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FIGHTING THE STRATEGIC BATTLE TO WIN THE WAR

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UNINSURED AND UNDERINSURED MOTORIST UPDATE

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UNINSURED AND UNDERINSURED MOTORIST UPDATE

I. COVERAGE ISSUES

A. Defining “Insured”

DeSaga v. West Bend Mut. Ins. Co., 391 Ill. App. 3d 1062, 910 N.E.2d 159, 331 Ill. Dec. 86 (3d Dist. 2009) – Plaintiff’s decedent was hit by a car and killed after he walked onto a roadway to remove some pieces of scrap that had fallen from his truck. Plaintiff sought benefits from her decedent’s employer’s insurance carrier, West Bend, pursuant to its underinsured motorist endorsement of the insurance policy. West Bend denied coverage, claiming that the decedent was not occupying the vehicle as required under the policy to trigger underinsured (“UIM”) motorist coverage. Plaintiff filed a declaratory judgment action seeking a judgment that her decedent was entitled to UIM coverage at the time of the accident. West Bend filed a counterclaim for declaratory judgment to the contrary. Both sides moved for summary judgment, and the trial court ruled in favor of West Bend, finding that plaintiff’s decedent was not occupying the insured vehicle at the time of the accident as required under the policy to trigger UIM coverage. Plaintiff appealed.

On appeal, plaintiff argued that Illinois law prohibits West Bend from defining “insured” more narrowly for UIM coverage purposes than it did for liability bodily injury coverage under the policy. A policy provision (or definition) that conflicts with Illinois law will be considered void and unenforceable. The court looked to the statutory scheme of the Illinois Insurance Code to analyze the applicable policy term. However, the court was mindful of the parties’ freedom to contract in analyzing the definitions of insured as articulated in the policy at issue, and noted that its power to declare a provision void must be exercised sparingly.

West Bend admitted that Illinois law prohibited it from defining “insured” differently in an uninsured (UM) provision than in a UIM provision in the same policy, but argued that Illinois law did not preclude it from defining insured differently under its UIM provisions than its liability provisions. In considering plaintiff’s position, the court noted that Illinois law requires minimum liability coverages to protect the public by securing payment of their damages. The Illinois legislature enacted requirements concerning UM and UIM coverages to put the insured in the same position as it would have been had the at-fault driver had adequate coverage to pay the insured’s damages. The court found that the laws regarding liability, uninsured and underinsured coverages were all connected.

The court then looked to the Illinois Supreme Court and other appellate districts for further interpretation and discussion of the issue of whether an insurer could define insured more narrowly for purposes of UIM coverage than for liability coverage. The *DeSaga* court cited the Illinois Supreme Court’s *dicta* in *Phelan*, a 1974 decision, wherein it stated the following:

[The Illinois Insurance Code] does not restrict the parties to an insurance contract from determining *initially* who will be insured under the policy, but once that

determination has been made, [the Illinois Insurance Code] mandates that UM coverage be extended to anyone who is an insured for purposes of liability coverage [emphasis added].

DeSaga, 391 Ill. App. 3d at 1069.

After considering the previous decisions rendered in the appellate districts and the Illinois Supreme Court, the *DeSaga* court held that because the plaintiff is deemed an insured for purposes of liability coverage, it must be deemed an insured for purposes of UIM coverage. In the instant case, the court found that a more narrow definition was an indirect attempt at denying UIM (and UM) coverage to its "insured." The court found that West Bend's attempt to define "insured" differently violates Illinois law and reversed the trial court's judgment.

Also, the court addressed the defendant's alternative argument that the plaintiff's decedent was not occupying the insured vehicle at the time of the accident. The court found that even if it had held that the defendant could require the element of "occupying the vehicle" in its UIM provision, the court would have found that the plaintiff's decedent was occupying the vehicle as required under the provision. Two elements must be satisfied in order to impose liability on the insurer in an instance where occupancy is at issue: "(1) there must be some nexus or relationship between the insured party and the covered vehicle, and (2) there must be actual or virtual physical contact between the injured party and the covered vehicle." *DeSaga*, 391 Ill. App. 3d at 1071. In the instant case, the defendant conceded a relationship between the decedent and the covered vehicle.

