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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Matthew KEARNS and Patricia Kearns, Plaintiffs,

v.

TRAVELERS PROPERTY CASUALTY COMPANY of America and Progressive Direct Insurance Company, Defendants.

C.A. No. N16C-02-095 RRC
|
Submitted: October 15, 2019
|
Decided: November 1, 2019

On Defendant Travelers Property Casualty Company of America's Motion in Limine "To Exclude Evidence and/or Testimony Regarding Damages Under an Underinsured Motorist Policy." **GRANTED.**

Attorneys and Law Firms

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MEMORANDUM OPINION

COOCH, R.J.

I. INTRODUCTION

***1** Before this Court is Defendant Travelers Property Casualty Company of America's ("Travelers") Motion in Limine. This is a case involving the enforceability of a non-duplication of payment clause in an underinsured motorist ("UIM") insurance policy offered by Travelers to the employer of Plaintiff Matthew Kearns where Plaintiff Kearns has already received workers' compensation benefits pursuant to workers' compensation insurance provided by his employer. Plaintiff was an employee who was injured in an automobile accident while driving an automobile owned by his employer.

Travelers contends as follows:

1. The Employer, pursuant to the Delaware Supreme Court's holding in [*Stoms v. Federated Serv. Ins. Co.*], had the right to buy [underinsured motorist] coverage with the limitations contained in the current Travelers policy which only prevents double recovery for losses that were paid under other coverage bought by the Employer.

2. The Employer had no requirement to buy UIM coverage and no requirement to buy duplicative coverage.

3. The clause at issue in the Travelers policy is enforceable as a restriction on claims for any element of losses the instant plaintiff is entitled to recover under Workers' Compensation. Plaintiff should not be allowed to plead, prove and/or recover for losses that include all medical bills, since they were payable under PIP and/or Workers' Compensation, and all wages payable under Total Disability (TTD); Temporary Partial Disability (TPD); Permanent Partial Disability (PPD); and Disfigurement that the plaintiff was entitled to recover under Workers' Compensation.[1]

Plaintiffs Matthew Kearns and Patricia Kearns (collectively "Kearns") assert "that the [non-duplication] clause of the Traveler's insurance policy is not enforceable."[2]

Defendant Progressive Direct Insurance Company ("Progressive") has not participated in the briefing on this motion and acknowledges that the "Travelers policy [is] primary if it afford[s] coverage, and that Progressive's policy [is] excess... Progressive's only contention is that its coverage is excess over Travelers', provided Travelers' is required to provide benefits. Progressive acknowledges that if benefits

under Travelers' policy are unavailable, Progressive's policy would become primary."[3]

Thus, this dispute between Kearns and Travelers is adjudicated as between those parties only. For reasons set forth below, Travelers' Motion in Limine is GRANTED.

II. FACTS AND PROCEDURAL HISTORY[4]

1. Mr. Kearns ("Kearns") was injured in a work related motor vehicle accident on February 15, 2014. His injuries allegedly resulted in pain, suffering, loss of income and a diminished future earning capacity.

***2** 2. The vehicle was owned by his Employer ("Employer").

3. At all times relevant, Kearns' Employer maintained policies of workmen's compensation insurance and underinsured motorist insurance with Travelers Insurance Company.

4. Following the accident, Kearns pursued a claim against Employer for workmen's compensation benefits.

5. Kearns began receiving workmen's compensation total disability benefits due to his inability to work, along with reimbursement for accident related medical care and treatment.

6. Kearns commuted his indemnity benefits, including total disability, partial disability, permanency and disfigurement, in exchange for a lump sum payment. The Commutation Order did not allocate amounts owed, to any particular category of future indemnity benefits.

7. Kearns also sought compensatory damages from the third-party tortfeasor.

8. Kearns resolved his claim against the third-party tortfeasor.

9. Kearns subsequently filed a claim for underinsured motorist benefits under the Employer's Travelers policy. Kearns also filed a claim against his personal underinsured motorist policy with Progressive Insurance Company.

10. Travelers seeks to limit or eliminate Kearn's right to underinsured motorist benefits by relying upon what is commonly known as the "non-duplication clause" within its policy.

III. DISCUSSION

Travelers' Non-Duplication Provision is Enforceable.

This motion presents an issue of apparent first impression in Delaware.

Travelers' UIM non-duplication policy provision reads in pertinent part:

> We will not make a duplicate payment under this Coverage for any element of "loss" for which payment has been made by or for [anyone] who is legally responsible, including all sums paid under the policy's Liability Coverage.
>
> We will not pay for any element of "loss" if a person is entitled to receive payment for the same element of "loss" under any workers' compensation, disability benefits or similar law.[5]

Travelers contends that this clause is a permissible restriction on claims for any element of losses a plaintiff is entitled to under workers' compensation. Specifically, since Kearns has recovered payments for medical bills,[6] wages,[7] and disfigurement,[8] Travelers asserts that Kearns should not be allowed to plead, prove and/or recover for these losses at trial.[9]

In response, Kearns argues generally that this non-duplication policy provision is unenforceable as a matter of "public policy."[10]

The Delaware Supreme Court has set forth guidelines for examining limitations or exclusions contained in automobile insurance policies in *State Farm Mutual Auto. Ins. Co. v. Kelty.*[11] The Delaware Supreme Court there held that

> ***3** the appropriate analysis to determine if coverage limitations or exclusions are valid is to start with the language of the statute, and only if it is ambiguous, to consider relevant public policy. Even then, any judicial ruling impinging on contractual freedom should be carefully justified by reference to the public policy as reflected in the overall statutory regime, as that is the

legitimate source of public policy in this heavily regulated field.[12]

Although *Kelty* involved an issue arising under Delaware's personal injury protection statute, 21 *Del. C.* § 2118, this analytical structure is appropriate for the disposition of the issue at bar. Thus, the Court must first analyze this provision against the language of 18 *Del. C.* § 3902 and, as appropriate, consider issues of public policy.

I. Statutory Analysis

First, the Court must determine whether the statute is ambiguous.[13] A statute is ambiguous if it is "susceptible of two reasonable interpretations."[14] If it is unambiguous, then the words in the statute are ascribed their plain meaning.[15] However, if it is ambiguous, then the Court "consider[s] the statute as a whole, rather than in parts, and [the Court] read[s] each section in light of all others to produce a harmonious whole."[16]

Delaware's UIM statute, 18 *Del. C.* § 3902, provides in pertinent part:

> (b) Every insurer shall offer to the insured the option to purchase additional coverage for personal injury or death up to a limit of $100,000 per person and $300,000 per accident or $300,000 single limit, but not to exceed the limits for bodily injury liability set forth in the basic policy. Such additional insurance shall include underinsured bodily injury liability coverage.
>
> (1) Acceptance of such additional coverage shall operate to amend the policy's uninsured coverage to pay for bodily injury damage that the insured or his or her legal representative are legally entitled to recover from the driver of an underinsured motor vehicle.
>
> (2) An underinsured motor vehicle is one for which there may be bodily injury liability coverage in effect, but the limits of bodily injury liability coverage under all bonds and insurance policies applicable at the time of the accident are less than the damages sustained by the insured. These limits shall be stated in the declaration sheet of the policy.
>
> (3) The insurer shall not be obligated to make any payment under this coverage until after the limits of liability under all bodily injury bonds and insurance policies available to the insured at the time of the accident have been exhausted by payment of settlement or judgments.
>
> (4) An insured who executes a release of a single tortfeasor owner or operator of an underinsured motor vehicle in exchange for payment of the entire limits of liability insurance afforded by the tortfeasor's liability insurer shall continue to be legally entitled to recover against that tortfeasor for the purposes of recovery against the insured's underinsurance carrier. An insured who executes a release of 1 of multiple tortfeasors shall have rights against that tortfeasor and the insured's underinsurance carrier determined in accordance with the Uniform Contribution Among Joint Tortfeasors Act and paragraph (b)(3) of this section.[17]

***4** Delaware's UIM statute does not directly address the issue of limitation or exclusion in the context of a non-duplication clause in a UIM policy taken out by an employer on behalf of an employee ("employer-obtained policy"). Travelers' policy provision does not conflict with the language of 18 *Del. C.* § 3902 and the Court does not find the Delaware's UIM statute "ambiguous" as to this issue. However, the Court will examine public policy considerations since that is Kearns' essential argument.

II. Public Policy Analysis

"The public policy underlying 18 *Del. C.* § 3902 is to permit an insured as a rational and informed consumer to contract for supplemental insurance protecting him from an irresponsible driver who causes death or injury."[18] "The public policy of 18 *Del. C.* § 3902 requires that any attempts to limit the right of injured persons to underinsured motorist coverage are to be narrowly construed."[19] "Moreover, if a literal interpretation yields a result inconsistent with the general statutory intention, such interpretation must defer to the general intent."[20] "Clearly, the goal of Delaware's underinsured motorist statute is to protect innocent persons from irresponsible and impecunious tort-feasors."[21]

It follows that Travelers' UIM non-duplication policy provision is not violative of public policy nor is this policy provision in conflict with the language of 18 *Del. C.* § 3902. This provision precludes recovery for workers' compensation payments previously paid to Kearns. This provision does not limit a plaintiff to UIM coverage as a whole, but rather limits recovery to the plaintiff for amounts for which that

plaintiff has already been compensated, as happened here. As Travelers concedes, "[t]hat clause does not preclude the plaintiff from recovering any amount for damages that are not covered under any Workers' Compensation policy."[22] It is reasonable to limit UIM coverage under employer-obtained UIM policies where that coverage would otherwise be duplicative. Additionally, not only did Travelers have no obligation to purchase UIM coverage, it had no obligation to purchase duplicate coverage.

* * *

In *Stoms*, a case heavily relied upon by Travelers, the Delaware Supreme Court expressly permitted employers to preclude certain classes of individuals entitled to UIM benefits so long as the statutory minimum coverage had been satisfied.[23] Following such rationale, it was reasonable for Travelers to carve out an exception as to benefits and losses that certain individuals may be entitled to from other policies and coverages, such as workers' compensation payments, so long as any statutory minimum coverage had been obtained. Travelers has sought only to preclude certain amounts to be paid from their UIM policy that has already been paid to and received by Kearns. Additionally, and as stated in *Stoms*, "[t]o hold that any coverage above the statutory minimum —such as uninsured motorists coverage, for which no level of coverage is statutorily mandated—has to be afforded to all who benefit from a policy would dissuade employers from buying anything above the statutory minimum."[24] If an employer-obtained UIM insurance policy containing this non-duplication of benefits clause were to be deemed void as against public policy, this outcome might well have the effect of discouraging employers from taking out UIM policies for their employees and could increase premiums.[25]

***5** Travelers also relies on a personal injury protection (PIP) case, *State Farm Mutual Auto. Ins. Co. v. Kelty*,[26] for analogous support for its position that "[t]he 'non-duplication clause' set forth in the policy at issue is not an exclusion of a particular class of persons because of their relationship with the insured; nor is it an exclusion based on the manner in which the insured is injured; nor is it a fault-based exclusion ... [and that] [t]he policy's 'non-duplication clause' is a valid limitation and not in conflict with the language of 18 *Del. C.* § 3902."[27] Additionally, and as argued by Travelers,

> [t]he limitation on UIM coverage at issue here is not only consistent with the parties' expectations, but also consistent with Delaware's public policy. Just as in *Kelty*, the insured here purchased all coverage mandated by statute. Just as in *Kelty*, the insured here purchased supplemental coverage, beyond the statutorily-mandated coverages. Just as in *Kelty*, the limitation on coverage at issue here does not restrict the policyholder from maintaining all statutorily-mandatory coverages under the Policy. Just as in *Kelty*, invalidating the limitation on coverage here would force the insurance company to provide supplemental insurance to an unidentified set of possible claimants, making the supplemental coverage more expensive. This will have the effect of reducing the number of Delaware employers who opt for the supplemental UIM coverage, which is contrary to the public policy underlying the financial responsibility law.[28]

Although *Kelty* addressed the interpretation of 21 *Del. C.* § 2118, the Court finds *Kelty* analagous. The Court agrees with Travelers that the policy in this instant case is not an exclusionary provision, but rather a limitation on benefits that Kearns has already received. Additionally, as observed in *Kelty*, "requiring insurers to expand coverage beyond that which is statutorily mandated or contracted for by policyholders [...] would increase the cost of—and thereby reduce the number of Delaware drivers willing to pay for—excess coverage."[29]

* * *

Kearns relies upon *Henry v. Cincinnati Ins. Co.*[30] Kearns, using *Henry*, asserts that "the Delaware Supreme Court [in that case] rejected the carrier's attempt to limit or reduce the UIM claim"[31] which, Kearns states, Delaware Courts routinely do.[32] In *Henry*, the issue on appeal was whether "the Superior Court erred in finding that the [Workers' Compensation] Act's exclusivity provision[33] preclude[d] appellants from receiving underinsured-motorist benefits through the automobile liability policy their respective employers each purchased from Cincinnati."[34] The Supreme Court held that "[t]he Act's exclusivity provision does not prevent an employee from receiving underinsured-motorist benefits provided by an automobile liability policy that his or her employer has purchased from a third-party

insurance company."[35] Here, in its interpretation of *Henry*, Kearns fails to distinguish the issue of "exclusivity" from "limitation." *Henry* addressed the issue of "exclusivity" that was interpreted under 19 *Del. C.* §§ 2304 and 2363. *Henry* did not address the "limitation" issue that was raised in Travelers' Motion in Limine and the parties agree that it is interpreted under 18 *Del. C.* § 3902.

***6** Kearns cites only the following extract from *Henry* to support his contention that Delaware courts have routinely rejected attempts by insurance carriers to limit or reduce UIM coverage:[36]

> "In Delaware, an employee who is injured within the course of his employment by a third party is permitted to recover workers' compensation benefits from his employer and also to pursue a personal injury action against the tortfeasor. A basic principle of workers' compensation law is that if a stranger's negligence was the cause of the injury to claimant in the course of employment, the stranger should not be in any degree absolved of his or her normal obligation to pay damages. In the case of underinsured-motorist coverage, the insurer steps into the shoes of the alleged third-party tortfeasor."[37]

The first two sentences above are, however, actually direct quotations from two Delaware Supreme Court cases, while the third sentence is a summary of a third Delaware Supreme Court case. The first sentence is found in *Duphily v. Del. Elec. Co-op., Inc.*,[38] the second sentence is found in *Stayton v. Clariant Corp.*,[39] and the third sentence was *Henry's* summary of the holding in *Progressive N. Ins. Co. v. Mohr.*[40] But, utilizing this language, Kearns essentially argues that, in Travelers' attempt to limit Kearns' recovery of duplicative compensation, Travelers is absolving its "normal obligation" to pay damages. However, Travelers' normal obligation in this case is to pay for damages that Kearns has not been compensated for under the Workers' Compensation Act. The three sentences from *Henry* quoted by Kearns must be read in the context of the key holding in *Henry* that the exclusivity provisions of the Workers' Compensation Act did not preclude a UIM action by an employee. In fact, the three sentences relied upon by Kearns in *Henry* was followed by the following:

> Because Cincinnati is being sued in these cases in its capacity as a third-party insurance company standing in the shoes of an alleged third-party tortfeasor, these suits are permitted under **19 Del. C. § 2363**.[41]

Reading the three sentences Kearns has quoted from *Henry* in the full context, *Henry* is not directly on point or analogous. Kearns did not cite *Duphily*, *Stayton*, or *Progressive* in his moving papers. Thus, as Travelers argues, *Henry* is distinguishable.

Kearns also relies on *Miller v. State Farm Mutual Auto Ins. Co.*[42] for the proposition that the Supreme Court found the receipt of workers compensation benefits constituted a collateral source and that the lower Court had erred by permitting the introduction of that evidence at trial.[43] However, *Miller* is distinguishable because the policy at issue in that case was not an employer-obtained UIM policy, but rather an employee-obtained UIM policy.

***7** In addition to *Miller*, Kearns relies on *Castillo v. Clearwater.*[44] However, like *Miller*, the policy at issue in *Castillo* was an employee-obtained UIM policy, not an employer-obtained UIM policy. Therefore, like *Miller*, *Castillo* is distinguishable.

At oral argument, and for the first time, Kearns cited *Pankowski v. State Farm Mutual Auto. Ins. Co.*,[45] a case that involved a non-duplication clause of another insurance company's policy. *Pankowski*, however, did not address the voluntary nature of UIM coverage or the impact on the insurer's ability to reduce or limit that coverage. Additionally, *Pankowski* involved an employee-obtained UIM policy, whereas this case involves an employer-obtained UIM policy. The *Pankowski* plaintiff paid the premiums, whereas Travelers in this case paid the premiums for the UIM policy at issue. Furthermore, in *Pankowski*, the plaintiff had already received a payout for the liability limits. No such payment from the insured ever occurred in the instant matter. As such, *Pankowski* is distinguishable.

The parties at oral argument also referred this Court a case decided last June, *Brown v. Taleah Everett, et al.*,[46] that held that the exclusions in a UIM policy in that case were inconsistent with the UIM statute's plain language and not valid. The distinguishable factor here is that *Brown* interpreted non-duplication clauses in employee-obtained UIM policies, rather than employer-obtained UIM policies. Additionally, *Brown* discussed four Superior Court cases[47] that held that non-duplication clauses in *employee-obtained*

UIM policies were unenforceable. However, these cases were not workers' compensation cases; these four cases involved non-employer obtained UIM policies and neither party has specifically cited or discussed them.

* * *

Therefore, since Travelers' non-duplication provision is enforceable, and Kearns recovered payments for medical bills, wages, and disfigurement, Kearns is not allowed to plead, prove and/or recover for these losses at trial against Travelers. However, benefits non-recoverable under workers' compensation insurance, such as pain and suffering, may be potentially recoverable under the Travelers policy, as acknowledged at oral argument by Travelers.

VI. CONCLUSION

For the foregoing reasons, Defendant Travelers Property Casualty Company of America's Motion in Limine is **GRANTED**.

All Citations

Not Reported in Atl. Rptr., 2019 WL 6704934

Footnotes

1 Email from Scott L. Silar, Esquire, dated October 11, 2019 (D.I. 66).
2 Email from Adrienne M. McDonald, Esquire, dated October 15, 2019 (D.I. 67).
3 Email from Richard D. Abrams, Esquire, dated October 15, 2019, at 2 (D.I. 68) (Progressive's UIM policy was purchased directly by Kearns).
4 The parties have jointly stipulated to a statement of facts they agree controls during the disposition of this motion.
5 Def.'s Mot. in Limine, Ex. A at 2 (titled “Section D. Limit of Insurance”).
6 Email from Scott L. Silar, Esquire (D.I. 66) (Medical bills were payable under PIP and/or Workers' Compensation.).
7 *Id.* (Wages were payable under Total Disability (TTD), Temporary Partial Disability (TPD), Permanent Partial Disability (PPD)).
8 *Id.* (Kearns was entitled to recover Disfigurement under Workers' Compensation).
9 *Id.*
10 Pl.'s Opp. To Def.'s Mot. in Limine at §§ 5-8.
11 *State Farm Mutual Auto. Ins. Co. v. Kelty*, 126 A.3d 631 (Del. 2015).
12 *Id.* at 641.
13 *Dewey Beach Enters., Inc. v. Bd. of Adjustment*, 1 A.3d 305, 307 (Del. 2010).
14 *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011).
15 *Dewey Beach Enters.*, 1 A.3d at 307.
16 *Taylor*, 14 A.3d at 538.
17 18 *Del. C.* § 3902(b).
18 *Miller v. State Farm Mutual Auto Ins. Co.*, 993 A.2d 6 1049, 1055 (Del. 2010) (“Unlike no-fault insurance, underinsured motorist coverage is not compulsory, but supplemental in nature.”).
19 *Essick v. Barksdale*, 882 F.Supp. 365 (Del. 1995) (a case involving a deceased plaintiff decedent's UIM policy, holding in part that the tortfeasor was an underinsured motorist for purposes of insured's UIM coverage.).
20 *Id.* (citing *Home Ins. Co. v. Maldonado*, 515 A.2d 690 (Del. 1986) (*see also Nationwide Mutual Ins. Co. v. Krongold*, 318 A.2d 606, 609 (Del. 1974)).
21 *Id.* (citing *Hurst v. Nationwide*, 652 A.2d at 12 (Del. 1995)).
22 Def.'s Reply to Pl.'s Opp. to Def.'s Mot. in Limine at § 7; *see* Tr. at 7. (“pain and suffering usually is not something that is covered under a workers' compensation policy. Therefore, there's nothing to say that Mr. Kearns could not avail himself to pain and suffering under this policy.”)
23 *Stoms v. Federated Serv. Ins. Co.*, 125 A.3d 1102 (Del. 2015).
24 *Id.* at 1107.
25 Def.'s Mot. in Limine at § 11 (citing to *Stoms*, 125 A.3d at 1106).
26 *State Farm Mutual Auto Ins. Co. v. Kelty*, 126 A.3d 631 (Del. 2015).

27 Def.'s Mot. in Limine at § 8.
28 *Id.* at § 12.
29 *Kelty* at 636.
30 *Henry v. Cincinnati Ins. Co.*, 212 A.3d 285 (Del. 2019).
31 Amendment to Pl.'s Opp. to Def.'s Mot. in Limine at 2 (D.I. 58).
32 *Id.*
33 19 *Del. C.* § 2304.
34 *Henry* at 287.
35 *Id.*
36 Amendment to Pl.'s Opp. at 1.
37 *Id.* at 2.
38 *Duphily v. Del. Elec. Co-op., Inc.*, 662 A.2d 821, 834 (Del. 1995) (holding in pertinent part that evidence as to medical expenses paid by workers compensation carrier was admissible at trial).
39 *Stayton v. Clariant Corp.*, 10 A.3d 597, 600 (Del. 2010) (holding that pursuant to the dual persona doctrine, the Workers' Compensation Act's exclusivity provision did not bar employee's action against employer).
40 *Progressive N. Ins. Co. v. Mohr*, 47 A.3d 492, 504 (Del. 2012) (holding that, as matter of first impression, automobile insurance statute required insurer to provide pedestrian personal injury protection (PIP) benefits coverage under a Delaware policy for insured who was injured, as a pedestrian, in Delaware by a Delaware-insured car.).
41 *Henry* at 290 (emphasis added).
42 *Miller v. State Farm Mutual Auto. Ins. Co.*, 993 A.2d 1049 (Del. 2010).
43 Pl.'s Opp. to Def.'s Mot. in Limine at § 10.
44 *Id.* at § 8. (*see also Castillo v. Clearwater Ins. Co.*, 8 A.3d 1177 (Del. 2010)).
45 *Pankowski v. State Farm Mutual Auto. Ins. Co.*, 2013 WL 5800858 (Del. Super. 2013).
46 *Brown v. Taleah Everett, et al.*, 2019 WL 2361539 (Del. Super. 2019).
47 *See Baunchalk v. State Farm Mutual Auto Ins. Co.*, 2015 WL 12979117; *see Tillison v. GEICO Secure Ins. Co.*, 2017 WL 2209895; *see Johnson v. State Farm Mutual Auto. Ins. Co.*, 2017 WL 4652061; and *see Perez v. State Farm Mutual Auto. Ins. Co.*, 2018 WL 2473152.

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