

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN HOME ASSURANCE CO.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 03-CV-0768
	:	
JOSEPH POPOWICZ and	:	
RITA POPOWICZ,	:	
Defendants.	:	

ORDER

AND NOW, this day of May, 2003, upon consideration of: (i) Defendants' Motion to Dismiss (Document No. 3, filed February 24, 2003); (ii) Plaintiff's Response to the Dismiss (Document No. 4, filed March 10, 2003); and (iii) Defendants' Reply in support of their Motion (Document No. 5, filed March 27, 2003), it is hereby **ORDERED** as follows.

On December 20, 1999, Defendant, Joseph Popowicz, was operating a motor vehicle owned by his employer and insured by Plaintiff, when Defendant and Jan Warrington, the driver of another motor vehicle, collided (P. Resp. at p. 1). Joseph Popowicz and Rita Popowicz filed suit against Jan Warrington in the Court of Common Pleas, Philadelphia County, and subsequently committed the litigation to binding arbitration (P. Resp. at ex. B). The arbitration panel awarded \$75,000 in favor of Joseph Popowicz and Rita Popowicz and against Jan Warrington (P. Resp. at p. 2). Thereafter, Defendants made a underinsured motorist ("UIM") benefits claim to Plaintiff, who has refused coverage based upon the theory of collateral estoppel. On February 6, 2003, Plaintiff filed a declaratory judgment complaint against the Defendants in the United States District Court for the Eastern District of Pennsylvania, seeking to enjoin arbitration based upon collateral estoppel (Document No. 1, filed February 6, 2003). Thereafter, on February 21, 2003, Joseph and Rita Popowicz, as Plaintiffs, filed suit in the Court of Common

Pleas of Philadelphia County, seeking to Compel the Appointment of Uninsured Motorist Arbitrators. American Home Assurance Company, as Defendants, sought the removal and consolidation of the Common Pleas action with the Declaratory Judgment action currently pending in this Court (see 03-CV-1537, Document No. 1, filed March 12, 2003).

Rule 12(b) of the Federal Rules of Civil Procedure states, in relevant parts, that, “[e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter.” In a Rule 12(b)(1) challenge there is a light burden on the plaintiff to prove subject matter jurisdiction. In deciding the motion, the court “may review any evidence to resolve factual disputes concerning the existence of jurisdiction,” Mortenson v. First Federal Sav. and Loan Ass’n, 549 F.2d 884, 891 (3d Cir. 1977), and the court is not constrained by the plaintiff’s complaint.

The district court is compelled to engage in a limited two-prong inquiry to determine the arbitrability of a specific dispute: (i) whether the parties seeking or resisting arbitration entered into a valid arbitration agreement; and (ii) whether the dispute between those parties falls within the language of the arbitration agreement. John Hancock Mutual Life Ins. Co. v. Olick, 151 F.3d 132, 139 (3d Cir. 1998); see also PaineWebber Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990). “In conducting this limited review, the court must apply ordinary contractual principles, ‘with a healthy regard for the strong federal policy in favor of arbitration.’” Olick, 151 F.3d at 137 (quoting Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983)). The Third Circuit recognizes a narrow exception to the

two-part arbitrability test when a party claims that the arbitration should be precluded as a result of collateral estoppel or res judicata based upon a prior federal judgment. Olick, 151 F.3d at 138. Generally, in this situation, the district court, and not the arbitrator, is directed to resolve all collateral estoppel or res judicata claims based upon a prior federal judgment before compelling or enjoining arbitration. Id.; see also Telephone Workers Union of New Jersey v. New Jersey Bell Tel. Co., 584 F.2d 31, 33 (“When a federal court is presented with the contention that a prior federal judgment determined issues now sought to be relitigated in an arbitral forum it must first determine the effect of the judgment.”). However, the narrow exception to the two-prong arbitrability test resulting from a collateral estoppel or res judicata claim based upon a prior federal judgment, does not apply when the collateral estoppel or res judicata claim is a result of a prior *arbitration* award or judgment. Olick, 151 F.3d at 139-40. Therefore, this Court will proceed in conducting a limited two-prong arbitrability review.

The Pennsylvania Underinsured Motorists Coverage (“PUMC”) contract between the Plaintiff and Joseph Popowicz’s employer, states, in relevant parts:

Arbitration

a. If we and an “insured” disagree whether the “insured” is legally entitled to recover damages from the owner or driver of an “underinsured motor vehicle” or do not agree as to the amount of damages that are recoverable by that “insured” then the matter may be arbitrated. However, disputes concerning coverage under this endorsement may not be arbitrated.

(P. Resp. at ex. A., p. 3).

Neither party disputes that they entered into a valid and binding arbitration agreement, but rather, Plaintiff contends that there is a “coverage dispute” among the parties and that the nature of the conflict exceeds the scope of the arbitration agreement. Plaintiff relies on the language of

the arbitration provision: “disputes concerning coverage under this endorsement may not be arbitrated.” (P. Resp. at ex. A., p. 3). Specifically, Plaintiff asserts that the Defendants’ prior arbitration award against Jan Warrington, the tortfeasor liable to the Defendants for damages resulting from the motor vehicle collision, collaterally estops Defendants from pursuing UIM benefits under the insurance policy issued by Plaintiff.

However, the Plaintiff’s collateral estoppel claim manifests itself as an affirmative defense. In Pennsylvania, “an affirmative defense is defined as one where the defendant admits his commission of the act charged, but seeks to justify or excuse it.” Radich v. Goode, 886 F.2d 1391, 1396 (3d Cir. 1989)(quoting Commonwealth v. White, 342 Pa. Super 1, 492 A.2d 32, 35 (1985)). By asserting collateral estoppel, Plaintiff is admitting the underlying issue, the coverage, but seeks to deny making a payment to the Defendants on the grounds of issue preclusion. On its face, the dispute is not whether the Defendants are covered under Joe Popowicz’s employer’s UIM policy, but rather, whether the Defendants were given a full and fair opportunity to assert all their claims in the prior arbitration and whether they were compensated for all the damages that they were legally entitled to recover. This dispute falls squarely within the arbitration agreement in the policy and it shall be left for the arbitration panel to decide, what, if any, preclusionary effect stems from the prior arbitration.

Based on the foregoing reasons, the Defendants Motion to Dismiss pursuant to the Fed. R. Civ. P. 12(b)(1) is **GRANTED**, therefore this case is **DISMISSED** and the parties are directed to submit the dispute to binding arbitration pursuant to the terms of the contract.¹ This is

¹ The Plaintiffs, Joseph and Rita Popowicz, filed a complaint in the state court, immediately preceding the declaratory judgment complaint in this case, seeking to
(continued . . .)

a final legal adjudication and the Clerk of Court is directed to statistically close this matter.

BY THE COURT:

Legrome D. Davis, U.S.D.J.

compel American Home Assurance Company to submit the dispute to binding arbitration. See Joseph Popowicz, et al., v. American Home Assurance Co., 03-CV-1537 (E.D. Pa. 2003). Thereafter, American Home Assurance Co. removed the action to this Court, and the action was subsequently consolidated with the matter currently pending before this Court. Therefore, the reasoning and legal outcome in the current action is also binding upon the consolidated case, 03-CV-1537.