Regarding the second element, the parties agreed that the decedent was not in actual physical contact with the insured vehicle at the time of the accident; thus, the issue is whether the decedent was in virtual physical contact with the covered vehicle. The undisputed factual evidence established that the decedent had parked his vehicle on the side of the road in order to retrieve scrap metal from the roadway. He had activated his flashing emergency lights when he went to remove the scrap. The court, finding that plaintiff's decedent's conduct in removing the material from the roadway was reasonable, noted that the decedent may have even had a statutory obligation to remove the scrap metal as it had fallen from his vehicle. The court found that the decedent was in virtual physical contact with the insured vehicle at the time of the accident. Thus, the court held that the decedent met the requirements under the "occupying" test, and would have been covered under the UIM provision in his employer's policy, had it not been rendered void and unenforceable.

Schultz v. Illinois Farmers Ins. Co. and Illinois Farmers Ins. Co. v. Weglarz, No. 108038, 2010 WL 966206 (March 18, 2010) – The Illinois Supreme Court consolidated the appeals from the matters of *Schultz v. Illinois Farmers Insurance Company* and *Illinois Farmers Insurance Company v. Weglarz* in order to address the single question presented to the court: whether an insurer can define "insured" for purposes of underinsured ("UIM") coverage in a more narrow, restrictive way than it does for uninsured ("UM") or liability coverage purposes. For the reasons that follow, the Illinois Supreme Court held that it cannot.

In *Schultz*, the driver (“Smetana”) and her passenger (“O’Conner”) were involved in an accident with an underinsured motorist. Neither Smetana nor O’Conner were related to the owner of the vehicle that they occupied at the time of the accident. The occupied vehicle was insured by Farmers. Smetana and O’Conner each made claims under the underinsured motorist (UIM) provision of the Farmers’ policy. Farmers paid Smetana’s claim but denied O’Conner’s claim. Farmers claimed to rely on the UIM provision in its policy that limited UIM coverage to the policyholder and its family members. On cross motions for summary judgment, the trial court ruled in Farmers’ favor, declaring no available UIM coverage to O’Conner based on the policy language. O’Conner appealed.

The *Weglarz* litigation involved a similar set of facts and an identical Farmers policy. Again, the UIM provision excluded nonrelative occupants from UIM coverage. Even though the *Weglarz* plaintiff was related to the policyholder, she did not reside with the policyholder. Farmers denied coverage arguing that the UIM provision excluded nonresident relatives from coverage as well. The *Weglarz* trial court found that the UIM provision contained ambiguous language, and construed the ambiguity against Farmers. On cross motions for summary judgment, the court held that the plaintiff was entitled to coverage under the policy. Farmers appealed.

On appeal, Farmers argued that Illinois law permits it to define “insured” more narrowly for UIM purposes than it does for liability and UM purposes. Generally, terms of an insurance policy that contravene Illinois law or seek to circumvent the underlying purpose of a statute in effect at the time of the policy’s issuance are void and unenforceable. Illinois law requires a policy to insure not only those named in the policy but also any “permissive user” of the insured vehicle. The parties disputed the meaning of the term “permissive user.”

Farmers argued that a passenger should be excluded from the definition of permissive user. The court applied the ordinary meaning of the term, as required under the rules of statutory interpretation and notes that “permissive user” is defined as any person using or responsible for the use of the subject vehicle with the express or implied permission of the insured. The court further found that the plain and ordinary meaning of permissive user includes passengers; otherwise, the statute would have used the term “driver.” The court held that Illinois mandatory liability coverage requirements clearly extend to all permissive users, including permissive passengers, by the very language in the statute.

Farmers further argued that Illinois law permits it to treat UIM coverage differently than it treats UM or liability coverage. The court pointed out that Illinois law requires that automobile liability policies include uninsured motorist coverage, and that UM coverage must extend to all who are insured under the policy’s liability provisions. Furthermore, under Illinois law, insurers are required to provide UIM coverage where the UM coverage exceeds the statutory minimums required for liability for bodily injury, which are currently \$20,000/\$40,000. The UIM coverage must be equal in amount to the UM coverage under the policy. UIM coverage must then also extend to those who were insured under the policy’s liability provisions. UM and UIM provisions

are, therefore, inextricably linked. If a person qualifies as an insured for liability coverage, then he qualifies as an insured for UM and UIM coverage as well.*

**This opinion has not been released for publication in the permanent law reports due to the recent date of release by the Illinois Appellate Court. Until it is released for publication, it is subject to revision or withdrawal by the court.*

Practical Considerations: An auto policy cannot define “insured” more narrowly for uninsured and underinsured coverage than it does for liability coverage. Generally speaking, courts will allow the parties (insured and insurer) the freedom to contract and the freedom to define who qualifies as an insured, but only to the extent that the insurer does not draft the policy in a way that seeks to circumvent statutory protections under the Illinois law.

