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STATEMENT OF THE FACTS

State Farm Mutual Automobile Insurance Company (State Farm) hereby incorporates by reference the Statement of Facts set forth in the Merit Brief of Appellant Motorists Mutual Insurance Company.

ARGUMENT

Certified Conflict Question: Whether the definition of “insured” as “any other person occupying your covered auto who is not a named insured or insured family member for uninsured motorist’s coverage under another policy” is ambiguous and should be construed against the insurer to provide coverage for a permissive operator of a covered vehicle who is not a named insured or insured family member?

STATE FARM’S PROPOSITION OF LAW NO. I

AN AUTOMOBILE INSURANCE POLICY PROVISION WHICH DEFINES THE TERM “INSURED” TO INCLUDE PERMISSIVE USERS OF THE COVERED VEHICLE ONLY IF THEY ARE NOT INSURED FOR UM/UIM COVERAGE BY ANY OTHER INSURANCE POLICY IS VALID AND ENFORCEABLE.

I. There Is No Public Policy Basis Upon Which To Invalidate The Clause Before The Court In This Appeal.

It should first be noted that this case is governed by the version of R.C. 3937.18 as amended by S.B. 97. As per that legislation, there no longer is any public policy basis upon which to invalidate the terms contained within the uninsured/underinsured motorist (UM/UIM) coverage portion of an automobile insurance policy. In fact, the public policy of Ohio is now that UM/UIM coverage is a purely voluntary coverage which requires no offer of any kind in conjunction with the issuance of an automobile insurance policy.

In enacting this act, it is the intent of the General Assembly to do all of the following:

(B) Express the public policy of the state to:

1. Eliminate any requirement of the mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;

See staff notes to the S.B. 97 amendments to R.C. 3937.18.

The new statutory language set forth in R.C. 3937.18 expresses the Legislature’s intent. The statute now specifies that insurance companies may, but are not required, to include uninsured or underinsured motorist coverage at all.

(A) Any policy of insurance delivered or issued for delivery in this state with respect to any motor vehicle. . . may, but is not required to include insured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages.

R.C. 3937.18.

Since it is now a purely voluntary coverage, the General Assembly also established that the public policy of Ohio is that no UM/UIM coverage is ever to be created by “operation of law.” The staff notes or uncodified law set forth with the S.B. 97 amendments state that the General Assembly intended to:

(2) Eliminate the possibility of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages being implied as a matter of law in any insurance policy;

See staff notes to R.C. 3937.18.

Given the above, this Honorable Court’s review of this appeal should not include any consideration of a public policy basis upon which to invalidate definitional clauses such as that forth in the Motorists policy.

II. Ohio Law Provides That The Parties To An Automobile Insurance Policy May Define Who Qualifies As An Insured Under The Policy.

The seminal case regarding the rights of the parties to an insurance contract to limit those persons who qualify as insureds under the policy is Holliman v. Allstate Insurance Company (1999), 86 Ohio St.3d 414. Holliman held that the parties to an insurance contract could define who was to be insured under the policy in any matter they deemed fit. In Holliman, supra, there was an umbrella policy that defined insured persons to include only “you and any resident relative.” A guest passenger in the vehicle argued that the coverage ought to also be extended to the passenger just because he/she was occupying the insured vehicle. The Ohio Supreme Court disagreed stating:

Nothing in R.C. 3937.18 or *Martin* prohibits the parties to an insurance contract from defining who is an insured person under the policy.

Id. at 417.

The Holliman holding that the persons insured by a particular insurance policy ought to be governed by the manner in which the policy defines the term “insured” as opposed to whether the person happens to be operating or occupying a particular vehicle is consistent with the syllabus law set forth in Martin v. Midwestern Group Ins. Co.¹ (1994), 70 Ohio St. 3d 478, wherein this Court held the purpose of UM/UIM coverage is to insure particular persons, not vehicles.

1. Pursuant to R.C. 3937.18, uninsured motorist coverage was designed by the General Assembly to protect persons, not vehicles. (Abate v. Pioneer Mut. Cas. Co. [1970], 22 Ohio St.2d 161, followed.)

Id., Syllabus 1 to the case.

The appellate courts have taken this to heart, agreeing that parties to insurance contracts can define the class of insureds for any particular policy as they deem fit.

. . . the statutory requirements of R.C. 3937.18 are not triggered until there has been a determination that the claimant is an insured. Furthermore, Holliman reaffirms the right of parties to an insurance contract to define the class of insureds for any particular policy and acknowledges that the determination of “who is an insured” is the initial issue in any insurance coverage dispute.

Finn v. Nationwide Agribusiness Ins. Co. (August 11, 2003) Allen App. No. 1-02-80, 2003 Ohio 4233, ¶¶ 50-53.

It should be noted that the policy language which this court approved in Holliman, supra, limited the UM/UIM coverage to the named insured and his/her family. The policy did not include *any* additional occupants of the vehicle as an insured, even if those persons had no UM/UIM coverage of their own. The policy language before the court in this case is much less harsh in its application. It seeks to hold those persons who have purchased their own UM/UIM coverage to the benefit of their own bargain but extends coverage to persons who, perhaps

¹ Superseded in part by later versions of R.C. 3937.18.

because they do not own or drive a vehicle, have no UM/UIM coverage of their own. If clauses like the one now before the court are deemed to somehow be unenforceable and/or vague, then the logical result will be that parties who are unwilling to share their UM/UIM coverage with guest occupants *carte blanche* will incorporate the much harsher definition this Court has already approved in Holliman, supra.

It should further be noted that this appeal does not concern the use of an “escape clause” to avoid providing coverage to a person who otherwise qualifies as an insured under the policy. In Lumbermens Mutual Casualty Company v. Xayphonh (March 26, 2003), Summit App. No. 21217, 2003 Ohio 1482, ¶¶ 26-28, the Court agreed that there is a critical distinction between a clause which precludes a person from qualifying as an insured in the first place as opposed to a clause which takes coverage away from a person who is an insured.

[*P27] In *Selective Ins. Co. v. Wilson* (2002), 5th Dist. No. CT2002-0009, 2002 Ohio 7388, the Fifth District Court of Appeals addressed the same argument as asserted by Appellants. The policy in *Wilson* contained the same definition of an insured as the Lumbermens policy in the case sub judice. ***The court found that the policy in question did not eliminate UIM coverage for an insured, nor did it act as an illegal exclusion. 2002 Ohio 7388 at P23. The court noted the distinction between an exclusion from coverage and a condition for coverage. Id., citing Luckenbill v. Midwestern Indemn. Co. (2001), 143 Ohio App.3d 501, 506, 758 N.E.2d 301. The court therefore found that Martin did not apply, because the claimant did not establish that he was an insured under the terms of the policy. 2002 Ohio 7388 at P23; see, also, Harris v. Mid-Century Ins. Co. (1996), 111 Ohio App.3d 399, 403, 676 N.E.2d 544.***

[*P28] ***We find this reasoning to be persuasive. Neither Phoui nor Jason can meet the first prong of Martin, as they are not insureds under the policy. Accordingly, Appellants' reliance on Martin is misplaced. Appellants' argument ignores the distinction between the definition of an insured and a term that excludes coverage under specified circumstances for an insured. “Nothing in R.C. 3937.18 or Martin prohibits the parties to an insurance contract from defining who is an insured person under the policy.” Holliman, 86 Ohio St.3d at 416-417, citing Wayne Mut. Ins. Co. v. Mills (1996), 118 Ohio App.3d 146, 154, 692 N.E.2d 213. Therefore, we conclude that the policy does not act as an impermissible exclusion under Martin.***

Id. at ¶¶ 26-28.

This Court in Holliman, *supra*, recognized that the issue of whether a person initially qualifies as an insured is a separate and distinct threshold issue when determining whether coverage applies. This is especially so where a person is attempting to submit a claim under someone else's insurance policy.

Here, plaintiffs fail the first prong of the *Martin* test, in that they are not insureds under the Allstate umbrella policy. Although plaintiffs may suggest that the narrow definition of "insured persons" contained in the umbrella policy is simply an attempt to circumvent *Martin*, the argument is unpersuasive. Unlike the claimant in *Martin*, plaintiffs are not seeking uninsured motorist coverage under their policies. Rather, they contend that because they were passengers in an automobile driven by an individual who was an insured under an uninsured motorist policy, they are entitled to relief under that policy, even though they are not named as insureds in it.

Holliman, *supra*, at 416-417.

The issue in this case is whether, as a threshold issue, the parties to an insurance contract can limit the UM/UIM coverage to protecting the insured, his/her resident relatives and those additional occupants who do not, themselves, have UM/UIM coverage available from their own policies. Given the authority set forth above, there is no question that the parties to an automobile insurance policy have the right under Ohio law to define who qualifies as an insured under the UM/UIM coverage as they deem fit.

III. The Appellate Courts Have Repeatedly Enforced Definitional Clauses Such As The One Before This Court Which Do Not Include Permissive Users Of The Covered Vehicle As Additional Insureds If They Have Other UM/UIM Coverage.

The courts of Ohio have already had an opportunity to consider policy provisions which exclude a person from qualifying as an insured for UM/UIM coverage if such person has his/her own insurance coverage. The exact language now before this Court was first litigated in Shepherd v. Scott (Aug. 29, 2002), Hancock App. No. 5-02-22, 2002 Ohio 4417, where the Third Appellate District specifically construed and approved the clause.

[*P11] Appellee Motorists moved for summary judgment on the grounds that Charlotte Sheppard was not an insured according to the terms of their

underinsured motorist policy issued to driver Sandy Hites. The Motorists Mutual Uninsured Motorist policy defines an insured as follows:

* * *

[*P14] "Any other person occupying your covered auto who is not a named insured or an insured family member for uninsured motorists coverage under another policy."

[*P15] Appellant Cincinnati argues that Section B(2) of the Motorists Policy is an invalid and unenforceable escape clause designed to preclude coverage for an insured in the event of other coverage and therefore, the Motorists Policy is the primary insurer for Sheppard's injuries. Cincinnati bases its argument on the Ohio Supreme Court's holdings in *State Farm Mut. Auto. Ins. Co. v. Home Indemnity Ins. Co.* (1970), 23 Ohio St.2d 45,... and our holding in *Halcyon Insurance Co. v. Empire Fire and Marine Insurance Co.*, Allen App. No. 1-01-88, 2001 Ohio 2281. We do not find Appellant's argument to be well taken.

* * *

[*P24] We find *Holliman* to be controlling in the matter sub judice. Appellant, like the plaintiff in *Holliman*, argues that Sheppard, the passenger in Hites' vehicle, is entitled to UM/UIM coverage simply because that vehicle was driven by a person who was insured under a UM/UIM policy. The *Holliman* court rejected this argument and so must we. Therefore, the clause identified as section B(2), defining who will be an insured for purposes of UM/UIM coverage is not invalid and unenforceable.

Shepherd v. Scott, supra, at ¶¶ 11 - 24.

This same issue and policy language was litigated in Mitchell v. Motorists Mut. Ins. Group (August 4, 2005), Franklin App. No. 04AP-589, 2005 Ohio 3988. In Mitchell, the Tenth Appellate District considered the same policy language and agreed that nothing prevented an insurer from defining an insured under the UM/UIM coverage so as to exclude passengers who have their own uninsured motorist coverage.

[*P22] Here, Motorists utilized its ability to define who is an insured under the policy to exclude from that definition passengers who are insureds under other policies. Although Mitchell is unhappy with the result, i.e., that he is limited to collecting benefits only under his cousin's policy, no public policy or statute prohibits it or even militates against it.

Mitchell v. Motorists Mut. Ins. Group, supra, at ¶ 22.

In Safeco Insurance Company of Illinois v. Motorists Mutual Insurance Company (April 27, 2006), Cuyahoga App. No. 86124, 2006 Ohio 2063, the Eighth Appellate District, citing Mitchell and Shepherd with approval agreed that an insurer could define who was insured under the policy at issue to exclude persons who had their own coverage from so qualifying.

[*P25] In the instant matter, the Motorists policy excludes Heil from the definition of an insured for UM/UIM coverage because she had UM/UIM coverage under another policy. Heil was the named insured under the Safeco policy. In compliance with *R.C. 3937.18*, Safeco provided its insured with UM/UIM coverage. We find that the Motorists policy neither violates the purpose nor the language of *R.C. 3937.18* and that Heil is not an insured for purposes of UM/UIM coverage under the Motorists policy.

Id. at ¶ 25.

The Ninth Appellate District next considered the same type of clause which included permissive users of a vehicle as an additional insured so long as those persons did not have their own UM/UIM coverage. In Lightning Rod Mut. Ins. Co. v. Grange Mut. Cas. Co. (2006), 168 Ohio App. 3d 505, the clause in question defined the term “insured” to include: “3. Any other person while occupying your covered auto..., if that person is not insured for Uninsured Motorists Coverage under another policy.” Id. at P. 12. The court agreed the clause would not include the permissive user of the Grange vehicle as an insured because he was insured under his own Lightning Rod policy.

[P14]** In this case, Grange exercised its ability to define who is an insured under the policy it issued to Helen Calendine to exclude from that definition passengers who are insured under other policies. It is undisputed that Burkhart was covered under the Lightning Rod policy.

Id. at P. 14.

Earlier this year the Sixth Appellate District considered this same issue and enforced a clause which excluded from the definition of “insured” those persons who were insured under other policies.

[*P44] Here, Grange exercised its power to define the term "insured" under the subject policy, specifically excluding from its definition passengers insured under other policies. This was a proper exercise of its power. See, also, *Lightning Rod*,

supra (where the court, in a factually analogous case, found the insurer's definition of "insured" to be valid and enforceable); *Safeco, supra*, (holding that "[t]here is nothing that would prohibit [a] person from excluding as an insured any passengers in his vehicle who have their own policies of insurance containing UM/UIM coverage.")

Engler v. Stafford (May 11, 2007), Lucas App. No. L-06-1257, 2007 Ohio 2256, at ¶ 44.

Most recently, the Fourth Appellate District, considered whether an insurance policy could define the term insured to include only those passengers who did not have their own UM/UIM coverage. In Keffer v. Cent. Mut. Ins. Co. (May 17, 2007), Vinton App. No. 06CA652, 2007 Ohio 3984, the court construed a slightly different definition of insured which included: "2. Any other person occupying your covered auto who is not a named insured or an insured 'family member' for [UM/UIM] coverage under another policy." The Fourth District determined that the clause adequately limited the additional persons qualifying as insureds to those persons who did not have UM/UIM coverage under another policy.

[*P16] In the case at bar, we believe that nothing prohibits Central Mutual from defining who is an insured under the UIM policy provisions. We agree with the rationales expressed in *Shepherd*, *Mitchell*, and *Safeco* that limiting the definition of an insured as Central Mutual has in the case at bar does not contravene R.C. 3937.18.

Id. at P. 16.

The decision by the Twelfth District below, which refused to enforce the definitional clause in the Motorists' policy due to a perceived ambiguity in the policy language runs contrary to the well reasoned decisions by the Third, Fourth, Sixth, Eighth and Tenth appellate districts on this same issue. There is no question that parties to an insurance policy may limit permissive users of a covered vehicle to qualifying as additional insureds only if the permissive users are not insured under their own policies of insurance. Language of the type presently before this Court, and as set forth in the appellate decisions cited above, has been repeatedly found sufficient to accomplish this and should be found to be sufficient by this Honorable Court.

CONCLUSION

In Holliman, supra, this Honorable Court approved the use of a definitional clause which included only the named insured and his/her resident relatives as insureds under the UM/UIM coverage of the policy. Under no circumstances did any permissive users of the vehicle qualify for UM/UIM coverage even if they had no other source of recovery. The guest passengers in the case were deemed not to qualify as insureds under the policy and were precluded from recovery.

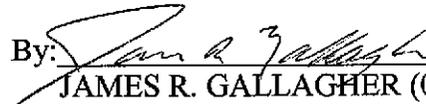
In the wake of Holliman, some insurers in Ohio drafted definitions of the term “insured” which were less harsh in their application. As set forth above, the definitions include permissive users if they do not have their own UM/UIM coverage, but hold permissive users to the benefit of their bargain if they had obtained a certain amount of UM/UIM coverage to protect themselves. The Third, Fourth, Sixth, Eighth and Tenth appellate districts have already reviewed and approved definitional clauses which, in addition to the named insured’s family, include other occupants of the covered vehicle as insureds so long as those persons do not have coverage of their own under another policy. None of these appellate districts found any ambiguity in crafting the definition of an “insured” for UM/UIM purposes in this manner. The decision by the Twelfth District below that such a definition is ambiguous is the decidedly minority view.

Amicus Curiae State Farm Mutual Automobile Insurance Company respectfully submits that this Honorable Court should reverse the decision of the appellate court below. In so doing, the Court should create syllabus law such as that set forth in State Farm’s Proposition of Law herein to the effect that a definitional provision which includes permissive users of a vehicle as insureds only if they do not have their own UM/UIM coverage is a valid and enforceable policy provision. In the event the Court finds ambiguity with the particular language now before the Court, State Farm

respectfully submits that the syllabus law resulting from this appeal should still affirm that definitional clauses of this type, when drafted clearly, are fully enforceable in Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Amicus Curiae State Farm Mutual Automobile Insurance Company in Support of Appellant Motorists Mutual Insurance Company was served by regular U.S. mail, postage pre-paid, upon T. Andrew Vollmar, Attorney for Defendant-Appellant Motorists Mutual Insurance Company at Freund, Freeze & Arnold, One Dayton Centre, 1 South Main Street, Suite 1800, Dayton, Ohio 45402-2017; P. Christian Nordstrom, Attorney for Third-Party Defendant-Appellee American States Insurance Co. dba Insurquest Ins. Co., at Jenks, Pyper & Oxley Co., L.P.A., 901 Courthouse Plaza SW, 10 North Ludlow Street, Dayton, Ohio 45402; and upon James J. Slattery, Jr., Plaintiff-Attorney pro se - Appellee, 506 East Fourth Street, #503, Cincinnati, Ohio 45202 on this 27th day of August, 2007.


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