IN THE SUPREME COURT OF OHIO

CASE NO. 2007-0593

LINDA B. WOHL
Plaintiff,

and

TYLER C. SWINNEY & JAMES J. SLATTERY, JR.
Plaintiffs-Appellees

v.

MOTORISTS MUTUAL INSURANCE CO.
Defendant/Third-Party Plaintiff-Appellant

v.

AMERICAN STATES INS. CO. d.b.a. INSURQUEST INS. CO.
Third-Party Defendant-Appellee

Appeal from Decision Entered on 2-12-07 by the Court of Appeals of Butler County, Ohio, Twelfth Appellate District, in Case No. CA2006-05-123

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Introduction

This Court should answer the certified question in the negative and rule that Motorists Mutual Insurance Company's (Motorists) policy language defining insured for uninsured/underinsured motorists (UM/UIM) coverage is not ambiguous.[1] Further, this Court should rule that any alleged ambiguity in Motorists' definition of insured cannot be read in favor of a non-policy holder, such as James Slattery. Regardless of Mr. Slattery's status under other sections of Motorists' policy with Linda Wohl, Mr. Slattery has no rights under the UM/UIM portion of the policy, because he did not bargain for the coverage he seeks. The definition of insured in Motorists' UM/UIM endorsement is not ambiguous, because it has a definite legal meaning, but even assuming for the sake of argument an ambiguity exists, the ambiguity should not be read in favor of a person who did not bargain for the coverage. Finally, there is no evidence that reading the definition to cover Mr. Slattery benefits Motorists' insured, Linda Wohl.

Proposition of Law No. 1

A definition of "insured" for UM/UIM is not ambiguous, when the definition has a definite legal meaning.

Motorists' definition of "insured" in its UM/UIM endorsement has a definite legal meaning, as a matter of law, because the 3rd, 4th , 10th and 8th Appellate Districts determined that the subject language has a meaning that excludes occupants of an insured vehicle who have UM/UIM coverage with another company. *Keffer v. Cent. Mut. Ins. Co.*, (4th District) 2007-Ohio-3984; *Mitchell v. Motorists Mutual Ins. Co.*, (10th District) 2005-Ohio-3988; *Safeco v. Motorists*, (8th District) 2006-Ohio-2063; *Shepherd v. Scott*, (3rd District) 2002-Ohio-4417. Nothing in Ohio's UM/UIM

[1]Motorists' definition of "insured" is restated in the appendix to this brief for ease of reference.

statute, R.C. 3937.18, prevents Motorists from defining "insured" in this manner. *Shepherd*, supra; *Keffer*, supra. If policy language has a definite legal meaning, and if R.C.3937.18 does not prohibit the language, then a court should enforce the language. *Id.* See also, *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.

On October 31, 2001, the Ohio Legislature amended Ohio's UM/UIM statute to give insurance companies freedom to include a broad range of terms and conditions in a UM/UIM policy. Revised Code Section 3937.18(I)(5), states:

> (I) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances, including but not limited to any of the following circumstances:
>
> *******
>
> (5) When the person actually suffering the bodily injury, sickness, disease, or death is not an insured under the policy.

R.C. 3937.18(I)(5) contemplates that the UM/UIM claimant must actually be an insured to recover benefits. Motorists' UM/UIM definition of "insured," excludes from the definition those vehicle occupants who are either named insureds for UM/UIM on another policy, or insured family members for UM/UIM on another policy. R.C. 3937.18(I)(5) contemplates and permits such a definition. There is no public policy against Motorists' language defining insured for UM/UIM. *Shepherd*, supra at ¶ 23.

Through Senate Bill 97, the applicable version of R.C. 3937.18, the Legislature eliminated the mandatory requirement that all automobile liability insurance providers offer UM/UIM coverage with every automobile liability insurance policy. R.C. 3937.18(A). The Legislature also specifically stated its intent to eliminate the possibility of coverage by operation of law. See R.C. 3937.182.