B. Statutory Exclusions

Ryan v. State Farm Mut. Auto. Ins. Co., 397 Ill. App. 3d 48, 921 N.E.2d 458, 336 Ill. Dec. 844 (1st Dist. 2009) – The plaintiff, a City of Chicago police officer, was driving a patrol car when he was injured in an accident with an uninsured vehicle. Prior to the day of the accident, the plaintiff had never before driven that particular patrol car. Following the accident, he sought uninsured motorist benefits pursuant to a personal auto policy he had with the defendant, State Farm, on a different vehicle which he owned. State Farm denied the claim, relying on a coverage exclusion in the policy relating to vehicles “furnished or available for [the insured’s] regular use.” State Farm sought a declaration of no coverage, and the trial court granted its motion for summary judgment. The plaintiff appealed.

On appeal, the plaintiff contended that the trial court erred in finding that the patrol car he drove at the time of the accident was furnished or available for his regular use. The exclusion referencing uninsured and underinsured coverage stated: “There is no coverage under coverages U and U1 for bodily injury to an insured while occupying a motor vehicle owned by, leased to, or furnished or available for the regular use of you, your spouse or any relative if [the vehicle] is not insured for this coverage under this policy.” *Ryan*, 921 N.E.2d at 460.

The court initially noted that when interpreting an insurance policy, it must follow the rules of contract interpretation. Plain and ordinary meaning will be applied to its terms, unless an ambiguity exists, at which time the ambiguity will be construed strictly against the insurer. The court found the language of the exclusion plain and unambiguous.

The plaintiff argued that he only used the vehicle one time, and therefore, the vehicle cannot be considered furnished or available for his regular use. However, the court found that the plain language of the exclusion does not depend on actual use, and does not deny coverage based on regular use, but instead excluded vehicles that were furnished or available to the insured. The exclusion depends on “availability.”

Plaintiff further argued that the court erroneously stretched the exclusion to include a pool of vehicles, because the exclusion does not expressly reference a pool of vehicles. The court found that the vehicle was one among a pool of vehicles made available to the plaintiff. The court, referencing a 1958 decision rendered in the Court of Appeals for the Seventh Circuit, stated that since the vehicle was part of a pool of vehicles furnished or available to the plaintiff for his regular use as a police officer, it was excluded under the policy. The court found the plaintiff's actual use immaterial to the analysis, and affirmed the trial court's judgment in favor of State Farm.

Practical Considerations: It is important to note that the court focused on the fact that the exclusion was drafted consistently with the statutory regular use exclusion enacted by the Illinois Legislature. *See*, 215 ILCS 5/143a(1) for regular use language. The court further noted that it is not against public policy to allow insurers to exclude risks for which they have not collected a premium. In this case, the excluded vehicle was a patrol car furnished for a police officer's use in high risk situations. The court found it unreasonable to conclude that State Farm's policy would provide coverage for this high risk at no cost to the plaintiff.

C. Available Limits

Erie Ins. Exchange v. Triana, Nos. 1-08-3319, 1-08-3628, 2010 WL 395647 (1st Dist. Feb. 3, 2010) – Triana was a passenger in Christine Wagner's ("Wagner") vehicle when the vehicle collided with another driven by William Weinen ("Weinen"). Triana and Wagner each made claims against Weinen for bodily injuries sustained in the accident. Weinen was insured by State Farm, with \$100,000/\$300,000 limits. State Farm paid \$100,000 to each person. Triana and Wagner also made underinsured (UIM) claims under Wagner's policy with Erie. The Erie policy had \$300,000/\$300,000 limits. Erie tendered \$100,000 in full satisfaction of both claims, contending that \$100,000 was the full amount available in UIM coverage under the policy. Triana and Wagner rejected, and Erie sought a declaration of the remaining policy limits in circuit court.

The trial court found that \$100,000 remained under Erie's split-limits policy for the claims made by Triana and Wagner. The trial court agreed with Erie's position that the \$200,000 paid by State Farm must be set-off against Erie's \$300,000 per accident limit, leaving \$100,000 to be apportioned between the Triana and Wagner claims. Triana and Wagner appealed, arguing that because the Erie policy was a split-limits policy, the set-off provisions in the policy required that only the \$100,000 received by Wagner should be set-off against her \$300,000 per person limits, leaving \$200,000 in available UIM coverage.

On appeal, Triana and Wagner raised two primary issues: (1) whether the maximum amount of UIM coverage available should have been \$200,000 (applying a \$100,000 set off against the \$300,000 per person limits); and (2) whether the setoff provisions of Erie's policy were ambiguous and, therefore, construed strictly against Erie and in favor of Triana and Wagner. The court stated that when interpreting the terms of a policy, it will first determine whether the terms are clear and unambiguous. In doing so, the court will read the terms together. A term is

ambiguous if it is susceptible to more than one meaning. If the terms of the applicable policy provision are unambiguous, the court will apply their ordinary meanings.

After reading the terms applicable to this case, the court found the terms unambiguous. According to the court, the Erie policy clearly stated that the per-person limits would be applied if one insured person was injured in an accident, while the per-accident limits would be the most that would be applied if more than one insured person was injured in an accident. Under the policy, an insured is anyone who occupies any auto insured by Erie under the policy. In this case, Triana and Wagner were insureds protected under the policy, and thus, the court ruled that the per-accident limits of \$300,000 was the maximum amount Erie had to pay out under the policy.

To address the set-off issue, the court looked to the language that specifically provided that the policy limits would be reduced by the amounts paid by the tortfeasor. Here, the tortfeasor's insurance carrier, State Farm, paid \$100,000 to each Triana and Wagner. Thus, the total amount Erie was obligated to pay for this accident under the policy was \$100,000. Therefore, the Appellate Court upheld the judgment in Erie's favor.

Practical Considerations: Policy language matters! We are reminded again that the court will look to the terms of the insurance policy and give unambiguous terms their plain and ordinary meanings.

D. Ripeness

In Gregory v. Farmers Auto. Ins. Ass'n, 392 Ill. App. 3d 159, 910 N.E.2d 763, 331 Ill. Dec. 354 (5th Dist. 2009), plaintiff's decedent died in an automobile accident while he was a passenger in a vehicle co-owned by defendant's insured. The vehicle, co-owned by Jeffrey Wolf and Ralph Wolf, was insured under a personal auto policy, as well as a business auto policy. Defendant conceded coverage under the personal auto policy, and was defending the Wolfs under that policy in the underlying litigation. Plaintiff filed a declaratory judgment action against defendant seeking coverage under the business auto policy. The trial court granted the plaintiff's motion for summary judgment on the issue, and the defendant appealed.

On appeal, the defendant argued that the issue was not ripe for adjudication. The Appellate Court stated that an action seeking a declaration that an insurer has a duty to defend is ripe upon filing a complaint; however, an action seeking a declaration that an insurer has a duty to indemnify is not ripe for adjudication until an insured becomes legally obligated to pay damages in the underlying action. In this case, the underlying tort action was still pending at the time the plaintiff sought a declaration of indemnity. Therefore, the issue of indemnity coverage, the Appellate Court held, was not ripe for adjudication.

The plaintiff offered the distinction that she was not seeking a determination of limits, but merely of coverage. The Appellate Court noted that an action that seeks a declaration of limits and an action that seeks declaration of indemnification coverage both seek a declaration of the duty to indemnify. The court found that the plaintiff's argument was without merit. The court

emphasized that the purpose of the rule regarding ripeness is to avoid advisory opinions, which in essence, is the equivalent of giving legal advice to the parties.

II. ARBITRATION CLAUSES

American Family Mut. Ins. Co. v. Stagg, 393 Ill. App. 3d 619, 912 N.E.2d 1283, 332 Ill. Dec. 397 (5th Dist. 2009) – American Family entered into an automobile insurance contract with Diane Stagg (“Stagg”), which included an arbitration provision that provided in pertinent part: “[a]ny arbitration award not exceeding the minimum limit of the Illinois Safety Responsibility Law: 1. will be binding; and 2. May be entered as a judgement [sic] in any court having jurisdiction.” Subsequent to entering into the policy, Stagg sustained injuries in an automobile accident. She collected the at-fault driver’s liability insurance limits of \$25,000 and sought underinsured (“UIM”) motorist coverage under her policy with American Family. Her UIM claim proceeded to arbitration, where the arbitration panel awarded Stagg \$36,340.75. The arbitration panel found that American Family was entitled to a set-off for the \$25,000 collected from the at-fault driver and \$5,000 in medical payments that American Family had paid on Stagg’s behalf prior to the arbitration. American Family was left to pay \$6,340.75 if the court entered judgment on the arbitration award.

