

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

**FIRST LIBERTY INSURANCE
CORP., et al.,**

Plaintiffs,

v.

ARIELLE BUDOW, et al.,

Defendants.

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CIVIL NO. 05-CV-88

MEMORANDUM OPINION & ORDER

RUFE, J.

July 17, 2007

In this declaratory-judgment action, the parties have asked the Court to determine whether certain insurance coverage will be recoverable in a personal-injury suit currently pending in New Jersey state court. Presently before the Court are Plaintiffs' and Defendants' Cross-Motions for Summary Judgment. The ultimate question before the Court is whether underinsured-motor-vehicle coverage and/or excess liability coverage, supplied by Plaintiffs to certain Defendants via two separate insurance policies, will be available for recovery in the pending state-court action. After considering the parties' relevant arguments and, more importantly, reviewing the applicable Pennsylvania law,¹ the Court has determined that the insurers are not obligated to provide either type of coverage in this case. Therefore, the Court will grant Plaintiffs' Motion and deny Defendants' Motions.

¹ As a federal court exercising diversity jurisdiction over this action under 28 U.S.C. § 1332, the Court is compelled to apply the substantive law of the state in which it sits. *See Nationwide Ins. Co. v. Resseguie*, 980 F.2d 226, 229 (3d Cir. 1992) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). In light of this dictate, and since there is no dispute between the parties that the policy contracts in this case are governed by Pennsylvania law, the Court will apply Pennsylvania state law throughout this Memorandum Opinion.

I. FACTUAL BACKGROUND

A. The Parties

Initially, it is appropriate to briefly identify the parties to this action and their postures in the instant litigation. Plaintiffs First Liberty Insurance Corporation (“First Liberty”) and Liberty Mutual Insurance Company (“Liberty Mutual”) are large insurance companies offering a variety of coverages for a variety of risks. Defendant Arielle Budow (“Arielle”) is a minor who was seriously injured in a motor-vehicle accident in 2004. Defendants Rabbi Ira Budow (“Budow”) and Dr. Susan Fuchs (“Fuchs”) are husband and wife and Arielle’s parents, and Budow is the owner of the vehicle in which Arielle was a passenger when she sustained her injuries. Defendant Albert Lopez was the permissive driver of Budow’s vehicle (the “Budow vehicle”) at the time of the relevant accident. Defendant New Jersey Manufacturer’s Insurance Company is an insurance company that provided liability insurance to Lopez at the time of the accident.

B. Factual History

The facts underlying this declaratory-judgment action are not in dispute.² In 2003, Budow and Fuchs purchased from Plaintiff Liberty Mutual a personal-catastrophe liability insurance policy (the “umbrella policy”) with effective dates of April 20, 2003, to April 20, 2004. This umbrella policy provided them with \$1 million of excess liability coverage.³ Later that year, they purchased from Plaintiff First Liberty an automobile insurance policy with effective dates of October 1, 2003, to October 1, 2004. That policy provided liability coverage in the amount of \$250,000 per

² The parties have stipulated to the pertinent facts. See Defs.’ Mot. for Summ. J. [Doc. # 25], at Ex. A.

³ Excess liability insurance protects the insured’s personal assets when a judgment against him exceeds the liability limits of an underlying insurance policy or policies, such as a homeowners’ or automobile insurance policy.

person injured in an accident, and underinsured-motor-vehicle coverage in the amount of \$1,000,000 after stacking.⁴

At all times relevant to this action, Arielle resided with her parents at their home in Yardley, Pennsylvania, while attending private school in Deal, New Jersey. As a result, she commuted approximately one hour to and from school each day. Arielle, who was fifteen at the time, was not a licensed driver and, therefore, could not drive herself to school. Accordingly, her parents had to either drive Arielle to school themselves or arrange for another person to drive her. Because their busy schedules often precluded them from driving Arielle to school, they hired Albert Lopez to drive Arielle to school on days when they were unable to do so personally. On those days, they permitted Lopez to drive a car that was owned by Budow and insured under the First Liberty policy.

On one such morning, March 8, 2004, Lopez was driving Arielle to school in a snowstorm when he apparently lost control of the vehicle and crashed into several trees. The impact caused the back bumper to penetrate through the trunk area and into the backseat where Arielle was seated. As a result, Arielle suffered serious injuries, including severe back injuries, requiring multiple surgeries and other extensive treatment.

At the time of the accident, Lopez insured his own vehicle through a policy provided by New Jersey Manufacturer's Insurance Company. That policy provided liability coverage for up to \$100,000 per accident. Lopez was also insured for liability purposes under Budow's First Liberty

⁴ "Stacking" refers to the practice of adding the policy limits on two or more insured vehicles to obtain a higher total amount of uninsured- or underinsured-motor-vehicle coverage. For example, if an insured purchases \$100,000 of uninsured- or underinsured-motor-vehicle coverage on two vehicles, he may actually recover up to \$200,000 in first-party benefits if he is injured by an uninsured or underinsured motorist.

policy, which included coverage for a driver who used a covered vehicle with the owner's permission. That policy provided up to \$250,000 in liability coverage for Arielle's injuries. Together, these policies offer \$350,000 of liability coverage.

In a parallel state-court proceeding, Arielle seeks recovery above the available \$350,000 of liability insurance. In correspondences related to the New Jersey state-court action, Arielle's counsel has insisted that she can recover both the underinsured coverage provided by her father's First Liberty policy and the excess liability coverage provided by her father's Liberty Mutual policy. The insurance companies have responded by informing Arielle's counsel that neither the underinsured coverage nor the umbrella coverage is available.

As for the underinsured coverage in the automobile insurance policy, First Liberty cited the following relevant endorsement:

A. We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "underinsured motor vehicle" because of "bodily injury":

1. Sustained by an "insured"; and
2. Caused by an accident.

The owner's or operator's liability for these damages must arise out of the ownership, maintenance, or use of the "underinsured motor vehicle". . . .

B. "Insured" as used in this endorsement means:

1. You or a "family member". . . .

C. "Underinsured motor vehicle" means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but the amount paid for "bodily injury" under that bond or policy to an "insured" is not enough to pay the full amount the "insured" is legally entitled to recover as damages.

However, “underinsured motor vehicle” does not include any vehicle or equipment:

1. For which liability coverage is provided under Part A of this policy. . . .⁵

As for the umbrella policy, Liberty Mutual relied on the following policy language, which was found on the second page of the contract under a section entitled “**EXCLUSIONS**”:

This policy does not apply to:

- h. **personal injury** to any **insured**.⁶

On the previous page, “insured” is defined to include:

you [the named insured and his/her spouse] and the following:

- a. residents of your household, but only if:
 - (1) related to you by blood, marriage or adoptions; or
 - (2) under the age of 21 and in the care of anyone named above;⁷

Defendants contest Plaintiffs’ assertion that these provisions disallow recovery in Arielle’s case. Accordingly, Plaintiffs filed the instant declaratory-judgment action so that this Court could determine whether the underinsured-motor-vehicle coverage provided by the First Liberty policy and/or the umbrella coverage provided by the Liberty Mutual policy is/are recoverable by Arielle in the pending state-court action.

II. STANDARD FOR SUMMARY JUDGMENT

Disposition upon motion for summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

⁵ Defs.’ Mot. for Summ. J. [Doc. # 25], at Ex. H, Endorsement AS 2051 09 00, Underinsured Motorists Coverage – Pennsylvania (Stacked).

⁶ Id. at Ex. C, Personal Catastrophe Liability Policy Agreement, at 2.

⁷ Id. at Ex. C, Personal Catastrophe Liability Policy Agreement, at 1.

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.”⁸ In this case, the Court is presented with cross-motions for summary judgment. The mere existence of cross-motions does not necessarily dictate that one motion will be granted and the other denied, thereby disposing of the case.⁹ If, however, there are no genuine issues as to any material fact, the Court may enter a final disposition by applying the relevant law to the undisputed facts.¹⁰ In situations where the parties have stipulated to all of the material facts, as have the parties in this case, there is by definition no genuine issue of material fact and only questions of law remain for the Court to decide.¹¹ As a result, the remaining dispute of law will be resolved by the Court at the summary-judgment stage.

III. DISCUSSION

A. The Underinsured-Motor-Vehicle Coverage

To rebut Plaintiffs’ assertion that the underinsured-motor-vehicle coverage provided by the First Liberty policy is not recoverable in the underlying personal-injury action, Defendants argue that the language of the underinsured-motor-vehicle-coverage clause cannot and does not exclude coverage under the particular circumstances of this case. Defendants do not contest Plaintiffs’ claim that the relevant policy language is clear and unambiguous. Nor do they argue that

⁸ Fed. R. Civ. P. 56(c).

⁹ See Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3d Cir. 1968).

¹⁰ See generally Fed. R. Civ. P. 56(c).

¹¹ See Fed. R. Civ. P. 56, Notes of Advisory Comm. on 1987 Amendments to Rule (“A fact is not genuinely in dispute if it is stipulated . . . by the parties . . .”). The stipulation must, however, resolve all material issues of fact so that there is no genuine factual dispute ripe for trial. An incomplete or equivocal stipulation may be insufficient to resolve all issues of material fact and, consequently, summary judgment would be inappropriate. See, e.g., Williams v. Chick, 373 F.2d 330 (8th Cir. 1967). In this case, the stipulation sufficiently resolves any issue of material fact, leaving the Court to dispose of the case upon the cross-motions.

the provision excluding Budow’s vehicle from the definition of an underinsured motor vehicle for purposes of underinsured-motor-vehicle coverage is invalid or against public policy.¹² Instead, they argue that Lopez’s vehicle, which was not involved in the accident, should qualify as an underinsured motor vehicle under the First Liberty policy contract such that Arielle can recover underinsured-motor-vehicle benefits under the policy. First, they argue that Lopez’s vehicle qualifies as an underinsured motor vehicle under a plain reading of the contract. In the alternative, they argue that the clause requiring that the underinsured motor vehicle somehow be involved in or related to the accident in order for underinsured-motor-vehicle benefits to be recoverable violates certain statutory provisions of the Pennsylvania Motor Vehicle Financial Responsibility Law (“MVFRL”), as well as the legislative intent underlying those provisions. The Court will consider these arguments in that order.

1. Whether Lopez’s Vehicle Triggers Underinsured-Motor-Vehicle Coverage

The Court’s inquiry begins with an examination of the policy contract itself, to determine if Lopez’s vehicle qualifies as an underinsured motor vehicle for the purposes of triggering coverage. Plaintiffs argue that the language of the underinsured-motor-vehicle-coverage provision precludes coverage when the vehicle purported to be the underinsured motor vehicle—Lopez’s vehicle—is wholly unrelated to the accident in which Arielle sustained her injuries. Defendants argue to the contrary, claiming that Lopez’s liability arises from his ownership

¹² See Defs.’ Mot. for Summ. J. [Doc. # 25], at 9 (“Defendants herein do not claim that the Budow vehicle is an underinsured vehicle, the claim is that the Lopez vehicle is an underinsured vehicle and indeed it is by the definitions contained both in the statute and the contract.”); Defs.’ Reply Br. [Doc. # 30], at 4 (“However, Defendants herein do not claim that the Budow vehicle is an underinsured vehicle, the claim is that the Lopez vehicle is an underinsured vehicle and indeed it is by the definitions contained both in the statute and the contract.”) (“Defendant does not claim that the Budow vehicle’s limits trigger the underinsured coverages of the Budow policy, but it is the Lopez vehicle’s liability coverage inadequacies that are the triggering mechanism.”).

of a car that qualifies as an underinsured motor vehicle because his liability policy is insufficient to fully compensate Arielle.

Under Pennsylvania law, a court interpreting the terms of an insurance contract must strive “to effectuate the intent of the parties as manifested by the language of the written instrument and must generally enforce the clear, unambiguous terms of the policy.”¹³

In this case, First Liberty is obligated to provide underinsured-motor-vehicle coverage when “an ‘insured’ is legally entitled to recover from the owner or operator of an ‘underinsured motor vehicle . . . [if] [t]he owner’s or operator’s liability for these damages . . . arise[s] out of the ownership, maintenance, or use of the ‘underinsured motor vehicle.’”¹⁴ Under this clear and unambiguous language, the liability to which the tortfeasor is subjected must be dependent in some way upon his ownership, maintenance, or use of the vehicle identified as the underinsured motor vehicle.

