

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

THOMAS BREMER	:		
	:		
Plaintiff	:		
	:		
v.	:	3:CV-03-1810	
	:	(CHIEF JUDGE VANASKIE)	
	:		
PRUDENTIAL PROPERTY & CASUALTY	:		
INSURANCE COMPANY	:		
	:		
Defendant	:		

MEMORANDUM

Plaintiff Thomas Bremer was injured in a car accident and received money from settlements with two other persons involved in the accident. The settlement with one of the persons, Stacy Sue Gist, was for less than Gist's full policy limit. In the present action against Defendant Prudential Property and Casualty Insurance Company, with which Plaintiff has a policy for underinsured motorist coverage, Plaintiff has filed a Petition to Modify or Correct an Arbitration Award in order to obtain underinsured motorist coverage for the difference between the amount actually recovered from the settlement with Gist and Gist's full policy limit. Stated otherwise, the issue presented here is whether an underinsured motorist carrier is entitled to credit the policy limits covering a settling party against an award of damages, or is the credit restricted to the amount actually paid on behalf of the settling party. Concluding that decisions of the Pennsylvania Superior Court, holding that the underinsured motorist carrier is entitled to a credit in the amount of the settling party's liability coverage limits, accurately reflect the ruling that the Pennsylvania Supreme Court would make were it confronted with this issue, I will deny Plaintiff's Petition.

I. Background

On February 1, 1996 in Scranton, Pennsylvania, a vehicle operated by Christina A. Howell struck a vehicle being driven by Thomas Bremer, and immediately thereafter, a vehicle operated by Stacy Sue Gist, who was traveling behind Bremer, hit the rear of Bremer's vehicle. As a result of the accident, Bremer and his wife filed an action against Howell, Gist, and Howell's Garage. The Bremers received the policy limits of Howell in the amount of \$50,000, and the amount of \$15,000 from the \$100,000 liability insurance of Gist. Plaintiff voluntarily dismissed Howell's Garage as a defendant.

Thomas Bremer filed for arbitration against Prudential Property and Casualty Insurance Company under the underinsured motorist coverage provisions of his policy, having a policy limit of \$200,000. The Arbitrators concluded: "We, the majority Arbitrators, find in favor of the Plaintiff in the gross amount of \$200,000.00, which amount is reduced by appropriate credit of \$150,000.00, leaving a net Award to the Plaintiff of \$50,000.00, this 15th day of September, 2003." (Pl.'s Br. at 2; see also Pl.'s App. 2.)

Under the Payments Reduced clause, Bremer's underinsured motorist policy states that "[p]ayments will be reduced by any amount paid or payable by persons responsible for the accident." (Ex. A at 11, Def.'s Exs.) Moreover, regarding underinsured motorist coverage, Bremer's policy provides:

[Defendant] will pay up to [Defendant's] limit of liability for bodily injury that is covered under this part when an insured (whether or not occupying a car) is struck by an underinsured motor vehicle. [Defendant's] payment is based on the amount that an insured is legally entitled to recover for bodily injury but could not collect from the owner or driver of the underinsured motor vehicle because:

*THE OWNER OR DRIVER IS UNDERINSURED

The owner or driver responsible for the accident has liability insurance or a liability bond with limits that are less than the full amount the insured is legally entitled to recover as damages.

No payment will be made under this part until liability insurance and bonds of all responsible motor vehicles are exhausted by payment of settlement or judgment. This is a coverage of last resort.

(Ex. A at 7, Def.'s Exs. (emphasis added).) The underscored language is commonly referred to as an "exhaustion clause."

Plaintiff commenced this action in the Court of Common Pleas of Lackawanna County, seeking to modify or correct the arbitration award pursuant to 42 Pa. Cons. Stat. Ann. §§ 7314 and 7315. A Notice of Removal from the Court of Common Pleas of Lackawanna County to this Court was filed on October 10, 2003. Jurisdiction in this Court is based on diversity of citizenship pursuant to 28 U.S.C. § 1332.¹

¹Regarding jurisdictional requirements, the following is undisputed:

3. Plaintiff was at the time of the filing of this action in state court a citizen of the Commonwealth of Pennsylvania.
4. Defendant Prudential is a citizen of a state other than Pennsylvania.

Regarding review of the arbitration award in this case, Plaintiff relies on sections of the underinsured motorist of the policy that provide as follows:

All disputes affecting the scope of coverage, the amount of coverage, a person's right or eligibility to make a claim, or the insured's selection of coverage, will be determined by the court in the county where the insured lives at the time the demand for arbitration is made; or a Federal District Court whose jurisdiction includes the county where the insured lives.

Following the entry of an arbitration award, either party may file a petition to vacate or modify the award in the court in the county where the arbitration was conducted. The court may modify or correct the award where:

....

