UNINSURED AND UNDERINSURED MOTORIST UPDATE

Presented and Prepared by:
Mark J. McClenathan
mmcclenathan@heylroyster.com
Rockford, Illinois • 815.963.4454

Prepared with the Assistance of:
Dana J. Hughes
dhughes@heylroyster.com
Rockford, Illinois • 815.963.4454

Heyl, Royster, Voelker & Allen
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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

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I. SET-OFFS

Farmers Auto. Ins. Ass'n v. Coulson, 402 Ill. App. 3d 779, 931 N.E.2d 1257, 342 Ill. Dec. 74 (5th Dist. 2010) – The defendant, Kassandra Coulson, was seriously injured when a vehicle owned and operated by Robert Roy drove through the window of a Subway restaurant, striking Coulson and two other customers inside. The driver, Roy, was insured by State Farm with a bodily injury liability limit of $50,000. State Farm paid Coulson $24,000 to settle her claim (and the other $26,000 to settle other injured persons' claims). Coulson settled with the property owner and franchisee for $410,000.

At the time of the accident, Coulson was covered as a family member under her stepfather's automobile insurance policy issued by Farmers. The policy contained underinsured ("UIM") coverage of $300,000 per person and $500,000 per occurrence. Coulson made a demand for the UIM per person limits under the policy.

Farmers declined to pay benefits arguing that the policy contained a set-off provision which obligated Farmers to pay at the most $300,000 minus "any amounts paid by others who may be legally responsible for (insured's) bodily injuries." Thus, Farmers argued that it owed Coulson nothing under this provision because it was entitled to a set-off in the amount of the payments Coulson already received from the at-fault driver, property owner, and franchisee, which totaled $434,000.

Farmers filed a declaratory judgment action. The set-off provision in the UIM policy provided the following: "The limit of liability for this coverage should be reduced by all sums paid because of the 'bodily injury' by or on behalf of persons or organizations who may be legally responsible." The trial court found that the language of the policy was clearly a set-off provision allowing Farmers to reduce the amount payable under the policy's UIM provision by all the sums paid on or on behalf of persons or organizations who may be legally responsible, which in that case was $434,000. Thus, the court granted Farmers' Motion for Summary Judgment. Coulson appealed.

On appeal, Coulson argued that the set-off provision in her insurance policy with Farmers was ambiguous. Generally, an ambiguous term in an insurance policy will be construed against the insurer and in favor of the insured. However, the Appellate Court declined to address this argument because it found that the set-off provision allowing Farmers to set-off the amounts paid by the property owner and franchisee would violate Illinois public policy and was, therefore, void.

The Appellate Court, Fifth District, initially examined the *Hoglund* decision, an Illinois Supreme Court decision rendered in 1992, which examined a nearly identical set-off provision in an uninsured policy written by State Farm. In *Hoglund v. State Farm Mut. Auto Ins. Co.*, 148 Ill. 2d 272, 592 N.E.2d 1031, 170 Ill. Dec. 351 (1992) (a decision involving two cases consolidated on

appeal), the plaintiffs were both injured while they were passengers in an uninsured vehicle whose driver collided with another insured vehicle. The drivers of the other insured vehicles each had bodily injury policy limits of $100,000 and paid this amount to each of the plaintiffs. The plaintiffs, each alleging they suffered damages in excess of the $100,000 filed claims against their seeking the policy limits under the uninsured provisions. The State Farm policy, like the applicable Farmers policy in the case at bar included the following set-off provision: *"Any amount payable under this coverage shall be reduced by any amount paid or payable to or for the insured: a. by or for any person or organization who is or may be held legally liable for the bodily injury to the insured."* State Farm argued that this language supported a set-off in each case due to the $100,000 bodily-injury limits recovered by the plaintiffs from each of the insured drivers. The Court disagreed, finding that a literal interpretation would allow for a reduction by any amount paid to the insured by any party. The Court held that applying a literal interpretation of this set-off provision would frustrate the public policy of placing the injured party in the same position as if the uninsured driver had been insured pursuant to the Uninsured Motorist Statute.

The *Hoglund* Court went on to say that uninsured motorist policies are intended to provide coverage for damages caused by uninsured motorists. To apply the set-off literally would deprive the insured of the benefit of the uninsured coverage for which she paid premiums to State Farm. The *Hoglund* Court noted that the purpose of a set-off is to prevent a double recovery by the insured. Hence, State Farm was allowed a set-off only to the extent necessary to prevent a double recovery.