Defendants claim that Arielle is entitled to recover from Lopez for his negligence in operating her father’s vehicle. They further claim that Lopez is the “owner” of an underinsured motor vehicle because the liability policy on his own vehicle is inadequate to fully compensate Arielle for her injuries. Therefore, they argue, Arielle is legally entitled to recover from the owner or operator of an underinsured motor vehicle, thereby triggering the underinsured-motor-vehicle coverage provided by the First Liberty policy. They fail to address, however, how Lopez’s liability arises out of either his ownership, use, or maintenance of a vehicle that was parked in some other

¹³ Allstate Ins. Co. v. Leiter, 306 F. Supp. 2d 488, 491 (M.D. Pa. 2004) (quotation omitted); see also, e.g., Paylor v. Hartford Ins. Co., 640 A.2d 1234, 1235 (Pa. 1994).

¹⁴ Defs.’ Mot. for Summ. J. [Doc. # 25], at Ex. H, Endorsement AS 2051 09 00, Underinsured Motorists Coverage – Pennsylvania (Stacked).

location at the time of the March 2004 accident.

In fact, Lopez's liability in the pending state-court action is wholly unrelated to his ownership, use, or maintenance of his personal vehicle. It is clear that his liability for Arielle's injuries does not arise out of the use or maintenance of his personal vehicle: he was not operating his vehicle at the time of the accident and Arielle's injuries are not connected to any maintenance activity on his personal vehicle. Lopez's liability is also unrelated to the ownership of his personal vehicle. He is liable for his negligent operation of the Budow vehicle, and that liability is not dependent upon his ownership of a personal vehicle that was not involved in the accident; he would be liable regardless of the fact that he owned a vehicle covered by a liability insurance policy at the time of the accident. Therefore, under the plain language of the policy contract, the underinsured-motor-vehicle coverage cannot be triggered by Lopez's vehicle, because Lopez's liability does not arise out of his ownership, use, or maintenance of an underinsured motor vehicle.

2. Whether the Exclusionary Provision is Valid

The next question, then, is whether this clause—which essentially excludes certain vehicles defined as underinsured motor vehicles under the MVFRL from qualifying as the underinsured motor vehicle under the policy—is contrary to the MVFRL or the public policy underlying it. Defendants argue that the MVFRL defines underinsured motor vehicles in more general terms than the policy, and that the MVFRL does not support the disqualification of Lopez's vehicle as an eligible underinsured motor vehicle for the purposes of recovering underinsured-motor-vehicle coverage. Defendants' overarching argument is that it is against the public policy of the MVFRL to allow First Liberty to avoid providing underinsured-motor-vehicle coverage in this case.

That the exclusionary clause at issue should be stricken as against public policy is a

novel argument not yet addressed by Pennsylvania courts.¹⁵ While multiple courts have considered whether insurers can enforce “family car exclusions,”¹⁶ it does not appear that any court has considered whether insurers can require that the “underinsured motor vehicle,” as defined in the policy, be involved in or somehow related to the accident—that is, whether insurers can require that the underinsured motor vehicle’s owner’s or operator’s liability for the accident arise out of his ownership, use, or maintenance of the underinsured motor vehicle. To determine the validity of this clause, the Court must examine the purpose of the MVFRL, the policy underlying the underinsured-motor-vehicle-insurance provisions of the MVFRL, and the unique factual circumstances in the instant case.

a. *Considering the Validity of Contract Provisions in Light of Public Policy*

The Pennsylvania Supreme Court has acknowledged that “public policy is more than a vague goal which may be used to circumvent the plain meaning of [a] contract.”¹⁷ Accordingly, the Court has established a “cautious approach in examining whether a contract provision violates the often formless face of public policy.”¹⁸ According to the Court,

Public policy is to be ascertained by reference to the laws and legal precedents and not from the 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

¹⁵ For the purposes of this discussion, the term “Pennsylvania courts” includes both Pennsylvania state courts and federal courts applying Pennsylvania law.

¹⁶ A “family car exclusion” generally limits the definition of an underinsured motor vehicle by excluding any vehicle owned by or furnished or available for the regular use of the named insured or any family member. See, e.g., Paylor, 640 A.2d at 1235.

¹⁷ Eichelman v. Nationwide Ins. Co., 711 A.2d 1006, 1008 (Pa. 1998).

¹⁸ Prudential Prop. & Cas. Ins. Co. v. Colbert, 813 A.2d 747, 752 (Pa. 2002) (quoting Burstein v. Prudential Prop. & Cas. Ins. Co., 809 A.2d 204, 207 (Pa. 2002)).

of that policy through long governmental practice or statutory enactments, . . . the Court should not assume to declare contracts contrary to public policy. The courts must be content to await legislative action.¹⁹ . . . Moreover, the application of public policy concerns in determining the validity of an insurance exclusion is dependent upon the factual circumstances presented in each case.²⁰

Accordingly, this Court must examine the legislative intent behind the MVFRL and its underinsured-motorist provisions—as ascertained from both the statute itself and related case law—when considering whether the disputed clause is invalid as against Pennsylvania public policy.

b. *Policy Behind the MVFRL and Underinsured-Motor-Vehicle Insurance*

Before the Pennsylvania legislature enacted the MVFRL, underinsured-motor-vehicle coverage, unlike uninsured-motor-vehicle coverage, was neither required nor regulated by statute.²¹ The MVFRL, however, requires insurers to offer underinsured-motor-vehicle coverage for purchase by an insured with his or her liability policy.²² By the language of the statute, the coverage is intended to “provide protection for persons who suffer injury arising out of the maintenance or use of a motor vehicle and are legally entitled to recover damages therefor from owners or operators of underinsured motor vehicles.”²³ The statute defines an underinsured motor vehicle very generally as: “[a] motor vehicle for which the limits of available liability insurance and self-insurance are insufficient to pay losses and damages.”²⁴

Pennsylvania courts have considered the purpose of the MVFRL and, specifically,

¹⁹ Burstein, 809 A.2d at 207 (Pa. 2002) (quotation omitted).

²⁰ Id. (citing Paylor, 640 A.2d at 1240).

²¹ Wolgemuth v. Harleysville Mut. Ins. Co., 535 A.2d 1145, 1148 (Pa. Super. Ct. 1988) (en banc).