American Family filed suit to enforce the arbitration award entered in Stagg’s favor. The complaint also stated that Stagg had not objected to the award within the time frame set forth in the Uniform Arbitration Act (“UAA”). American Family argued, in the alternative, that Stagg was barred from rejecting the award, and consequently, judgment should be entered consistent with the arbitration award.

Stagg filed a motion to dismiss American Family’s suit, claiming that the arbitration award was not binding under the terms of the arbitration provision in UIM endorsement because the award exceeded the minimum statutory limits (\$20,000). In response to American Family’s claim of untimely rejection, Stagg argued that the terms of the arbitration provision in the contract governed her rejection, and she was not required to reject the award in accordance with the timeframe set forth in the UAA. The trial court found in favor of Stagg on both issues, granting her motion to dismiss American Family’s complaint, and her motion for trial *de novo*. American Family appealed.

On appeal, American Family argued that the meaning of the term “arbitration award” meant the actual amount it was ordered to pay as a result of the arbitration award. The court articulated the general rule of contract interpretation, which provides that it is the court’s obligation to ascertain and give effect to the intention of the parties as expressed in the language. If the terms are susceptible to more than one meaning, then they will be considered ambiguous and will be construed strictly against the insurer. The arbitration award was actually \$36,340.75. However, after the set-off, American Family would have been required to pay \$6,340.75. Stagg argued that arbitration award should be interpreted to mean the actual award, which in this case was \$36,340.75.

The court found that “arbitration award” was susceptible to more than one meaning. The court construed the ambiguity against American Family, and held that “arbitration award” would be defined according to Stagg’s interpretation of the term. Thus, the court held that the arbitration award exceeded the statutory minimum limits, that it was not binding against the parties and that Stagg had the right to a trial on the merits pursuant to the policy.

American Family also argued that even if the award did exceed the statutory minimum limits, Stagg was barred from rejecting the award due to the untimely nature of her rejection. The court disagreed, again looking to the language of the policy. The court agreed with Stagg’s argument that she was not required to confirm her rejection to the UAA, as the arbitration provision in the policy clearly governed the terms of the arbitration. Further, Stagg was not required to state any additional grounds to vacate the award. The policy provided her a basis to reject the award – that it exceeded the minimum limits – and request a trial on the merits. The court stated that American Family had the opportunity, as the drafter of the insurance policy, to address the definition of “arbitration award” and to provide a timeframe for rejection, but it failed to do so. The Appellate Court upheld the trial court’s rulings in favor of Stagg.

Practical Considerations: Ambiguities in an insurance policy will always be construed against the insurer. The court stressed that the insurer has the right to define all the terms in the insurance policy.

III. OFFERS

Nicholson v. State Farm Mut. Auto. Ins. Co., No. 2-08-0639, 2010 WL 1208887 (2d Dist. Mar. 23, 2010) – Plaintiff’s decedents (“Janotas”) took out an automobile liability policy with State Farm in 1988. The policy insured a 1988 Olds and provided \$100,000 in liability limits and \$50,000 per person in uninsured motorist (UM) limits. The Janotas signed a coverage selection form at that time acknowledging their opportunity to elect UM coverage in the amount equal to liability coverage. In 1997, the Janotas changed the insured vehicle to a 1997 Olds. In September of 1999, the Janotas requested an increase in coverage to \$250,000 per person liability limits, and \$100,000 in UM limits. Their premium increased as a result. The Janotas did not execute the coverage selection form until November of 1999. In 2003, the Janotas changed the insured vehicle to a 2003 Buick, but made no other changes to the policy.

In November 2003, the Janotas were fatally injured in an accident with an uninsured motorist. Their estate sought \$250,000 each in UM benefits. State Farm paid \$100,000 on behalf of Mr. Janota and \$100,000 on behalf of Mrs. Janota. The administrator of the Janotas’ estate sought a reformation of the policy, arguing that State Farm failed to offer UM coverage in accordance with the Illinois Insurance Code. The trial court agreed, and reformed the policy to afford the Janotas \$250,000 each in UM benefits. State Farm appealed.

In this case, the parties disputed whether the September 1999 transaction constituted a new application requiring an express denial of UM coverage, or whether the policy was simply a renewal of the previous policy which would not require an express denial. In 1999, the law provided that no policy shall be renewed or delivered or issued for delivery unless uninsured motorist coverage was included in the amount of liability coverage, unless the UM coverage was specifically rejected by the insured. In this case, the 1999 transaction changed the level of coverage the Janotas enjoyed, and triggered an increase in premiums. The court held that the 1999 transaction resulted in a new policy which required a new offer (and refusal if appropriate) of UM coverage.*

**This opinion has not been released for publication in the permanent law reports due to the recent date of release by the Illinois Appellate Court. Until it is released for publication, it is subject to revision or withdrawal by the court.*

IV. STACKING

Abram v. United Services Auto. Ass'n, 395 Ill. App. 3d 700, 916 N.E.2d 1175, 334 Ill. Dec. 287 (1st Dist. 2009) – Plaintiff’s decedents (“the Abrams”) were killed in Louisiana when they were in an automobile accident caused by an uninsured driver. The vehicle the Abrams occupied at the time of the accident, a 2003 GMC Envoy, was insured by United Services Automobile Association (“USAA”). The Abrams also owned a BMW, which USAA insured as well. The two vehicles were insured under the same policy; however, the policy provided different coverages for each vehicle. Particularly, the declarations page of the policy specifically excluded uninsured or underinsured coverage for the BMW, while the policy provided \$300,000/\$500,000 in UM limits for the GMC. The Abrams also had a personal umbrella policy (“PUP”) which provided excess coverage up to \$2 million per occurrence. Following the accident, USAA paid the plaintiffs \$500,000 as a result of the Abrams’ deaths.

The plaintiffs filed a declaratory judgment action seeking an order granting additional UM payments. Plaintiffs presented three arguments:

- (1) that the court should imply UM coverage on the BMW;
- (2) that the anti-stacking provisions in the policy are ambiguous and should be construed liberally in favor of coverage; and
- (3) that the PUP provided UM coverage of \$2 million in excess of the \$500,000 UM coverage in the underlying automobile policy.

The plaintiffs filed a motion for summary judgment and USAA moved to dismiss the complaint. The trial court dismissed the complaint and denied plaintiff’s motion for summary judgment finding that the policy expressly prohibited stacking and that the PUP did not provide UM coverage. The trial court never addressed the issue of whether UM coverage on the BMW was

implied. The trial court agreed with USAA that the plaintiffs were limited to recovering \$500,000 in UM benefits under their policy. Plaintiffs appealed.

On appeal, the plaintiffs made the same three arguments. Initially, plaintiffs argued that the trial court should have implied UM coverage on the BMW. Further, they argued that they should be able to stack the UM coverages and recover \$1 million, i.e., \$500,000 on each insured vehicle. However, like the trial court, the Appellate Court found the stacking issue dispositive. The court found that plaintiffs were precluded from stacking UM coverages, regardless of whether UM coverage on the BMW was implied.

The plaintiffs acknowledged the five anti-stacking provisions in their policy, but argued that the provisions did not preclude them from stacking UM coverages. Plaintiffs first argued that Illinois law provides that if premiums are paid on both vehicles, then recovery is permitted on both vehicles. However, the Appellate Court found that where the limits are listed once on the declaration page, then regardless of the number of premiums paid or vehicles listed, recovery is limited to the amount of coverage listed. In the policy at issue, the Abrams did not pay for UM coverage on both vehicles; therefore, the court found the plaintiffs' argument meritless.

Plaintiffs also argued that the anti-stacking provisions in the policy did not preclude them from stacking UM coverages because two insured persons were killed in the same accident. The plaintiffs focused their arguments on the three, UM-specific, anti-stacking provisions. Plaintiffs argued that the UM-specific anti-stacking provisions did not specifically address their unique situation, that is, two insured persons killed in one accident. Plaintiffs relied on the following language in the policy in support of their argument: "by any person in any one accident." Plaintiffs argued that the anti-stacking provisions therefore applied only in situations where one insured person was injured or killed in an accident.

The court articulated the rule that when construing anti-stacking provisions in an insurance policy, all provisions will be read together and given their plain and ordinary meanings, unless the terms are ambiguous. If the terms are ambiguous, then the court will liberally construe them in favor of allowing insureds to stack coverages.

The court addressed the first line of the UM anti-stacking provision, which is as follows: "You are not able to stack UM or UIM coverage on any vehicle on this policy." The court found that when read together with the rest of the anti-stacking provisions in the policy, the provision is unambiguous. Thus, the court held that the language plainly precludes the plaintiffs from stacking any UM coverage afforded under the policy.

The plaintiffs also argued that the Appellate Court should construe the Abrams' PUP in favor of coverage because the PUP was ambiguous as to whether the policy provided \$2 million in excess UM coverage. The Appellate Court again looked to plain language of the policy provisions. It found that several provisions plainly stated that the PUP did not provide UM coverage. Plaintiffs argued that the language relied on by USAA was ambiguous: "This policy provides no first party insurance coverage (including but not limited to, any uninsured motorist

coverage, underinsured motorist coverage, personal injury protection or any medical payments coverage)." The Appellate Court disagreed, finding that first-party coverage was explicitly defined in the provision. Thus, the Appellate Court found that the provision expressly and unambiguously excluded UM coverage from the Abrams PUP.

The Appellate Court held that the Abrams' policy unambiguously precluded stacking UM coverages, and further held that the PUP did not provide \$2 million in excess UM coverage. Therefore, the court affirmed the trial court's rulings.

Economy Premier Assur. Co. v. Jackson, 393 Ill. App. 3d 929, 913 N.E.2d 90, 332 Ill. Dec. 495 (2d Dist. 2009) – Ellen Hall and Tommy Jackson were the divorced parents of Thomas Jackson ("Thomas") who was killed while a passenger in a car owned by Christian DeFilippo. Two others were injured in the accident, which was DeFilippo's fault. DeFilippo's vehicle was insured under a policy with Allstate which provided \$50,000/\$100,000 liability limits. Allstate paid \$15,000 each to Ellen, Tommy, and Thomas' sister Sarah Jackson (collectively referred to as "the claimants"). At the time of the accident, Thomas was an insured under Ellen's policy with Safeco which provided \$100,000/\$300,000 in UM and UIM coverage; Thomas was also an insured under Tommy's policy with Economy Premier which likewise had \$100,000/\$300,000 UM and UIM limits. Ellen and Tommy each made UIM claims under their respective policies. Both carriers took the position that they were entitled to share liability under their policies' respective anti-stacking provisions, meaning they would each pay a share of their single \$100,000 per-person limits because only one loss had occurred.

Three lawsuits ensued over the coverage dispute:

(1) Economy Premier sought a declaratory judgment that the maximum available UIM coverage under its policy was \$25,000 (\$100,000 limits - \$50,000 Allstate limits, divided by two to account for "other insurance" available under the Safeco policy);

(2) The claimants filed suit against Economy Premier seeking a declaratory judgment that the Safeco policy was not "other insurance" which could be used to reduce the amount of coverage in the Economy UIM provision. They also argued that they were Tommy's next of kin within the meaning of the Wrongful Death Act and were entitled to recover UIM benefits under both of the policies.

(3) The claimants filed a similar suit against Safeco seeking the same relief as they sought against Economy Premier.

The trial court found that Safeco and Economy were entitled to a combined \$45,000 set-off (\$22,500 each) from the amount Allstate paid to the claimants for Thomas' death. The court further ordered each carrier to pay \$77,500 on the UIM claims presented. The carriers appealed.

On appeal, the issue was whether the trial court improperly stacked the UIM coverages in rendering its judgment in favor of the claimants. The parties generally agreed that the policies

prohibit stacking UIM coverages, but they disagree about whether the court in fact stacked the policies at all in rendering its decision. The court acknowledged that the anti-stacking provisions would preclude an insured from stacking when the insured has more than one policy of coverage available. In this case, the key was determining who the insured was for purposes of the anti-stacking provisions-Thomas or the claimants.

On appeal, the carriers argued that Thomas was the "insured" for purposes of the anti-stacking provisions. The claimants, on the other hand, argued that they were the "insureds" for purposes of addressing the stacking issue. To determine whether stacking had occurred in violation of the policies' anti-stacking provisions, the court examined the nature of the claims presented. The Appellate Court found that the claimants sought relief under the Wrongful Death Act, which allows personal claims for the decedent's survivors. Whereas, the carriers argued that the claimants sought UM benefits on Thomas' behalf. Hence, Thomas was not the insured seeking to stack coverages.

Once the Appellate Court found that claimants were the "insureds" for purposes of the anti-stacking provision, the court needed to then determine whether the provision was otherwise applicable. In order to find the anti-stacking provision applicable, the claimants would have to have additional coverage available to them. The court found that Ellen was not an insured under Tommy's policy, and vice versa. Neither Ellen nor Tommy had other insurance coverage available. Therefore, the anti-stacking provision was not triggered in this litigation because no other insurance coverage was available to either Ellen or Tommy. Thus, the Appellate Court held that the anti-stacking provision did not preclude the relief awarded to the claimants by the trial court.

Every argument advanced by the carriers was based on the assertion that Thomas was the "insured" for purposes of evaluating the anti-stacking provisions in the applicable policies. The court distinguished Tommy and Ellen's claims from any claim that could have been brought on behalf of Thomas' estate, which would have presented a different scenario to the court. The Appellate Court affirmed the trial court's rulings, holding that no impermissible stacking had occurred.



Mark J. McClenathan

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Mark joined Heyl Royster in 1989, and became a partner with the firm in 1998.

Mark concentrates his practice in commercial and civil litigation. He has extensively defended product liability, professional liability, construction liability, and agriculture liability cases.

In addition, Mark has represented clients in the areas of business and corporate law, construction law, and real estate. Also, Mark has represented municipalities and clients before various governmental bodies, and has extensive experience in annexations, subdivisions and developments, zoning, and intergovernmental agreements.

Prior to joining Heyl Royster, Mark worked for the legal department of the Defense Logistics Agency (Defense Contract Services) of the Department of Defense in Chicago; the legal departments of two Fortune 500 companies headquartered in the Twin Cities, Minnesota including Land O'Lakes, Inc. in St. Paul and 3M Corporation in Minneapolis; and then was in private practice with a firm in Rockford, where he practiced in the areas of business and corporate law, commercial and civil defense litigation, and bankruptcy (creditors' rights).

Significant Cases

- *Fox Controls, Inc. v. Honeywell, Inc.*, 2004 WL 906114 (N.D. Ill. 2004) Dismissal of case alleging misappropriation of trade secrets.
- *Zimmerman v. Fasco Mills Co.*, 302 Ill. App. 3d 308 (2d Dist. 1998) Dismissal of case involving "fireman's rule."
- *Donovan v. Beloit Corp.*, 275 Ill. App. 3d 25 (2d Dist. 1995) Structural Work Act versus pre-emption of OSHA issue.
- *Jansen v. Aaron Equipment*, (N.D. Ill. 1995) Product liability case involving joint and several rule.
- *Baker v. Boomgarden*, 263 Ill. App. 3d 251 (2d Dist. 1994) Dismissal of roofers' personal injury claim against homeowners.

Transactions

- Assisted various municipalities on incorporations; drafting new or amending existing zoning, subdivision, and general ordinances; drafting comprehensive plans;

negotiating and drafting border agreements and annexation agreements.

- Represented municipalities in court on border disputes.
- Represented municipalities before administrative boards on disciplinary proceedings (including police issues).
- Represented Ken Rock Community Center on sale of commercial/school property.

Public Speaking

- "Evidentiary Issues for the Claims Professional" Heyl Royster 2008
- "Premises Liability Update" Heyl Royster 2007
- "Mediation and Arbitration: When, Why & How?" Heyl Royster 2001
- Various presentations to local realtor company meetings on professional liability issues
- "Evidentiary Issues for the Fire Investigator" Northern Illinois Arson Investigator Association annual certification meeting

Professional Recognition

- Selected as a Leading Lawyer in Illinois. Only five percent of lawyers in the state are named as Leading Lawyers
- Winnebago County Pro Bono Volunteer of the Year (1990)
- Court certified mediator, Winnebago County

Professional Associations

- Winnebago State Bar Association
- Illinois State Bar Association
- American Bar Association
- Illinois Association of Defense Trial Counsel
- Defense Research Institute
- Court Admissions
- State Courts of Illinois
- United States District Court, Northern District of Illinois

Education

- Juris Doctor, Hamline University School of Law, 1987
- Bachelor of Arts (Magna Cum Laude), University of Wisconsin - Eau Claire, 1984
- Porter Scholar, Beloit College, 1979-1980