Relying on the *Hoglund* Court's analysis, the *Farmers* Court found that to allow Farmers to set off the amounts that are unrelated to the underinsured motorist coverage would deny Coulson the very protection against an underinsured motorist for which her stepfather had paid premiums. Coulson's stepfather paid premiums for $300,000 in underinsured motorist coverage. The at-fault driver, Roy, was an underinsured motorist who paid only $24,000 to Coulson. The property owner and the franchisee were not *underinsured motorists, and their payments to Coulson to resolve their alleged liability for her injuries are irrelevant to the amount Coulson can recover under the applicable UIM provision in the Farmers policy*. If Farmers were allowed to deduct the amounts paid to Coulson by the property owner and the franchisee, this would frustrate the public policy of placing Coulson in the same position as if Roy had been fully insured. Because Coulson's claim would not result in a double recovery in contravention to public policy, the Court found that Coulson could recover up to $276,000 under her stepfather's UIM policy with Farmers.

Zdeb v. Allstate Ins. Co., 404 Ill. App. 3d 113, 935 N.E.2d 706, 343 Ill. Dec. 698 (1st Dist. 2010) – While walking on a sidewalk, Elizabeth Zdeb was struck by a car driven by Kamil Scislowicz. Zdeb claimed serious injuries following the accident, claiming over $200,000 in damages. Scislowicz's insurance company, State Farm, paid Zdeb its bodily injury liability limits of $50,000. Zdeb asserted a claim under the UIM provision of her policy with her insurer, Allstate, for $50,000, the difference between her UIM limits and the amount she received from State Farm.

The Allstate policy provided UIM coverage with a $100,000 limit for bodily injury and medical payment coverage of $50,000. Zdeb paid separate premiums for the UIM and medical payment coverages, as is typically done in an automobile policy. The limits of liability section of the policy declaration included the following set-off provision:

> Damages payable will be reduced by:
>
> 1. all amounts paid by or on behalf of the owner or operator of the uninsured auto or anyone else responsible. This includes all sums paid under the bodily injury or property damage liability coverage of this or any other auto insurance policy.
>
> 2. all amounts payable under any workers' compensation law, disability benefits law, or any similar *automobile medical payments coverage*. (Emphasis added.)

Zdeb, 404 Ill. App. 3d at 115.

Since Allstate had paid Zdeb $38,952.53 pursuant to the med pay provision, and since Zdeb had received $50,000 from State Farm, Allstate claimed a total set-off of $88,952.53. Allstate then tendered $11,047.47 to Zdeb to resolve her UIM claim.

Zdeb sought a declaration in circuit court that she was entitled to $50,000 in UIM benefits. She argued that the med pay coverage was a separate and distinct portion of the policy for which she had paid a premium. She claimed that as a general rule, a set-off is only allowed to prevent double recovery. Allstate filed a motion for summary judgment, claiming the applicable set-off provision in the policy unambiguously allowed Allstate to set-off the medical payments made to Zdeb. The trial court agreed with Allstate, and further found that after the set-off, Zdeb was placed in the same position had she recovered $100,000 in liability coverage from the at-fault driver's insurer, which is consistent with the purpose of UIM coverage. Zdeb filed an appeal.

On appeal, Zdeb did not argue that the set-off provision was ambiguous, but rather, argued that Allstate violated public policy when it set-off the medical payments. The Court examined the Illinois Supreme Court case of *Sulser*, which construed the legislative intent for providing underinsured motorist coverage. *Sulser v. Country Mut. Ins. Co.,* 147 Ill. 2d 548, 591 N.E.2d 427, 169 Ill. Dec. 254 (1992). The *Sulser* Court articulated the public policy behind the statute: "to place the insured in the same position he would have occupied if injured by a motorist who carried liability insurance in the same amount as the policyholder." The Court held that under *Sulser*, Allstate's set-off provision did not violate public policy.

The Court then examined *Adolphson v. Country Mut. Ins. Co.,* 187 Ill. App. 3d 718, 543 N.E.2d 965, 135 Ill. Dec. 397 (3d Dist. 1989). In *Adolphson,* the Court addressed whether the insurer could set-off medical payments coverage from its UIM coverage. The *Adolphson* Court found "[n]othing in the (underinsured motorists) statute prevents the insurer from reducing its liability

by amounts paid under other coverages in the same policy." The Court further found the applicable set-off provision was unambiguous, and thus, the insurer was entitled to the set-off.

In *Zdeb*, the Appellate Court found nothing in the statute to prevent Allstate from claiming the set-off of medical payments since the policy expressly authorized the set-off. The set-off did not prevent plaintiff from recovering $100,000, the amount she would have been entitled to if the at-fault driver would have had $100,000 bodily injury liability limits. Therefore, the Appellate Court upheld the trial court's judgment in favor of Allstate, holding that the Allstate policy was consistent with public policy and therefore valid.

II. ARBITRATION

A. Arbitration Awards and "Trial *De Novo*" Provisions

Phoenix Ins. Co. v. Rosen, No. 110679, 2011 WL 1500013 (April 21, 2011) – Martha Rosen was injured in an auto accident involving another driver who was insured for a maximum limit of $25,000, while Rosen's policy (with Phoenix Insurance) included UIM coverage of $500,000. Because Rosen wanted substantially more than $25,000 for her injuries, she made a claim against Phoenix requesting coverage under her UIM provisions of her policy.

Following the UIM arbitration, Rosen was awarded $382,500 less set-offs. Phoenix filed a complaint with the Cook County circuit court rejecting the arbitration award and demanding a jury trial, citing the so-called "trial *de novo*" provision of paragraph (C)(2) of the arbitration agreement, which states:

> C. Unless both parties agree otherwise, arbitration will take place in the county in which the 'insured' lives. Local rules of law as to procedure and evidence will apply. A decision agreed to by two of the arbitrators will be binding as to:
>
> 1. Whether the 'insured' is legally entitled to recover damages; and
>
> 2. The amount of damages. *This applies only if the amount does not exceed the minimum limit for bodily injury liability specified by the Illinois Safety Responsibility Law. If the amount exceeds that limit, either party may demand the right to a trial.* This demand must be made within 60 days of the arbitrators' decision. If the demand is not made, the amount of damages agreed to by the arbitrators will be binding.

Phoenix Ins. Co., 2011 WL 1500013 at *1.

Rosen answered and asserted as an affirmative defense that the trial *de novo* provision was "invalid and unenforceable as against the public policy of the State of Illinois." *Id.* She also filed a counterclaim asking the court to enforce the arbitration award in her favor. The trial court struck

Rosen's affirmative defense and dismissed her counterclaim. Rosen immediately appealed to the Appellate Court, First District, which reversed that decision, holding that trial *de novo* provision "unfairly and unequivocally favors the insurer over the insured because an insurance company is unlikely to appeal a low binding arbitration award while very likely to appeal a high award." *Id.* at *2. The Court also found that such provisions violate "the public policy considerations in support of arbitration" by increasing the time and costs required to settle the dispute. The Court therefore found that "trial *de novo* provisions in underinsured clauses are against public policy in Illinois." *Id.*

Phoenix appealed to the Illinois Supreme Court, and even allowed the Illinois Trial Lawyers Association (ITLA) leave to submit an *amicus curiae* brief in support of Rosen.

The Illinois Supreme Court reversed the Appellate Court's decision, and ruled in favor of Phoenix.

The Court held that the provision in Rosen's underinsured-motorist policy allowing either party to reject an award over the statutory minimum for liability coverage does not violate public policy and is not unconscionable. Based on their holding, the Illinois Supreme Court found that the circuit court's granting of Phoenix's motion to dismiss Rosen's counterclaim was appropriate. Therefore, the judgment of the Appellate Court was reversed, and the judgment of the circuit court was affirmed.

In making this ruling, the Court found that:

(1) Illinois public policy favors arbitration as a means for resolving disputes;
(2) Illinois public policy does not require arbitration to be binding;
(3) Trial *de novo* provisions do not violate public policy;
(4) Uninsured-motorist and underinsured-motorist policies serve the same legislative purpose, and the state law specifically requires the use of trial *de novo* provisions in UM cases.

Id. at *7.

As to the last point, the Court determined that trial *de novo* provisions are consistent with the public policy of Illinois when they appear in *uninsured* motorist policies. Importantly, the legislature did more than simply condone the use of such provisions in the uninsured-motorist context; it explicitly required their use. And if it is good enough for UM cases, it is good enough for UIM cases. The Court held:

> Correspondingly, the public policy of Illinois does not merely condone the use of trial *de novo* provisions in uninsured-motorist policies. It is the public policy of Illinois that such provisions must be included.

> As we have repeatedly emphasized, the legislative considerations behind the underinsured-motorist statute are the same as those underlying the uninsured-motorist statute. Both statutes ensure that an injured policyholder will be compensated for her damages up to the limits of coverage she has paid for, regardless of the coverage carried by the at-fault driver. . . . This common purpose is underscored by the underinsured-motorist statute's requirement that coverage limits under that provision must equal the insured's uninsured-motorist coverage limit. . . . We acknowledge, of course, that the legislature has declined to enact a trial *de novo* requirement in the underinsured-motorist context. Thus, Rosen is correct that the legislature has not clearly defined Illinois' public policy with respect to trial *de novo* provisions in underinsured-motorist policies. However, the legislature's requirement of the provisions in uninsured-motorist policies is certainly evidence of the legislature's view of trial *de novo* agreements. Where the public policy as expressed by the legislature affirmatively requires a contractual provision in one context, it would be inconsistent to say that an identical provision in a highly related context is so against public policy that we must refuse to enforce it, unless some distinction between the two contexts supports such a result. [citations omitted.]

Id at *8.

In addition to rejecting Rosen's argument that the trial *de novo* provision is unenforceable as against public policy, the Illinois Supreme Court also rejected her related argument that the provisions are unenforceable because they are unconscionable. The Court handily dismissed Rosen arguments that the provision in question lacked "mutuality" and unequivocally favored the insurer over the insured. Rosen could not convince the Court that insurance contracts bear the earmarks of adhesive contracts, and the trial *de novo* policy is so one-sided and oppressive that no rational insured would voluntarily agree to such a provision.

Simply put, the Illinois Supreme Court found:

> the structure of the arbitration provision in Rosen's insurance policy taken as a whole helps ensure some measure of fairness between the parties. When a conflict arises between the insurer and the insured under the underinsured-motorist provision, as occurred in this case, both parties are entitled to choose an arbitrator, and those two arbitrators together select the third arbitrator. Then the parties may present evidence regarding the insured's damages and the insurer's liability. After hearing this evidence, the arbitrators reach a decision as to the amount of damages, if any, to which the insured is entitled under her insurance contract. Thus, when an insured is bound to an award less than $20,000, it is not an award crafted by the insurance company for its own benefit. Rather, the

> arbitration agreement is designed to result in an award that is the product of the informed and reasoned judgments of an impartial panel of arbitrators.

Id. at *12.

Thus, based on *Phoenix*, trial *de novo* provisions contained in UIM provisions are enforceable.

B. Arbitration Hearings and Coverage Issues

United Auto. Ins. Co. v. Wilson, ___ Ill. App. 3d ____, 942 N.E.2d 717, 347 Ill. Dec. 514 (1st Dist. 2011) – The Wilsons were involved in a hit-and-run accident with an uninsured driver, and subsequently filed an uninsured ("UM") claim with their insurer, United Automobile Insurance Company (hereinafter "United Auto"). The Wilsons' vehicle was stolen, then recovered and junked, prior to United Auto's inspection. United Auto filed a declaratory judgment action seeking a finding of no coverage due to the Wilsons' alleged spoliation of evidence. The applicable insurance policy contained an arbitration provision. The trial court denied United Auto's motion to stay arbitration pending resolution of the coverage issue, and ordered the parties to proceed to arbitration on all issues, including coverage.

United Auto appealed the trial court's ruling on its motion to stay, and the Appellate Court reversed, relying on the Illinois Supreme Court case, *State Farm Fire & Cas. Co. v. Yapejian,* 152 Ill. 2d 533, 605 N.E.2d 539, 178 Ill. Dec. 745 (1992) which held that arbitration pursuant to the Illinois Insurance Code is limited to disputes concerning covered claims, once coverage had been established. Under *Yapejian,* coverage is an issue for the trial court to determine. Thus, the Appellate Court remanded with instructions to the trial court to stay arbitration pending resolution of the coverage issue.

United Auto, however, had not moved to stay arbitration during the pendency of the appeal, and thus, the arbitration proceeding commenced during the appeal. After the parties presented evidence on all issues, the trial court received the Appellate Court's mandate, and once again stayed arbitration proceedings. The parties then proceeded to trial on the coverage issue, and the court found there was coverage. United Auto appealed the ruling, but again, did not move to stay the arbitration proceedings during the appeal. The trial court ordered arbitration on the Wilsons' UM claim. The arbitrator awarded $11,000 to Woodrow Wilson and $9,000 to Sidney Wilson. United Auto then filed a declaratory judgment action seeking to vacate the arbitration award. The trial court dismissed the declaratory judgment action, and confirmed the arbitration award. United Auto appealed.

On appeal, the issue was whether the arbitration award is void because arbitration proceedings commenced before the circuit court determined the issue of coverage. Initially, the Appellate Court noted that the Court will take a limited review of an arbitration award, and construe it so as to uphold it whenever possible. The Court will vacate the award only when one of the following elements are found:

> 1. The award was procured by corruption, fraud or other undue means;
>
> 2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any one of the arbitrators or misconduct prejudicing the rights of any party;
>
> 3. The arbitrators exceeded their powers;
>
> 4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5 (710 ILCS 5/5 West (2008)) as to prejudice substantially the rights of a party; or
>
> 5. There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 (710 ILCS 5/2 (West 2008)) and the party did not participate in the arbitration hearing without raising the objection; [b]ut the fact that the relief was such that it could not or would not be granted by the circuit court is not ground for vacating or refusing to confirm the award.

710 ILCS 5/12 (West 2008).

United Auto appeared to argue that the arbitrator exceeded her powers by hearing evidence before coverage was determined by the trial court. (The Court describes it this way because United Auto's appellate brief did not clearly spell out this argument.) The Court noted that an arbitrator's authority is expressed in the arbitration agreement. However, because United Auto did not include the arbitration agreement in its brief, and because the Court presumes an arbitrator will act within the scope of her authority, the Court presumed the arbitrator's award was within the scope of her authority.

The Appellate Court also addressed its prior reversal of the trial court's arbitration order. The Appellate Court's mandate did not vacate any portions of prior arbitration proceedings, but rather only stayed – temporarily postponed – further arbitration proceedings until the trial court had decided the coverage issue. Moreover, the Appellate Court found United Auto's reliance on *Yapejian* was misplaced because *Yapejian* stands only for the rule that an arbitrator may not decide the issue of coverage. The Court noted that *Yapejian* does not preclude the commencement of arbitration proceedings prior to the resolution of coverage. The Appellate Court here found that *Yapejian* did not support United Auto's argument and that the arbitrator presumably acted within her authority. Accordingly, the Court held that that United Auto's argument failed. The Appellate Court affirmed the trial court's order dismissing United Auto's declaratory judgment action and confirming the arbitration award in the Wilsons' favor.

Rein v. State Farm Auto. Ins. Co., No. 1-10-0764, 2011 WL 855652 (1st Dist. March 4, 2011) – On April 5, 2007, Lauren Rein was injured in a hit-and-run accident. The other driver was never identified. Rein was insured by State Farm for bodily injury caused by an uninsured driver or

unknown driver in a hit-and-run situation. The applicable policy had the following mandatory arbitration provision: "Under the uninsured motor vehicle coverages, any arbitration or suit against us will be barred unless commenced within two years after the date of the accident." On April 2, 2009, State Farm received a letter from an attorney on Rein's behalf, notifying State Farm of Rein's intention to pursue an uninsured claim as a result of the April 5, 2007 accident. The letter did not mention arbitration. State Farm denied Rein's claim, and Rein sought a declaratory judgment compelling State Farm to arbitration for her uninsured claim.

State Farm moved for summary judgment on the grounds that Rein failed to comply with the specific limitations provision cited above. In support of its position, State Farm relied on two earlier First District cases that interpreted similar limitations provisions and concluded that the insured had not expressly requested arbitration or disclosed an arbitrator on the insured's behalf within two years of the accident, as required by the arbitration provision. *See, Buchalo v. Country Mut. Ins. Co.,* 83 Ill. App. 3d 1040, 404 N.E.2d 473, 39 Ill. Dec. 89 (1st Dist. 1980); *Shelton v. Country Mut. Ins. Co.,* 161 Ill. App. 3d 652, 515 N.E.2d 235, 113 Ill. Dec. 426 (1st Dist. 1987). In response, Rein argued that the newer Fifth District case of *Hale* controlled, which interpreted a similar provision, but held that an implied intent to commence arbitration was sufficient to satisfy the arbitration provision. *Hale v. Country Mut. Ins. Co.,* 334 Ill. App. 3d 751, 778 N.E.2d 721, 268 Ill. Dec. 455 (5th Dist. 2002). State Farm urged the trial court to disregard the broader interpretation articulated in *Hale* that conflicted with the earlier First District cases. The trial court granted summary judgment in favor of State Farm.

On appeal, Rein raised three arguments as follows: (1) that no conflict exists in First and Fifth District cases: *Buchalo* and *Shelton* are distinguishable and *Hale* is controlling; (2) that Rein's attorney's letter constituted the first step to commence arbitration; and (3) that the policy provision is against public policy. In response, State Farm argued, respectively (1) that the circuit court correctly followed the older First District cases which conflict with the newer Fifth District case; (2) that Rein's letter cannot reasonably read as commencing arbitration; and (3) that the policy limitation does not contravene public policy and is valid.

The Court addressed the public policy argument first. It examined the *Hale* decision cited by Rein which directly addressed this issue. The *Hale* Court found that an insurance policy's two-year limitations provision is not contrary to public policy. The Court rejected Rein's public policy argument.

The Appellate Court next addressed the applicable First and Fifth District cases. The parties agreed that if *Buchalo* and *Shelton* cannot be distinguished, then they conflict with *Hale*. The Appellate Court found the distinctions in *Buchalo* and *Shelton* minimal, and focused on the alleged conflict with the *Hale* decision.

In *Hale,* the applicable policy provided, "Arbitration proceedings will not commence until we receive your written demand for arbitration." Within two years, the insured's attorney sent a letter stating, ". . . [i]t appears that we have an underinsured claim." When the attorney sent this letter, litigation against the at-fault driver was pending. The insurer denied the claim, and the

decision was upheld by the trial court. The Fifth District reversed, finding the language imperfect but satisfactory to serve the purpose of notifying the insurer of the claim. The Court reasoned that the insured could not have known within the two-year period whether he would certainly have a claim due to the pendency of the litigation against the at-fault driver. Furthermore, the Court reasoned that the insurance industry could not have intended its insureds to formally request arbitration in every minor claim, for that would result in the industry being inundated with premature demands for arbitration.

The Appellate Court in the instant case disagreed with the *Hale* Court's reasoning for two reasons. First, the Court disagreed with the *Hale's* Court's holding that "notice" could serve as a "demand" under the limitations provision. The Court found this holding was without authority, and disregarded the limitations provision's specific and unambiguous requirement for express action. Secondly, the Court saw no reason to concern itself with the burden an insurance company contracts to impose upon itself. The Court thought that burden is best addressed by the insurance company that is free to modify its provision or take other affirmative steps to address it.

Finally, the Appellate Court turned to Rein's letter. It noted that the letter did not even mention arbitration, let alone indicate her selection for an arbitrator. The Appellate Court found Rein's letter did not comply with the explicit requirement in State Farm's provision requiring Rein to take specific, affirmative steps to commence arbitration. Therefore, the Appellate Court affirmed the trial court's judgment in State Farm's favor.

III. STACKING

Hanson v. Lumley Trucking, LLC, 403 Ill. App. 3d 445, 932 N.E.2d 1179, 342 Ill. Dec. 718 (5th Dist. 2010) – Brian Waters, an employee of Lumley Trucking, LLC, was driving one of Lumley's vehicles when it collided with a vehicle insured by Progressive with liability limits of $50,000/$100,000. Waters' injuries were fatal. Progressive paid Waters' estate $50,000 to settle the claim against Progressive's driver. Lumley's vehicle carried UIM coverage in a policy issued by General Casualty Company.

The estate sought UIM benefits pursuant to the UIM provision of the General Casualty policy. In a declaratory judgment action, the estate sought to stack the available UIM coverage, which would amount to $1 million in available UIM coverage to the estate. The estate argued that the applicable policy provided a $40,000 limit for each of the 25 vehicles it insured under the policy, but did not prevent stacking of the limits. General Casualty counterclaimed, arguing that the policy did not allow its UIM coverage to be stacked. Furthermore, because the estate had received $50,000 from Progressive, General Casualty argued it owed nothing to the estate.

At issue before the trial court, and ultimately the Appellate Court, was whether the UIM coverage for the 25 insured vehicles could be stacked to allow the estate to recover up to $1 million in UIM benefits under the policy. The trial court focused on the declarations page,

finding that the declaration page of the policy contained a single line setting forth a shorthand identification of "46," which cross-referenced a set of 25 vehicles, with a single identification of a single amount of UIM coverage. The court found the declarations page unambiguous and specifically prohibited stacking. The court ruled in General Casualty's favor on the pleadings. The estate appealed.

The only issue before the Appellate Court was whether the policy allowed stacking of the UIM coverage. The estate argued that the "46" shorthand reference to 25 vehicles created an ambiguity in the policy, in favor of coverage. An ambiguity exists if the relevant portion is subject to more than one *reasonable* interpretation, not whether creative possibilities can be suggested. Here, the estate concluded that by using the number "46" to reference the 25 vehicles, it should be allowed to stack coverage for 25 vehicles. The Appellate Court found the argument confusing because it is not a reasonable interpretation of the policy language.

The Appellate Court turned to the pertinent policy provisions. The Court noted that the manner in which the insurance company lists the coverage on its declaration sheet provides important information that is specific to the policyholder. In the case at bar, the declarations page listed the UIM coverage once. Further, it specifically included a clear and unambiguous stacking clause as follows: "Regardless of the number of covered 'autos,' 'insureds,' premiums paid, claims made[,] or vehicles involved in the 'accident,' the most we will pay for all damages resulting from any one 'accident' is the Limit of insurance for Underinsured Motorist Coverage shown in this endorsement." Since the UIM limit of $40,000 was listed one time, there is no reasonable way to interpret the policy so as to allow stacking the coverage for all 25 insured vehicles.

IV. MISCELLANEOUS ISSUES

A. Wrongful Death Act

In re Estate of Anderson, No. 1-10-1240, 2011 WL 947126 (1st Dist. March 15, 2011) – Frederick Anderson's vehicle was rear-ended by an underinsured driver, killing Frederick. In her representative capacity as the administrator of his estate, Frederick's wife, Marion, filed a wrongful death action against the underinsured driver, and a claim for benefits under Frederick's UIM policy with State Farm. In addition to his wife Marion, Frederick left two surviving adult sons. The underinsured driver's insurer tendered its $20,000 limits to settle the suit filed against it. State Farm tendered $230,000 in settlement of the UIM claim to Marion, as administrator of the estate.

Marion filed a petition to approve the distribution of the $230,000 solely to her, individually, as the only insured per the insurance policy. Marion argued that Frederick's sons were not insureds under the policy and thus, were not entitled to any of the proceeds of the UIM settlement. The sons objected to the petition, arguing that the proceeds should be distributed pursuant to the Wrongful Death Act, or alternatively, they should be considered insureds under the policy.

The trial court certified the following specific question to the Appellate Court, which was an issue of first impression in Illinois – whether benefits paid pursuant to a policy of underinsurance should be disbursed pursuant to the Illinois Wrongful Death Act and not according to the policy of underinsurance? The Court examined the language of the insurance policy and of the Wrongful Death Act, to discern the intent and purpose of them both, taking them each in turn.

The applicable insurance policy contained the following language:

> We will pay damages for bodily injury *an insured is legally entitled to collect* from the owner or driver of an underinsured motor vehicle. The *bodily injury must be sustained by an insured* and caused by an accident arising out of an operation, maintenance or use of an underinsured motor vehicle." (Emphasis added.)

In re Estate of Anderson, 2011 WL 947126 at *2.

In this case, the legal entitlement to collect damages from the underinsured driver comes from the Wrongful Death Act, which put simply, permits recovery for a death caused by a wrongful act of another. The Act identifies those individuals who, by law, are entitled to pursue recovery under the Act, as follows:

> Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action *shall be for the exclusive benefit of the surviving spouse and next of kin* of such deceased person.

Id.

The underinsured motorist provisions of the policy define "insured" as "any person entitled to recover damages because of bodily injury to an insured." Based on the language of the policy and the Wrongful Death Act, the only basis for payment of UIM benefits in this case is the wrongful death action, which is statutorily brought for the benefit of the spouse and next of kin. Thus, the proceeds of the settlement with State Farm represent wrongful death damages, distributable to Marion *and* Frederick's two sons. The Court answered the certified question in the affirmative.

B. Unreasonable and Vexatious Behavior

West Bend Mut. Ins. v. Norton, ___ Ill. App. 3d ___, 940 N.E.2d 1176, 346 Ill. Dec. 572 (3d Dist. 2010) – Wanda Norton was driving her car when a vehicle driven by Karyn Patterson struck her. Norton was insured by West Bend Mutual Insurance; Patterson was insured by American Family Insurance. Norton filed a claim with West Bend, which paid $2,852.50 pursuant to medical payments coverage, and $4,232.26 for property loss and rental vehicle expenses. West Bend sought reimbursement from American Family, and recovered the property damage expenses.

Norton notified American Family of her special damages of $18,307.87, and when her claim with American Family did not settle, she filed suit against Patterson without notifying American Family or West Bend. A default judgment was subsequently entered against Patterson. Norton did not notify American Family of the judgment until 90 days after entry of the judgment. American Family denied coverage for the loss due to lack of notice. Norton then asserted an uninsured claim against West Bend, which West Bend denied. West Bend urged Norton to move to vacate the judgment against Patterson so West Bend could pursue subrogation against American Family, pointing out Norton's contractual obligation to cooperate with West Bend's subrogation efforts.

Norton refused to vacate the judgment against Patterson and filed suit against West Bend seeking UIM benefits pursuant to her policy. West Bend moved to dismiss, arguing that the claim must be submitted to arbitration. The trial court dismissed the suit and ordered the claim proceed to arbitration. Meanwhile, West Bend sought a declaration of its obligations under the policy, which was stayed by agreement pending arbitration.

At arbitration, one and one-half years later, the panel awarded $7,113.61 to Norton, which was promptly offered by West Bend. Norton refused to accept West Bend's offer, and filed a counterclaim to West Bend's declaratory judgment claim, alleging unreasonable and vexatious delay pursuant to section 155 of the Illinois Insurance Code. Section 155 provides, in relevant part:

> In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees. 215 ILCS 5/155 (West 2004).

West Bend, 940 N.E.2d at 1179.

The trial court stated that the relevant inquiry is whether West Bend had a good faith basis for contesting the UM claim. In finding West Bend acted in good faith, the trial court stated that West Bend had consistently disputed its obligation to provide coverage in this instance, and further, the parties had agreed to the arbitration date, which was approximately four and one-half years after Norton filed suit against West Bend seeking payment under the UIM provision of the policy. Therefore, the trial court dismissed Norton's claim against West Bend. Norton appealed.

The issue before the Appellate Court was whether West Bend's conduct was unreasonable and vexatious pursuant to section 155. The Appellate Court noted that the test is whether the insurance company had a *bona fide* defense to the claim. West Bend claims it had a *bona fide* dispute due for two reasons:

1. Norton's failure to timely notify American Family of the suit and judgment against Patterson, thereby resulting in Norton's "uninsured" status; and

2. Norton's failure to cooperate with West Bend's subrogation efforts, as required by the insurance policy.

According to the Appellate Court, West Bend did not delay the claim due to inaction, but instead responded immediately that the claim should be submitted to arbitration. West Bend disputed its obligation to pay, and timely sought declaratory relief. The parties agreed to proceed to arbitration pending the coverage issue, and agreed on the arbitration date. After arbitration, Norton refused to settle her claim, and only then – approximately five years later – did she raise an unreasonable and vexatious claim.

The Appellate Court agreed with the trial court that West Bend was entitled to defend Norton's claim, and was not unreasonable and vexatious in its denial. To the contrary, the Appellate Court found that any delay in resolving the claim was attributable to Norton's rejection of the award, rather than any action or inaction on West Bend's part. The Appellate Court affirmed the trial court's judgment in West Bend's favor.

Mark J. McClenathan

- Partner

Mark joined Heyl Royster in 1989, and became a partner with the firm in 1998.

Mark concentrates his practice in commercial and civil litigation. He has extensively defended product liability, professional liability, construction liability, and agriculture liability cases.

In addition, Mark has represented clients in the areas of business and corporate law, construction law, and real estate. Also, he has represented municipalities and clients before various governmental bodies, and has extensive experience in annexations, subdivisions and developments, zoning, and intergovernmental agreements.

Prior to joining Heyl Royster, Mark worked for the legal department of the Defense Logistics Agency (Defense Contract Services) of the Department of Defense in Chicago; the legal departments of two Fortune 500 companies headquartered in the Twin Cities, Minnesota including Land O'Lakes, Inc. in St. Paul and 3M Corporation in Minneapolis; and then was in private practice with a firm in Rockford, where he practiced in the areas of business and corporate law, commercial and civil defense litigation, and bankruptcy (creditors' rights).

Significant Cases

- *Fox Controls, Inc. v. Honeywell, Inc,*. 2004 WL 906114 (N.D. Ill. 2004) - Dismissal of case alleging misappropriation of trade secrets.
- *Zimmerman v. Fasco Mills Co,*. 302 Ill. App. 3d 308 (2d Dist. 1998) - Dismissal of case involving "Fireman's Rule."
- *Donovan v. Beloit Corp*., 275 Ill. App. 3d 25 (2d Dist. 1995) - Structural Work Act versus pre-emption of OSHA issue.
- *Jansen v. Aaron Equipment,* (N.D. Ill. 1995) - Product liability case involving joint and several rule.

Transactions

- Assisted various municipalities on incorporations; drafting new or amending existing zoning, subdivision, and general ordinances; drafting comprehensive plans; negotiating and drafting border agreements and annexation agreements.
- Represented municipalities in court on border disputes.
- Represented municipalities before administrative boards on disciplinary proceedings (including police issues).
- Represented Ken Rock Community Center on sale of commercial/school property.

Public Speaking

- *"Evidentiary Issues for the Claims Professional"* Heyl Royster (2008)
- *"Premises Liability Update"* Heyl Royster (2007)
- *"Mediation and Arbitration: When, Why & How?"* Heyl Royster (2001)
- Various presentations to local realtor company meetings on professional liability issues

Professional Recognition

- Selected as a *Leading Lawyer* in Illinois. Only five percent of lawyers in the state are named as *Leading Lawyers*
- Winnebago County Pro Bono Volunteer of the Year (1990)
- Court certified mediator, Winnebago County

Professional Associations

- Winnebago County Bar Association
- Illinois State Bar Association
- American Bar Association
- Illinois Association of Defense Trial Counsel
- Defense Research Institute

Court Admissions

- State Courts of Illinois
- United States District Court, Northern District of Illinois

Education

- Juris Doctor, Hamline University School of Law, 1987
- Bachelor of Arts (Magna Cum Laude), University of Wisconsin - Eau Claire, 1984
- Porter Scholar, Beloit College, 1979-1980