114 P.3d 90, 96 (Colo. App. 2005). "Public policy favors the settlement of disputes, provided they are fairly reached, and if releases and settlements may be lightly ignored defendants, and their insurance companies representing them, would be discouraged from ever settling claims for personal injuries because of the uncertainty as to their finality." *Davis v. Flatiron Mat'ls Co.*, 511 P.2d 28, 32 (Colo. 1973); *see also Colo. Ins. Guar. Ass'n v. Harris*, 827 P.2d 1139, 1142 (Colo. 1992); *Gates Corp. v. Bando Chem. Indus., Ltd.*, 4 F. App'x 676, 682 (10th Cir. 2001) ("Colorado public and judicial policies favor voluntary agreements to settle legal disputes.").

> Persons involved in accidents or their representatives carry on and conclude negotiations precisely because there is uncertainty as to the extent of injuries or liability or both, and because of the uncertainty as to the outcome of any ensuing litigation. A general release duly executed and fairly obtained is a complete bar to further recovery for injuries sustained.

Davis, 511 P.2d at 32 (internal quotation marks omitted).

C. The Enforceability of Plaintiff's Release.

In this case, Plaintiff does not dispute that she released her UIM claim against Allstate in return for $2700. Plaintiff also does not dispute that the release of her rights under this statute was voluntary. In doing so, she was represented by the same counsel as in this case. She does not dispute that she (through her counsel) was aware of the issue of whether Allstate could lawfully consider the MedPay amounts in settling her claim.

Plaintiff argues that the release is void or unenforceable as contrary to the public policy embodied in section 10-4-609(1)(c). Plaintiff asserts that because Allstate Property deducted the MedPay benefits it had paid to third parties from its settlement offer on her UM/UIM claim, the release is contrary to the anti-setoff provision in section 10-4-609(c)(1). Plaintiff further argues that "[c]ontracts in violation of statutory prohibitions are void," citing *R.P.T. of Aspen, Inc. v. Innovative Commc'ns, Inc.*, 917 P.2d 340, 342 (Colo. App. 1996). *R.P.T.* did not address whether a contract was void due to a statutory violation, but only whether a court faced with the question of arbitrability must first decide whether the contract was void.

In general, "statutory rights may … be waived." *Klein v. State Farm Mut. Auto. Ins. Co.*, 948 P.2d 43, 46–47 (Colo. App. 1997), *as modified on denial of reh'g* (May 29, 1997) (citing *First Interstate Bank of Denver, N.A. v. Central Bank & Trust Co.*, 937 P.2d 855 (Colo. App. 1996); *People v. Bergen*, 883 P.2d 532 (Colo. App. 1994)). The question is "whether the legislative purpose is thwarted if the statute is not applied in particular circumstances. * * * Legislative intent is, in the first instance, discerned from the terms of a statute." *First Interstate*, 937 P.2d at 862. In *First Interstate*, the court found that a statute of repose could be waived because "the General Assembly could, but did not, either preclude or restrict the parties' ability to waive" it. *Id.* Here, section 10-4-609(1)(c) could have, but did not, prohibit an insured from

waiving the rights which that statute provides. Thus, as in *First Interstate*, there is no statutory bar against Plaintiff's voluntary waiver of her right to UM/UIM benefits without setoff for MedPay benefits.[3] Nor does *Calderon* suggest such a bar; in that case, there was no issue of a release. The insured tried his claim for UM/UIM benefits against the insurer, and the setoff occurred only when the district court reduced the judgment. In short, Section 10-4-609 does not by its terms require an insured to take nothing less than full compensation for UM/UIM losses, and implying such a requirement "would undermine Colorado public policy that favor[s] voluntary agreements to settle legal disputes." *Archuleta v. USAA Cas. Ins. Co.*, Civ. 17-191-RBJ, 2017 WL 3157947, at *2 (D. Colo. July 25, 2017).[4]

Plaintiff points to the general rule that "[a] contract provision is void if the interest in enforcing the provision is clearly outweighed by a contrary public policy," citing *Norton Frickey, P.C. v. James B. Turner, P.C.*, 94 P.3d 1266, 1267 (Colo. App. 2004), and *Rademacher v. Becker*, 374 P.3d 499 (Colo. App. 2015), *reh'g denied* (Nov. 19, 2015), *cert. denied*, No. 15SC1051, 2016 WL 3453473 (Colo. June 20, 2016). However, "[t]his rule does not exist for the benefit of the party seeking to avoid contractual obligations, but instead serves to *protect the public* from contracts that are *detrimental to the public good*." *Rademacher*, 374 P.3d at 499 (emphasis added).

As the "public good" impacted by Plaintiff's release, Plaintiff argues that section 10-4-609 codifies public policies of "preventing the dilution of UM coverage" and precluding any

[3] The statute makes the insured's purchase of UM/UIM coverage optional, C.R.S. § 10-4-609(3), but the court does not deem that language persuasive for either side. *See, e.g., Kral v. Am. Hardware Mut. Ins. Co.*, 784 P.2d 759, 765 (Colo. 1989).

[4] Allstate also filed the July 12, 2017 transcript from *McCracken v. Progressive Direct Insurance Co.*, Civ. 17-cv-114-CMA-STV (D. Colo.), in which Judge Christine M. Arguello dismissed similar claims as barred by a release because the insured did not show grounds for unenforceability. Doc. #45-1. Judge Arguello's reasoning is persuasive.

offsets from UM/UIM for benefits paid under other coverages. Response at 4 (quoting *State Farm Mut. Auto. Ins. Co. v. Brekke*, 105 P.3d 177, 184-85 (Colo. 2004), and citing *Aetna Cas. & Sur. Co. v. McMichael*, 906 P.2d 92, 100 (Colo. 1995), *Newton v. Nationwide Mut. Fire Ins. Co.*, 594 P.2d 1042, 1043-45 (Colo. 1979)).[5]

Essentially, Plaintiff argues that the rights which section 10-4-609 gives to insureds caused her release of those rights to be contrary to public policy when she entered it. *See, e.g.*, Response at 8. Plaintiff's argument ignores the difference between protecting insureds from unfair insurance contracts vs. protecting insureds from the consequences of voluntarily releasing claims. *Brekke*, *Aetna*, and *Newton* each address whether insurance contract provisions were unenforceable as contrary to section 10-4-609 or public policy. As Plaintiff points out, courts have a "responsibility to scrutinize insurance policies" for unenforceability. Response at 4, citing *Countryman v. Farmers Ins. Exchange*, No. 12-1456, 545 F. App'x 762, 764 (10th Cir. Nov. 18, 2013), and *Newton v. Nationwide Mut. Fire Ins. Co.*, 594 P.2d 1042, 1043-45 (Colo. 1979). *Countryman* cites *Huizar v. Allstate Insurance Co.*, 952 P.2d 342, 344 (Colo. 1998). *Huizar* held that insurance contracts are subject to such scrutiny because

> [i]nsurance policies … differ from ordinary, bilateral contracts. … Because of both the disparity of bargaining power between insurer and insured and the fact that materially different coverage cannot be readily obtained elsewhere, automobile insurance policies are generally not the result of bargaining.

Id. at 344.

[5] Plaintiff also cites *Rivera v. American Family Insurance Group*, 292 P.3d 1181, 1185 (Colo. App. 2012) for a policy that "tort victims injured by uninsured or underinsured motorists receive full compensation for their injuries." That is what the insured argued, but the court disagreed. The statute "does not require full indemnification of losses … it provides coverage only to the extent necessary to compensate an insured for loss, *subject to the limits of the insurance contract.*" *Id.* at 1186 (internal quotation marks omitted, emphasis original).

In contrast, the contract presently at issue is not the insurance policy, but the release. Although Plaintiff contends that Allstate dictated the terms of the release, Plaintiff concedes that she was able to successfully counteroffer regarding the settlement amount. In its June 11, 2014 letter, Allstate offered $1500, and it ultimately paid Plaintiff $2700 to settle. Plaintiff also concedes that entering into the release agreement was optional. Instead of settling and releasing her UM/UIM claim, Plaintiff could have brought suit against Allstate for breach of the insurance policy. Although the legislative intent of the UM/UIM statute is to require insurers to offer such coverage and to not dilute the coverage provided by deducting other benefits paid, this says nothing of whether an insured can voluntarily waive or release those rights in settling a claim.

Plaintiff has not pointed to any authorities that suggest Plaintiff's release is unenforceable. Plaintiff relies on *Kral v. American Hardware Mutual Insurance Co.,* 784 P.2d 759, 764-65 (Colo. 1989), but it is distinguishable. In that case, the insured settled her UM claim with her insurance carrier for $30,000 (the full policy amount for that coverage) in a release-trust agreement that gave the carrier a right to 15% of any settlement or judgment that the insured obtained later from others. It was the insured's "inability to obtain full compensation for the loss she sustained" that caused the release to "violate th[e] legislative policy and … be unenforceable."[6] *Kral,* 784 P.2d at 765-66 (distinguishing *Granite State Ins. Co. v. Dundas*, 528 P.2d 961 (Colo. App. 1974)).

> [R]equiring the insured to reimburse her insurance company when she obtained money from a tortfeasor, [would] potentially keep... her from fully recovering for her loss. But the [*Kral*] court did not

[6] In *Kral*, the insured sued and settled with third parties (not the uninsured motorist) for $177,500. *Kral,* 784 P.2d at 761. Upon notifying the insurer of the settlement, the insurer demanded 15% of the proceeds, which came to $26,635 – just short of what the insurer had paid to settle the UM claim. This "would place Kral in the position of having no greater protection against her loss than if uninsured motorist coverage had not been purchased." *Id.* at 764.

> say that insured parties were *required* to accept nothing less than full compensation for their losses.

Archuleta, 2017 WL 3157947, at *2. *See also Arline v. Am. Fam. Mut. Ins. Co.*, Case No. 16CV34390, *slip op.* at 5 (Denver Dist. Ct. June 5, 2017), filed at Doc. #44-1 (nonprecedential opinion distinguishing *Kral).*

Here, Plaintiff does not allege facts that under *Kral* would make the release unenforceable. Plaintiff does not allege that the release resulted in her "having no greater protection against her loss" than if she had not purchased UM/UIM coverage, or her being unable "to obtain full compensation for the loss she sustained." The court infers in Plaintiff's favor (as the non-movant) that Allstate not only "considered" the $5,000 it had paid in MedPay benefits but also subtracted that amount from its June 2014 settlement offer and its September 2014 settlement amount. Plaintiff still only alleges that she and the putative class members "are or were legally entitled to receive" additional UM/UIM benefits. Doc. #5, Complaint ¶ 43. But Plaintiff alleges that entitlement based only on section 10-4-609(1)(c) prohibiting Allstate from deducting the $5,000 MedPay from its settlement offer on UM/UIM. Plaintiff does not allege that she was entitled to additional UIM benefits because the MedPay deduction left her with uncompensated losses from the underinsured motorist. Because Plaintiff does not allege that the release caused her UM/UIM coverage to be meaningless or caused her to be unable to receive full compensation for her loss, *Kral* is distinguishable.

Nor do Plaintiff's other cited cases support her position. *Norton Frickey* regarded a "contract to apportion attorney fees upon [an] attorney's departure from the firm;" the court found the contract was enforceable. 94 P.3d at 1266, 1269. *Rademacher* found a "private agreement in which influence over a criminal prosecution is exchanged for … the promise to pay money" was void as contrary to the public policy that is embodied in the criminal laws. 374 P.3d

at 499. *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 109 (Colo. 1992), held the terminability of at-will employment is unenforceable when it is conditioned on requiring the employee to perpetrate a fraud on the government. *Loffland Bros. Co. v. Indus. Claim Appeals Panel*, 770 P.2d 1221, 1226 (Colo. 1989) recognized that private settlement agreements cannot abrogate the authority of the director of worker's compensation or otherwise abrogate statutory conditions affecting public policy, but does "not hold that Colorado public policy generally invalidates agreements releasing legal claims to compensation." *Archuleta*, 2017 WL 3157947, at *2 (distinguishing *Loffland*). In *General Steel Domestic Sales, LLC v. Steel Wise, LLC*, No. 07-cv-01145-DME-KMT, 2009 WL 185614, (D. Colo. Jan. 23, 2009), the unenforceable provisions of a settlement agreement prevented testimony that was relevant to other litigants' consumer protection claims. In *Mata v. Anderson*, 685 F. Supp. 2d 1223, 1262 (D.N.M. 2010), *aff'd*, 635 F.3d 1250 (10th Cir. 2011), the unenforceable provision "releases the police department from liability for any future harm it may cause to a member of the public." Each of these cases involved a contract provision that impacted the public beyond just the parties to the contract. The same is true of Plaintiff's cases (Response at 5-6) from other jurisdictions.

Again, Plaintiff's release has no impact on nonparties or the public in general. The only public impact that Plaintiff alleges is in regard to Allstate's general practice of deducting MedPay benefits in settling UM/UIM claims. But the generality of Allstate's conduct does not cause Plaintiff's release itself to have a public impact. In short, Plaintiff has not shown that the release is void as illegal or contrary to public policy.

The court concludes that Plaintiff's release bars her claims, regardless of whether *Calderon* should or should not be given retroactive effect. Even assuming that *Calderon* applies retroactively (as Plaintiff argues), nothing barred Plaintiff from voluntarily waiving the statute's

anti-setoff provision when she settled and released her claim. *See also Arline, slip op.* at 4-5 (not addressing whether *Calderon* applied retroactively); Doc. #45-1, *McCracken,* Civ. 17-114-CMA-STV, July 12, 2017 transcript at 5, 8 (same).

III. CONCLUSION

For each of the reasons stated above, the court RECOMMENDS granting Allstate's motion for judgment on the pleadings and dismissing Plaintiff's claims.

DATED: July 28, 2017.

BY THE COURT:

s/Craig B. Shaffer
United States Magistrate Judge