²² 75 Pa. Con. Stat. Ann. § 1731(a) (2006).

²³ Id. § 1731(c).

²⁴ Id. § 1702.

the underinsured-motor-vehicle coverage required by the MVFRL, on numerous occasions. When considering the general policy underlying the MVFRL, the Supreme Court of Pennsylvania has often noted that “legislative concern for the increasing cost of insurance is the public policy that is to be advanced by statutory interpretation of the MVFRL.”²⁵ According to the Court,

[t]he repeal of the No-Fault Act and the enactment of the MVFRL reflected a legislative concern for the spiralling [sic] consumer cost of automobile insurance and the resultant increase in the number of uninsured motorists driving on public highways . . . [as well as] the General Assembly’s departure from the principle of ‘maximum feasible restoration’ embodied in the now defunct No-Fault Act. . . . This policy concern . . . functions to protect insurers against forced underwriting of unknown risk that insureds have neither disclosed nor paid to insure. Thus, operationally, insureds are prevented from receiving gratis coverage, and insurers are not compelled to subsidize unknown and uncompensated risks by increasing insurance rates comprehensively.²⁶

The specific policy underlying the MVFRL’s underinsured-motorist-coverage requirement was first announced by an *en banc* panel of the Pennsylvania Superior Court in Wolgemuth v. Harleysville Mutual Insurance Co.²⁷:

The purpose of underinsured motorist coverage is to protect the insured (and his additional insureds) from the risk that a negligent driver of *another* vehicle will cause injury to the insured (or his additional insureds) and will have inadequate liability coverage to compensate for the injuries caused by his negligence. . . .²⁸ [T]he statute contemplates one policy applicable to the vehicle which is at fault in causing the injury to the claimant and which is the source of liability coverage (which is ultimately insufficient to fully compensate the victim), and a *second* policy, under which the injured claimant is either an insured or a covered person. It is the *second*

²⁵ E.g., Burstein, 809 A.2d at 207 (internal quotation omitted).

²⁶ Id. at 207–08 (internal quotations and citations omitted).

²⁷ 535 A.2d at 1149.

²⁸ Id. (emphasis added). The Third Circuit has reiterated this concept: “[Underinsured-motorist] insurance is designed to protect an insured from a negligent driver of another vehicle who causes injury to the insured, *but through no fault of the insured*, lacks adequate insurance coverage to compensate the insured for his or her injuries.” Nationwide Mut. Ins. Co. v. Cosenza, 258 F.3d 197, 209 (3d Cir. 2001) (emphasis added).

policy which the statute contemplates as the source of underinsured motorist coverage, where the liability coverage provided by the first policy of insurance is insufficient to fully compensate the claimant for his injuries.²⁹

Pennsylvania courts have consistently adopted and cited this language when considering questions regarding the applicability of underinsured-motor-vehicle coverage in light of the MVFRL. Other courts have expanded upon this explanation of the rationale underlying the MVFRL's underinsured-motor-vehicle-insurance provisions. For instance, the Superior Court has noted that the provisions were promulgated

to resolve the inequities which resulted when only uninsured motorist coverage was mandatory and a claimant who had purchased uninsured motorist coverage was involved in a car accident with an underinsured motorist rather than an uninsured motorist. [The Pennsylvania] legislature thus intended underinsured motorist coverage to operate in the same manner as uninsured motorist coverage only for motorists who were injured by underinsured motorists. With uninsured motorist coverage, a claimant cannot recover third party liability benefits and uninsured motorist coverage from a tortfeasor's policy of insurance. . . . [Therefore], it follows logically that a claimant cannot recover third party liability benefits and underinsured motorist coverage from the same policy of insurance.³⁰

Furthermore, Pennsylvania courts have often noted that underinsured-motor-vehicle coverage is generally purchased “to protect oneself from other drivers whose liability insurance purchasing decisions are beyond one’s control.”³¹

Based on these policy considerations, numerous Pennsylvania courts and federal courts applying Pennsylvania law have found that the MVFRL does not require insurance providers

²⁹ Id. (emphasis in original).

³⁰ Newkirk v. United Servs. Auto. Assoc., 564 A.2d 1263, 1267–68 (Pa. Super. Ct. 1989); see also, e.g., Cooperstein v. Liberty Mut. Ins. Co., 611 A.2d 721, 725 (Pa. Super. Ct. 1992).

³¹ Cosenza, 258 F.3d at 209 (quoting Paylor, 640 A.2d at 1238) (also citing to Kmonk-Sullivan v. State Farm Mut. Ins. Co., 746 A.2d 1118, 1123 (Pa. Super. Ct. 1999)); see also Paylor, 649 A.2d at 1237–38 (quoting Holz v. N. Pac. Ins. Co., 765 P.2d 1306, 1309–10 (Wash. Ct. App. 1988)).

to pay both liability and underinsured-motor-vehicle benefits from a single policy.³²

In upholding exclusionary clauses that disallow so-called dual recovery, the courts have emphasized that underinsured-motor-vehicle coverage is not intended to relieve the insured or his family members from the obligation to purchase adequate liability insurance.³³ As such, an injured individual should not be permitted to recover both third-party liability benefits and first-party underinsured-motorist benefits from the same insurance policy.³⁴ Numerous courts have formally recognized that dual recovery of liability and underinsured-motor-vehicle benefits from a single insurance policy is generally prohibited under Pennsylvania law.³⁵

This prohibition, however, is not absolute. Rather, it is founded on the premise that “an individual should not be able to convert the relatively inexpensive underinsured motorist insurance into the more expensive liability insurance,”³⁶ nor should insurers “be compelled to underwrite unknown risks that it has not been compensated to insure.”³⁷ As the Wolgemuth court noted, it may be possible for a person to recover under both the liability and underinsured-motor-

³² See, e.g., Leiter, 306 F. Supp. 2d 488; Paylor, 640 A.2d 1234; Cooperstein, 611 A.2d 721; Kelly v. Nationwide Ins. Co., 606 A.2d 470 (Pa. Super. Ct. 1992); Sturkie v. Erie Ins. Co., 595 A.2d 152 (Pa. Super. Ct. 1991); Caladarado v. Keystone Ins. Co., 573 A.2d 1108 (Pa. Super. Ct. 1990); Newkirk, 564 A.2d 1263.