When this Court interpreted a previous version of R.C. 3937.18[2], this Court determined that nothing in R.C. 3937.18 prohibited an insurance company from defining "insured" for UM/UIM purposes. *Holliman v. Allstate Ins. Co.* 86 Ohio St. 3d 414, 416-417, 1999 Ohio 116, 715 N.E.2d 532. But, in this case, Safeco (dba American States Ins. Co., hereafter "Safeco") and Mr. Slattery argue that because Mr. Slattery qualifies as an insured under other sections of Motorists' contract with Linda Wohl, he must also be an insured for UM/UIM coverage. (See Slattery brief at page 7 and Safeco brief at page 13.) Certainly, there is no authority for these arguments in either R.C.3937.18 or the case law interpreting the statute. *Shepherd*, supra, at ¶18-26.

The landscape of Ohio's UM/UIM law has changed dramatically since the Legislature enacted Senate Bill 97. This Court should not interpret policies to result in coverage not contemplated by the parties to the contract. Sound legal precedent and reasoning would have this Court implement Motorists' intent as plainly stated in the policy language.

Motorists' opponents argue for coverage based on Mr. Slattery's status as an insured in the medical payments and liability coverages, but neither the liability coverage nor the medical payments coverage are issues in this appeal. Further, the policy has separate definitions of "insured" in the liability, medical payments and UM/UIM sections. (See Appendix.) Thus, the Appellees argue for coverage based on a separate definitions, different from and not relevant to the definition of "insured" in the UM/UIM section of the policy. Without any legal authority, Appellees argue for a windfall of UM/UIM coverage to someone who incidentally qualifies as an insured under the separate medical payments and liability sections of a policy, but the plain intent of the separate

[2]The previous version of R.C. 3937.18 at issue in *Holliman* and *Shepherd* was a version of the statute that required insurance companies to offer UM/UIM with any offer of automobile liability coverage.

definition in the UM/UIM section is to exclude an occupant who bargained for UM/UIM coverage with another company.

Appellees' arguments for coverage based on Mr. Slattery's status under other portions of the policy ignore the fact that in the other cases interpreting Motorists' UM/UIM definition of insured, the Courts of Appeals found Motorists' definition of insured to have a definite legal meaning, without analyzing the definition of "insured" in other parts of the policies. Those claimants in *Keffer*, *Shepherd*, *Mitchell* and *Safeco*, ostensibly were "insureds" under either the medical payment or liability sections of the policies, and would have come to the table with the same presumed rights as Mr. Slattery in this case. But, every court of appeals reviewing this language, except the 12th District Court of Appeals in this case, found the occupants of the insured vehicles were not insureds for UM/UIM under the subject definition, when the occupants were the named insureds or an insured family members for UM/UIM on another policy. *Keffer*, supra; *Mitchell*, supra; *Safeco*, supra; and *Shepherd*, supra

For example, in *Safeco*, supra, at ¶12, the court stated, "Safeco makes a rather unpersuasive argument that because Heil was defined as an insured under the liability portion of the [Motorists] policy, she qualifies for UM/UIM coverage by operation of law..." Thus, in the *Safeco v. Motorists* case, Safeco made arguments for coverage to the 8th Appellate District that are similar to the Safeco's arguments in its brief to this Court, based on the claimant qualifying as an "insured" for liability coverage under a Motorists policy. The 8th District Court of Appeals rejected Safeco's argument, finding that the definition of "insured" in the UM/UIM endorsement had a definite legal meaning that excluded the claimant because she was the named insured on a Safeco policy for UM/UIM, just like Mr. Slattery. *Id.* at ¶19, citing *Mitchell*, supra.

In the case before this Court, Safeco argues that the 8th Appellate District's decision in *Safeco v. Motorists* is flawed, because the majority opinion is, "devoid of any linguistic explanation for the non-ambiguity of the policy." (See Safeco's brief at page 17, Citing to Judge Karpinski's dissent in *Safeco v. Motorists*). This criticism actually ignores that portion of the majority opinion in *Safeco v. Motorists* in which the Court of Appeals stated, "We find that the interpretation suggested by Safeco is not a reasonable construction of the contract and appears contrary to the intention of the parties." *Id.* at ¶19. Thus, the language needs no "linguistic explanation," because the intent is as plain as the nose on a face. The reasonable interpretation of this definition results in Mr. Slattery not meeting the definition of insured because he was the named insured on a Safeco policy.

What Safeco really wants is a tortured interpretation of the definition of "insured," even though Motorists' intent is plainly understood. Plain language needs no explanation or interpretation. The 8th, 10th and 3rd and 4th Appellate Districts all found Motorists' definition of insured to have a definite legal meaning that excludes those individuals who were either named insureds or insured family members for UM/UIM on other policies of insurance. *Keffer*, supra; *Mitchell*, supra; *Safeco*, supra, and *Shepherd,* supra. In *Safeco*, the 8th Appellate District stated:

> Safeco argues that this should be read to define an insured as any other person occupying your covered auto who (1) is not a named insured, or (2) is an insured family member for uninsured motorists coverage under another policy. In support of this argument, Safeco refers to the "last antecedent" grammatical rule that provides "'Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent * * *.'" *Indep. Ins. Agents v. Fabe* (1992), 63 Ohio St.3d 310, 314, quoting *Carter v. Youngstown* (1946), 146 Ohio St. 203, 209. In considering the intention of the parties, we are mindful that insurance coverage is "determined by a '* * * reasonable construction [of the contract] in conformity with the intention of the parties as gathered from the ordinary and commonly understood meaning of the language employed.'" *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 211, quoting *Dealers Dairy Products Co. v. Royal Ins. Co.* (1960), 170 Ohio St. 336, paragraph one of the syllabus.

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> Generally, insurance policies contain 'other insurance' provisions that attempt to either vitiate or limit an insurer's liability for covering an insured's loss when another insurance policy also covers the insured." We find that a reasonable construction of the contract here is that the parties intended to exclude coverage for persons who had UM/UIM coverage under another insurance policy and were neither a named insured nor an insured family member under the Motorists policy. (Underline added for emphasis).

The 8th District's decision is not devoid of a "linguistic explanation" for the non-ambiguity. Indeed, the 8th District Court of Appeals, like the Courts of Appeals for the 10th, 3rd and 4th Districts in *Mitchell*, *Shepherd*, and *Keffer* respectively, found the definition of "insured" to have a definite legal meaning. Each of these Courts found Motorists' intent plain from the language used. The fact that the 12th District lost its way and decided to follow the dissent of Judge Karpinski in the face of legal precedent from 3 other appellate districts should not dissuade this Court from enforcing the obvious intention behind Motorists' definition of insured.[3]

Mr. Slattery and Safeco both attempt to distinguish this case on the basis that Mr. Slattery was an insured for liability purposes as a permissive driver of Linda Wohl's BMW. The claimant in *Keffer*, 2007-Ohio-3984, was also a permissive user of the insured vehicle, but that did not affect the 4th District Court of Appeals' analysis of the claim for UM/UIM coverage under the same circumstances. *Id.* at ¶6. The 4th District Court of Appeals interpreted a Central Mutual Insurance Company policy with language defining insured for UM/UIM coverage that is identical to the subject

[3] *Keffer* was not decided until after the 12th District's decision in this case. Notably, the 4th District Court of Appeals' decision in *Keffer* cites to *Safeco v. Motorists*, but there is no reference in the decision to the 12th District's decision in *Wohl v. Swinney*, 2007-Ohio-592, perhaps reflecting on how the 4th District Court of Appeals viewed the decision that caused this appeal. *Id.* at ¶14.

language in Motorists' policy. *Id.* at ¶ 1-6. Like Mr. Slattery, the claimant in *Keffer* was "an insured" for and received medical payments coverage, as an occupant of the insured vehicle. *Id.*

In *Keffer*, the injured claimant borrowed his mother's car and was driving his family at the time he and his passengers were involved in an accident with an underinsured tortfeasor, and like Mr. Slattery, the claimant in *Keffer* qualified as an "insured" in other parts of the policy as a permissive user of the insured vehicle. *Id.* The trial court granted summary judgment to the claimant, essentially holding that R.C. 3937.18(C) imposed coverage by operation of law. *Id.* at ¶7. Ironically, this was the same ruling made by the trial court in the subject case.

In overturning the judgment against Central Mutual, the 4th District Court of Appeals stated, "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 ¶16. Again, the 4th Appellate District found the language defining "insured" to have a definite legal meaning of excluding those occupants of an insured vehicle who were insureds for UM/UIM on another policy, even though the claimant was a permissive user of the insured vehicle and even though Central Mutual paid medical payments coverage to him. *Id.* at ¶ 15.

Appellees argue that this Court should apply the so called last antecedent rule to interpret Motorists' definition of insured. That rule states, "Referential and qualifying words and phrases, **where no contrary intention appears**, refer solely to the last antecedent." See *Safeco v, Motorists*, supra, at ¶18. (Underline added for emphasis). According to the courts actually using that rule of construction, the application of the last antecedent rule should only occur when "no other contrary intention appears." *Id.*

In the case of Motorists' definition of "insured," the last antecedent rule cannot apply because a clear contrary intention appears. According to the majority in *Safeco*, "The parties intended to exclude coverage for persons who had UM/UIM coverage under another insurance policy and were neither a named insured nor an insured family member under the Motorists policy." *Id.* at ¶19, quoting *Mitchell*. Other Courts of Appeals have also recognized this contrary intention, and thus, the last antecedent rule has no application. *Keffer*, at ¶15; *Mitchell*, at ¶22 and 30; *Shepherd*, at ¶33.

Both Safeco and Mr. Slattery cite to an affidavit from an English professor at Xavier University to support their argument that the subject language is ambiguous. The interpretation of an automobile liability insurance policy presents a question of law that appellate courts review without deference to a trial court. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 1995-Ohio-214. If a reviewing court interprets policies as a matter of law without deference to a lower court, then certainly this Court should not defer to an English professor who has no legal training. An English professor cannot usurp a court's authority to answer a question of law. This is especially true when the English professor's affidavit is contradicted by decisions from 4 separate Appellate Courts, none of whom found the subject language ambiguous.

Mr. Slattery argues that because he was a permissive operator of Linda Wohl's BMW, he could view himself as "you," the insured, under the UM/UIM coverage. (See Slattery Brief at Page 5 and 7). His argument is contradicted by the plain language of the Motorists' policy. The term "you" is specifically defined, and it refers to Motorists' named insured, Linda Wohl. There is no other reasonable interpretation of the term "you" as it is used in Motorists' policy. There simply is no basis for interpreting the contract so that "you" includes Mr. Slattery, a person who never bargained for coverage with Motorists.

Therefore, none of Appellees' arguments for coverage are persuasive, and sound legal reasoning requires that this Court find no ambiguity in the definition of "insured" found in the UM/UIM portion of Motorists' contract with Linda Wohl. The 12th District Court of Appeals erred in finding coverage, because the Court ignored the obvious intent behind Motorists' language. The definition is not reasonably understood to have any meaning argued for by Motorists' opponents, and the only reasonable interpretation of the definition is that it excludes occupants of an insured vehicle who have UM/UIM coverage with another company, either as the named insured or as an insured family member.

Mr. Slattery asks this Court to infer that the language is ambiguous because the 12th District Court of Appeals' decision conflicts with that of other courts. (See Slattery brief at 8). But, the fact that the 12th District's decision disregarded legal authority from every other court of appeals in this state reviewing the subject language is not a basis for labeling the language ambiguous. In tallying the number of judges finding no ambiguity, Mr. Slattery fails to count the judges who either did or would have ruled for Motorists in *Keffer*, *Shepherd* and *Mitchell*.

Mr. Slattery calls the conflict between one decision and 4 others an operational ambiguity, and he refers to the conflict from the12th District's decision as "res ipsa loquitor." If this court finds an ambiguity, it would overturn the decisions in *Shepherd*, *Mitchell*, *Keffer* and *Safeco*. The fact that the 12th District Court of Appeals erroneously found an ambiguity should not serve as a basis for invalidating decisions from 4 other appellate districts. What "speaks for itself" is the 12th District's unilateral departure from sound legal precedent to find coverage where none exists. Only 1 out of 5 appellate courts found Motorists' language is ambiguous. That is a statistic that speaks for itself.

Proposition of Law No. 2:

Alleged ambiguities in an insurance contract should not be read in favor of a claimant who is not a party to the insurance contract.

Mr. Slattery has no rights under the UM/UIM portion of Motorists' contract with Linda Wohl, because he never bargained for coverage from Motorists. This Court should follow this Court's holding in *Westfield v. Galatis*, wherein this Court stated:

> It is generally the role of the finder of fact to resolve ambiguity. See,e.g., *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St.3d 64, 609 N.E.2d 144. However, where the written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party. *Cent. Realty Co. v. Clutter* (1980), 62 Ohio St.2d 411, 413, 16 O.O.3d 441, 406 N.E.2d 515. In the insurance context, the insurer customarily drafts the contract. Thus, an ambiguity in an insurance contract is ordinarily interpreted against the insurer and in favor of the insured. *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380, syllabus.
>
> There are limitations to the preceding rule. "Although, as a rule, a policy of insurance that is reasonably open to different interpretations will be construed most favorably for the insured, that rule will not be applied so as to provide an unreasonable interpretation of the words of the policy." *Morfoot v. Stake* (1963), 174 Ohio St. 506, 23 O.O.2d 144, 190 N.E.2d 573, paragraph one of the syllabus. Likewise, <u>where "the Plaintiff is not a party to [the] contract of insurance * * *, [the Plaintiff] is not in a position to urge, as one of the parties, that the contract be construed strictly against the other party</u>." *Cook v. Kozell* (1964), 176 Ohio St. 332, 336, 27 O.O.2d 275, 199 N.E.2d 566. This rings especially true where expanding coverage beyond a policyholder's needs will increase the policyholder's premiums. *Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶ 13-14. (Citations in original, underline added for emphasis).

In the case presently before this Court, Mr. Slattery is not "a party to the contract." Nevertheless, Mr. Slattery and Safeco urge this Court to find coverage based on Mr. Slattery's status as an insured under other portions of the policy, namely the medical payments and liability sections. These arguments lack merit for several reasons.

The obvious intent behind having multiple definitions of "insured" is for each definition to mean something different. When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. *Hamilton Ins. Serv. Inc. v. Nationwide Ins. Cos.* (1999), 86 Ohio St.3d 270, 273, 714 N.E.2d 898, citing *Employers' Liab. Assur. Corp. v. Roehm* (1919), 99 Ohio St. 343, 124 N.E. 223, syllabus. See, also, Section 28, Article II, Ohio Constitution. As stated by this Court in *Galatis*, "[A court should] examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy." Citing, *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 31 OBR 289, 509 N.E.2d 411, paragraph one of the syllabus.

Motorists has separate definitions for the term "insured" in the liability, medical payments and UM/UIM portions of the policy. The clear intent is for the definition in the UIM section to mean something different from the other definitions. (See Appendix.) By defining "insured" differently in each section, Motorists' obvious intent was for different classes of people to qualify as an "insured" in those three sections. Otherwise, Motorists would have only one definition of "insured" for the entire policy.

Safeco and Mr. Slattery's arguments for coverage based on other definitions of "insured" in other parts of the policy ignore the well settled principal that courts must look to a policy as a whole in determining the intent behind the contract. *Galatis*, supra. Because Motorists' policy has different definitions of "insured" in each of the above sections, this Court should enforce the obvious intent of having the definition of "insured" for UM/UIM coverage actually mean something different from the other definitions. Considering the intent of the policy when read as a whole, and considering the separate and distinct definition of "insured" in the UM/UIM portion of the contract,

Mr. Slattery's incidental status as an insured in the liability and medical payments sections of the policy is irrelevant to construing any part of the UIM/UIM endorsement.

Motorists' opponents urge this Court to read an alleged ambiguity in the contract in favor of Mr. Slattery. The concept of reading an insurance policy's ambiguities in favor of the policy holder originates in contract law. *Westfield v. Galatis*, supra, at ¶ 11-13. This concept stems from the fact that with some contracts, like insurance policies, parties to the contract have unequal bargaining power in forming the terms. *Id.* For this reason, courts read ambiguous terms against the drafter of the contract. *Id.*

In this case, however, Mr. Slattery never bargained with Motorists for insurance coverage. He bought his coverage from Safeco. Under a contract law analysis, there is no reason for construing an alleged ambiguity in Mr. Slattery's favor when he is not a party to the contract and when he did not bargain for the coverage he is seeking. He had no unequal bargaining power with Motorists.

In *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 161, 566 N.E.2d 1220, this Court stated, "Only a party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract in Ohio". Thus, under contract law, Mr. Slattery must be either a party to the contract, which he is not, or a third party beneficiary, to claim any right under the contract. Section 302 of the Restatement of the Law 2d, Contracts (1981) 439-440 ("Section 302") concerns intended and incidental beneficiaries. Section 302, which was adopted as law in *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, 40, states:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Section 302, at 439-440. In *TRINOVA Corp. v. Pilkington Brothers, P.L.C.* (1994), 70 Ohio St.3d 271, order clarified by 71 Ohio St.3d 1202, the Supreme Court of Ohio stated:

> Under this theory, only an intended beneficiary may exert rights to a contract of which he is not a party. The so-called "intent to benefit" test provides that there must be evidence, on the part of the promisee, that he intended to directly benefit a third party, and not simply that some incidental benefit was conferred on an unrelated party by the promisee's actions under the contract. There must be evidence that the promisee assumed a duty to the third party. * * *

Id. at 277-278. See, also, *Chitlik v. Allstate Ins. Co.* (1973), 34 Ohio App.2d 193, 196 ("[t]he third party need not be named in the contract, as long as he is contemplated by the parties to the contract and sufficiently identified. Nor need the third party accept the contract, or even acknowledge its existence * * * but it must be shown that the contract was made and entered into with the intent to benefit the third person. A mere incidental or indirect benefit is not sufficient to give him a right of action"); Comment e to Section 302, at 443 (stating that "[p]erformance of a contract will often benefit a third person. But unless the third person is an intended beneficiary as here defined, no duty to him is created * * *").

Mr. Slattery clearly is not a party to the subject contract, and thus, under this Court's decision in *Westfied v. Galatis*, Mr. Slattery is not entitled to have any alleged ambiguity read in his favor. *Galatis*, supra at ¶13-14. Further, he is not a third party beneficiary for UM/UIM coverage under the intent to benefit test outlined above, because the subject definition of "insured" specifically states

he is not an insured, since he is the named insured on another UM/UIM policy. As a non policy holder who did not bargain for the coverage, Mr. Slattery's status under other portions of the contract is irrelevant to whether an ambiguity should be read in his favor. Any contractual benefit to Mr. Slattery is merely incidental, and he does not qualify as a third party beneficiary.

The words of the UM/UIM endorsement do not confer any benefit or right on Mr. Slattery, such that he meets the third party beneficiary test described above. In fact, the definition of "insured" excludes Mr. Slattery from the class of vehicle occupants who would have rights under the UM/UIM portion of the policy, because Mr. Slattery is the named insured for UM/UIM coverage on another policy. Thus, Mr. Slattery is not a third party beneficiary for UM/UIM coverage in the contract between Linda Wohl and Motorists.

Under a traditional contract analysis, Mr. Slattery is not entitled to claim any right under the contract, including but not limited to, his perceived right to have an alleged ambiguity read in his favor. Because Mr. Slattery is not an insured for UM/UIM coverage, and because he is not a party to the Motorists contract, nor a third party beneficiary of the UM/UIM coverage, he simply has no rights to coverage. This Court should not depart from well settled principals of law stated in this court's decision in *Westfield v. Galatis,* and those principals grounded in contract law, to find coverage where none exists.

Both Mr. Slattery and Safeco argue that Linda Wohl benefits if Motorists covers Mr. Slattery, but there simply is no evidence to support this assertion. Indeed, Linda Wohl and James Slattery allocated all but $1.00 of the $500,000 from the tortfeasor's insurance carrier to Linda Wohl. Ms. Wohl and Mr. Slattery settled with the tortfeasor after learning Motorists' position that Mr. Slattery was not an insured. So, regardless of whether Motorists covered Mr. Slattery, Linda Wohl and Mr.

Slattery still allocated virtually all of the tortfeasor's insurance limits to Linda Wohl. Linda Wohl faired just as well in her recovery from the tortfeasor, even though Motorists did not cover Mr. Slattery.

Safeco argues that Linda Wohl benefits from Motorists covering Mr. Slattery for UM/UIM because Linda Wohl was a passenger in the BMW at the time of the accident. (See Page 8-9 of Safeco's brief.) While it is easy to see how Linda Wohl benefits from Motorists providing liability coverage to Mr. Slattery while she is a passenger in her own car, it is not at all apparent, based on the allocation of funds, how Linda Wohl would benefit, either as a claimant or as a passenger in the car, if Motorists provided Mr. Slattery UM/UIM coverage. Whether Linda Wohl benefits from coverage must also be considered in the context that Mr. Slattery made his own decision to buy his UM/UIM coverage from Safeco. Thus, Mr. Slattery was not driving around without UM/UIM coverage. He had the coverage, but he just did not buy it from Motorists. Again, because Mr. Slattery and Ms. Wohl chose to allocate virtually all of the tortfeasor's $500,000 to Linda Wohl, the argument that Linda Wohl somehow benefits from Motorists covering Mr. Slattery simply flies in the face of logic. Linda Wohl did not receive less money from the tortfeasor, even though Motorists had clearly stated its position that Mr. Slattery was not an insured for UM/UIM benefits before Ms. Wohl released the tortfeasor. There is no reasonable argument that Linda Wohl was worse off because Motorists did not provide Mr. Slattery with UM/UIM coverage.

Safeco speculates that Linda Wohl's premiums were not affected by Motorists' implementing an endorsement that uses the subject definition of "insured." (See Safeco's brief at page 9.) Safeco's argument ignores the fact that the insurance industry is moving towards UM/UIM coverage

that excludes coverage for those occupants of an insured vehicle who have coverage with another company.

For example, State Farm filed an amicus brief asking this Court to rule in Motorists' favor in this case, in part because State Farm has a similar provision in its policy. As noted above, in *Keffer*, the 4th District considered a Central Mutual policy with language identical to that found in the Motorists policy. Likewise, in *Engler v. Stafford*, 2007-Ohio-2256, the 6th District Court of Appeals considered and upheld similar language in a Grange Mutual policy that defined insured to exclude an occupant of an insured vehicle who had coverage with another company. Thus, Motorists is not alone in rewriting its UM/UIM coverage in this manner.

As shown in the case law, several competing companies are defining "insured" in this manner in the UM/UIM coverage, and it is reasonable to conclude that Motorists adopted this definition of "insured" to stay competitive on customer premiums. Ohio's consumers benefit from insurance companies writing UM/UIM coverage in this manner, because the definition has the obvious intent of excluding a risk not underwritten by the company insuring the vehicle. Premiums are better controlled by the competition between insurance companies, whose premiums are based on risks actually contemplated by the insurer, as opposed to risks underwritten by another company. When UM/UIM coverage shifts to an occupant's own policy, as opposed to the company insuring the vehicle, Ohio's consumers get what they bargain for in buying UM/UIM coverage.

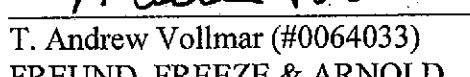
One can imagine that if Mr. Slattery had himself bargained for $250,000 of UM/UIM from Safeco when he bought his own coverage, this appeal would never have been filed. What this definition of "insured" is really about is preventing a windfall of coverage to those people who voluntarily chose to purchase less coverage for themselves.

Surprisingly, Safeco argues that no one but the insurance companies benefit from this industry change and that Motorists put Mr. Slattery in a position that is worse than if Mr. Slattery had no coverage at all. (See page 10 of Safeco's brief.) Nothing could be further from the truth. Mr. Slattery was free to demand more than $1.00 of the tortfeasor's limits, which could have put Mr. Slattery in a better position. Further, Mr. Slattery is still free to collect whatever UM/UIM benefits he chose to buy from Safeco. Mr. Slattery is in the position that he bargained to be in, because he made the decision to buy his coverage from Safeco. When a mutual company such as Motorists implements a change in its auto policies excluding risks that it did not underwrite or collect a premium for, all of the policyholders benefit from the company's sound business decision.

Conclusion

This Court should decide with the majority of appellate courts across Ohio reviewing this issue and rule that Motorists' definition of "insured" for UM/UIM is not ambiguous. The last antecedent rule should only apply when no contrary intent appears, and in this case, every reviewing court, except the 12th District Court of Appeals, found the subject definition of "insured" to carry a plain intent. Further, even if an ambiguity is assumed for the sake of argument, that ambiguity should not be read in favor of one who did not bargain for the coverage to begin with. Motorists respectfully asks this Court to answer the certified question in the negative and hold that as a matter of law, Motorists' definition of insured in the UM/UIM section of the policy has a definite legal meaning. That definite legal meaning excludes coverage for occupants of an insured vehicle who are the named insured for UM/UIM coverage on another policy. No other reading of the policy is reasonable, but even if an ambiguity is assumed for argument purposes, reading the subject definition to include Mr. Slattery in no way benefits Motorists' policy holder, Linda Wohl.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the following, via ordinary mail on this 5th day of November, 2007:

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APPENDIX

The following is the definition of "insured" appears in the **UM/UIM portion** of the Motorists policy:

Insured as used in this endorsement means:

1. You or any **family member.**

2. 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. (See Supp. Page 47.)

The following definition of "insured" appears in the **medical payments** portion of the Motorists policy:

"Insured" as used in this Part means:

1. You or any **family member**:

   a. while **occupying**; or

   b. as a pedestrian when struck by:

   a motor vehicle designed for use mainly on public roads or a trailer of any type.

2. Any other person while **occupying your covered auto.** (See Supplement Page 56.)

The following is the definition of "insured" in the **liability section** of the Motorists policy:

"Insured" as used in this Part means:

1. You or any **family member** for the ownership, maintenance or use of any auto or **trailer**.

2. Any person using **your covered auto.**

3. **For your covered auto**, any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.

4. For any auto or **trailer**, other than **your covered auto**, any other person or organization but only with respect to legal responsibility for acts or omissions of you or any **family member** for whom coverage is afforded under this Part. This provision (B.4.) applies only if the person or organization does not own or hire the auto or **trailer**. (See Supplement Page 54.)