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

JULIE AMBER-MESSICK, Administratrix for Estate of Christopher Kangas, Deceased,	:	
Plaintiff	:	**CIVIL ACTION**
	:	**NO. 04-3424**
v.	:	
	:	
PROGRESSIVE INSURANCE,	:	
Defendant	:	

MEMORANDUM OPINION AND ORDER

RUFE, J. **June 30, 2005**

Before the Court are cross-motions for partial summary judgment on the parties' cross-claims for declaratory judgment regarding whether this dispute should be resolved in binding arbitration.

The facts relevant to the instant motions are not in dispute. On May 4, 2002, an automobile driven by sixteen year-old Jonathan Kerney struck fourteen year-old Christopher Kangas, who was riding his bicycle at the time. Tragically, Christopher died of his injuries the following day. Having reached a settlement with Kerney for $1.00, Plaintiff Julie Amber-Messick, Christopher's mother and the administratrix of his estate, pursues an underinsured motorist ("UIM") claim against Defendant Progressive Halcyon Insurance Company ("Progressive").[1] To this end, on June 29, 2004, Plaintiff filed a civil action in the Court of Common Pleas of Delaware County, Pennsylvania, asserting five claims relating to Progressive's refusal to pay UIM benefits under the insurance contract.[2] Defendant properly removed the complaint to this Court on July 20, 2004, with jurisdiction

[1] By settling with Kerney for $1.00, Plaintiff acknowledged that Progressive would be entitled to the full credit of the $100,000 policy limit of Kerney's liability insurance coverage. Compl. at ¶ 15.

[2] Plaintiff's other four causes of action are for: 1) insurance bad faith; 2) violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law; 3) fraud and deceit; and 4) breach of contract.

premised on diversity.

In Count Four of the Complaint, Plaintiff seeks declaratory judgment from the Court requiring Progressive to submit to binding arbitration on Plaintiff's UIM claim. Progressive has counterclaimed for a declaratory judgment that it is not required to arbitrate Plaintiff's UIM claim. The Court now addresses the pending partial summary judgment motions on this threshold forum issue. Progressive's liability under the insurance contract is not at issue here.

I. STANDARD OF REVIEW

A court should grant a motion for summary judgment if the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[3] The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact.[4] To defeat summary judgment, the non-moving party must set forth evidence of "specific facts showing that there is a genuine issue for trial."[5] "An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party."[6] "In determining whether a genuine issue of fact exists, we resolve all factual doubts and draw all reasonable inferences in favor of the nonmoving party."[7]

When the Court is confronted by cross-motions for partial summary judgment, it must

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[3] Fed. R. Civ. P. 56(c).

[4] Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

[5] Fed. R. Civ. P. 56(e).

[6] Sentry Select Ins. Co. v. Fleming, No. Civ.A.03-4801, 2003 WL 22681760, at *2 (E.D. Pa. Nov. 13, 2003) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)).

[7] UPMC Health Sys. v. Metropolitan Life Ins. Co., 391 F.3d 497, 502 (3d Cir. 2004).

consider each motion individually.[8] Therefore, "[e]ach side bears the burden of establishing a lack of genuine issues of material fact."[9] In this case, because neither party sets forth any genuine issues of material fact relevant to the instant cross-motions, the issues before the Court are strictly legal and are ripe for summary judgment.

II. DISCUSSION[10]

This dispute centers entirely on the validity of the emphasized portion of the following provision from Plaintiff's Progressive insurance policy, which became effective on February 19, 2002:

> If we and an insured person cannot agree on:
> 1. The legal liability of the operator or owner of an uninsured motor vehicle or underinsured motor vehicle; or
> 2. The amount of the damages sustained by the insured person;
>
> *this will be determined by arbitration if we and the insured person mutually agree to arbitration* prior to the expiration of the bodily injury statute of limitations in the state in which the accident occurred.[11]

Plaintiff does not contest that this language from the contract requires both parties' consent for Plaintiff's UIM claim to be resolved in arbitration. However, Plaintiff claims that the Court should invalidate this language because it is inconsistent with Title 31, Section 63.2(a) of the Pennsylvania Code, which provides: "The extent of the coverage which shall be offered as 'Uninsured Motorists Coverage' shall be at least that coverage contained in the sample form in

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[8] Reinert v. Giorgio Foods, Inc., 15 F. Supp. 2d 589, 593-94 (E.D. Pa. 1998).

[9] Id.

[10] The Court's jurisdiction is based on diversity. 28 U.S.C. § 1332. Both parties premise their arguments on Pennsylvania law, so the Court applies that law here. See generally Sentry Select Ins. Co., 2003 WL 22681760, at *3 ("The Court will apply Pennsylvania law in construing the language of the Sentry Policy because this is a diversity action.").

[11] Def.'s Answer, Exh. 1 at 26 (emphasis added).

Exhibit C, which is the National standard form for this insurance." Exhibit C, in turn, contains the following arbitration provision:

> 8. Arbitration. If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this endorsement, then, *upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association*, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this endorsement.[12]

Plaintiff also contends that a recent decision from the Pennsylvania Insurance Commissioner mandates that insurance policies contain a provision requiring arbitration of UIM disputes like Plaintiff's. On June 30, 1997, the Insurance Federation of Pennsylvania filed a Petition for Declaratory Order with the Commissioner challenging the authority of the Pennsylvania Insurance Department ("PID") to require arbitration of UIM disputes. On July 16, 2001, the Commissioner issued a Declaratory Opinion and Order (hereinafter, the "Koken Order") reaffirming PID's authority to adopt the regulation requiring arbitration of UIM disputes.[13] The Pennsylvania Commonwealth Court affirmed the Koken Order, and the issue is now pending before the Pennsylvania Supreme Court.[14]

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[12] 31 Pa. Code § 63.2, Exh. C (emphasis added). The Pennsylvania Insurance Commissioner has held that this regulation applies equally to UIM disputes: "Title 31, section 63.2 of the Pennsylvania Code includes a sample form (Exhibit C) that mandates arbitration for UM disputes. The considerations favoring arbitration of UM disputes are no different in the UIM context." See Declaratory Opinion and Order of M. Diane Koken dated July 16, 2001, attached to Plaintiff's Complaint as Exhibit E (hereinafter, "Koken Order").

[13] See Compl., Exh. E.

[14] Ins. Fed. of Pennsylvania v. Koken, 801 A.2d 622, 624 (Pa. Commw. Ct. 2002) (hereinafter, IFP v. Koken) ("[W]e remain convinced that [PID] has the implied authority to require arbitration of UM and UIM coverage disputes."), alloc. granted, 829 A.2d 309 (Pa. July 29, 2003).

Progressive asserts that the arbitration provision in Plaintiff's policy is valid because David Wulf, a PID examiner, approved Plaintiff's policy form on October 16, 2001, five months after the Koken Order.[15] Progressive argues that the Koken Order and subsequent Commonwealth Court opinion do not mandate that automobile insurance policies require binding arbitration for UIM disputes. Rather, according to Progressive, these decisions give PID the authority to disapprove a policy form that does not contain a binding arbitration provision but do not require it to do so. Therefore, so the argument goes, PID's approval of Plaintiff's policy form was within the scope of its authority, and the arbitration provision in Plaintiff's policy is valid.

Plaintiff responds that PID's approval of Plaintiff's policy was a mistake as it is clearly inconsistent with the Commissioner's pronouncement that:

> Given these decisions and the obvious reliance which the courts and the public have long placed on arbitration in the UM and UIM context, any determination that now would make arbitration merely voluntary on the part of insurers could potentially cause serious disruption in the timely administration of justice by placing further burdens on the judicial system. It also could potentially cause consumers to believe they had the right to pursue a remedy in arbitration when, in fact, the insurer had deleted a long-standing arbitration provision from its policy form. Thus, Petitioner's requested change in the well-established practice of requiring arbitration in UM and UIM disputes is, in itself, against public policy and consumer interests.[16]

The Commissioner goes on to say that an "infinite variety of arbitration clauses would be consistent with [PID's] policy to require such clauses," but that the language used "must not 'destroy the finality and binding nature of the arbitrators' decision.'"[17] According to Plaintiff, in light of the

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[15] See Letter dated Oct. 16, 2001, attached as Exhibit C to Def.'s Mem of Law.

[16] Koken Order at 7-8.

[17] Id. at 9 (quoting Hoerst v. Prudential Prop. & Cas. Ins. Co., 624 A.2d 187, 189 (Pa. Super. Ct. 1993)).

Koken Order, Mr. Wulf did not have the authority to approve Plaintiff's insurance contract because it lacked a valid arbitration provision.

With these arguments in mind, the question presented to the Court is the following: Does Pennsylvania law mandate that automobile insurance policies contain provisions requiring binding arbitration of UIM disputes upon demand of either party? The Supreme Court of Pennsylvania has not specifically addressed this question; thus, we must predict how the Supreme Court of Pennsylvania would rule.[18] Although the case law among the Pennsylvania Superior Courts and Commonwealth Courts is somewhat haphazard, the weight of the authority dictates that the answer to this question is "no." As a result, Plaintiff's policy is valid, and, as the parties do not mutually agree to arbitration, this dispute is properly before this Court.

To begin, despite the strong language favoring arbitration clauses in the Koken Order, the opinion concludes only that PID "***may*** disapprove automobile insurance policies which do not contain binding arbitration for uninsured and underinsured motorists disputes."[19] The subsequent Commonwealth Court opinion only reaffirms PID's authority to disapprove UIM policies on this ground.[20] The Koken Order and Commonwealth Court opinion do not, however, ***require*** PID to disapprove an automobile insurance policy that does not require arbitration of UIM disputes. Moreover, they do not stand for the proposition that a provision requiring the parties to mutually agree to binding arbitration violates Pennsylvania law.

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[18] Rabatin v. Columbus Lines, Inc., 790 F.2d 22, 24 (3d Cir. 1986) ("If . . . the Pennsylvania Supreme Court has not articulated the law in this area, we must predict what rule it would apply."); Aetna Cas. & Sur. Co. v. Castagnola, No. Civ.A.88-4585, 1989 WL 49523, at *2 (E.D. Pa. May 9, 1989).

[19] Koken Order at 9 (emphasis added).

[20] IFP v. Koken, 801 A.2d at 624 ("[W]e remain convinced that the Department has the implied authority to require arbitration of UM and UIM coverage disputes.").

None of the other cases cited by Plaintiff give this Court the authority to strike the arbitration provision in her insurance policy as contrary to Pennsylvania law. Although these cases make clear that "public policy favors arbitration" in Pennsylvania,[21] they do not mandate that automobile insurance contracts allow for arbitration of UIM disputes at the request of either party. Nor do they require PID to disapprove a policy like the one in question here. For example, consistent with IFP v. Koken, the court in Prudential Property and Casualty Insurance Co. v. Muir, 513 A.2d 1129, 1130 (Pa. Commw. Ct. 1986), held only "that [PID] had the implied authority to promulgate [31 Pa. Code § 63.2]. . . ." Similar to IFP v. Koken, this holding does not require PID to disapprove of automobile insurance policies based on provisions (or lack thereof) requiring arbitration of UIM disputes; rather, it merely affirms PID's authority to do so. Here, PID approved the arbitration provision in Plaintiff's policy, consistent with PID's power under IFP v. Koken and Muir.

Neuhard v. Travelers Insurance Co., 831 A.2d 602 (Pa. Super. Ct. 2003), is also distinguishable. In Neuhard, relying on the Koken Order, the trial court ordered the parties to proceed to arbitration on Plaintiff's UIM claim even though the insurance policy at issue only required binding arbitration of UM claims, not UIM claims. On appeal, the Superior Court reversed, holding that the trial court had improperly applied the Koken Order retroactively because the policy was issued in 1999, two years before the Koken Order was issued. Although the issue of retroactive application is not relevant to Plaintiff's policy,[22] Neuhard is distinguishable because that policy

[21] Borgia v. Prudential Ins. Co., 750 A.2d 843, 850 (Pa. 2000).

[22] The Koken Order was issued on July 17, 2001; Plaintiff's policy was approved on October 17, 2001 and became valid on February 19, 2002.

contained no arbitration provision for UIM claims. Unlike the policy in Neuhard, Plaintiff's policy contains a binding arbitration provision for UIM claims but simply requires that the parties mutually consent to such arbitration. Therefore, Neuhard does not support Plaintiff's claim that the arbitration provision in her policy is invalid.

Plaintiff conspicuously ignores several cases wherein Pennsylvania courts have unequivocally declared that arbitration clauses are not required under Pennsylvania law. For example, in McFarley v. American Independent Insurance Co., 663 A.2d 738 (Pa. Super. Ct. 1995), the court, in response to the appellants' argument that Title 31, Section 63.2 of the Pennsylvania Code mandates submission of their UM claim to arbitration, stated: "[w]e have repeatedly rejected the argument raised by appellants, holding that in the absence of a statutory requirement, arbitration may not be required by regulation."[23] Moreover, the McFarley court specifically declined to follow Muir, in part "because [it was] not confronted with a challenge to the Insurance Commissioner's authority to promulgate regulations. . . ."[24] This same principle applies to the instant claim. Even assuming that PID has the authority to reject policies that do not contain a valid arbitration provision, PID approved the policy in question here. As such, it is not for this Court to decide whether PID properly followed its own regulation.

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[23] McFarley, 663 A.2d at 740 ("Further, appellants' correct assertion that public policy generally favors arbitration is not sufficient to warrant imposition of a term which materially alters a perfectly valid insurance contract."); see also Dearry v. Aetna Life & Cas. Ins. Co., 610 A.2d 469, 472 (Pa. Super. Ct 1992) ("There is no law in the Commonwealth of Pennsylvania which requires that persons involved in a dispute over UM or UIM coverage submit the controversy to arbitration. Further, there is no law in the Commonwealth of Pennsylvania which requires that parties to insurance policies enter an agreement that any dispute surrounding coverage be submitted to arbitration.").

[24] Id. at 740 n.2.

IV. CONCLUSION

The Court finds that Pennsylvania law, as it currently stands, does not mandate that automobile insurance contracts contain provisions requiring binding arbitration of UIM disputes. Therefore, having been approved by PID, the UIM arbitration provision in Plaintiff's insurance policy is valid. Plaintiff is entitled to have its UIM dispute resolved by arbitration only if Defendant consents. Because Defendant does not consent here, the instant UIM dispute shall remain before this Court.[25]

An appropriate Order follows.

[25] Having arrived at this conclusion, the Court need not address the parties' arguments relating to the constitutional issues present here.

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Plaintiff	:	**CIVIL ACTION**
	:	**NO. 04-3424**
v.	:	
	:	
PROGRESSIVE INSURANCE,	:	
Defendant	:	

ORDER

AND NOW, this 30th day of June, 2005, after a hearing, and upon consideration of Plaintiff's Motion for Partial Summary Judgment [Doc. #13], Defendant's Motion for Partial Summary Judgment [Doc. #14], the parties' respective Responses [Docs. ##16, 17] and Supplemental Memoranda [Docs. ## 19, 20], it is hereby **ORDERED** that Defendant's Motion is **GRANTED** and Plaintiff's Motion is **DENIED**. The Court will set further discovery and dispositive motion deadlines by separate order.

It is so **ORDERED**.

BY THE COURT

/s/ Cynthia M. Rufe

CYNTHIA M. RUFE, J.