³³ See Paylor, 640 A.2d at 1240 (adopting the reasoning of the court in Linder by Linder v. State Farm Mut. Auto. Ins. Co., 364 N.W.2d 481 (Minn. App. Ct. 1985)).

³⁴ E.g., Newkirk, 564 A.2d at 1268 (“[A] claimant cannot recover third party liability benefits and underinsured motorist coverage from the same policy of insurance.”).

³⁵ See supra note 32.

³⁶ See, e.g., Cosenza, 258 F.3d at 211–12; Leiter, 306 F. Supp. 2d at 493; Paylor, 640 A.2d at 1240.

³⁷ Colbert, 813 A.2d at 754 (quoting and approving Burstein, 809 A.2d at 208).

vehicle coverages of a single policy under certain circumstances.³⁸ But the potential for such recovery depends on the facts of each case and, ultimately, dual recovery will be permitted only in cases where it is clear that the insured is not attempting to convert underinsured-motor-vehicle coverage into liability coverage, or forcing the insurer to underwrite unknown risks that have neither been disclosed nor included in a premium calculation.³⁹

And, to this date, Pennsylvania courts have been reluctant to allow double recovery from a single policy.⁴⁰ Defendants cite the case of Marroquin v. Mutual Benefit Insurance Co.⁴¹ to support their argument that Arielle should be able to recover both liability and underinsured-motorist benefits in her underlying personal-injury action. But the plaintiff in that case was not permitted to “double recover” both types of benefits from a single policy; rather, the Court held only that an insured could not be precluded from recovering underinsured-motor-vehicle benefits simply because the underinsured motor vehicle was owned by his brother.⁴²

In Marroquin, the plaintiff was injured when he was struck by a car owned and operated by his brother. The plaintiff was insured under an insurance policy owned by his parents

³⁸ Wolgemuth, 535 A.2d at 1149. In fact, Pennsylvania courts have on rare occasions allowed double recovery, but only under exceptional circumstances. See Cont'l Ins. Co. v. Kubek, 86 F. Supp. 2d 503 (E.D. Pa. 2000); Pempkowski v. State Farm Mut. Auto. Ins. Co., 678 A.2d 398 (Pa. Super. Ct. 1991) (considering a set-off provision as opposed to an exclusionary clause).

³⁹ Cosenza, 258 F.3d at 212 (citing and discussing the Supreme Court of Pennsylvania’s decision in Paylor, 640 A.2d at 1240–41); see also Colbert, 813 A.2d at 754 (quoting and approving Burstein, 809 A.2d at 208).

⁴⁰ While Pennsylvania courts have allowed double recovery in some exceptional cases, see Kubek, 86 F. Supp. 2d 503; Pempkowski, 678 A.2d 398, Defendants have failed to cite a single case in which double recovery was permitted or explain how the instant case is analogous to those cases. Moreover, in cases where double recovery has been permitted, the courts have reiterated that double recovery is appropriate only when the claimant is not attempting to convert underinsured-motorist coverage into liability coverage. See, e.g., Kubek, 86 F. Supp. 2d at 509.

⁴¹ 591 A.2d 290 (Pa. Super. Ct. 1991).

⁴² Id. at 297.

that explicitly denounced liability coverage for a “non-covered vehicle” owned by a family member. The policy included underinsured-motor-vehicle benefits, but excluded from the definition of “underinsured motor vehicle” any car owned by or furnished or available for the regular use of the named insureds or any family members. The plaintiff’s brother insured himself and his vehicle under a separate policy. It was uncontested that the plaintiff’s insurance policy did not extend liability coverage to his brother’s vehicle; therefore, only the brother’s policy provided liability coverage. After recovering the limits of his brother’s liability coverage, the plaintiff sought to recover underinsured-motorist benefits from his parents’ insurance policy, under which he was insured. The insurance company denied benefits based on the family-car exclusionary clause. The trial court upheld the exclusionary clause, determining that it did not violate the legislative intent of the MVFRL or public policy.⁴³ The Pennsylvania Superior Court reversed. It found that the exclusionary clause was invalid under Pennsylvania law because the plaintiff was not trying to convert underinsured-motorist coverage into liability coverage, and therefore should not be barred from recovering his first-party benefits.⁴⁴ The plaintiff did not attempt to recover both liability and underinsured-motorist benefits from his parents’ insurance policy, so the exclusion was overreaching.

As such, Marroquin is consistent with the various Pennsylvania cases in which exclusionary clauses have been upheld when the insured attempts to convert underinsured-motor-vehicle coverage into liability coverage because the plaintiff did not attempt to “double recover.” The court’s decision was limited to the unique factual circumstances of the case and did not

⁴³ Id. at 292.

⁴⁴ Id. at 296–97.

announce a new general rule condoning double recovery in all cases. Even after Marroquin, it is clear that the policy and legislative intent behind the MVFRL prohibits an insured from dual recovery if the insured is attempting to convert underinsured-motor-vehicle coverage into liability coverage, or forcing the insurer to underwrite unknown risks that have neither been disclosed nor paid for.

3. Does the Public Policy of the MVFRL Require Invalidation of the Clause?

After examining the policy rationales underlying the MVFRL, the Court is unable to discern an overriding public policy that forbids First Liberty from restricting its definition of a qualifying underinsured motor vehicle in the way that it has here. To the contrary, invalidation of the restriction in this case would defeat the legislative intent and disserve the various policies behind the MVFRL and its provisions concerning underinsured-motor-vehicle insurance.

First, the MVFRL was enacted in order to control the ever-increasing costs of automobile insurance. One of the major principles underlying the statute, therefore, is that insurers should not be forced to underwrite unknown risks that have neither been disclosed to the insurers nor contemplated in the premium calculation. Generally, courts should not allow insureds to receive gratis coverage, since doing so could spawn comprehensive increases in insurance rates to subsidize the unexpected coverage.

In this case, forcing First Liberty to provide underinsured-motor-vehicle benefits to Arielle would require it to underwrite unknown risks and provide gratis coverage. The policy explicitly and conspicuously restricted coverage to those instances when the tortfeasor's liability arose out of the ownership, use, or maintenance of the underinsured motor vehicle. As a result, the policy did not agree to underwrite the risk that First Liberty would have to pay underinsured-motor-

vehicle benefits if a permissive user of the Budow vehicle, who was also the owner of an unrelated vehicle with an insufficient liability policy, caused injury to an insured. By the terms of the policy, Budow did not pay for such coverage. Accordingly, it would be inappropriate and in contravention of the MVFRL for the Court to rewrite the contract so that Arielle would receive such coverage for free.

Second, the purpose of underinsured-motor-vehicle insurance is to protect insureds from the risk that a negligent driver, over whose insurance-purchasing decisions the insureds have no control, causes injuries for which he has inadequate liability coverage. Purchasing underinsured-motor-vehicle insurance does not relieve the insured from providing adequate liability insurance for his own vehicle. Pennsylvania courts have consistently confirmed that insureds should not be able to purchase low-costing underinsured-motor-vehicle coverage in lieu of more-expensive liability coverage, and then attempt to convert the underinsured-motor-vehicle coverage into liability coverage when a loss occurs.

Here, Budow was in full control of Lopez's liability coverage as a permissive driver of the Budow vehicle. Had Arielle's father wanted his daughter to have greater protection while riding in his vehicle when it was being driven by a permissive user, he should have purchased greater liability insurance to cover the permissive user's potential negligence or required the permissive user to carry additional liability coverage. But, since he did not, he cannot now attempt to rely on underinsured-motor-vehicle coverage to fill a coverage gap that he had the responsibility to fill by ensuring that a permissive user of his vehicle would have adequate liability insurance.

This is a classic example of an insured attempting to convert underinsured-motor-vehicle insurance into liability insurance, which Pennsylvania courts have consistently prohibited.

Allowing recovery of underinsured-motor-vehicle benefits in this case would allow Budow to pay a low premium for his underinsured-motor-vehicle coverage and then convert that coverage into liability insurance, for which he should have paid a much higher premium. As discussed above extensively, Pennsylvania law does not allow such conversion, and this Court finds no reason here to carve out an exception to that well-settled doctrine.

Third, underinsured-motor-vehicle coverage is intended to protect an insured from negligence by an underinsured driver in the same way that he or she would be protected from an uninsured driver. If Lopez had not had independent liability insurance, he would have been covered by Budow's liability insurance alone. Under those circumstances, it is firmly established that Arielle would not be able to recover both liability benefits and uninsured-motor-vehicle coverage from the First Liberty policy. As Pennsylvania courts have noted, this outcome should not be different simply because Lopez has some liability coverage from his personal policy.⁴⁵

Finally, While Defendants argue that the MVFRL's definition of an underinsured motor vehicle requires First Liberty to consider Lopez's vehicle a qualifying underinsured motor vehicle under the contract, no support for this interpretation exists in either the MVFRL or relevant case law. Defendants have failed to identify any supporting legislative intent or a single case requiring insurance companies to adopt the MVFRL's definition in crafting their policy contracts. Contrary to Defendants' argument, the fact that the MVFRL definition would encompass the Lopez vehicle does not mean that First Liberty is unable to include additional requirements for which vehicles will trigger its underinsured-motor-vehicle coverage.

Ultimately, the public policy and legislative intent behind the MVFRL supports the

⁴⁵ See Cooperstein, 611 A.2d at 725; Newkirk, 564 A.2d at 1267-68.

restrictive clause included in the First Liberty policy contract that limits recovery of underinsured-motor-vehicle benefits to cases in which the identified underinsured motor vehicle is reasonably related to the subject accident. Pennsylvania public policy does not require this Court to rewrite the contract by striking the clause; nor does it support such activism. The policy contract reflects the bargained-for agreement between the insurer and the insured, and this Court will not disrupt its terms. Accordingly, since the clause is valid and Lopez's vehicle does not qualify as an underinsured motor vehicle under its explicit language, underinsured-motor-vehicle benefits are not recoverable in the pending state-court action.

B. The Umbrella Coverage

In addition to their claim that underinsured-motor-vehicle benefits should be recoverable in this case, Defendants claim that Arielle can recover benefits from the Liberty Mutual umbrella policy based on her father's liability. In denying coverage under the umbrella policy, Plaintiffs point to Exclusion h, which attempts to exclude coverage for personal injuries suffered by an insured. According to Plaintiffs, since "an insured" includes a resident of the named insured's household who is related to the policyholder by blood or under the age of 21 and in the care of the named insured, Plaintiffs argue that Arielle's claim against her father is not covered.

The crux of Defendants' argument for coverage is that excluding coverage for personal injuries suffered by an insured, Arielle, frustrates the reasonable expectations of the named insured, who purchased the policy. In making this overarching argument, Defendants intersperse arguments that the relevant exclusionary language is unenforceable because it is included in a contract of adhesion, is objectively unfair, and is inconspicuously located, even if its terms are unambiguous.

1. Applicable Pennsylvania Law

Pennsylvania courts generally agree that when an exclusionary provision in an insurance policy is clear and unambiguous, a court must reject the argument that an insured's reasonable expectations have been frustrated by that exclusionary provision.⁴⁶ This is true even though insurance contracts are generally considered to be contracts of adhesion, since a clear, unambiguous, and conspicuously located exclusionary clause will prevent any possibility of unfair surprise.⁴⁷ Thus, if an exclusionary clause in an insurance contract is unambiguous, conspicuously located, and does not result in the provision of a type of coverage wholly different than the type of coverage that the insured is seeking, then the exclusion is generally enforceable.

The Supreme Court of Pennsylvania considered this issue in the seminal case Standard Venetian Blind Co. v. American Empire Insurance,⁴⁸ holding that “[w]here . . . the policy limitation relied upon by the insurer to deny coverage is clearly worded and conspicuously displayed, the insured may not avoid the consequences of that limitation by proof that he failed to read the limitation or that he did not understand it.”⁴⁹ Acknowledging that “the exclusions at issue [were] plain and free of ambiguity, and could have been readily comprehended by [the insured] had he

⁴⁶ See Neil v. Allstate Ins. Co., 549 A.2d 1304, 1309 (Pa. Super. Ct. 1988) (citing Standard Venetian Blind Co. v. Am. Empire Ins., 459 A.2d 563 (Pa. 1983)); see also, e.g., Bubis v. Prudential Prop. & Cas. Ins. Co., 718 A.2d 1270, 1272 (Pa. Super. Ct. 1998); Riccio v. Am. Republic Ins. Co., 683 A.2d 1226, 1231 (Pa. Super. Ct. 1996) (“An insured will not be heard to complain that his reasonable expectations were frustrated by policy terms which are clear and unambiguous.”); St. Paul Mercury Ins. Co. v. Corbett, 630 A.2d 28, 30 (Pa. Super. Ct. 1993).

⁴⁷ See Bishop v. Washington, 480 A.2d 1088, 1094–95 (Pa. Super. Ct. 1984); see also Neil, 549 A.2d at 1310 n.4.

⁴⁸ 459 A.2d 563 (Pa. 1983).

⁴⁹ Id. at 567.

chosen to read them,”⁵⁰ the Court found that to allow the insured to avoid application of the policy limitations would require it “to rewrite the parties’ written contract.”⁵¹

The Supreme Court’s analysis in Venetian Blind directly conflicted with an approach previously announced by the Superior Court in Hionis v. Northern Mutual Insurance Co.⁵² In Hionis, which was decided almost a decade before Venetian Blind, the court held that an insurer had “the burden of establishing the applicability of an exclusion or limitation [by proving] that the insured was aware of the exclusion or limitation and that the effect thereof was explained to him,” even if the exclusionary provision was “written in unambiguous terms.”⁵³ The Supreme Court explicitly rejected this view in Venetian Blind, instructing Pennsylvania courts that Hionis was “not to be followed.”⁵⁴ But, at the same time, the Court noted that “in light of the manifest inequality of bargaining power between an insurance company and a purchaser of insurance, a court may on occasion be justified in deviating from the plain language of a contract of insurance.”⁵⁵

The Supreme Court of Pennsylvania later confirmed this possibility in Tonkovic v. State Farm Mutual Automobile Insurance Co.,⁵⁶ when it held that an insured could avoid an unambiguous limitation under the unique circumstances of that case. In Tonkovic, the defendant

⁵⁰ Id. at 566 (internal quotation omitted).

⁵¹ Id.

⁵² 327 A.2d 363 (Pa. Super. Ct. 1974).

⁵³ Id. at 365.

⁵⁴ Venetian Blind, 459 A.2d at 567. Nonetheless, Defendants cite to Hionis, and the language explicitly rejected by the Pennsylvania Supreme Court in Venetian Blind, as if it were still controlling law, which the Court finds to be a rather disingenuous tactic.

⁵⁵ Id.

⁵⁶ 521 A.2d 920 (Pa. 1987).

insurance company unilaterally inserted an exclusionary clause into an insurance contract after it had already accepted the insured's application and premium payment. After inserting the exclusionary clause, the insurance company failed to explain the clause to the insured or ensure that the insured accepted the clause. The Supreme Court decided that this was the type of case contemplated by Venetian Blind in which a court could deviate from the clear language of the policy. This was because the insurer elected to issue a policy substantially different from what the insured requested and paid for, and then failed to advise the insured of the changes made.⁵⁷ Under those circumstances, the insurer had a duty at least to inform the insured "of the substantial discrepancy between the coverage for which he applied and that which the policy actually provided."⁵⁸ Ultimately, the Court held that "where . . . an individual applies and prepays for specific insurance coverage, the insurer may not unilaterally change the coverage provided without an affirmative showing that the insured was notified of, and understood, the change, regardless of whether the insured read the policy."⁵⁹ The Court's holding, however, was limited to the factual circumstances of the case, and the Court suggested that Venetian Blind would continue to control in cases where the insured simply failed to read or understand a clear and unambiguous limitation.⁶⁰

Based on the decision in Venetian Blind, Pennsylvania courts have consistently upheld exclusionary clauses that clearly and unambiguously limit coverage. For example, in Neil

⁵⁷ Id. at 925.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ See id. at 924–25.

v. Allstate Insurance Co.,⁶¹ the Superior Court of Pennsylvania upheld an exclusionary clause very similar to the one at issue in the instant case, finding that it clearly and unambiguously excluded coverage for bodily injury suffered by an insured. In that case, a so-called family exclusion clause in a homeowners' insurance policy stated that the policy would "not cover bodily injury to an insured person," and included in its definition of "an insured person" the policyholder and, "if a resident of [the policyholder's] household, any relative and any dependent person in [the policyholder's] care."⁶² When the policyholders' son was injured near their home, they instituted an action against the alleged tortfeasor. The tortfeasor subsequently joined them as defendants based on a negligent-supervision claim, and they demanded that Allstate provide a defense and cover them for any liability they could incur as a result of the action. Allstate refused to do so based on the family exclusion clause.

After reviewing Pennsylvania cases on the subject, the court devoted significant attention to Venetian Blind in finding that the exclusionary clause was enforceable. Accordingly, the court refused to rewrite the policy by invalidating the clause because "[t]o do so . . . would disturb established principles of law regarding the rights and liabilities of parties who freely contract, and would place insurance companies in the impracticable situation of insuring losses which they have specifically not contemplated and for which they have not funded reserves."⁶³ Furthermore, the court found that even though the policy contract was a contract of adhesion, the exclusionary clause was not "unreasonably favorable" to the insurer; the exclusion was clearly and precisely

⁶¹ 549 A.2d 1304 (Pa. Super. Ct. 1988).

⁶² Id. at 1304–05.

⁶³ Id. at 1310.

stated, was “not buried in fine print deep in the insurance contract,” and the insured had other insurance options for covering the types of injuries that their son suffered.⁶⁴

The Third Circuit Court of Appeals addressed the validity of a similar exclusionary clause in Electric Insurance Co. v. Rubin.⁶⁵ In that case, a personal excess-liability policy contained an exclusionary clause that excluded coverage “for personal injury to you [the policyholder] or your relative.”⁶⁶ When the insured faced a lawsuit brought by his wife for personal injuries suffered in a car accident, the insurer denied coverage based on the exclusionary clause. The Third Circuit conducted a three-part inquiry to determine whether the clause was valid and enforceable. First, the court determined that the clause, as written, excluded coverage. Then, the court inquired into whether the exclusionary clause could be invalidated based on a specific law or precedent requiring invalidation, and found that no such law or precedent existed. Finally, the court considered whether legislative intent required invalidation, and found that there was no applicable insurance or consumer-protection statute that the legislature intended to require invalidation of the clause. Ultimately, the court held that the exclusionary clause was enforceable, noting that so-called family exclusion clauses were valid in Pennsylvania,⁶⁷ and that they must be given effect when their language is clear and unambiguous.⁶⁸

⁶⁴ Id. at 1310 n.4.

⁶⁵ 32 F.3d 814 (3d Cir. 1994).

⁶⁶ Id. at 815.

⁶⁷ Id. at 818.

⁶⁸ Id. at 817.

2. Enforceability of Exclusionary Clause in this Case

In the instant case, the Court finds no reason to deviate from the holdings of Pennsylvania courts considering clear, unambiguous, and inconspicuously placed exclusionary clauses. Defendants' argument that their reasonable expectations are frustrated by the exclusionary clause does not convince the Court that it should rewrite the contract, which Defendants entered into freely and with full knowledge of its terms. Because the exclusionary clause comports with the requirements for validity and enforceability under Pennsylvania law, the Court will allow it to have its intended effect.

Notwithstanding Defendants' argument that the Liberty Mutual insurance contract is a contract of adhesion, the limiting provision cannot be struck in the name of the insureds' so-called reasonable expectations. The exclusionary clause is both clear and unambiguous, as well as conspicuously located. It is *not*, as Defendants claim, "buried within the language of the policy." It is prominently displayed on the second page of the policy under the all-caps and bold heading "**EXCLUSIONS.**" The wording of the exclusion is neither subtle nor technical; rather, it is plain and straightforward, clearly excluding "personal injury to any insured."⁶⁹ On the previous page, "insured" is clearly defined to include a resident of the policyholders' household that is either related by blood or under the age of 21 and in the care of the policyholders. Understanding the exclusion requires nothing more than a reasonable reading of the policy. It does not require any special or technical knowledge, excessive searching or sifting through the policy, or reference to any materials other than the policy itself.

⁶⁹ The terms "personal injury" and "insured" are even bolded to inform the policyholder/reader that the policy includes specific definitions for those words.

Despite Defendants' argument to the contrary, the Supreme Court of Pennsylvania's decision in Venetian Blind controls in this case, and Liberty Mutual did not have an affirmative duty to specifically make Defendants aware of the exclusion or explain the effect thereof. As discussed above, the exclusion was conspicuously included in the policy at the time of purchase, and was worded in clear and unambiguous language. This case, therefore, is easily distinguishable from Tonkovic, where the insurer unilaterally limited coverage by adding an exclusion *after* having accepted the application and premium payment for the policy. In that case, the insured received a policy providing coverage that significantly differed from the specific insurance he had requested and for which he had paid a premium. As a result, the Venetian Blind doctrine was inapplicable, and the court was justified in deviating from the plain language of the contract.

In this case, on the other hand, "[t]he insurance policy issued . . . was what it purported to be, and what the insured purchased[:] a general liability policy. The purpose of a general liability policy is to protect an insured from claims made by third parties for injuries to their person or property resulting from the policyholder's negligence."⁷⁰ An umbrella policy is intended to protect the insureds' assets only from third-party claims, not claims made by an insured under the policy. This is especially true when the policy contains an obvious and plain exclusion for first-party personal-injury claims—that is, claims made by an insured against the policyholders. In light of the type of policy being purchased and the clear and unambiguous exclusionary clause, Defendants cannot now claim that they reasonably expected that the umbrella policy they purchased would provide such coverage. Had Budow and Fuchs simply read the policy at the time of purchase, they

⁷⁰ Tonkovic, 521 A.2d at 923; see also id. at 923–24 (describing the reasoning underlying the Venetian Blind decision and distinguishing the facts of Tonkovic so that the Court could depart from Venetian Blind).

would have understood—as any reasonable person would have understood—that they would not be covered for personal injuries suffered by them or their daughter, Arielle. As the Supreme Court of Pennsylvania established in Venetian Blind, in situations such as this one where “the policy limitation relied upon by the insurer to deny coverage is clearly worded and conspicuously displayed, the insured may not avoid the consequences of that limitation by proof that he failed to read the limitation or that he did not understand it.”⁷¹

As other Pennsylvania courts have noted, exclusionary clauses such as the one at issue here are included in insurance policies in order to make insurance coverage available to consumers at competitive premium rates.⁷² If courts choose to rewrite contracts by striking plain and clear exclusions, insurance companies would be forced to provide coverage that they had not contemplated when calculating their premiums, inevitably resulting in the future escalation of premium rates and a pricing-out effect that could deter or preclude some consumers from purchasing excess liability policies. Instead, in the absence of any deception, unfair dealing, or unconscionability, courts should “accord the proper significance to the written contract.”⁷³ Doing so will uphold the reasonable expectations of both the insurers and the insureds: insurers will be required to provide the amount and type of coverage that they contracted to provide, and insureds will be provided with the coverage for which they bargained and paid their premium.

Accordingly, this Court will enforce the exclusionary clause in the Liberty Mutual policy precluding coverage for personal injuries sustained by an insured. Considering the clarity,

⁷¹ 469 A.2d at 567.

⁷² See, e.g., Neil, 549 A.2d at 1310 n.4.

⁷³ Venetian Blind, 469 A.2d at 567.

unambiguity, and conspicuousness of the clause, Defendants could not have reasonably expected coverage for injuries sustained by Arielle, who is clearly an insured under the policy. Under Pennsylvania law, they cannot now claim that they did not understand that such injuries would not be covered and expect the Court to rewrite the contract to their liking.

IV. CONCLUSION

Applying contract terms as they are written at times leads to unfortunate results for someone affected by the contract. Such is the case here where the applicable liability coverages may be insufficient to fully compensate Arielle for her injuries. But the principles of contract law require the Court to acknowledge and respect the right of parties to freely contract with one another for specific rights and duties. The policy contracts at issue in this case simply do not provide the coverage that Defendants hoped they might, and the Court cannot find sufficient grounds to rewrite the contracts to provide the coverage sought. Accordingly, Arielle may not look to either the underinsured-motor-vehicle coverage under the First Liberty policy or the excess liability coverage under the Liberty Mutual policy to cover her damages in her pending state-court personal-injury action.

An appropriate Order follows.