5. The arbitrators committed an error of law such that had it been a verdict of a jury the court would have entered a different or other judgment notwithstanding the verdict.

Arbitration will be conducted in accordance with the Provisions of the Pennsylvania Uniform Arbitration Act and the Pennsylvania Arbitration Act of 1927.

(Ex. A at 11, Def.'s Exs.)

5. Removing Defendant Prudential was at the time of the filing of this action in state court a citizen of the State of New Jersey and has its principal place of business in a state other than Pennsylvania.

6. This action is for a matter in controversy in excess of the sum or value of \$75,000, exclusive of interest and costs and is between citizens of different states. . . .

(Notice of Removal ¶¶ 3-6.)

Plaintiff asserts the following:

The plaintiff does not contest or in any way challenge the Award in favor of the plaintiff in the gross amount of \$200,000.00.

The reduction in the amount of \$150,000.00 was the \$50,000.00 credit for the amount plaintiff received from Christina A. Howell, plus the \$100,000.00 full policy limits of Stacy Sue Gist, who only paid \$15,000.00.

The Arbitrators should have reduced the Award only by \$65,000.00, the \$50,000.00 paid by the insurance carrier of Christina A. Howell and \$15,000.00, the amount paid by the insurance carrier of Stacy Sue Gist since she was not responsible, or if responsible, no more than the \$15,000.00 which her insurance carrier paid.

(Pl.'s Br. at 2-3; see also Pl.'s Br. at 14-22.)

Defendant argues that the arbitrators did not commit an error of law and that it is "entitled to a credit of the full amounts of coverage that were payable under both of the tortfeasors' respective liability policies." (Def.'s Br. at 11.) As recognized by Defendant, "the parties have essentially agreed that the issue before the Court is whether or not the arbitrators committed an error of law in the amount of the credit that was granted to the Defendant, Prudential." (Def.'s Br. at 6.)

II. Discussion

There appears to be no controlling Pennsylvania Supreme Court case addressing the issue presented here. In this circumstance, a federal court in a diversity case is to

predict what the applicable state's highest court would decide if confronted with the same case. Aetna Cas. & Sur. Co. v. Farrell, 855 F.2d 146, 148 (3d Cir. 1988). "In the absence of an authoritative pronouncement by a state's highest court, [a federal court] may give serious consideration to the opinion of an intermediate appellate court." Id. Lacking an authoritative pronouncement by the Pennsylvania Supreme Court, serious consideration will be given to opinions of the Pennsylvania Superior Court that are applicable to this case. The Pennsylvania Superior Court has decided a number of cases relevant to the present situation, and those decisions support giving a credit to Defendant for Gist's full policy limit.

The leading case is Boyle v. Erie Ins. Co., 656 A.2d 941 (Pa. Super. Ct. 1995), app. denied, 542 Pa. 655, 668 A.2d 1120 (1995). Boyle, like this case, involved a three-party automobile accident, with the claimant for underinsured motorist benefits having settled with the other two participants in the mishap. Thomas and Janice Boyle, the plaintiffs, made a claim for underinsured motorist coverage under their policy with Erie Insurance Company, the defendant. The claim arose from a car accident in 1986 occurring when the plaintiffs were in a vehicle in which Thomas Boyle was driving. When he slowed his car to permit another vehicle operated by Charles Speelman to enter the flow of traffic, the Boyles' vehicle was struck in the rear by a truck driven by Dale Hitchcock. The plaintiffs obtained a settlement from Speelman for the full limits of his liability coverage, which was \$15,000, and from Hitchcock for fifty percent of his liability coverage, which was \$150,000. One of the

reasons that Erie denied underinsured motorist coverage to the plaintiffs was they had not exhausted the limits of Hitchcock's liability policy.² The exhaustion clause in the Boyles' policy stated:

With respect to underinsured motor vehicles, we [Erie] will not be obligated to make any payment until the limits under all bodily injury insurance policies and liability bonds applicable at the time of the accident, including other than motor vehicle insurance, have been exhausted by payment of settlements or judgments.

Boyle, 656 A.2d at 942. The Pennsylvania Superior Court held as follows:

[W]e hold that exhaustion clauses are not per se invalid, but they cannot validly be interpreted to require an insured to seek recovery from other than the owners and operators of vehicles involved in the accident.

....

"Where the best settlement available is less than the [tortfeasor's] liability limits, the insured should not be forced to forego settlement and go to trial in order to determine the issue of damages."

On the other hand, an exhaustion clause must be interpreted to provide protection to an insurance company against a demand by its insured to fill the "gap" after a weak claim has been settled for an unreasonably small amount. The statutorily mandated coverage for underinsured motorist benefits was not intended to permit the insured absolute and arbitrary discretion to determine how payment should be apportioned between his or her own insurance company and the

²The other reason that Erie denied coverage was the plaintiffs' failure to obtain Erie's consent to their settlement with the third party tortfeasors. During Oral Argument conducted on April 14, 2004 in the present case, Defendant asserted that consent is not at issue in this case. Thus, the consent issue need not be addressed here.

tortfeasor's liability carrier. This was poignantly observed by the Supreme Court of Minnesota as follows:

. . . Practically, the insured would have no incentive to obtain the best settlement if he or she is assured of recovering the "gap" from the underinsurer. Use of the underinsurance benefits in this way . . . would . . . place the underinsurer at an unfair disadvantage in which it had no control over the insured's right to settle but yet had to pay the difference between the settlement and the liability limits. . . .

We conclude, therefore, that the conflicting interests of insured and insurer can best and most fairly be served by construing the exhaustion clause in this case as a "threshold requirement and not a barrier to underinsured motorist insurance coverage." Thus, when the insureds settled their claim against the tortfeasor's liability carrier for less than policy limits, the underinsured motorist carrier was entitled to compute its payment to its injured insureds as though the tortfeasor's policy limits had been paid. Under this view, the insureds will not be allowed underinsured motorist benefits unless their damages exceed the maximum liability coverage provided by the liability carriers of other drivers involved in the accident; and their insurer will, in any event, be allowed to credit the full amounts of the tortfeasors' liability coverages against the insureds' damages. . . .

Boyle, 656 A.2d at 943-44 (citations omitted and emphasis added).³

The holding in Boyle has been consistently followed in subsequent cases by the Pennsylvania Superior Court. Harper v. Providence Washington Ins. Co., 753 A.2d 282 (Pa.

³At the time of the Boyles' accident in 1986, section 1731 of the Motor Vehicle Financial Responsibility Law, 75 Pa. Cons. Stat. Ann. § 1731(a), mandated underinsured motorist coverage, but this section was amended in 1990. Boyle v. Erie Ins. Co., 656 A.2d 941, 942 & n.1 (Pa. Super. Ct. 1995). Section 1731 currently requires only that underinsured motorist coverage be offered, and the purchase of such coverage is optional.

Super. Ct. 2000); Sorber v. Am. Motorists Ins. Co., 680 A.2d 881 (Pa. Super. Ct. 1996); Kelly v. State Farm Ins. Co., 668 A.2d 1154 (Pa. Super. Ct. 1995); Chambers v. Aetna Cas. & Sur. Co., 658 A.2d 1346 (Pa. Super. Ct. 1995). At least one other federal court has also found Boyle to be an accurate indicator of Pennsylvania law, holding that insureds may only recover underinsured motorist benefits to the extent that their awarded damages exceed the aggregate of coverage afforded by the liability carriers of other involved motorists. See DiSantis v. Allstate Ins. Co., Civ. A. No. 95-6700, 1996 U.S. Dist. LEXIS 5320 (E.D. Pa. Apr. 19, 1996).⁴ I, too, find Boyle's logic persuasive. Exhaustion of limits clauses provide coverage in excess of the liability limits available for the injuries in question. Affording the underinsured carrier a credit for the total liability limits of multiple tortfeasors enables a plaintiff to negotiate recovery with the insurance carriers of all responsible parties, regardless of the recovery of liability limits, while at the same time restricting the underinsured carrier's liability to the excess coverage it contracted to provide.

The exhaustion clause for underinsured motorist coverage in the present case provides: "No payment will be made under this part until liability insurance and bonds of all responsible motor vehicles are exhausted by payment of settlement or judgment. This is a

⁴Our Court of Appeals reached a similar conclusion under New Jersey law, holding that, although an underinsured carrier cannot demand exhaustion of liability limits as a condition of coverage, it is entitled to a credit in the full amount of liability limits. See Aetna Cas. & Sur. Co. v. Farrell, 855 F.2d 146, 150 (3d Cir. 1988).

coverage of last resort.” (Emphasis added.) This exhaustion clause does not differ in a material way from that in Boyle. Plaintiff in effect seeks “gap” coverage for the difference between Gist’s full policy limit of \$100,000 and the amount of the settlement with Gist for \$15,000. Defendant, however, did not contract to provide such “gap” coverage, and Boyle holds that Defendant’s policy cannot be interpreted to require such coverage. Defendant is entitled to set off against the determined damages of \$200,000 the aggregate of the liability limits (\$150,000) for the two other vehicles involved in the accident.

Plaintiff relies heavily on Overfield v. Ohio Cas. Ins. Co., 39 Pa. D. & C.4th 548 (Lackawanna County C.P. Ct. 1998), which, in part, held that “the most equitable and judicious approach to automobile accident claims involving multiple plaintiffs who have allocated a tort-feasor’s policy limits is to permit the [underinsured] insurer to assert a credit only for the liability insurance proceeds actually received by the claimant rather than the tort-feasor’s policy limits.” Id. at 566. The Lackawanna County Common Pleas Court’s decision, however, explicitly distinguished Boyle. The Hon. Terrence Nealon observed in Overfield that Boyle “does not accurately reflect the realities present in a multiple plaintiff scenario in which a tort-feasor’s liability limits have been interpleaded into court to be apportioned among the claimants.” Overfield, 39 Pa. D. & C.4th at 561. By way of contrast, this case involves a factual scenario indistinguishable from that considered in Boyle: one plaintiff settling with the operators of two other vehicles involved in the accident for less than

the aggregate of their liability limits. Judge Nealon acknowledged that the approach adopted in Boyle is “workable and equitable in those instances in which the [underinsured motorist] claimant could have potentially exhausted the tort-feasor’s liability coverage,” id., the precise scenario presented here. Indeed, Judge Nealon recognized that Boyle “does have relevance with regard to a single claimant” pursuing a liability claim. Id. at 562. Thus, Overfield does not afford a basis for holding Boyle inapplicable here.

Overfield also involved an arbitration panel’s refusal to give credit for the full amount of the liability limits of a carrier which had not interpleaded its limits to be divided among multiple claimants. Judge Nealon found Boyle inapplicable in this latter situation based on the language of the underinsured policy, finding that the policy before him required exhaustion of only one liability policy, as opposed to the limits of all policies required by the policy at issue in Boyle and that presented here. Thus, Overfield is distinguishable for this reason as well.⁵

⁵In Overfield, the arbitrators had determined that the non-interpleading defendant bore a 10% responsibility for the plaintiff’s damages, and gave the underinsured carrier a credit in the amount of 10% of the determined damages. Judge Nealon found this approach to be warranted because the offset was limited by contract to the amounts paid or payable by those “legally responsible” for the plaintiff’s injuries and the liability of the non-interpleading party could only be pro rata. Plaintiff in this case argues that Defendant is entitled to a credit only for the percentage of responsibility allocable to Gist. Unlike Overfield, the arbitration panel in this case did not determine the percentage of Gist’s responsibility. Thus, the factual premise found in Overfield to allow for a pro rata credit is missing here. More importantly, Boyle does not contemplate requiring an arbitration panel to determine relative percentage of responsibility for fashioning an offset, but instead gives

Finally, Overfield is distinguishable because the plaintiff in that case had not yet resolved her claim with the party whose carrier had not interpleaded its liability limits. Thus, the underinsured carrier could request an assignment to seek contribution from the other tortfeasor's carrier. Here, of course, Bremer has settled with Gist's carrier, thereby foreclosing a contribution claim.

In this case, the policy entitles Defendant to a credit in the amount of the liability limits for all "responsible" motor vehicles. Plaintiff argues that Defendant is not entitled to a credit for Gist's policy limit because Gist was not "responsible" for the accident. Indeed, Plaintiff asserts that "[i]t is clearly apparent that in the event Mr. and Mrs. Bremer proceeded to trial against the defendant, Stacy Sue Gist, the result would have been a defense verdict." (Pl.'s Br. at 22.) Plaintiff, however, cannot undo the decisions to bring an action against Gist, to voluntarily withdraw only Howell's Garage as a defendant and not Gist, and to obtain \$15,000 from Gist's insurance as a settlement of Plaintiff's claim against Gist. Boyle requires that, in these circumstances, the underinsured carrier receives credit for the liability limits of the tortfeasors against whom the claimant pursued claims and received recoveries. Accordingly, the Arbitration Award will be confirmed.

effect to exhaustion of limits clauses by according the carrier a credit for the full amount of the liability limits available for the plaintiff's injuries, regardless of the amount paid by the settling carriers.

III. Conclusion

In light of Boyle and its progeny, Defendant is entitled to a credit for the full amount of Gist's policy limit of \$100,000. Accordingly, Plaintiff's Petition to Modify or Correct an Arbitration Award will be denied, and the Arbitration Award of September 15, 2003 will be confirmed. An appropriate Order follows.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

DATE: August 18, 2004

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

THOMAS BREMER	:	
	:	
Plaintiff	:	
	:	
v.	:	3:CV-03-1810
	:	(CHIEF JUDGE VANASKIE)
PRUDENTIAL PROPERTY & CASUALTY	:	
INSURANCE COMPANY	:	
	:	
Defendant	:	

ORDER

NOW, THIS 18th DAY OF AUGUST, 2004, for the reasons set forth in the foregoing Memorandum, IT IS HEREBY ORDERED THAT:

1. Plaintiff's Petition to Modify or Correct an Arbitration Award (Dkt. Entry 1) is **DENIED**.
2. The Arbitration Award dated September 15, 2003 is **CONFIRMED**.
3. The Clerk of Court is directed to enter judgment in favor of Defendant and to mark this matter **CLOSED**.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania