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

PROGRESSIVE INSURANCE COMPANY	:	CIVIL ACTION
	:	
v.	:	
	:	
MIDHAT GONDI	:	NO. 04-2034

MEMORANDUM AND ORDER

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE November 1 , 2004

This is a declaratory judgment action in which an insurer and insured seek a ruling concerning Mr. Gondi's entitlement to uninsured motorist coverage for injuries he sustained in a bizarre accident involving his own car. The facts are undisputed. Although we do not find any ambiguity in the insurance policy, we find that enforcement of the policy in the specific set of facts now facing the court would be contrary to public policy and the policy underlying Pennsylvania's Motor Vehicle Financial Responsibility Act, (MVFRA").

RELEVANT FACTS:

On May 13, 2003, Mr. Gondi drove his 2000 Toyota Corolla to a food market in the 2200 block of South 63rd Street in Philadelphia. He parked his car across the street from the food market, leaving his keys inside the car. While exiting the food market, Mr. Gondi saw someone enter his vehicle. Mr. Gondi approached the vehicle as the unknown driver began pulling the car away from the parking spot, striking Mr. Gondi. Mr. Gondi suffered a fractured scapula, fractured shoulder, and multiple fractured ribs. The car was insured by Progressive.

When Mr. Gondi made a claim for uninsured motorist benefits under Progressive's policy, the claim was denied. Progressive contends that Mr. Gondi is not entitled to such benefits because the vehicle is not an "uninsured motor vehicle" as defined in the policy.

Mr. Gondi claims that the policy language is ambiguous and inconsistent, violates Pennsylvania law, is inconsistent with the legislative intent of the MVFRA, and is contrary to public policy.

GOVERNING LEGAL STANDARDS

Summary judgment is warranted where the pleadings and discovery, as well as any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pr. 56. Here, the parties agree that there is no issue of material fact. They seek a ruling as to whether Mr. Gondi is entitled to uninsured motorist coverage. Pursuant to Pennsylvania law, if a contract provision is clear and unambiguous, the court shall give effect to the provision unless to do so would violate public pollicy. Jeffrey v. Erie Ins. Exchange, 621 A.2d 635, 638 (Pa.Super. 1993).

Because subject matter jurisdiction in this case is based on diversity of citizenship, my role is to apply the substantive law as decided by the Commonwealth's highest court. Kane v. BOC Group, Inc., 234 F.3d 160, 162 (3d Cir. 2000); Travelers Indemnity Co. of Illinois v. DiBartolo, 131 F.3d 343, 348 (3d Cir. 1997). Where there is no Pennsylvania Supreme Court authority exactly on point, I must predict how the Supreme Court would resolve the issue. Travelers v DiBartolo, supra. This may involve consideration of (1) what the Pennsylvania Supreme Court has said in related areas; (2) the decisional law of the Pennsylvania intermediate courts; (3) federal cases interpreting state law; and (4) decisions from other jurisdictions that have discussed the issue. Werwinski v. Ford Motor Co., 286 F.3d 661, 675 (3d Cir. 2002).

DISCUSSION

A. Policy Language

With respect to Uninsured Motorist Coverage, the policy provides:

> Subject to the Limits of Liability, if **you** pay the premium for Uninsured Motorist Coverage, **we** will pay for damages, other than punitive or exemplary damages, which an **Insured person** is legally entitled to recover from the **owner** or operator of an **insured motor vehicle** because of **bodily injury**:
> 1. sustained by an **insured person**;
> 2. caused by an **accident**; and
> 3. arising out of the ownership, maintenance, or use of an **uninsured motor vehicle.**

Here, Mr. Gondi contends that two of the policy provisions are inconsistent. Thus, there is an ambiguity that should be construed against Progressive.

The two provisions to which Mr. Gondi refers are both contained in the definition of an "uninsured motor vehicle." The first paragraph defining the term uninsured motor vehicle begins:

> **"Uninsured motor vehicle"** means a land motor vehicle or trailer of any type:
> a. To which no **bodily injury** liability bond or policy applies at the time of the accident;

Policy, Part III, Additional Definitions, 6(a).

That paragraph is followed by:

> An **"uninsured motor vehicle"** does not include any motorized vehicle or equipment:
> a. **owned** by **you** or a **relative**; . . .
> g. shown on the **Declarations Page** of this policy;

We find no ambiguity. Mr. Gondi's car was covered by an insurance policy that included coverage for bodily injury. Similarly, the state courts and federal courts relying on Pennsylvania caselaw have concluded that there is no ambiguity in these provisions. In construing nearly identical language, the Honorable Harvey Bartle of this court, concluded:

> It is plain that under the clear and unambiguous language of the policy the [] car cannot be an uninsured motor vehicle. The policy specifically excludes it from that definition by virtue of its being "insured under the liability coverage" of the policy.

State Farm Mut. Auto. Ins. Co. v. Sinsel, 00-2985, 2000 WL 1705413 *2 (E.D. Pa. Nov. 6, 2000). Judge Bartle relied on several other cases with identical holdings. See Parsons v. State Farm Mut. Auto. Ins. Co., 484 A.2d 192 (Pa.Super, 1984); Kelly v. Nationwide Ins. Co., 606 A.2d 470 (Pa. Super. 1992); Myers v. State Farm Ins. Co., 86-5492, 1987 WL 5201 (E.D.Pa. Jan. 5, 1987). Therefore we reject the defendant's argument that the policy language was inconsistent and ambiguous.

B. Policy Considerations

Mr. Gondi next contends that Progressive's denial of uninsured motorist coverage is against public policy and the policy underlying the MVFRA. In pressing this argument, the Defendant relies on two cases from the Pennsylvania Superior Court, Ector v. Motorists Insurance Companies, 571 A.2d 457 (Pa.Super. 1990), and Prudential Property and Casualty Ins. Co. v. Falligan, 484 A.2d 88 (Pa.Super. 1984). In Falligan, the court permitted uninsured motorist coverage for an uninsured pedestrian who was struck by a vehicle operated by the owner's son without the owner's permission. In doing so, the court relied primarily on the legislative intent underlying the No-Fault Act – "to provide maximum feasible restoration to all accident victims in a comprehensive, fair and uniform manner." Falligan, at 92(quoting Tubner v. State Farm Auto. Ins. Co., 436 A.2d 621, 623 (Pa. 1981)). Relying on Falligan, the court in Ector permitted an uninsured pedestrian who was struck by a stolen car to recover uninsured motorist benefits from the owner's insurance company.

The problem with relying on these two cases, is that the reasoning underlying Falligan (and thus, underlying Ector) has since been rejected by an *en banc* decision of the Pennsylvania Superior Court. Falligan was decided under the No-Fault Act, the precursor to the MVFRA. After Ector was decided, the Superior Court decided Jeffrey v. Erie Ins. Exchange, 621 A.2d 635 (Pa.Super. 1993), in which the court held that the MVFRA was "an implicit rejection" of the maximum feasible restoration theory underlying the No-Fault Act, Falligan, and Ector. Jeffrey, at 641. Thus, we do not find the Defendant's reliance on Ector and Falligan to be dispositive.

That being said, we find it repugnant when faced with the facts of this case to deny Mr. Gondi coverage. Therefore, we expanded our research into the generic violation of public policy and the policies underlying the MVFRA. In discussing public policy as a basis for invalidating a contract provision, the Pennsylvania Supreme Court recently stated:

> Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest. As the term "public policy" is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy. . . . Only dominant public policy would justify such action. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, the Court should not assume to declare contracts . . . contrary to public policy.

Burstein' v. Prudential Prop. & Cas. Ins. Co., 809 A.2d 204, 207 (Pa. 2002). With respect to the MVFRA, the Court noted that the "dominant and overarching public policy" was "legislative concern for the spiraling consumer cost of automobile insurance and the resultant increase in the number of uninsured motorists driving on public highways." Id. at 208 n.3.

Relying on these stated policies underlying the MVFRA, we found numerous cases in which the courts of the Commonwealth refused to invalidate provisions of automobile insurance policies. In Stelea v. Nationwide Mutual Ins. Co., 830 A.2d 1028 (Pa.Super 2003), the driver/owner of a motorcycle was injured in an accident and received the policy limits from the tortfeasor. Although the motorcyclist did not carry underinsured motorist coverage on his motorcycle, he sought such benefits under a policy he carried on his car. That policy contained a "household exclusion," which excludes coverage for an otherwise insured individual when that person is occupying a separately owned vehicle that is not insured under the subject policy. The Superior Court enforced the exclusion, finding that such enforcement did not violate the policies underlying the MVFRA. The court noted that to allow recovery would allow insureds

> to collect underinsured motorist benefits from every policy on which they were a named insured, even if the insurer had not been compensated for the coverage, or even been informed of the risk. Insureds would be able to receive benefits far in excess of the amount of coverage for which they paid, and insurers would be forced to increase the cost of insurance, which would be patently unfair.

Stelea, at 1032. See also Paylor v. Hartford Ins. Co., 640 A.2d 1234 (Pa. 1994)(household exclusion was enforced noting that to allow coverage would result in conversion of inexpensive underinsured motorist coverage into more expensive liability coverage); Demutis v. Erie Ins. Exchange, 851 A.2d 172 (Pa.Super. 2004)(same, relying on Paylor); Old Guard Ins. Co. v. Houck, 801 A.2d 559 (Pa.Super. 2002)(same).

From these cases, it is clear that the Pennsylvania courts are striving to reign in abuses of the insurance industry which result in higher premiums for the consumer. The courts

will not allow injured parties to double dip, collecting under both the liability and un/under-insured motorist portions of a policy, or to take advantage of the less expensive uninsured motorist protection they may have on another vehicle.

In reviewing Sinsel, Judge Bartle's case, and the cases cited therein, it is clear that such underlying policies guided those decisions. In Sinsel, the driver of the vehicle crashed into a tree with the intention of committing suicide and his passenger attempted to recover uninsured motorist benefits pursuant to the driver's policy. As previously discussed, Judge Bartle found that the language of the policy was unambiguous in excluding the insured vehicle from being an uninsured motor vehicle for purposes of uninsured motorist coverage. However, in discussing policy considerations, Judge Bartle concluded that "it is against the public policy of this Commonwealth to provide insurance coverage for intentional acts." Sinsel, at *2 (quoting Nationwide Mut. Ins. Co. v. Hassinger, 473 A.2d 171, 173 (Pa. Super. 1984)).

In Kelly, which Judge Bartle cited in Sinsel, the Superior Court again rejected the theory of turning un/under-insured motorist coverage into a supplemental liability coverage. Kelly, at 474. The Honorable Donald VanArtsdalen of this court was guided by this reasoning in deciding no un/under-insured motorist coverage existed for the passenger of a vehicle involved in an accident who had already received the policy limits under the liability section of the policy. Myers, at *4.

Review of the cases in Pennsylvania reveals that the courts are guided by the policies underlying the MVFRA – "legislative concern for the spiraling consumer cost of automobile insurance and the resultant increase in the number of uninsured motorists driving on public highways." Burstein, at 208 n.3. It is also clear that when the Pennsylvania courts

determine whether enforcement of a provision or exclusion violates public policy they look at the facts of the individual case to determine if enforcement in light of the specific facts is violative of public policy. See Paylor v. Hartford Ins. Co., 640 A.2d 1234, 1240 (Pa. 1994)("[t]he enforceability of the exclusion is dependent upon the factual circumstances presented in each case.").

The facts of this case are much different than any cited by either party or found by this court. Here, Mr. Gondi is not attempting to take advantage of the insurance he had on another vehicle or turn inexpensive uninsured motorist coverage into more costly liability coverage for which he had not paid. Mr. Gondi carried full coverage on the vehicle in question, including liability and uninsured motorist coverage. He was unable to recover liability benefits from the policy because there was no liability coverage for the unknown non-permissive driver. Thus, his only means of compensation is through his uninsured motorist coverage.

The stated purposes of the MVFRA are to bring down the cost of auto insurance and decrease the number of uninsured drivers on the roads. Here, in his attempt to stop the theft of his car, which loss would be covered by his comprehensive coverage, Mr. Gondi was hit and injured. Had he been successful in his attempt, he would have saved his insurance company the claim for the loss of the car. Thus, enforcement of the exclusion runs afoul of the first stated purpose. In addition, enforcement of the exclusion would result in a premium-paying, fully insured driver, being denied coverage for his injuries. This certainly is no incentive to insure one's vehicle. Thus, we conclude that, if faced with the specific facts of this case, the courts of Pennsylvania would conclude that enforcement of the exclusion would violate public policy.

An appropriate Order follows.

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O R D E R

AND NOW, this 1st day of November, 2004, upon consideration of the cross-motions for summary judgment and the reply briefs, IT IS HEREBY ORDERED that the Plaintiff's Motion for Summary Judgment is DENIED and the Defendant's Motion for Summary Judgment is GRANTED. Although we find no ambiguity in the provisions of the insurance policy, we find that enforcement of the exclusion in the circumstances presented in this case would violate public policy.

BY THE COURT:

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE