ORIGINAL

IN THE SUPREME COURT OF OHIO

State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company,	:	Case No. 2009-0122
Petitioners,	:	On Review of Certified Question from the United States District Court, Northern District of Ohio, Eastern Division
v.	:	
Laura Grace, Elizabeth Garcia, Ladon Ruffin, Dorian Jones, Angela Webb, and Patricia Schwab,	:	
Respondents.	:	

MERIT BRIEF OF PETITIONERS STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND STATE FARM FIRE AND CASUALTY COMPANY IN SUPPORT OF ANSWERING CERTIFIED QUESTION IN THE AFFIRMATIVE

James A. DeRoche, Esq. (0055613)
Garson & Associates Co., LPA
1600 Rockefeller Building
614 West Superior Avenue
Cleveland, Ohio 44113
Telephone: 216.592.8741
Facsimile: 216.696.8558

Glenn D. Feagon, Esq. (0041520)
8905 Lake Avenue, 4th Floor
Cleveland, Ohio 44113
Telephone: 216.937.2222
Counsel for Respondents Grace, Garcia, Ruffin and Jones

Alberto R. Nestico, Esq. (0071676)
Gary W. Kisling, Esq. (0003438)
Robert W. Redick, Esq. (0070861)
Thomas Vasvari, Esq. (0046614)
Kisling, Nestico & Redick LLC
3200 W. Market St., Suite 300
Akron, Ohio 443333

Mark A. Johnson (0030768)
Counsel of Record
mjohnson@bakerlaw.com
Rodger L. Eckelberry (0071207)
reckelberry@bakerlaw.com
Robert J. Tucker (0082205)
rtucker@bakerlaw.com
Baker & Hostetler LLP
Capitol Square, Suite 2100
65 East State Street
Columbus, Ohio 43215-4260
Telephone: 614.228.1541
Facsimile: 614.462.2616

FILED
MAY 01 2009
CLERK OF COURT
SUPREME COURT OF OHIO

Telephone: 330.869.9007
Facsimile: 330.869.9009

Austin Tighe, Esq.
Feazell & Tighe, L.L.P.
6300 Bridgepoint Parkway, Bridgepoint 2
Suite 220
Austin, TX 78730
Telephone: 512.372.8100
Facsimile: 512.372.8140
Counsel for Respondent Angela Webb

Patrick J. Perotti, Esq. (0005481)
Nicole T. Fiorelli, Esq. (0079204)
Dworen & Bernstein Co., L.P.A.
60 South Park Place
Painesville, Ohio 44077
Telephone: 440.352.3391
Facsimile: 440.352.3469

Edwin E. Schottenstein, Esq. (0016834)
Schottenstein Law Offices
100 East Broad Street, Suite 1337
Columbus, Ohio 43215
Telephone: 614.452.2266
Facsimile: 614.462.2406
Counsel for Respondent Patricia Schwab

Michael K. Farrell (0040941)
mfarrell@bakerlaw.com
Baker & Hostetler LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485
Telephone: 216.621.0200
Facsimile: 216.696.0740
Counsel for Petitioners State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

I. STATEMENT OF THE CASE 1

II. STATEMENT OF FACTS 1

A. *Grace, et al. v. State Farm Mutual Automobile Insurance Company, et. al.*, Case No. 1:08-CV-254 1

B. *Webb v. State Farm Mutual Automobile Insurance Company*, Case No. 5:08-CV-1917 2

C. *Schwab v. State Farm Mutual Automobile Insurance Company*, Case No. 1:08-CV-2083 3

D. Facts Common to Each Case 3

III. ARGUMENT 4

A. Introduction 4

B. R.C. 3937.18, As Amended By S.B. 97, Expressly Authorizes Exclusions To UM Coverage 5

C. Petitioners' Insurance Policies Expressly Exclude UM Coverage For Medical Expenses Paid Or Payable Under Med-Pay Coverage 11

D. The Non-Duplication Clause Is Enforceable Regardless Of Separate Premiums Paid For UM And Med-Pay Coverages 13

1. Duplicate payments may be excluded under UM coverage 13

2. Insureds receive a substantial benefit from both UM and Med-Pay coverages 16

IV. CONCLUSION 19

CERTIFICATE OF SERVICE 21

APPENDIX

Certification Order of the United States District Court for the Northern District of Ohio A-1

R.C. 3937.18 ..... A-14

First Amended Complaint, *Grace, et al. v. State Farm Mutual Automobile Insurance Company, et. al.*, N.D. Ohio Case No. 1:08-CV-254 ..... A-18

Complaint, *Webb v. State Farm Mutual Automobile Insurance Company*, N.D. Ohio Case No. 5:08-CV-01917 ..... A-34

Complaint, *Schwab v. State Farm Mutual Automobile Insurance Company*, N.D. Ohio Case No. 1:08-CV-2083 ..... A-43

Galloway v. Henry, Case No. 07-CV-10521 (Montgomery Cty. Common Pleas, Oct. 22, 2008) A-53

TABLE OF AUTHORITIES

Page

Cases

Auto-Owners Ins. Co. v. Lydon (Mich.App. 1986), 386 N.W.2d 628 19

Bacchus v. Farmers Ins. Group Exchange (Ariz. 1970), 475 P.2d 264 15

Barnes v. Allstate Ins. Co. (La.App. 1992), 608 So.2d 1045 19

Berrios v. State Farm Ins. Co., 98 Ohio St.3d 109,
2002-Ohio-7115, 781 N.E.2d 149 ..... 5, 6, 8, 15, 19

Bousquet v. State Auto Ins. Co., 8th Dist. No. 89601, 2008-Ohio-922 7

Calhoun v. Harner, 3d Dist. No. 1-06-97, 2008-Ohio-1141 7

Cole v. Inland Nat'l Ins. Co. (Ill.App. 1971), 273 N.E.2d 65 19

Girgis v. State Farm Mut. Auto. Ins. Co. (1996),
75 Ohio St.3d 302, 1996 Ohio 111, 662 N.E.2d 280 18

Grange Mut. Cas. Co. v. Lindsey, 22 Ohio St.3d 153, 22 OBR 228,
489 N.E.2d 281 ..... 5, 17, 19

Green v. Westfield Ins. Co., 9th Dist. No. 06CA0025-M, 2005-Ohio-5057 ..... 10, 12, 14

Hartford Accident & Indem. Co. v. Lackore (Fla. 1982), 408 So.2d 1040 19

Karabin v. State Auto Mut. Ins. Co.(1984), 10 Ohio St.3d 163, 10 OBR 497 ..... 11, 14, 15, 16

Keenan v. Industrial Indem. Ins. Co. (Wash. 1987), 738 P.2d 270 19

Kelly v. Auto-Owners Ins. Co., 1st Dist. No. C-050450, 2006-Ohio-3599 ..... 6, 10, 14

Lager v. Miller-Gonzalez, 120 Ohio St.3d 47, 2008-Ohio-4838, 896 N.E.2d 666 ..... 4, 6, 13

Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm (1995),
73 Ohio St.3d 107, 652 N.E.2d 684 11

Northwestern Mut. Ins. Co. v. Rhodes (Cal.App. 1965), 238 Cal.App.2d 64 19

Ostransky v. State Farm Ins. Co. (Neb. 1997), 566 N.W.2d 399 19

Quinones v. Penn. Gen. Ins. Co. (C.A.10, 1986), 804 F.2d 1167 19

Ruder v. West Am. Ins. Co. (Ind.App. 1972), 280 N.E.2d 68 19

Savoie, Admr. v. Grange Mut. Ins. Co. (1993),
67 Ohio St.3d 500, 1993 Ohio 134, 620 N.E.2d 809 ..... 10, 14, 18

Schutlz v. Farmers Ins. Group of Companies (Ariz. 1991), 805 P.2d 381 ..... 15, 16

Shearer v. Motorists Mut. Ins. Co. (1978),
53 Ohio St.2d 1, 7 O.O.3d 1, 371 N.E.2d 210 ..... 5, 8, 15, 19

Shenyey v. Glasgow, 8th Dist. No. 91713, 2009-Ohio-1366 ..... 8, 11, 14

Smith v. GuideOne Ins., 10th Dist. No. 02AP-1096, 2003-Ohio-3823 10

Snyder v. Am. Family Ins. Co., 114 Ohio St.3d 239,
2007-Ohio-4004, 871 N.E.2d 574 ..... 6, 7, 9, 10, 11, 12, 17

Snyder v. Am. Family Ins. Co., 10th Dist. No. 05AP-16, 2005-Ohio-6751 ..... 5, 6, 9

State Farm Fire & Cas. Co. v. Trousdale (Ill.App. 1997), 285 Ill.App.3d 566 18

Strock v. Pressnell (1988), 38 Ohio St.3d 207 9

Wayne Mut. Ins. Co. v. Bradley, 5th Dist. No. 2005CA00200, 2006-Ohio-1517 8

Welbron v. State Farm Mut. Auto. Ins. Co. (C.A.5, Feb. 6, 2007),
2007 U.S. App. LEXIS 4871 19

Wertz v. Wertz, 6th Dist. No. H-06-036, 2007-Ohio-4605 ..... 8, 10, 14

Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 11

Statutes

R.C. 3937.18 ..... passim

I. STATEMENT OF THE CASE

Each of the three cases consolidated before this Court were filed in or removed to the Northern District of Ohio, Eastern Division. *Grace, et al. v. State Farm Mutual Automobile Insurance Company, et. al.*, Case No. 1:08-CV-254; *Webb v. State Farm Mutual Automobile Insurance Company*, Case No. 5:08-CV-01917; *Schwab v. State Farm Mutual Automobile Insurance Company*, Case No. 1:08-CV-2083. The plaintiffs in those three cases ("Respondents") challenge application of a clause in their policies of insurance excluding coverage under uninsured/underinsured motorist insurance coverage ("UM") for medical expenses already paid under the medical payments coverage ("Med-Pay") of the same policies.

Petitioners State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company (collectively, "State Farm") moved for judgment on the pleadings in each of the cases. On January 15, 2009, the United States District Court for the Northern District of Ohio certified a question of state law to this Court concerning enforceability of such an exclusion. Appx. at 8. On March 25, 2009, this Court accepted the certified question.

II. STATEMENT OF FACTS

A. *Grace, et al. v. State Farm Mutual Automobile Insurance Company, et. al.*, Case No. 1:08-CV-254.

The *Grace* action was filed by four separate plaintiffs, each of whom was insured under a policy of insurance issued by State Farm. Respondent Laura Grace was injured in an accident with an uninsured motorist. Appx. at 21. She incurred $2,193.50 in medical expenses. Id. Ms. Grace was offered $3,500 in satisfaction of her UM claim, *excluding* her medical expenses. Id. at 11. Ms. Grace was instructed to submit a claim under her Med-Pay coverage for reimbursement of her medical expenses. Id.

Respondent Elizabeth Garcia also was injured in an accident with an uninsured motorist and, as a result, incurred $1,272.00 in medical expenses. Id. Ms. Garcia was offered $750 in satisfaction of her UM claim, *excluding* medical expenses. Id. Ms. Garcia was likewise instructed to submit a claim under the Med-Pay coverage for reimbursement of her medical expenses. Id.

Respondent Ladon Ruffin was injured in an accident with an uninsured motorist and, as a result, incurred $1,283.00 in medical expenses. Id. at 23. Mr. Ruffin was offered $4,000 in satisfaction of his UM claim, *excluding* medical expenses. Id. Mr. Ruffin was instructed to submit a claim under the Med-Pay coverage for reimbursement of his medical expenses. Id.

Respondent Dorian Jones was injured in the same accident involving Mr. Ruffin, incurring $5,941 in medical expenses. Id. Mr. Jones was offered $6,500 in satisfaction of his UM claim, *excluding* medical expenses. Id. at 24. Mr. Jones was instructed to submit a claim under the Med-Pay coverage for reimbursement of his medical expenses. Id.

Respondents Grace, Garcia, Ruffin and Jones allege that State Farm "refused to pay for each Plaintiff's costs of medical care under the UMBI coverage portion of the applicable insurance policies, instead *paying* for the cost of medical care only under the Med Pay coverage and excluding it from the UMBI coverage settlement." (Emphasis added.) Id. at 20.

B. ***Webb v. State Farm Mutual Automobile Insurance Company*, Case No. 5:08-CV-1917.**

Respondent Angela Webb was injured in an automobile accident with an insured driver. Appx. at 37. Ms. Webb received $25,000, the policy limits, from the tortfeasor's insurance carrier. Id. Ms. Webb requested, *and received*, "her full Medpay policy limits of $25,000" under her policy of insurance with State Farm. Id. at 38. Subsequently, Ms. Webb

demanded "payment of these *same* damages under her UM coverage. . . ." (Emphasis added.) Id. State Farm denied any further payment. Id.

C. ***Schwab v. State Farm Mutual Automobile Insurance Company*, Case No. 1:08-CV-2083.**

Respondent Patricia Schwab had an insurance policy issued by State Farm that included UM and Med-Pay coverages. Appx. at 44. Ms. Schwab's complaint does not allege she was injured in an automobile accident involving an uninsured or underinsured driver, she incurred medical expenses as a result of any accident, or that State Farm did not pay for any damages she incurred in an accident. Regardless, Ms. Schwab alleges to represent a putative class of State Farm insureds who "(1) paid separate premiums for UMBI coverage and Med. Pay coverage and/or (2) suffered a bodily injury and incurred medical bills for which [State Farm] refused to pay under both coverages." Id. at 45.

D. **Facts Common to Each Case.**

Each Respondent, in each case, was insured under a policy of insurance endorsed with form 6083VV that contained the following clause limiting UM/UIM coverage:

"Non-Duplication
We will not pay under Uninsured Motor Vehicle Coverage any medical expenses paid or payable under:
(1) Medical Payments Coverage of this policy, or
(2) the medical payments coverage, no fault coverage, personal injury protection, or other similar coverage of any other motor vehicle policy." Appx. at 3.

Each policy also contained a separate clause within the section outlining Med-Pay coverage:

"Non-Duplication
No ***person*** for whom medical expenses are payable under this coverage shall recover more than once for the same medical expense under this or similar vehicle insurance." (Emphasis *sic*.) Id. at 3.

III. ARGUMENT

A. Introduction.

The question certified by the United States District Court for the Northern District of Ohio, and accepted by this Court, is:

"Does Ohio Revised Code Section 3937.18, as amended in 2001 by S.B. 97 (effective October 31, 2001), permit insurers to include an express limitation of coverage in an automobile insurance policy that precludes payments made under Uninsured/Underinsured Motorist Coverage for medical expenses that are paid or payable under the Medical Payments coverage purchased in the same policy?" Entry of March 25, 2009.

The certified question should be answered in the affirmative because: (1) R.C. 3937.18, as amended by S.B. 97, expressly authorizes exclusions to UM coverage that are contained in the policy of insurance; (2) Respondents' insurance policies expressly exclude coverage under UM coverage for medical expenses paid or payable under Med-Pay coverage, and expressly preclude recovery for the same medical expenses more than once under the policies; and (3) R.C. 3937.18(I) expressly permits policy provisions limiting UM coverage regardless of any premiums.

As this Court has made clear, "[t]he purpose of UM insurance is to put an injured policyholder in the *same* position he would have been in if the tortfeasor had carried sufficient liability insurance." (Emphasis added.) *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, 896 N.E.2d 666, at ¶31 (citations omitted). Contrary to this Court's stated purpose of UM insurance, the express language of their insurance policies, and the dictates of R.C. 3937.18, Respondents seek to have this Court declare that they are entitled to be put in a *better* position than they would have been if the tortfeasors who caused their injuries had carried sufficient liability insurance. In years past, Respondents may have been entitled to such a declaration. No longer.

In 2001, after a series of amendments to R.C. 3937 by the Ohio Legislature and decisions of this Court invalidating or limiting those amendments based upon the statutory requirement that insurers offer UM coverage, the Ohio Legislature removed any requirement that insurers offer UM coverage. In addition, the Legislature *expressly* authorized the exclusion of UM coverage upon terms set forth in the insurance policy, regardless of the number of policies or premiums involved. As a result, and as this Court has recognized, the enforceability of exclusions to UM coverage is now purely one of contract interpretation. Under the plain language of Respondents' policies of insurance with State Farm, medical expenses paid or payable under Med-Pay coverage are excluded from UM coverage.

B. R.C. 3937.18, As Amended By S.B. 97, Expressly Authorizes Exclusions To UM Coverage.

In passing upon an insured's claim to UM coverage under an insurance policy, a court "must consider both the language of the policy and the law in effect *at the time of the accident. . .*" (Emphasis added.) *Snyder v. Am. Family Ins. Co.*, 10th Dist. No. 05AP-16, 2005-Ohio-6751, at ¶15. S.B. 97 was effective years before any of the accidents occurred giving rise to Respondents' claims.

Prior to the amendments to R.C. 3937.18 enacted by S.B. 97, under the then wording of the statute, this Court held that an insurance policy provision that reduced the amount paid under UM coverage based upon amounts paid under Med-Pay coverage was unenforceable as against public policy. See *Shearer v. Motorists Mut. Ins. Co.* (1978), 53 Ohio St.2d 1, 7 O.O.3d 1, 371 N.E.2d 210; *Grange Mut. Cas. Co. v. Lindsey* (1986), 22 Ohio St.3d 153, 22 OBR 228, 489 N.E.2d 281; *Berrios v. State Farm Ins. Co.*, 98 Ohio St.3d 109, 2002-Ohio-7115, 781 N.E.2d

149.[1] Those decisions were based on the statutory mandate that required insurers to offer UM coverage. R.C. 3937.18. With the passage of S.B. 97, the mandatory offering was eliminated and, as this Court recently noted, "precedent from the era [when exclusions from UM coverage were void and unenforceable because they eliminated or reduced coverage required by statute] is not compelling in the area of current Ohio insurance law." *Lager* at ¶23. In fact, the "multiple changes to R.C. 3937.18 effected by S.B. 97 and S.B. 267 reveal a clear legislative intent to disengage from earlier attempts to dictate that UM coverage be offered or provided, and to dictate which limitations on coverage will or will not be enforceable." *Snyder* at ¶21, aff'd (2007), 114 Ohio St.3d 239, 2007-Ohio-4004, 871 N.E.2d 574.[2]

Ohio courts have recognized the substantial change in UM law resulting from S.B. 97. "After the 2001 amendment, the exclusions [to UM coverage] in the statute serve only as examples; a UM policy may include ***any*** terms and conditions precluding coverage, as long as these circumstances are specified in the policy." (Emphasis added.) *Kelly v. Auto-Owners Ins. Co.*, 1st Dist. No. C-050450, 2006-Ohio-3599, at ¶7. The current version of the statute "reveals that the legislature sought to 'deregulate' [UM] policies, leaving to the parties whether any preconditions or exclusions will govern their relationship." *Snyder* at ¶22.

Included among the Legislature's 2001 changes to R.C. 3937 is the following provision:

> "Any policy of insurance that includes uninsured motorist coverage, underinsured motorists 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 . . . ." (Emphasis added.) R.C. 3937.18(I).

---

[1] The Court's decision in *Berrios* was issued after the effective date of SB 97. However, the injury giving rise to the claim occurred prior to the passage of SB 97, so the case was decided under the previous version of R.C. 3937.18.

[2] In order to distinguish between the Court of Appeals opinion and Supreme Court opinion in *Snyder*, the short form of *Synder* at ¶__ will be used for the Court of Appeal's opinion, and the short form of *Snyder*, 114 Ohio St.3d at __ for the Supreme Court's opinion.

As this Court noted, this current subsection (I)

"for the first time permits policies with uninsured-motorist coverage to limit or exclude coverage under circumstances that are specified in the policy *even if those circumstances are not also specified in the statute* * * * Eliminating the mandatory coverage offering and simultaneously permitting the parties to agree to coverage exclusions not listed in the statute provides insurers considerable flexibility in devising specific restrictions on any offered uninsured– or underinsured–motorist coverage." (Emphasis added.) *Snyder*, 114 Ohio St.3d at 244-45.

In stark contrast to the pre-S.B. 97 amendments to R.C. 3937.18, that statute now expressly states that policies of insurance that include UM coverage "may include terms and conditions that preclude coverage for bodily injury or death. . . ." R.C. 3937.18(I). That is precisely what is included in Respondents' policies of insurance - "terms and conditions that preclude coverage" – double recovery of medical expenses that are also paid or payable under Med Pay coverage are excluded under UM coverage. The difference in the pre- and post-S.B. 97 versions of R.C. 3937.18 is vitally important to the question before the Court because the accidents giving rise to Respondents' claims occurred *after* the effective date of the 2001 amendments to R.C. 3937.18(I). As a result, Respondents' claims are barred by the express policy exclusions, as authorized by amended R.C. 3937.18(I).

Citing this Court's opinion in *Snyder*, Ohio appellate courts have held that R.C. 3937.18 expressly authorizes limitations and exclusions to UM coverage as long as they are listed in the policy. See, e.g., *Calhoun v. Harner*, 3d Dist. No. 1-06-97, 2008-Ohio-1141, at ¶13-18 (upholding intra-family UM stacking exclusion); *Bousquet v. State Auto Ins. Co.*, 8th Dist. No. 89601, 2008-Ohio-922, at ¶12-16 (noting the Ohio Supreme Court "addressed the expansive language" of R.C. 3937.18(I) in *Snyder* and, even though *Snyder* did not involve an intra-family UM stacking exclusion, upheld such an exclusion because, post-S.B. 97, "[i]f insurers opt to offer UM/UIM coverage, they are free to include exclusions or limitations on that coverage.");

Wertz v. Wertz, 6th Dist. No. H-06-036, 2007-Ohio-4605, at ¶18-22 (same). Notably, each of these cases extended the holding in *Snyder* to an insurance policy provision different from the one at issue in *Snyder*.

Directly on point, with the benefit of this Court's *Snyder* decision, the Eighth District Court of Appeals recently affirmed the enforceability of a limitation on UM coverage based upon expenses paid or payable under Med-Pay coverage, under an identically worded policy of State Farm. *Shenyey v. Glasgow*, 8th Dist. No. 91713, 2009-Ohio-1366, at ¶13. The Eighth District Court of Appeals held that the 2001 amendments "permit[] policies with UM coverage to limit or exclude coverage under any circumstances." Id. The Eighth District Court of Appeals also rejected the assertion, made by Respondents in this case, that non-duplication clauses are unenforceable where insureds paid separate premiums for UM and Med-Pay coverages, noting that R.C. 3837.18(F) provides that any policy of insurance that includes UM coverage "may, without regard to any premiums involved, include terms that preclude any and all stacking of coverages." Id. at ¶15. See also *Galloway v. Henry* (Oct. 22, 2008), Montgomery County Court of Common Pleas No. 07-CV-10521 (holding same) (Appx. at 53-66).

To Petitioners' knowledge, only one Ohio decision has denied the enforceability of policy provisions precluding double-recovery under UM and Med-Pay coverages subsequent to the 2001 amendments to R.C. 3937.18. In *Wayne Mut. Ins. Co. v. Bradley*, 5th Dist. No. 2005CA00200, 2006-Ohio-1517, at ¶38, the court, relying upon the pre-S.B. 97 *Shearer*, *Lindsey*, and *Berrios* decisions, held that the insurer could not set-off amounts paid under Med-Pay coverage against amounts claimed under the insured's UM coverage pursuant to a subrogation clause.

Bradley, though, is not helpful to Respondents for at least two reasons. First, the *Bradley* court did not have the benefit of this Court's decision in *Snyder*, noting that, by the 2001 amendments to R.C. 3937.18, the Ohio Legislature "expressly left to the contracting parties to agree upon *any* terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances." (Emphasis added.) *Snyder* at ¶22. Second, the issue in *Bradley* was whether the insurer could properly recover amounts paid under Med-Pay coverage through assertion of a subrogation right reducing coverage under the insured's UM coverage. *Bradley* at ¶37. In holding the insured was entitled to double payment under both the Med-Pay and UM coverages, the *Bradley* court stated: "[T]his Court has previously held that an insurer cannot seek recovery from its own insured pursuant to a subrogation clause." Id.

In contrast, the Non-duplication clause at issue in the present case is *not* a subrogation clause. Rather, it is a limitation of UM coverage: "We will not pay under Uninsured Motor Vehicle Coverage any expenses paid or payable under * * * Medical Payments Coverage of this policy[.]" Appx. at 3. R.C. 3937.18, as amended by S.B. 97, does address and *expressly* authorizes the inclusion of exclusions to UM coverage.

Respondents posit that Ohio common law prohibits enforcement of a non-duplication clause under UM coverage. However, even if the common law previously would have prohibited enforcement of the non-duplication clause at issue, the Ohio General Assembly, in amending R.C. 3937.18, has abrogated any such rule. This Court has "consistently held that the legislative branch of state government, unless prohibited by constitutional limitations, may modify or entirely abolish common-law actions." *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 214 (citations omitted). As noted in *Snyder*, "the 2001 statute for the first time permits policies with uninsured-motorist coverage to limit or exclude coverage under circumstances that are

specified in the policy even if those circumstances are not also specified in the statute." 114 Ohio St. 3d at 244. "[W]here the [Ohio] General Assembly has spoken, and in so speaking violated no constitutional provision, the courts of this state must not contravene the legislature's expression of public policy." *Smith v. GuideOne Ins.*, 10th Dist. No. 02AP-1096, 2003-Ohio-4823, at ¶40. In the past, Ohio's common law interpretation of UM coverage has been overruled by the General Assembly. For example, the common law prohibition barring enforcement of intra-family stacking exclusions in insurance policies, as held in *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St.3d 500, 506, 1993 Ohio 134, 620 N.E.2d 809, was abrogated by S.B. 97 and such exclusions are now enforceable in Ohio. *See Kelly*, 2006-Ohio-3599; *Green v. Westfield Ins. Co.*, 9th Dist. No. 06CA0025-M, 2006-Ohio-5057; *Wertz*, 2007-Ohio-4605. Similarly, by expressly authorizing insurers to include exclusions or limitations on UM coverage, the Ohio Legislature has expressed the public policy of this state to allow any limitations or exclusions to UM coverage, and thus has abrogated any common law rule to the contrary.

In essence, to avoid the non-duplication provision of their policies, Respondents ask the Court to imply UM coverage "as a matter of law" where it does not contractually exist. However, Respondents' argument ignores the General Assembly's intent in amending R.C. 3937.18, which was 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;" Section 2, Am.Sub.S.B. No. 97. Consequently, Respondents may not obtain more UM coverage than that provided by the express policy terms.

In sum, as this Court held in *Snyder*, the Legislature's 2001 changes to R.C. 3937 now authorize exclusions to UM coverage "under circumstances that are specified in the policy even if those circumstances are not also specified in the statute." *Snyder*, 114 Ohio St.3d at 244. See also *Shenyey* at ¶13. This Court should hold as well that the exclusion in Respondents' policies with State Farm, for payment of medical expenses under UM coverage that are paid or payable under Med-Pay coverage, is valid and enforceable under current Ohio law.

C. Petitioners' Insurance Policies Expressly Exclude UM Coverage For Medical Expenses Paid Or Payable Under Med-Pay Coverage.

Interpretation of an insurance contract is a matter of law. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 1995 Ohio 214, 652 N.E.2d 684. When interpreting an insurance contract, courts "look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶11. When the intent of the parties is evident from the clear and unambiguous language in the provision, the plain language of that provision must be applied. *Karabin v. State Auto Mut. Ins. Co.* (1984), 10 Ohio St.3d 163, 166-67, 10 OBR 497. The plain and ordinary meaning of the language used in the insurance contracts between State Farm and Respondents evidences a clear intent of the parties to exclude UM coverage for medical expenses paid or payable under Med-Pay coverage.

Each Respondent, in each case, was insured under a policy of insurance endorsed with form 6083VV, which contained the following clause limiting UM coverage:

"Non-Duplication
We will not pay under Uninsured Motor Vehicle Coverage any medical expenses paid or payable under:
(1) Medical Payments Coverage of this policy, or

(2) the medical payments coverage, no fault coverage, personal injury protection, or other similar coverage of any other motor vehicle policy." Appx. at 3.

As expressly authorized by R.C. 3937.18(I),[3] Respondents' policies of insurance with State Farm include clear, unambiguous language that "preclude[s] UM/UIM coverage for circumstances * * * specified in the policy." *See Green* at ¶16; Appx. at 3. In addition, the Med-Pay provisions in each contract expressly inform insureds that "no person for whom medical expenses are payable under this coverage shall recover more than once for the same medical expense under this or similar vehicle insurance." Appx. at 3. These policy provisions, separately and collectively, make clear that policyholders may not recover twice for the same medical expenses.

Importantly, neither of these provisions reduce the total amount available under both coverages. Rather, they merely preclude payment for the same expenses twice. For example, if an insured has a UM coverage limit of $50,000, and a Med-Pay coverage limit of $5,000, an insured injured by an uninsured/underinsured motorist with $10,000 in medical expenses and $45,000 in other damages would recover a maximum under both coverages – $55,000. The same insured with $5,000 in medical expenses and $40,000 in other damages would receive $45,000 - $5,000 under the Med-Pay coverage and $40,000 under the UM coverage. What Respondents seek is for such an insured to receive $5,000 under the Med-Pay coverage for medical expenses, another $5,000 *for the same medical expenses* under the UM coverage, and $40,000 in other

[3] R.C. 3937.18(I) "permits policies with uninsured-motorist coverage to limit or exclude coverage under circumstances that are specified in the policy even if those circumstances are not also specified in the statute. . . ." *Snyder*, 114 Ohio St.3d at 244. Thus, it is of no import that the Ohio Legislature did not expressly list in the statue non-duplication clauses for expenses paid under Med-Pay coverage as valid because the exclusion is specified in the policies.

damages under the UM coverage, representing a total payment of $50,000 – for $45,000 in total damages.

As previously noted, the purpose of UM coverage is to place the injured policyholder in the *same* position with regard to recovery of damages that they would have been had the tortfeasor possessed liability insurance. *Lager* at ¶31. State Farm's Non-Duplication clause does precisely that – it places insureds in the exact same position with regard to recovery of damages that they would be in if the tortfeasors causing their injuries had liability insurance. Not in a better position, as Respondents seek, and not in a worse position, but the *same* position.

D. <u>The Non-Duplication Clause Is Enforceable Regardless Of Separate Premiums Paid For UM And Med-Pay Coverages.</u>

1. Duplicate payments may be excluded under UM coverage.

In their complaints, and in opposition to State Farm's motions for judgment on the pleadings before the Northern District of Ohio, Respondents repeatedly refer to their payment of separate premiums for UM and Med-Pay coverages. Appx. at 7. However, the 2001 amendments expressly authorize limiting coverages *regardless* of the number of premiums or policies involved. R.C. 3937.18(F) provides: "Any policy of insurance that includes [UM Coverage] may, *without regard to any premiums involved,* include terms that preclude any and all stacking of such coverages . . . ." (Emphasis added.). Similarly, R.C. 3937.18(G) provides:

> "Any policy of insurance that includes [UM Coverage] and that provides a limit of coverage for payment of damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125 of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to the bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. ***Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.***" (Emphasis added.).

Under both the statute and decisions of Ohio courts, anti-stacking provisions have been upheld despite the payment of separate premiums.[4] *Karabin*, 10 Ohio St.3d at 166; *Shenyey* at ¶19; *Kelly* at ¶13-14; *Green* at ¶23; *Wertz* at ¶21. Moreover, the separate non-duplication clause in the policy for Med-Pay coverage – prohibiting more than one recovery for the same medical expenses under the policy – is separately enforceable, as Med-Pay coverage "is [sic] simply a matter of contract between the insurer and insured." *Karabin*, 10 Ohio St.3d at 166.[5]

Prior to the enactment of S.B. 97, this Court issued a number of decisions invalidating UM coverage provisions on public policy grounds because of the mandatory offering provisions contained in the then existing versions of R.C. 3937.18. With the elimination of the mandatory offering provision, there is no "public policy" upon which to strike UM exclusions. Instead, with S.B. 97's passage, any review of UM coverage is identical to that which would occur if the clause was found in any other policy of insurance. As this Court has explained in the past, when no public policy considerations are implicated, the review of an insurance clause is purely a matter of contract to be applied as written. *Karabin*, 10 Ohio St.3d at 166. Illustrating this point, the *Karabin* Court compared a limitations clause under the medical payments portion of a policy with the review of UM coverage under the same policy, which was governed by a former versions of R.C. 3937.18. The court noted that medical payments coverage

"rests upon an entirely different ground than the uninsured motorist coverage since there is no public policy in Ohio prohibiting limitation of medical payments coverage. Unlike R.C.

---

[4] To the extent Respondents challenge the value of the coverage received based upon the premiums charged, they must address their concerns to the Ohio Department of Insurance. The premium for and the form of insurance policy containing the exclusion that Respondents challenge was filed with Ohio Department of Insurance. See R.C. 3937.03(A) and 3937.04(B).

[5] *Karabin* was limited by *Savoie*, in which this Court held that clauses prohibiting interfamily stacking of UM coverage were unenforceable, in part, because "liability insurers are collecting multiple premiums for multiple policies. . . ." 67 Ohio St.3d at 505, paragraph two of the syllabus. *Savoie*, though, has been superseded by statute – twice. See Staff Notes to R.C. 3937.18, as amended by Section 3, Am.Sub.S.B. No. 97; Section 9, Am.Sub.S.B. No. 20.

3937.18 which, before amendment, invalidated anti-stacking provisions in insurance contracts, *medical payments coverage is neither mandated nor governed by statute. It is thus simply a matter of contract between the insurer and insured.*" (Emphasis added.) Id. at 166.

Thus, with the current version of R.C. 3937.18 eliminating the mandatory offering of UM coverage, the difference between UM and Med-Pay coverage noted in *Karabin* has been eliminated and both UM and Med-Pay provisions are simply matters of contract. Moreover, the separate non-duplication clause under the Med-Pay coverage, prohibiting more than one recovery for the same medical expenses under the insurance policies, is also separately enforceable. *Karabin*, 10 Ohio St.3d at 166.

Even the Arizona Supreme Court, whose decision in *Bacchus v. Farmers Ins. Group Exchange* (Ariz. 1970), 475 P.2d 264, was relied upon by this Court in its decision in *Shearer*, and cited again in *Berrios*, has since limited its holding and held that non-duplication, subrogation, or similar provisions precluding double recovery for the same medical expenses under both UM and Med-Pay coverages are enforceable so long as the clauses do not reduce the UM coverage limit. See *Schutlz v. Farmers Ins. Group of Cos.* (Ariz. 1991), 805 P.2d 381, 382-83. In addressing a non-duplication clause similar to the one at issue here,[6] the Arizona Supreme Court also noted that Arizona's statute permitting anti-stacking provisions to preclude recovery under multiple policies, while "not directly applicable in this case because we are not dealing with multiple coverage[s] on different vehicles, but with multiple coverages in one policy on one vehicle[,] [nonetheless] demonstrates that Arizona public policy permits an insurer to preclude double recovery on multiple coverages." Id.

---

[6] The clause provided: "Any amount paid under 'medical payments coverage' will be applied against any other coverage applicable to the loss so that there is no duplication of 'medical payments' benefits. In no event shall a coverage limit be reduced below any amount required by law." *Schultz*, 805 P.2d at 381-82.

Like Arizona, Ohio law expressly permits anti-stacking clauses barring recovery under more than one policy, even though separate premiums are paid for the separate policies. See R.C. 3937.18(F).[7] Thus, since Ohio law upholds clauses prohibiting inter-family and intra-family stacking of coverages, even when separate premiums are paid for multiple policies, so too should this Court uphold exclusions prohibiting the duplication of benefits payable under Med-Pay coverage. Id.; *Karabin*, 10 Ohio St.3d at 167-68. Respondents, though, will ask this Court to believe that there is something magical about UM and Med-Pay coverages, when contained within the same policy, that renders a non-duplication clause unenforceable. To the contrary, like Arizona, Ohio's statutory authorization of anti-stacking provisions "demonstrates that [Ohio] public policy [now] permits an insurer to preclude double recovery on multiple coverages." *Schutlz,* 805 P.2d at 382-83.

2. Insureds receive a substantial benefit from both UM and Med-Pay coverages.

Respondents asserted in the district court that enforcement of the non-duplication clause results in charging a premium for non-existent coverage. Both UM and Med-Pay coverages, however, provide insureds with a distinct and independent benefit. As a result, insureds pay separate premiums for UM coverage and Med-Pay coverage and they receive separate benefits.

For example, as recognized by Justice Holmes' dissent in *Lindsey*: "The medical payments coverage provides for prompt payment of medical expenses upon verification that the

[7] R.C. 3937.18(F) states: "Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may, *without regard to any premiums involved*, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household." (Emphasis added).

expenses have been incurred as a result of an automobile accident. These payments are made regardless of fault and are of significant benefit to the insured." *Grange Mut. Cas. Co. v. Lindsey* (1986), 22 Ohio St.3d 153, 157, 22 OBR 228, 489 N.E.2d 281 (J. Holmes, dissenting).

In contrast, as recognized in *Snyder*, because Ohio law requires an insured seeking UM coverage "to prove all elements of the insured's claim that are necessary to recover from the owner or operator of the uninsured or underinsured motor vehicle," Med-Pay coverage has substantial value, apart from UM coverage. *Snyder*, 114 Ohio St.3d at 244 n.7; R.C. 3937.18(D). An insured seeking UM coverage must prove all of the elements of the claim before recovering any medical expenses. Med-Pay coverage, however, pays benefits regardless of whether an insured is at fault, another driver is at fault, or when no person is at fault. It pays benefits merely upon proof that medical expenses were incurred as a result of an accident, without an insured having to prove all of the elements of a claim against an uninsured driver under UM coverage, and without the delay inherent in such a burden. The difference between the benefits reveals the substantial value of having both coverages included in an insured's automobile policy.

In fact, Respondents' assertion that an insured would receive the same benefits without Med-Pay coverage as he would with Med-Pay coverage, while saving the additional premium expense, is simply wrong. The fact that an insured may not receive payment under a particular coverage under hypothetical circumstances, does not mean the insured has not received the benefit of the coverage, only that the contractual conditions for receiving payment under that particular coverage may not have been met. Consider, for example, an insured forced off the road by an uninsured driver who leaves the scene of the accident. In the absence of corroborative evidence from "independent third-party testimony" that the accident was caused by a driver who left the scene, the insured would be unable to recover under his UM coverage.

Girgis v. State Farm Mut. Auto. Ins. Co. (1996), 75 Ohio St.3d 302, 306-07, 1996 Ohio 111, 662 N.E.2d 280. The insured would still receive protection for medical expenses *from the risk* of being injured by an uninsured/underinsured driver, but the condition for receiving benefits under the UM provision simply were not met But, an insured who also had Med-Pay coverage would receive benefits under the Med-Pay coverage because that coverage provides payment regardless of fault.

Situations in which an insured is contractually entitled to recover under one coverage but not another are virtually limitless. Just because an insured pays separate premiums for the coverages, but only recovers once does not mean either coverage is illusory or without benefit. For example, limitations clauses precluding stacking of coverages, such as those previously barred by *Savoie*, are now enforceable *regardless of the premiums involved.* See R.C. 3937.18(G). Further, even *Savoie* upheld the enforceability of contractual prohibitions on intrafamily stacking, despite the separate payment of premiums for separate policies covering relatives of the same household. 67 Ohio St. 3d at 507; *accord State Farm Fire & Cas. Co. v. Trousdale* (Ill.App. 1997), 285 Ill. App. 3d 566, 571 (rejecting argument that UM coverage was merely illusory because it contained a clause that excluded coverage for insured's own vehicle because the endorsement still offered the insured protection and coverage when the insured is injured in an accident with a driver whose insurance policy is inadequate).

Med-Pay coverage does not, and is not designed, to provide a double recovery for those injured by an uninsured driver. Insurance clauses precluding double recovery do not render Med-Pay or UM coverage without value, and do not render the non-duplication clause in Respondents' policies with State Farm unenforceable. Rather, they further the purpose of insurance to compensate insureds for loss actually sustained. Not less. And certainly not more.

IV. CONCLUSION

Petitioners respectfully submit that given the 2001 amendments to R.C. 3937.18, this Court should join the majority of courts across the country in holding that limitations precluding double-recovery under both UM and Med-Pay coverages for the same medical expenses are valid and enforceable.[8]

As stated by this Court, *Berrios*, *Shearer*, and *Lindsey* existed "in the *separate world* of UM/UIM coverage." (Emphasis added.) *Berrios* at ¶43. That "separate world" existed only because of the public policy found in the mandatory offer of UM coverage under R.C. 3937.18. But both that public policy and the statutory scheme under which *Berrios*, *Shearer*, and *Lindsey* were decided were eliminated by S.B. 97. In light of the 2001 amendments to R.C. 3937.18 and

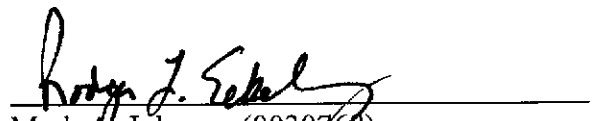
---

[8] See, e.g., *Welbron v. State Farm Mut. Auto. Ins. Co.* (C.A.5, Feb. 6, 2007), 2007 U.S. App. LEXIS 4871, at *7-8 (applying Miss. law) (interpreting Med-Pay provision identical to that at issue, insurer entitled to reduce UM benefits by amounts paid under Med-Pay coverage to avoid double-recovery); *Keenan v. Industrial Indem. Ins. Co.* (Wash. 1987), 738 P.2d 270, 273-74 (discussing and rejecting *Grange Mut. Cas. Co. v. Lindsey*, 22 Ohio St.3d 153) (overruled on other ground by *Price v. Farmers Ins. Co.* (1997), 946 P.2d 388); *Quinones v. Penn. Gen. Ins. Co.* (C.A.10, 1986), 804 F.2d 1167, 1171-72) (applying N.M. law) (insured not entitled to recover past medical expenses under both UM and Med-Pay coverages); *Ostransky v. State Farm Ins. Co.* (Neb. 1997), 566 N.W.2d 399, 402-03 (insurer entitled to offset medical expenses paid under Med-Pay coverage against UM claim to avoid paying the same expenses twice); *Barnes v. Allstate Ins. Co.* (La.App. 1992), 608 So.2d 1045, 1047 (insurer entitled to offset amounts paid under Med-Pay coverage against judgment entered on UM claim where policy provided insurer would not pay any amount under UM coverage "which represents expenses for medical services paid or payable" under Med-Pay coverage); *Ruder v. West Am. Ins. Co.* (Ind.App. 1972), 280 N.E.2d 68, 69 (insured not entitled to double-recovery of expenses under Med-Pay and UM coverages); *Hartford Accident & Indem. Co. v. Lackore* (Fla. 1982), 408 So.2d 1040, 1042-43 (insurer may set-off Med-Pay or personal injury protection benefits against UM benefits to avoid double-payment of same expenses); *Auto-Owners Ins. Co. v. Lydon* (Mich.App. 1986), 386 N.W.2d 628, 630 (insurer allowed to set-off amounts paid under no-fault insurance against UM claim to prevent double-recovery); *Northwestern Mut. Ins. Co. v. Rhodes* (Cal.App. 1965), 238 Cal.App.2d 64, 67-68 (insured not entitled to recovery under Med-Pay coverage amounts previously paid under UM coverage that would result in double-recovery); *Cole v. Inland Nat'l Ins. Co.* (Ill.App. 1971), 273 N.E.2d 65, 67-68 (insurer entitled to deduct amount of Med-Pay coverage from UM claim to avoid double-payment).

this Court's expansive reading of the statute in *Snyder*, there can be little doubt that the non-duplication clauses in Respondents' policies with State Farm are enforceable.

Therefore, State Farm respectfully requests that the Court respond to the certified question of law in the affirmative.

Respectfully submitted,



Mark A. Johnson (0030768)
Counsel of Record
mjohnson@bakerlaw.com
Rodger L. Eckelberry (0071207)
reckelberry@bakerlaw.com
Robert J. Tucker (0082205)
rtucker@bakerlaw.com
Baker & Hostetler LLP
Capitol Square, Suite 2100
65 East State Street
Columbus, Ohio 43215-4260
Telephone: 614.228.1541
Facsimile: 614.462.2616

Michael K. Farrell (0040941)
mfarrell@bakerlaw.com
Baker & Hostetler LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114-3485
Telephone: 216.621.0200
Facsimile: 216.696.0740

Counsel for Petitioners State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company

CERTIFICATE OF SERVICE

The undersigned certifies that on May 1, 2009, the foregoing was served upon the persons listed below by first class U.S. Mail, postage prepaid:

James A. DeRoche, Esq.
Garson & Associates Co., LPA
1600 Rockefeller Building
614 West Superior Avenue
Cleveland, Ohio 44113

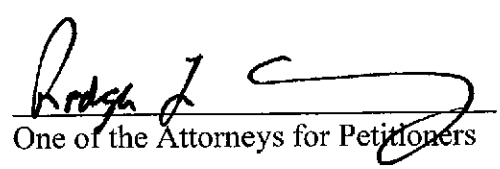
Glenn D. Feagon, Esq.
8905 Lake Avenue, 4th Floor
Cleveland, Ohio 44113
Counsel for Respondents Grace, Garcia, Ruffin and Jones

Alberto R. Nestico, Esq.
Gary W. Kisling, Esq.
Robert W. Redick, Esq.
Thomas Vasvari, Esq.
Kisling, Nestico & Redick LLC
3200 W. Market St., Suite 300
Akron, Ohio 443333

Austin Tighe, Esq.
Feazell & Tighe, L.L.P.
6300 Bridgepoint Parkway, Bridgepoint 2
Suite 220
Austin, TX 78730
Counsel for Respondent Angela Webb

Patrick J. Perotti, Esq.
Nicole T. Fiorelli, Esq.
Dworen & Bernstein Co., L.P.A.
60 South Park Place
Painesville, Ohio 44077

Edwin E. Schottenstein, Esq.
Schottenstein Law Offices
100 East Broad Street, Suite 1337
Columbus, Ohio 43215
Counsel for Respondent Patricia Schwab



One of the Attorneys for Petitioners

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LAURA GRACE, et al.,	:	**JUDGE KATHLEEN M. O'MALLEY**
Plaintiffs,	:	
v.	:	**Case No. 1:08-CV-254**
	:	**(Case 1)**
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,	:	
Defendants.	:	

ANGELA WEBB,	:	
Plaintiff,	:	
v.	:	**Case No. 5:08-CV-1917**
	:	**(Case 2)**
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	:	
Defendant.	:	

PATRICIA SCHWAB,	:	
Plaintiff,	:	
v.	:	**Case No. 1:08-CV-2083**
	:	**(Case 3)**
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	:	
Defendant.	:	

MEMORANDUM & ORDER CERTIFYING A QUESTION OF STATE LAW TO THE SUPREME COURT OF OHIO

Pursuant to Rule XVIII of the Rules of Practice of the Supreme Court of Ohio, the Court hereby issues a certification order after having found that the three above-captioned cases, all of which are currently pending before the Court as related, present a question of Ohio law that may

be determinative of the cases and for which it appears to the Court that there is no controlling precedent in the decisions of the Supreme Court of Ohio. For the reasons explained in more detail below, the Court respectfully requests that the Supreme Court of Ohio answer the following certified question of state law:

> Does Ohio Revised Code Section 3937.18, as amended in 2001 by S.B. 97 (effective October 31, 2001), permit insurers to include an express limitation of coverage in an automobile insurance policy that precludes payments made under Uninsured/Underinsured Motorist coverage for medical expenses that are paid or payable under the Medical Payments coverage purchased in the same policy?

I. NATURE OF THE CASES

The three related, above-captioned cases are all putative class action lawsuits in which the Plaintiffs are challenging the enforceability of a "non-duplication" clause set forth in the Defendants' automobile insurance policies, i.e., an express limitation of coverage in the policies, that precludes payments made under Uninsured/Underinsured Motorist ("UM/UIM") coverage for medical expenses that are paid or payable under the Medical Payments ("Med Pay") coverage purchased in the same policy.

As alleged in detail in the respective Complaints, all of the named Plaintiffs in the three cases were involved in a motor vehicle accident with an uninsured motorist and were insureds under policies issued by one of the two named Defendants – either Defendant State Farm Mutual Automobile Insurance Company or Defendant State Farm Fire and Casualty Company (collectively, "State Farm"). Each of the named Plaintiffs' policies included both UM/UIM coverage and Med Pay coverage. It is undisputed that the declaration page of the policies identified separate limits of coverage for both UM/UIM coverage and Med Pay coverage, and that State Farm charged separate premiums for both types of coverage. Further, all of the policies were endorsed with form 6083VV,

or a substantially identical form, that contained the following "non-duplication" clause, or limitation of the UM/UIM coverage, upon which the Plaintiffs base their claims:

> **Non-Duplication**
> We will not pay under Uninsured Motor Vehicle Coverage any medical expenses paid or payable under:
> (1) Medical Payments Coverage of this policy, or
> (2) the medical payments coverage, no fault coverage, personal injury protection, or other similar coverage of any other motor vehicle policy.

Each of the policies also contained another, separate "non-duplication" clause within its Med Pay coverage:

> **Non-Duplication**
> No ***person*** for whom medical expenses are payable under this coverage shall recover more than once for the same medical expense under this or similar vehicle insurance.

All of the named Plaintiffs submitted a UM/UIM insurance claim to State Farm, and based upon the above "non-duplication" clauses, State Farm refused the Plaintiffs' requests to be paid for the cost of medical care under both the UM/UIM and Med Pay coverages.

Premised on the unenforceability of the "non-duplication" clauses at issue, the named Plaintiffs in the three cases have asserted various claims of relief against State Farm, including causes of action for: (1) fraud and deceit; (2) breach of contract; (3) unjust enrichment; (4) breach of fiduciary duty; (5) breach of the covenant of good faith and fair dealing; and (6) declaratory and injunctive relief.

In general, the named Plaintiffs in each of the three cases seek to represent a class of persons that is composed of all residents of the State of Ohio who: (1) were insured persons under a policy of insurance issued by State Farm that included UM/UIM coverage and Med Pay coverage, for which State Farm charged separate premiums; (2) were insured persons under a policy of insurance comprised of State Farm's standard policy form or forms that included a purported "non-

duplication" clause; and (3) suffered a bodily injury for which State Farm refused to provide benefits for the cost of medical treatment under both the UM/UIM coverage and the Med Pay coverage portions of the policy.

II. CIRCUMSTANCES FROM WHICH THE QUESTION OF LAW ARISES

Currently pending before the Court in each of the three cases is a motion for judgment on the pleadings filed by State Farm. (*See* Case 1, Doc. 14; Case 2, Doc. 9; Case 3, Doc. 7.)[1] State Farm acknowledges that, in years past, the Supreme Court of Ohio has held that an insurance policy provision that reduced the amount paid under UM/UIM coverage based upon amounts paid under Med Pay coverage was unenforceable as against public policy. *See, e.g.*, *Berrios v. State Farm*, 781 N.E.2d 149 (Ohio 2002); *Grange Mut. Cas. Co. v. Lindsey*, 489 N.E.2d 281 (Ohio 1986); *Shearer v. Motorists Mut. Ins. Co.*, 371 N.E.2d 210 (Ohio 1978). State Farm, however, contends that the 2001 amendments to Ohio's UM/UIM statute, O.R.C. § 3937.18, made effective through the passage of S.B. 97 (effective October 31, 2001), abrogated the public policy prohibition outlined in *Berrios*, *Lindsey*, and *Shearer* and now permit insurers to include terms and conditions in policies that preclude UM/UIM coverage, such that the "non-duplication" clauses at issue in State Farm's policies are valid and enforceable as a matter of law.[2] In particular, State Farm relies heavily on the current version of O.R.C. § 3937.18(I) and the Supreme Court of Ohio's recent interpretation of that provision in *Snyder v. Am. Family Ins. Co.*, 871 N.E.2d 574 (Ohio 2007):

---

1 The Plaintiffs in Case 1 also filed a motion for judgment on the pleadings and a motion for class certification, both of which are pending before the Court as well. (*See* Case 1, Docs. 13, 18.)

2 Even though the Supreme Court of Ohio decided *Berrios* in 2002, the parties do not dispute that *Berrios* involved the version of O.R.C. § 3937.18 in effect *prior* to the 2001 amendments.

> [T]he 2001 statute for the first time permits policies with uninsured-motorist coverage to limit or exclude coverage under circumstances that are specified in the policy even if those circumstances are not also specified in the statute. *See* O.R.C. § 3937.18(I). Division (I) of the statute provides: "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: . . ." O.R.C. § 3937.18(I) (emphasis added). Eliminating the mandatory coverage offering and simultaneously permitting the parties to agree to coverage exclusions not listed in the statute provides insurers considerable flexibility in devising specific restrictions on any offered uninsured- or underinsured-motorist coverage. *See also* S.B. 97, Section 3(B)(3), 149 Ohio Laws, Part I, 788-789 (General Assembly expressed its intention to "[p]rovide statutory authority for the inclusion of exclusionary or limiting provisions in uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages").

Snyder, 871 N.E.2d at 579 (emphasis in original). In fact, State Farm notes that, after *Snyder* was decided, two Ohio courts of common pleas have determined that the same "non-duplication" clauses that are at issue here are enforceable under current Ohio law. *See Galloway v. Henry*, Montgomery County Court of Common Pleas, Case No. 07-CV-10521, 10/22/2008 Order granting State Farm's partial motion for summary judgment (copy attached at Case 1, Doc. 27-2; Case 2, Doc. 16-2; Case 3, Doc. 17-2); *Shenyey v. Glasgow*, Cuyahoga County Court of Common Pleas, Case No. CV-07-638114, 5/1/2008 Order granting State Farm's partial motion for summary judgment (certified copy attached at Case 2, Doc. 13-2 and Case 3, Doc. 13-2). In short, therefore, State Farm argues that, because Ohio law now expressly authorizes insurers to preclude UM/UIM coverage under the circumstances set forth in an insurance policy, and because State Farm's insurance policies clearly and unambiguously preclude coverage under UM/UIM coverage for medical expenses that are paid or payable under Med Pay coverage in the "non-duplication" clauses at issue, State Farm is entitled to judgment on the pleadings in all three cases.

By contrast, the Plaintiffs assert that State Farm is not entitled to judgment on the pleadings, because the 2001 amendments to O.R.C. § 3937.18 did not abrogate the public policy prohibition outlined in *Berrios*, *Lindsey*, and *Shearer* and, accordingly, the "non-duplication" clauses at issue remain invalid and unenforceable under Ohio common law. The Plaintiffs first argue that the 2001 amendments to O.R.C. § 3937.18 merely eliminated the statutory requirement that Ohio insurers offer UM/UIM coverage to their insureds, and that they had no effect on the continued viability of *Berrios*, *Lindsey*, and *Shearer*. Invoking the statutory canon of construction *expressio unius est exclusio alterius*, or the notion that the express inclusion of one thing implies the exclusion of the other, the Plaintiffs point out that the Ohio General Assembly, despite explicitly referencing several other Supreme Court decisions that were intended to be superseded by S.B. 97, did not even mention the *Lindsey* or *Shearer* line of decisions in the 2001 amendments or the commentary accompanying S.B. 97, let alone announce that the those decisions were superseded. The Plaintiffs also contend that one of the primary reasons that the Supreme Court of Ohio adopted the common law prohibition in *Berrios*, *Lindsey*, and *Shearer* was that people who pay separate premiums for separate coverages should get what they pay for, *see Berrios*, 781 N.E.2d at 151, and that the 2001 amendments did nothing to address this practical reason for prohibiting insurers from denying UM/UIM benefits by setting off Med Pay coverage payments. Further, the Plaintiffs note that the Fifth District Court of Appeals already has rejected arguments similar to those made by State Farm and determined that the 2001 amendments did not abrogate *Berrios*, *Lindsey*, and *Shearer*. *See Wayne Mut. Ins. Co. v. Bradley*, 2006-Ohio-1517 (Ohio Ct. App. 2006). And finally, the Plaintiffs insist that State Farm's reliance on the Supreme Court of Ohio's decision in *Snyder* is misplaced, because *Snyder* reaffirmed that a "common-law prohibition," such as the long-standing prohibition

established in *Berrios*, *Lindsey*, and *Shearer*, can still impose limits on policy terms. *See Snyder*, 871 N.E.2d at 581.

In sum, the Plaintiffs argue that, because existing Ohio common law prohibits State Farm from collecting two premiums for two separate coverages, and then setting one off from the other, the "non-duplication" clauses at issue are invalid and unenforceable and State Farm's motions for judgment on the pleadings should be denied. They argue that the public policy behind this rule is particularly powerful where, as they argue is the case here, the monies against which the insurer seeks a set off are insufficient to wholly compensate the insured for his or her losses.

Upon a careful review of the parties' arguments and applicable Ohio law, the Court has concluded that a certification order under Rule XVIII of the Rules of Practice of the Supreme Court of Ohio is appropriate. The Court believes that it is the Supreme Court of Ohio who should first have the opportunity to resolve the potentially case-determinative issue as to whether State Farm's "non-duplication" clauses are valid and enforceable under the current version of O.R.C. § 3937.18. To date, the Supreme Court of Ohio has not considered whether the prohibition established in *Berrios*, *Lindsey*, and *Shearer* against denying UM/UIM benefits by setting off Med Pay coverage payments continues to be good law in light of the 2001 amendments. Further, the parties have identified conflicting decisions by Ohio lower courts regarding whether the 2001 amendments abrogated *Berrios*, *Lindsey*, and *Shearer* – namely, the courts of common pleas' decisions in *Galloway* and *Shenyey* and the Fifth District Court of Appeals' decision in *Bradley*. And lastly, the Court notes that, in addition to the three above-captioned cases and *Galloway* and *Shenyey* (which still may be subject to appeal), there are a number of other lawsuits in both state and federal court that raise issues similar to those presented here, such that a resolution by the Supreme Court of Ohio on a certified question would avoid the possibility of additional inconsistent rulings. *See, e.g.*,

Struewing v. State Farm Mut. Auto. Ins. Co., United States District Court for the Southern District of Ohio, Case No. 1:08-CV-21-SJD; *Bates v. Progressive Specialty Ins. Co.*, Cuyahoga County Court of Common Pleas, Case No. CV-07-645172; *Stith v. McCurdy*, Hamilton County Court of Common Pleas, Case No. A0711102; *Harrison v. Frazier*, Butler County Court of Common Pleas, Case No. CV-2007-12-4907; *Detty-Huddleston v. Johnson*, Franklin County Court of Common Pleas, Case No. 07-CVC09-13032; *Carpeno v. Western Reserve*, Cuyahoga County Court of Common Pleas, Case No. CV-08-666052; *Eicher v. Nationwide*, Cuyahoga County Court of Common Pleas, Case No. CV-08-666054; *Whitely v. American Select Ins.*, Cuyahoga County Court of Common Pleas, Case No. CV-08-666055; *Holt v. Progressive Specialty Ins. Agency*, Stark County Court of Common Pleas, Case No. 2008-CV-03160.[3] Accordingly, given all of the above, the Court respectfully requests that the Supreme Court of Ohio answer the certified question of Ohio law set forth below.

III. QUESTION OF LAW TO BE ANSWERED

The Court certifies the following question:

> Does Ohio Revised Code Section 3937.18, as amended in 2001 by S.B. 97 (effective October 31, 2001), permit insurers to include an express limitation of coverage in an automobile insurance policy that precludes payments made under Uninsured/Underinsured Motorist coverage for medical expenses that are paid or payable under the Medical Payments coverage purchased in the same policy?

---

[3] The Court notes that it does not have access to the documents filed in the cases cited above and cannot independently verify that they raise similar issues to those presented here. These cases, however, were cited in a reply brief filed by State Farm in Case 2, Doc. 13 at 19-20 for this proposition, and that proposition has not been challenged by the Plaintiffs.

IV. PARTIES AND COUNSEL

In accordance with Sections 2(C) and 2(D) of Rule XVIII of the Rules of Practice of the Supreme Court of Ohio, the names of each of the parties and the contact information for counsel for each of the parties in the three cases is as follows:

Case 1 (No. 1:08-CV-254)

Named Plaintiffs:
Laura Grace

Elizabeth Garcia

Ladon Ruffin

Dorian Jones

Counsel for Plaintiffs:
David H. Krause (dhkrause@garson.com)
James A. DeRoche (jderoche@garson.com)
GARSON & ASSOCIATES
1600 Rockefeller Bldg.
614 Superior Avenue, NW
Cleveland, OH 44113
216-696-9330
Fax: 216-696-3177

Glenn D. Feagan
WAITE, SCHNEIDER, BAYLESS & CHESLEY
1513 Fourth & Vine Tower
One West Fourth Street
Cincinnati, OH 45202
513-621-0267
Fax: 513-621-0262

Defendants:
State Farm Mutual Automobile Insurance Company

State Farm Fire and Casualty Company

Counsel for Defendants:
Rodger L. Eckelberry (reckelberry@bakerlaw.com)
Mark Alan Johnson (mjohnson@bakerlaw.com)
Robert J. Tucker (rtucker@bakerlaw.com)
BAKER & HOSTETLER
65 East State Street, Ste. 2100
Columbus, OH 43215
614-228-1541
Fax: 614-462-2616

Michael K. Farrell (mfarrell@bakerlaw.com)
BAKER & HOSTETLER
3200 National City Center
1900 East Ninth Street
Cleveland, OH 44114
216-621-0200
Fax: 216-696-0740

Case 2 (No. 5:08-CV-1917)

Named Plaintiff:
Angela J. Webb

Counsel for Plaintiff:
Austin Tighe (austin@feazell-tighe.com)
6300 Bridgepoint Parkway, Ste. 220
Austin, TX 78730
512-372-8100
Fax: 512-372-8140

Alberto R. Nestico (nestico@knrlegal.com)
Gary W. Kisling (kisling@knrlegal.com)
Robert W. Redick (redick@knrlegal.com)
KISLING, NESTICO & REDICK
3200 West Market Street, Ste. 300
Akron, OH 44333
330-869-9007
Fax: 330-869-9008

Thomas M. Vasvari (vasvari@knrlegal.com)
KISLING, NESTICO & REDICK
970 Windham Court, Ste. 7
Boardman, OH 44512
330-729-1090
Fax: 330-869-9008

Defendant:
State Farm Mutual Automobile Insurance Company

Counsel for Defendant:
Rodger L. Eckelberry (reckelberry@bakerlaw.com)
Mark Alan Johnson (mjohnson@bakerlaw.com)
Robert J. Tucker (rtucker@bakerlaw.com)
BAKER & HOSTETLER
65 East State Street, Ste. 2100
Columbus, OH 43215
614-228-1541
Fax: 614-462-2616

Michael K. Farrell (mfarrell@bakerlaw.com)
BAKER & HOSTETLER
3200 National City Center
1900 East Ninth Street
Cleveland, OH 44114
216-621-0200
Fax: 216-696-0740

Case 3 (No. 1:08-CV-2083)

Named Plaintiff:
Patricia Schwab

Counsel for Plaintiff:
Edwin E. Schottenstein
SCHOTTENSTEIN LAW OFFICES
100 East Broad Street, Ste. 1337
Columbus, OH 43215
800-437-3757
Fax: 614-462-2406

Nicole T. Fiorelli (nfiorelli@dworkenlaw.com)
Patrick J. Perotti (pperotti@dworkenlaw.com)
DWORKEN & BERNSTEIN
60 South Park Place
Painesville, OH 44077
440-352-3391
Fax: 440-352-3469

Defendant:
State Farm Mutual Automobile Insurance Company

Counsel for Defendant:
Rodger L. Eckelberry (reckelberry@bakerlaw.com)
Mark Alan Johnson (mjohnson@bakerlaw.com)
Robert J. Tucker (rtucker@bakerlaw.com)
BAKER & HOSTETLER
65 East State Street, Ste. 2100
Columbus, OH 43215
614-228-1541
Fax: 614-462-2616

Michael K. Farrell (mfarrell@bakerlaw.com)
BAKER & HOSTETLER
3200 National City Center
1900 East Ninth Street
Cleveland, OH 44114
216-621-0200
Fax: 216-696-0740

V. DESIGNATION OF THE MOVING PARTY

In accordance with Section 2(E) of Rule XVIII of the Rules of Practice of the Supreme Court of Ohio, the Defendants – State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company – are designated as the moving party.

VI. SERVICE

In accordance with Section 3 of Rule XVIII of the Rules of Practice of the Supreme Court of Ohio, the Clerk of the United States District Court for the Northern District of Ohio, Eastern Division, is hereby directed to: (1) serve copies of this certification order upon all parties or their counsel of record; and (2) file with the Supreme Court of Ohio this certification order under the seal of this Court, along with certificate of service.

IT IS SO ORDERED.

/s/ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

Dated: January 15, 2009

CERTIFICATE OF SERVICE

This will certify that a copy of the Memorandum & Order Certifying a Question of State Law to the Supreme Court of Ohio (the "Memorandum & Order") was sent on the 15th day of January, 2009, by ordinary mail to the Supreme Court of Ohio, Office of the Clerk, 8th Floor, 65 South Front Street, Columbus, OH 43215. Additionally, a copy of the Memorandum & Order was served upon all counsel of record in each of the three above-captioned cases via the Court's electronic filing system.

/s/ Christine M. Huth
CHRISTINE M. HUTH
DEPUTY CLERK OF COURT

LEXSTAT OHIO REV CODE ANN 3937.18

PAGE'S OHIO REVISED CODE ANNOTATED
Copyright (c) 2009 by Matthew Bender & Company, Inc
a member of the LexisNexis Group
All rights reserved.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH APRIL 21, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 1, 2009 ***

TITLE 39. INSURANCE
CHAPTER 3937. CASUALTY INSURANCE; MOTOR VEHICLE INSURANCE

Go to the Ohio Code Archive Directory

ORC Ann. 3937.18 (2009)

§ 3937.18. Uninsured and underinsured motorist coverage

(A) Any policy of insurance delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state that insures against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle, may, but is not required to, include uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages.

Unless otherwise defined in the policy or any endorsement to the policy, "motor vehicle," for purposes of the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages, means a self-propelled vehicle designed for use and principally used on public roads, including an automobile, truck, semi-tractor, motorcycle, and bus. "Motor vehicle" also includes a motor home, provided the motor home is not stationary and is not being used as a temporary or permanent residence or office. "Motor vehicle" does not include a trolley, streetcar, trailer, railroad engine, railroad car, motorized bicycle, golf cart, off-road recreational vehicle, snowmobile, fork lift, aircraft, watercraft, construction equipment, farm tractor or other vehicle designed and principally used for agricultural purposes, mobile home, vehicle traveling on treads or rails, or any similar vehicle.

(B) For purposes of any uninsured motorist coverage included in a policy of insurance, an "uninsured motorist" is the owner or operator of a motor vehicle if any of the following conditions applies:

(1) There exists no bodily injury liability bond or insurance policy covering the owner's or operator's liability to the insured.

(2) The liability insurer denies coverage to the owner or operator, or is or becomes the subject of insolvency proceedings in any state.

(3) The identity of the owner or operator cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes of division (B)(3) of this section, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

(4) The owner or operator has diplomatic immunity.

(5) The owner or operator has immunity under Chapter 2744. of the Revised Code.

An "uninsured motorist" does not include the owner or operator of a motor vehicle that is self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered.

(C) If underinsured motorist coverage is included in a policy of insurance, the underinsured motorist coverage shall provide protection for insureds thereunder for bodily injury, sickness, or disease, including death, suffered by any insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the underinsured motorist coverage. Underinsured motorist coverage in this state is not and shall not be excess coverage to other applicable liability coverages, and shall only provide the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable to the insured were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured. For purposes of underinsured motorist coverage, an "underinsured motorist" does not include the owner or operator of a motor vehicle that has applicable liability coverage in the policy under which the underinsured motorist coverage is provided.

(D) With respect to the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in a policy of insurance, an insured shall be required to prove all elements of the insured's claim that are necessary to recover from the owner or operator of the uninsured or underinsured motor vehicle.

(E) The uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in a policy of insurance shall not be subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

(F) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.

(G) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages and that provides a limit of coverage for payment of damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

(H) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions requiring that, so long as the insured has not prejudiced the insurer's subrogation rights, each claim or suit for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages be made or brought within three years after the date of the accident causing the bodily injury, sickness, disease, or death, or within one year after the liability insurer for the owner or operator of the motor vehicle liable to the insured has become the subject of insolvency proceedings in any state, whichever is later.

(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:

(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

(2) While the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so, provided that under no circumstances will an insured whose license has been suspended, revoked, or never issued, be held to have a reasonable belief that the insured is entitled to operate a motor vehicle;

(3) When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

(4) While any employee, officer, director, partner, trustee, member, executor, administrator, or beneficiary of the named insured, or any relative of any such person, is operating or occupying a motor vehicle, unless the employee, officer, director, partner, trustee, member, executor, administrator, beneficiary, or relative is operating or occupying a motor vehicle for which uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided in the policy;

(5) When the person actually suffering the bodily injury, sickness, disease, or death is not an insured under the policy.

(J) In the event of payment to any person under the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages, and subject to the terms and conditions of that coverage, the insurer making such payment is entitled, to the extent of the payment, to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of that person against any person or organization legally responsible for the bodily injury or death for which the payment is made, including any amount recoverable from an insurer that is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer that is or becomes the subject of insolvency proceedings, to the extent of those rights against the insurer that the insured assigns to the paying insurer.

(K) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage included in a policy of insurance.

(L) The superintendent of insurance shall study the market availability of, and competition for, uninsured and underinsured motorist coverages in this state and shall, from time to time, prepare status reports containing the superintendent's findings and any recommendations. The first status report shall be prepared not later than two years after the effective date of this amendment. To assist in preparing these status reports, the superintendent may require insurers and rating organizations operating in this state to collect pertinent data and to submit that data to the superintendent.

The superintendent shall submit a copy of each status report to the governor, the speaker of the house of representatives, the president of the senate, and the chairpersons of the committees of the general assembly having primary jurisdiction over issues relating to automobile insurance.

131 v 965 (Eff 9-15-65); 132 v H 1 (Eff 2-21-67); 133 v H 620 (Eff 10-1-70); 136 v S 25 (Eff 11-26-75); 136 v S 545 (Eff 1-17-77); 138 v H 22 (Eff 6-25-80); 139 v H 489 (Eff 6-23-82); 141 v S 249 (Eff 10-14-86); 142 v H 1 (Eff 1-5-88); 145 v S 20 (Eff 10-20-94); 147 v H 261 (Eff 9-3-97); 148 v S 57 (Eff 11-2-99); 148 v S 267 (Eff 9-21-2000); 149 v S 97. Eff 10-31-2001.

Section Notes

The provisions of § 3 of SB 97 (149 v --) read as follows:

SECTION 3. In enacting this act, it is the intent of the General Assembly to do all of the following:

(A) Protect and preserve stable markets and reasonable rates for automobile insurance for Ohio consumers;

(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;

(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;

(3) Provide statutory authority for the inclusion of exclusionary or limiting provisions in uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;

(4) Eliminate any requirement of a written offer, selection, or rejection form for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages from any transaction for an insurance policy;

(5) Ensure that a mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages not be construed to be required by the provisions of *section 3937.181 of the Revised Code*, as amended by this act, that make uninsured motorist property damage coverage available under limited conditions.

(C) Provide statutory authority for provisions limiting the time period within which an insured may make a claim under uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages to three years after the date of the accident causing the injury;

(D) To supersede the holdings of the Ohio Supreme Court in those cases previously superseded by Am. Sub. S.B. 20 of the 120th General Assembly, Am. Sub. H.B. 261 of the 122nd General Assembly, S.B. 57 of the 123rd General Assembly, and Sub. S.B. 267 of the 123rd General Assembly;

(E) To supersede the holdings of the Ohio Supreme Court in *Linko v. Indemnity Ins. Co. of N. America (2000), 90 Ohio St.3d 445, Scott-Pontzer v. Liberty Mut. Fire Ins. Co. (1999), 85 Ohio St.3d 660, Schumacher v. Kreiner (2000), 88 Ohio St.3d 358, Sexton v. State Farm Mut. Auto. Ins. Co. (1982), 69 Ohio St.2d 431, Gyori v. Johnston Coca-Cola Bottling Group, Inc. (1996), 76 Ohio St.3d 565,* and their progeny.

The provisions of §§ 3, 4 of SB 267 (148 v --) read as follows:

SECTION 3. It is the intent of the General Assembly in amending division (A) of section 3937.18 of the Revised Code to supersede the holdings of the Ohio Supreme Court in Sexton v. State Farm Mut. Auto. Ins. Co. (1982), 69 Ohio St.2d 431, and Moore v. State Auto. Mut. Ins. Co. (2000), 88 Ohio St.3d 27, that division (A)(1) of section 3937.18 of the Revised Code does not permit an insurer to limit uninsured or underinsured motorist coverage in such a way that an insured must suffer bodily injury, sickness, death or disease for any other insured to recover from the insurer.

SECTION 4. It is the intent of the General Assembly in amending division (C) of *section 3937.18 of the Revised Code* to make it clear that new rejections of uninsured and underinsured motorist coverages or decisions to accept lower limits of coverages need not be obtained from an insured or applicant at the beginning of each policy period in which the policy provides continuing coverage to the named insured or applicant, regardless of whether a new, replacement, or renewal policy that provides continuing coverage to the named insured or applicant is issued by the insurer or affiliate of that insurer with or without new policy terms or new policy numbers.

Related Statutes & Rules

Cross-References to Related Statutes

Coverage for punitive or exemplary damages prohibited, *RC § 3937.18.2*.

Property damage coverage as part of uninsured motorist insurance, *RC § 3937.18.1*.

OH Administrative Code

Underinsured motorist coverage. OAC 3901-1-39.

Comparative Legislation

UNINSURED MOTORIST COVERAGE: CA--*Cal Ins Code § 11580.2* et seq

FL--*Fla. Stat. §§ 324.011* et seq, 627.413 et seq

IL--*215 ILCS § 5/143a*

IN--Burns *Ind. Code Ann. § 27-7-5-2* et seq

KY--*KRS §§ 304.20-020*, 304.39-320

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

LAURA GRACE **3363 Mulberry** **Toledo, Ohio 43608** **And** **ELIZABETH GARCIA** **2707 Pickle Road, Apartment 12** **Oregon, Ohio 43616** **And** **LADON RUFFIN** **4424 MLK Boulevard** **Garfield Heights, Ohio 44105** **And** **DORIAN JONES** **3691 East 144th Street** **Cleveland, Ohio 44120** **Plaintiffs,** **v.** **STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY** **One State Farm Plaza** **Bloomington, IL 61710** **And** **STATE FARM FIRE AND CASUALTY COMPANY** **1440 Granville Road** **Newark, Ohio 43093** **Defendants.**	**CASE NO.: 1:08CV254** **JUDGE KATHLEEN O'MALLEY** **FIRST AMENDED** **CLASS ACTION COMPLAINT** **(Jury Demand Endorsed Hereon)**

Now come Plaintiffs, on behalf of themselves all others similarly situated residents of the State of Ohio, by and through undersigned counsel, and for their complaint against Defendant State Farm Mutual Automobile Insurance Company ("State Farm Mutual"), and Defendant State Farm Fire and Casualty ("State Farm Fire"), (together "Defendants"), state the following:

SUMMARY OF COMPLAINT

1. Defendants are insurance companies authorized to engage in the business of selling automobile insurance to residents of the State of Ohio, and Defendants regularly and habitually engages in such business in Cuyahoga County, Ohio.

2. Plaintiffs are individuals who were insured under a policy of insurance issued by Defendants that included Uninsured Motorist coverage for bodily injury ("UMBI coverage"), pursuant to which Defendants generally agreed to pay all sums that an insured person is legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by such insured person. The insurance policies issued by Defendants also included separate Medical Payments coverage ("Med. Pay coverage"), pursuant to which Defendants agreed to pay the reasonable expenses incurred by an insured for necessary medical treatment sustained by the insured person and caused by a motor vehicle accident.

3. Defendants charge a separate premium for UMBI coverage and Med. Pay coverage, and the declaration page of automobile insurance policies issued by Defendants identify separate limits of coverage for UMBI coverage and Med Pay coverage.

4. Defendants included a "duplication of benefits" clause ("DOB Clause") in their standard Ohio insurance policy that purported to relieve Defendants of their obligation to pay all sums that an insured person is legally entitled to recover as damages from the owner or operator of an

uninsured or underinsured motor vehicle because of bodily injury sustained by such insured person under the UMBI coverage limit of the policy, and also pay the reasonable expenses incurred for necessary medical treatment sustained by the insured person and caused by a motor vehicle accident under the Med Pay coverage limit of the policy.

5. Defendants inserted the DOB Clause in their standard Ohio insurance policies, in violation of Ohio law, as a cost containment tool designed to substantially decrease benefits paid to insured persons and increase Defendants' profits at the expense of first party insured persons.

6. The net effect of the DOB clause on the insured is exactly the same as a subrogation clause that allows the insurer to assert a subrogation right arising from Med. Pay coverage payments against its own payments due under UMBI coverage.

7. Upon information and belief, at the time Defendants began issuing their new standard coverage form in Ohio that includes the DOB Clause, thereby reducing benefits to its customers and increasing Defendants' profits, Defendants did not reduce premiums charged to their customers for UMBI coverage and Med. Pay coverage.

8. Defendants inserted the DOB Clause in their standard policy without alerting its customers that the application of the DOB Clause in practice served to lower the limits available under the policy, and decrease the value of the policy in the event of a UMBI claim.

9. Each of the Plaintiffs suffered bodily injury due to the fault of an uninsured driver, and each submitted a claim to Defendant State Farm Mutual or Defendant State Farm Fire under the UMBI coverage portion of an insurance policy issued by that Defendant.

10. Defendants refused to pay for each Plaintiff's cost of medical care under the UMBI coverage portion of the applicable insurance policies, instead paying for the cost of medical care only under the Med. Pay coverage and excluding it from the UMBI coverage settlement.

JURISDICTION AND VENUE

11. This Court has jurisdiction over all causes of action asserted herein pursuant to the Ohio Constitution, Article IV, sec. 4, because this case is a cause not given by statute to other trial courts.

12. This Court has jurisdiction over Defendants because Defendants engage in sufficient business in Ohio, has sufficient recurring contacts with Ohio, or otherwise intentionally avail themselves of the Ohio market, through the sale of its insurance products in Ohio, to render the exercise of general jurisdiction by this court permissible under traditional notions of fair play and substantial justice.

13. Venue is proper in this Court because the Defendants regularly engage in substantial business in Cuyahoga County, a substantial portion of the practices complained of herein occurred in Cuyahoga County and because the Defendants have received substantial compensation as a result thereof in Cuyahoga County.

PLAINTIFF CLASS REPRESENTATIVES

14. Plaintiff Laura Grace was involved in an automobile accident on June 3, 2007. The accident was caused by the negligence of an uninsured driver and Ms. Grace suffered significant bodily injuries as a result.

15. Ms. Grace incurred at least $2,193.50 in medical bills related to the reasonable and necessary medical treatment she received as a result of the accident.

16. At the time of the accident Ms. Grace was driving an automobile she owned and that she had insured through the purchase of an automobile insurance policy issued by Defendant State Farm Mutual. The policy included both UMBI coverage and Med. Pay coverage, for which Defendant State Farm Mutual charged separate premiums.

17. Ms. Grace submitted a claim under the UMBI coverage portion of her policy, and Defendant State Farm Mutual eventually offered $3,500 to resolve her UMBI claim, which included only pain and suffering and lost wages. According to Defendant State Farm Mutual's claims adjuster, the UMBI offer specifically excluded the amount of her medical bills from consideration, and if Ms. Grace wanted her medical costs paid she had to make a separate Med. Pay claim. Thus, instead of paying the full and fair value of Ms. Grace's claim against the uninsured driver, Defendant State Farm Mutual stated that the cost of medical care would only be paid under the Med. Pay coverage portion of Ms. Grace's insurance policy.

18. Plaintiff Elizabeth Garcia was involved in an automobile accident on June 21, 2006 when the car she was driving was struck from behind by a hit-and-run driver. Ms. Garcia suffered bodily injuries as a result.

19. Ms. Garcia incurred at least $1,272 in medical bills related to the reasonable and necessary medical treatment she received as a result of the accident

20. The automobile that Ms. Garcia was driving was owned by her father and insured under an insurance policy issued by Defendant State Farm Fire, and Ms. Garcia was an insured person under the policy. The policy included both UMBI coverage and Med. Pay coverage, for which Defendant State Farm Fire charged separate premiums.

21. Ms. Garcia submitted a claim under the UMBI coverage portion of her policy, and Defendant State Farm Fire eventually offered $750 to resolve her UMBI claim, which included only pain and suffering. According to Defendant State Farm Fire's claims adjuster, the UMBI offer specifically excluded the amount of her medical bills from consideration, and if Ms. Garcia wanted her medical costs paid she had to make a separate Med. Pay claim. Thus, instead of paying the full and fair value of Ms. Garcia's claim against the uninsured driver, Defendant State

Farm Fire stated that the cost of medical care would only be paid under the Med. Pay coverage portion of Ms. Garcia's insurance policy.

22. Plaintiff Ladon Ruffin was involved in an automobile accident on January 10, 2007, when the car he was driving was struck from behind by a hit-and-run driver. Mr. Ruffin suffered bodily injuries as a result.

23. Mr. Ruffin incurred at least $1,283 in medical bills related to the reasonable and necessary medical treatment he received as a result of the accident.

24. At the time of the accident Mr. Ruffin was driving an automobile he owned and that he had insured through the purchase of an automobile insurance policy issued by Defendant State Farm Mutual. The policy included both UMBI coverage and Med. Pay coverage, for which Defendant State Farm Mutual charged separate premiums.

25. Mr. Ruffin submitted a claim under the UMBI coverage portion of his policy, and Defendant State Farm Mutual eventually offered $4,000 to resolve his UMBI claim, which included only pain and suffering. According to Defendant State Farm Mutual's claims adjuster, the UMBI offer specifically excluded the amount of Mr. Ruffin's medical bills from consideration, and if Mr. Ruffin wanted his medical costs paid he had to make a separate Med. Pay claim. Thus, instead of paying the full and fair value of Mr. Ruffin's claim against the uninsured driver, Defendant State Farm Mutual stated that the cost of medical care would only be paid under the Med. Pay coverage portion of Mr. Ruffin's insurance policy.

26. Plaintiff Dorian Jones was a passenger in Mr. Ruffin's vehicle at the time of the January 10, 2007 accident, and he also suffered significant injuries, incurring $5,941 in medical bills related to the reasonable and necessary medical treatment he received as a result of the accident.

27. Mr. Jones was an insured person under the insurance policy covering Mr. Ruffin's vehicle, and he submitted a UMBI claim and Med. Pay claim to Defendant State Farm Mutual.

28. Defendant State Farm Mutual eventually offered $6,500 to resolve Mr. Jones' UMBI claim, which included only pain and suffering. According to Defendant State Farm Mutual's claims adjuster, the UMBI offer specifically excluded the amount of Mr. Jones' medical bills from consideration, and if Mr. Jones wanted his medical costs paid he had to make a separate Med. Pay claim. Thus, instead of paying the full and fair value of Mr. Jones's claim against the uninsured driver, Defendant State Farm Mutual stated that the cost of medical care would only be paid under the Med. Pay coverage portion of the insurance policy.

CLASS ACTION ALLEGATIONS

29. Plaintiffs bring this action on behalf of themselves and all other persons similarly situated who are residents of the State of Ohio. The Class of persons that Plaintiffs represent is composed of all residents of the State of Ohio, who: (a) were insured persons under a policy of insurance issued by one of the Defendants that included UMBI coverage and Med. Pay coverage, for which Defendants charged separate premiums; (b) were insured persons under a policy of insurance comprised of one of the Defendants standard policy form or forms that included a purported "Med. Pay set-off;" and (c) suffered a bodily injury for which one of the Defendants refused to provide benefits for the cost of medical treatment under both the UMBI coverage and the Med. Pay coverage portions of the policy. Not included in this class are Defendants and its officers, directors, employees, agents and/or affiliates.

30. The Class is composed of tens of thousands of persons geographically dispersed throughout Ohio, the joinder of whom in one action is impractical, and the disposition of their claims in a Class action will provide substantial benefits to both the parties and the Court. The

Class is easily ascertainable through Defendants' readily available electronic business records and maintains a sufficient community of interest since the rights of each member of the Class was violated in similar fashion based upon Defendants' uniform unlawful practice and/or scheme. The victimized Class members can be identified in records maintained by Defendants, and thus can be located and notified with specificity of the pendency of this action via first class mail using techniques and a form notice customarily used in class action litigation.

31. Plaintiffs' claims are typical of members of the Class as a whole because of the similarity, uniformity, and common purpose of Defendants' unlawful conduct. Defendants utilize standard insurance forms in the State of Ohio that Defendants offered on a "take it, or leave it" basis to Ohio consumers, and it was through its standard contracts of adhesion that Defendants accomplished their unlawful objectives. Plaintiffs have sustained damage as a result of Defendants's wrongful conduct in violation of established Ohio law, as well as general principles of equity and fair play.

32. Plaintiffs will fairly and adequately protect the members of the Class and Plaintiffs have retained counsel competent and experienced in handling claims like those asserted in this case.

33. A class action is superior to all other methods for the just, fair and efficient adjudication of this controversy since joinder of all members is impractical. Furthermore, the damages suffered by individual Class members are not sufficient to justify the enormous cost associated with prosecuting this type of litigation. The expense and burden posed by such individual litigation make it impractical for the Class members to individually redress the wrongs done to them, nor would such an individual case be adequate to ensure that such practices cease to harm others. Further, there will be no difficulty in the management of this action as a class action.

34. Common questions of law and fact exist as to all members of the Class and these common issues predominate over any questions that go particularly to any individual member of the Class. Among such common questions of law and fact are the following:

a. Whether Defendants violated Ohio law by charging separate premiums for UMBI coverage and Med. Pay coverage, and then denying benefits under each of those separate coverages to their insureds;

b. Whether Defendants' adjusting practices, and in particular its refusal to pay the full amount that would have been recoverable from the uninsured or underinsured tortfeaser under UMBI coverage, along with Med. Pay benefits, violate the implied covenant of good faith and fair dealing with the Plaintiffs and members of the Class;

c. Whether Defendants devised and employed a scheme or artifice to underpay uninsured and underinsured claims, by unlawfully excluding the cost of medical treatment from such claims;

d. Whether Plaintiffs and the members of the Class have suffered damages and the proper measure of damages;

e. Whether Defendants' bad faith conduct in direct violation of established Ohio law justifies the imposition of exemplary damages, and the amount of such damages;

f. Whether Plaintiffs and the members of the Class are entitled to declaratory and injunctive relief barring Defendants' further unlawful conduct;

g. Whether Defendants have a duty to disclose material facts to the Plaintiffs and the Class;

h. Whether Defendants have a duty not to provide misleading and false declaration pages to Plaintiffs and the Class members;

i. Whether Defendants use of the "Med. Pay set-off" to reduce benefits to their customers without reducing premiums;

j. Whether the purported "Med. Pay set-off" that Defendants have inserted into its standard policy forms violates Ohio law and Ohio public policy;

k. Whether Defendants mislead their customers by falsely portraying the limits of UMBI coverage and Med. Pay coverage on their insurance declaration pages, due to the fact that the purported limits were over stated and did not reflect the combined limit interpretation of the policies later asserted by Defendants;

l. Whether Defendants engaged in an unfair and deceptive practice by treating the Med. Pay coverage limits and UMBI coverage limits as a combined limit, without clearly advising its customers of that fact;

m. Whether Defendants engaged in an unfair and deceptive practice by charging separate premiums for UMBI coverage and Med. Pay coverage, but then only providing coverage under a combined limit;

n. The significant amount of damages the Class has sustained as a result of Defendants' wrongful conduct, and the proper measure of damages;

o. Statewide class action treatment is appropriate because Defendants' unlawful denial of benefits scheme at issue occurs throughout the State of Ohio and Defendants' wrongful conduct alleged herein was accomplished through the use of standard contracts of adhesion throughout the State of Ohio.

COUNT ONE: FRAUD AND DECEIT

35. Plaintiffs incorporate the allegations set forth in Paragraphs 1-34 of this Complaint as if fully set forth herein.

36. Plaintiffs and members of the Class entered into automobile insurance agreements with Defendants, and they all were informed that there were separate limits of coverage for UMBI coverage and Med. Pay coverage.

37. Defendants charged separate premiums for UMBI coverage and Med. Pay coverage, without alerting Plaintiffs and the members of the Class that Defendants were combining the limits of coverage for those two separate types of coverage.

38. Defendants failed to properly advise their customers, including Plaintiffs and the members of the Class, that Defendants intended to only pay medical expenses under either the UMBI coverage or the Med. Pay coverage, but not both.

39. Plaintiffs and members of the Class reasonably relied on Defendants' misrepresentations and believed that the UMBI coverage and Med. Pay coverage were separate and distinct

coverage parts that offered separate limits and overlapping sources of recovery, and paid separate premiums for those two types of coverage accordingly.

40. Defendants mislead Plaintiffs and the members of the Class by setting forth separate UMBI coverage limits and Med. Pay coverage limits on the policy declaration page, even though in virtually all situations those limits were combined.

COUNT TWO: BREACH OF CONTRACT

41. Plaintiffs incorporate Paragraphs 1-40 of their Complaint as if fully set forth herein.

42. Defendants charged their customers, including Plaintiffs and the Class members, separate premiums for UMBI coverage and Med. Pay coverage.

43. Defendants entered into insurance agreements with Plaintiffs and members of the Class by which Defendants promised to provide UMBI coverage under which Defendants agreed to pay all sums that an insured person is legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by such insured person. Defendants breached their contractual obligations to Plaintiffs and the Class members by excluding medical costs from UMBI claims and thereby refusing to pay all sums that an insured person is legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by such insured person.

44. Plaintiffs and members of the Class performed their contractual obligations and satisfied all conditions precedent to Defendants' payment obligations.

45. Defendants materially breached their duties under the agreements with Plaintiffs and members of the Class by refusing to pay insurance benefits under both UMBI coverage and Med. Pay coverage, for the same injurious event and under separate limits, in violation of Ohio law.

46. By reason of the foregoing, Plaintiffs and members of the Class have been harmed and damaged in an amount to be proven at Trial.

COUNT THREE: UNJUST ENRICHMENT

47. Plaintiffs incorporate Paragraphs 1-46 of their Complaint as if fully set forth herein.

48. Defendants entered into insurance agreements with Plaintiffs and members of the Class by which Defendants promised to provide UMBI coverage under which Defendants agreed to pay all sums that an insured person is legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by such insured person.

49. There is an implied covenant of good faith and fair dealing between Defendants and the Plaintiffs and Class members, requiring Defendants to refrain from impairing, frustrating, or injuring the rights of insured persons under policies issued by Defendants.

50. Defendants breached their contractual obligations and breached its duty of good faith and fair dealing by refusing to pay the full amount recoverable from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by such insured person, and having breached their duty not to deceive Plaintiffs, owe a duty to Plaintiffs to compensate them for the harm so caused, including, but not limited to, payment of the full amount of medical costs reasonably and necessarily incurred.

51. Defendants have wrongfully profited by virtue of their failure to pay to Plaintiffs and the Class members' insurance benefits due and owing under insurance contracts issued by Defendants.

52. By failing and refusing to pay Plaintiffs and the Class members' insurance benefits properly due and owing, Defendants have wrongfully and in bad faith deprived Plaintiffs and the

Class members of the very protection that they were promised, and for which Defendants received substantial premiums. Defendants placed their interests in maximizing profits, and limiting disbursements, above the interests of Plaintiffs and the Class members.

53. Defendants have been unjustly enriched to the extent of the insurance benefits that Defendants wrongfully and unlawfully withheld from Plaintiffs and the members of the Class.

54. Defendants should be ordered to pay restitution to Plaintiffs and members of the Class for the insurance benefits that Defendants unlawfully withheld from them.

COUNT FOUR: DECLARATORY AND INJUNCTIVE RELIEF

55. Plaintiffs incorporate Paragraphs 1-54 of their Complaint as if fully set forth herein.

56. Because Defendants continue to adjust first party UMBI claims in such a manner as to deprive insured persons of the full value of the UMBI coverage and Med. Pay coverage for which Defendants received premium payments, Plaintiffs seek a declaratory judgment that the DOB clause that Defendants inserted into their standard policy violates Ohio law and is unenforceable, and declaring that Defendants' practice of charging premiums for both UMBI coverage and Med. Pay coverage but then only paying first party benefits under one violates Ohio law.

57. Plaintiffs seek injunctive relief requiring Defendants to cease adjusting first party UMBI claims by excluding the cost of medical treatment and requiring its insureds to seek medical cost reimbursement only through the Med. Pay portion of Defendants' insurance policies.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs on behalf of themselves and the members of the Class, pray for judgment and relief against Defendants as follows:

a. An Order certifying this matter as a class action under Rule 23 of the Federal Rules of Civil Procedure and appointing Plaintiffs and Plaintiffs' counsel to represent the Class;

b. An Order requiring Defendants to identify all class members and pay restitution to Plaintiffs and all members of the Class to restore all funds acquired by means of any act or practice declared by this Court to be unlawful, fraudulent, or unfair business practice, in violation of applicable laws, statutes or regulations, and in particular paying to Plaintiffs and all members of the Class the lesser of the cost of medical treatment or the limits of the Med. Pay coverage available under each applicable insurance policy;

c. Alternatively, an award in favor Plaintiffs and the Class members equal to the amount wrongfully retained and withheld by Defendants due to their failure to pay insurance benefits required under the applicable policies of insurance, as disgorgement of the benefit wrongfully obtained by Defendants;

d. An Order preliminary and/or permanently enjoining Defendants from pursuing the policies, acts and practices complained of herein;

e. Alternatively, and award of actual and compensatory damages in an amount to be proven at Trial, including, but not limited to any damages as may be provided for by statute, all in an amount in excess of Twenty-Five Thousand Dollars ($25,000.00).

f. An award of reasonable attorney's fees and costs of suit;

g. An award of pre-and post judgment interest; and

h. An award of such other or further relief that this Court may deem just and equitable.

/s/ James A. DeRoche
JAMES A. DeROCHE (0055613)
DAVID H. KRAUSE (0070577)
GARSON & ASSOCIATES CO., LPA
1600 Rockefeller Building
614 West Superior Avenue
Cleveland, Ohio 44113
jderoche@garson.com
dhkrause@garson.com
(216) 696-9330 / F: (216) 696-1700

/s/ Glenn D. Feagan
GLENN D. FEAGAN
Law Offices of Glenn D. Feagan
8905 Lake Avenue, 4th Floor
Cleveland, Ohio 44113
gfeagan@feaganlaw.com
(216) 937-2222

Attorneys for Plaintiffs

JURY DEMAND

Plaintiffs demand a Trial by jury on all of the within causes of action.

/s/ James A. DeRoche
JAMES A. DeROCHE (0055613)

/s/ Glenn D. Feagan
GLENN D. FEAGAN

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2008, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's System.

/s/ James A. DeRoche
JAMES A. DeROCHE (0055613)

/s/ Glenn D. Feagan
GLENN D. FEAGAN

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANGELA J. WEBB 921 Sixth Street NW Massillon, OH 44647, Individually and on behalf of all others similarly situated. Plaintiff, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY One State Farm Plaza Bloomington, IL 61710. and DOES 1 through 25, inclusive; Defendants.	))	CASE NO JUDGE **CLASS ACTION COMPLAINT** (Jury Demand Endorsed Hereon)

For her Complaint against STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and DOES 1 through 25 ("Defendants"), Plaintiff ANGELA J. WEBB ("Plaintiff"), on behalf of herself and all others similarly situated, alleges as follows:

NATURE OF THIS ACTION

1. This is a class action lawsuit brought on behalf of thousands of Ohio residents insured by State Farm Mutual Automobile Insurance Company ("State Farm"), each of whom suffered damages due to State Farm's failure to comply with its obligations under its Ohio automobile policies.

2. Each member of the Plaintiff Class contracted for and was charged separate premiums for Uninsured/Underinsured Motorist ("UM") coverage and Medical Payments

("Medpay") coverage. As such, each was entitled under their contract with State Farm to full coverage payments on covered claims made under each such provision.

3. State Farm breached its contracts with each Plaintiff Class member by failing to honor its obligation to make full coverage payments. In each instance, it illegally claimed a set-off of coverage payments made or owing under one provision (e.g. Medpay coverage) against the other (e.g. UM coverage). For example, where State Farm offered and settled for $10,000 for a UM claim where the insured had $5,000 in medical expenses, State Farm refused to pay an additional $5,000 on that same claim under Medpay coverage, asserting that to do so would result in a "double recovery" or "double dipping", and that the $5,000 was in effect subrogated to and subsumed by, and already offered and settled out of, the $10,000 UM payment.

4. That practice violates Ohio law. Ohio insureds are entitled to recover the same medical expenses under both UM coverage and Medpay coverage. State Farm's systematic and uniform refusal to make such payments and honor such claims is a breach of its policy obligations. As a result, Plaintiff and the Plaintiff Class are entitled to damages in an amount equal to full coverage and payment of all medical expenses within policy limits under their Medpay coverage and their UM coverage. Plaintiff and the Class are also entitled to all other damages, both statutory and common, that arise out of this claim to the fullest extent permitted by Ohio law.

PARTIES

5. Plaintiff Angela J. Webb is a resident of Stark County, Ohio and has been at all times relevant to this Complaint.

6. Plaintiff is informed and believes and thereon alleges that defendant State Farm is an Illinois Corporation business does substantial business throughout the State of Ohio. State Farm's Corporate headquartered in Bloomington, Illinois.

7. Plaintiff does not know the true names or capacities of the persons or entities sued herein as DOES 1 to 25; inclusive, and therefore sues such defendants by such fictitious names. Plaintiff is informed and believes and thereon alleges that each of the DOE defendants is in some manner legally responsible for the damages suffered by Plaintiff and the members of the Plaintiff Class as alleged herein. Plaintiff will amend this complaint to set forth the true names and capacities of these defendants when they have been ascertained, along with appropriate charging allegations, as may be necessary.

JURISDICTION AND VENUE

8. This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1332(d)(2) in that it is a class action filed under rule 23 of the Federal Rules of Civil Procedure, the matter in controversy, as aggregated pursuant to 28 U.S.C. § 1332(d)(6) exceeds the sum of $5,000,000 exclusive of interest and costs, and the Plaintiff and Plaintiff Class members are citizens of a state different from Defendant.

9. Venue is proper in the Northern District of Ohio pursuant to 28 U.S.C. § 1391(a) because Defendants are subject to personal jurisdiction in the Northern District. In addition, Defendants issued auto insurance policies in this district and a substantial portion of events or omissions giving rise to the claims occurred in this district.

FACTUAL BACKGROUND

10. During the Class Period, Defendants insured and accepted premium payments from Plaintiff and Plaintiff Class members. Plaintiff and Plaintiff Class members are informed

and believe and on that basis allege that Defendants warranted that upon entering into an insurance contract with Defendants, Plaintiff and Plaintiff Class would receive separate benefits for Medpay and UM coverage should they suffer a covered loss.

11. During the Class Period, State Farm entered into a written contract, in connection with automobile insurance services, with Plaintiff and Plaintiff Class, in the State of Ohio,

12. During the Class Period, Defendants issued Insurance Declarations ("Declarations") to Plaintiff and Plaintiff Class, reiterating the essential terms of their respective policies, including separate coverage for Medpay and UM coverage.

13. During the Class Period, Defendants also issued Endorsement 6083VV regarding Uninsured Motor Vehicle-Coverage which reads as follows:

> "*We will not pay under the Uninsured Motor Vehicle Coverage any medical expenses paid or payable under:*
>
> *1. Medical Payments Coverage of this Policy: or*
>
> *2. the medical payments coverage, no fault coverage, personal injury protection, or other similar coverage of any other motor vehicle policy.*

This is State Farm's attempt to limit the Plaintiff's recovery and simultaneously continue to collect both premiums for Medpay and premiums for UM coverage.

14. On or about September 11, 2007, Plaintiff was involved in an automobile accident in which she was injured and incurred substantial medical bills, which Defendants considered to be reasonable and necessary.

15. Plaintiff, through her attorneys, presented a claim to the tortfeasors' insurance companies, who on April 3, 2008, promptly tendered their policy limits of $25,000 in total.

16. On May 1, 2008, Plaintiff obtained permission from State Farm to settle with the tortfeasors' insurers. State Farm waived its subrogation interest in the liability claim for UM benefits but retained its right to reimbursement under the Medpay coverage.

17. On March 17, 2008 Plaintiff requested her full Medpay policy limits of $25,000.00 and provided all supporting medical bills and records. On April 16, 2008 received a check for that full amount with an itemized payment list, demonstrating that State Farm acknowledged that the medical treatment was related, reasonable and necessary.

18. On June 12, 2008, following Plaintiff's demand for payment of these same damages under her UM coverage, State Farm responded with a letter denying any further payment, and in fact actually asking for $10,000 to be returned because it thought it had overpaid.

19. State Farm's failure to provide full coverage and payment under Plaintiff's UM coverage was a breach of State Farm's insurance contract with the Plaintiff.

CLASS ACTION ALLEGATIONS

20. Description of the Class: Plaintiff brings this class action on behalf of herself and a Plaintiff Class defined as follows:

> All Ohio covered persons who (a) hold uninsured/underinsured motorist ("UM") coverage and Medical Payment ("Medpay") coverage through State Farm; (b) were involved in an automobile accident giving rise to claims under both UM and Medpay coverage; and (c) did not receive full coverage payments under each provision.

21. Excluded from the Plaintiff Class are covered persons whose coverage limits have been exhausted under both UM and Medpay; residents of states other than Ohio; members of the Ohio federal judiciary, State Farm, any entity in which it has a controlling interest, and their employees and members of their immediate families.

22. Plaintiff reserves the right to modify the Class description and the Class period based on the results of discovery.

23. Plaintiff and the Plaintiff Class bring this action for damages under Rule 23(b)(3) of the Federal Rules of Civil Procedure.

24. Numerosity: The proposed Class is so numerous that individual joinder of all its members is impracticable. Due to the nature of the trade and commerce involved, however, Plaintiff believes that the total number of Plaintiff Class members is at least in the thousands. While the exact number and identities of the Class members are unknown at this time, such information can be ascertained through appropriate investigation and discovery. The disposition of the claims of the Class members in a single class action will provide substantial benefits to all parties and to the Court.

25. Common Questions of Law and Fact Predominate: There are many questions of law and fact common to the representative Plaintiff and the Plaintiff Class, and those questions substantially predominate over any questions that may affect individual Class members. Common questions of fact and law include, but are not limited to, the following:

(a) Whether State Farm was required to make full coverage payments under both UM and Medpay coverage when claims were made that triggered both coverages;

(b) Whether State Farm's conduct in failing to make full coverage payments where both UM and Medpay coverage applied breached its contract with its insureds; and

(c) Whether Plaintiff and the Plaintiff Class have been damaged, and if so, in what amount.

26. Typicality: The claims of the Plaintiff are typical of the claims of the Plaintiff Class. Plaintiff has claims against State Farm for the unlawful conduct and practices described above. These claims have the same essential characteristics as the claims of the Plaintiff Class

as a whole, arise from the same course of conduct, and are based upon identical legal and remedial theories. All members of the Plaintiff Class (a) hold uninsured/underinsured motorist ("UM") coverage and Medical Payment ("Medpay") coverage through State Farm; (b) were involved in an automobile accident giving rise to claims under both UM and Medpay coverage; and (c) did not receive full coverage payments under each provision.

27. Adequacy of Representation: Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff has retained counsel with substantial experience in prosecuting complex and class action litigation. Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of the Plaintiff Class, and have the financial resources to do so. Neither Plaintiff nor her counsel has any interests adverse to those of the Class.

28. Predominance and Superiority: This suit is maintainable as a class action pursuant to and in compliance with Federal Rule of Civil Procedure Rule 23(b)(3) because the common questions of law and fact predominate over any questions affecting only individual members, making a class action superior to all other methods available for the fair and efficient adjudication of this controversy. While the aggregate damages sustained by the Plaintiff Class are likely to be millions of dollars, the damages suffered by individual members of the Plaintiff Class are relatively small. As a result, the expense and burden of individual litigation make it economically infeasible and procedurally impracticable for each member of the Plaintiff Class to seek redress individually for the wrongs done to them. The existing issues can be determined in a class action in a manageable, time-efficient, yet fair manner, and by a single jury. Absent a class action, Progressive will continue in its illegal course of conduct at the expense of Plaintiff Class members.

CAUSES OF ACTION

COUNT I
(Breach of Contract)

29. Plaintiff repeats and re-alleges the preceding allegations as if fully set forth herein.

30. This count is brought by the Class Representative Plaintiff individually, and on behalf of the Plaintiff Class.
31. Under and by virtue of the insuring agreements of State Farm's policies of insurance is language to the effect that State Farm shall pay to or on behalf of an insured the costs of the hospital, medical and ancillary services to the extent of the policy limits for injuries incurred by insureds and others expressly covered under those policies. The insurance policies under which Plaintiff and other members of the Plaintiff Class are insured are valid and enforceable contracts.
32. Plaintiff and other members of the Plaintiff Class fulfilled their obligations under the above-described insurance policies, including, inter alia, paying separate premiums (if insured), and submitting proof of loss in the form of medical bills, and any other information required of them.
33. Plaintiff and other members of the Plaintiff Class provided covered medical expenses and submitted to State Farm properly authenticated medical bills resulting from licensed medical treatment, which State Farm acknowledged were reasonable, necessary, and owing.
34. Under the above-described insurance policies, State Farm promised to pay to or on behalf of Plaintiff and the Plaintiff Class full coverage payments under both UM and Medpay coverage to which they were legally entitled within policy limits.
35. In breach of its contractual duties to Plaintiff and other members of the Plaintiff Class, State Farm systematically denied their UM and/or Medpay claims for full coverage payments for medical treatment.
36. As a direct and proximate result of the foregoing acts and/or omissions of State Farm, Plaintiff and other members of the Plaintiff Class were damaged in an amount to be determined at trial. In addition, Plaintiff is entitled to pre-judgment interest at the maximum rate allowed by law, and reasonable and necessary attorneys' fees. All conditions precedent to recovery have been satisfied.

JURY TRIAL

37. Plaintiff hereby requests a jury trial, and has tendered the appropriate fee.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all those similarly situated, prays for entry of judgment as follows:

(A) Certifying the Plaintiff Class, and appointing Plaintiff and his counsel to represent the Plaintiff Class;

(B) Finding that State Farm's actions constitute breach of contract, which proximately caused damages to Plaintiff and the Plaintiff Class;

(C) Awarding money damages to Plaintiff and the Plaintiff Class;

(D) Awarding prejudgment and post-judgment interest;

(E) Awarding reasonable attorneys' fees and costs; and

(F) For any further legal relief to which they may show themselves entitled.

Respectfully submitted,

KISLING, NESTICO & REDICK LLC

/S/ Alberto R. Nestico
ALBERTO R. NESTICO, Ohio SBN 0071676
Nestico@KNRLegal.com (email)
GARY W. KISLING, Ohio SBN 0003438
Kisling@KNRLegal.com (email)
ROBERT W. REDICK, Ohio SBN 0070861
Redick@KNRLegal.com (email)
THOMAS M. VASVARI, Ohio SBN 0046614
Vasvari@KNRLegal.com (email)
3200 W. Market St, Suite 300
Akron, Ohio 44333
(330) 869-9007 (Phone)
(330) 869-9008 (Fax)

AUSTIN TIGHE (*pro hac vice pending*)
austin@feazell-tighe.com (email)
FEAZELL & TIGHE, L.L.P.
6300 Bridgepoint Parkway, Bridgepoint 2
Suite 220
Austin, TX 78730
(512) 372-8100 (Phone)
(512) 372-8140 (Fax)

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

2008 JUL 25 P 2:24
CLERK OF COURTS
CUYAHOGA COUNTY

PATRICIA SCHWAB, Individually and on behalf of all others similarly situated 488 Delevan Road Lynhurst, OH 44114 Plaintiffs, vs. **STATE FARM,** PO BOX 3020 Newark, Ohio 43058-0000 One State Farm Plaza Bloomington, IL 61710-0000 Defendant.	CASE NO. _____ JUDGE _____ **CLASS ACTION COMPLAINT** (Jury Demand Endorsed Hereon) Judge: RICHARD J MCMONAGLE CV 08 666059

Now comes Plaintiff, individually and as representative of all others similarly situated, and for her Class Action Complaint states:

PARTIES

1. Defendant State Farm ("Defendant") is an insurance company doing business in the state of Ohio.

2. Plaintiff Patricia Schwab ("Plaintiff") is an individual and a resident of the state of Ohio who was insured under a policy of automobile insurance issued by Defendant.

JURISDICTION

3. This court has personal jurisdiction over Defendant because Defendant transacts business in the state of Ohio.

CLASS ALLEGATIONS

4. Plaintiff realleges and incorporates herein all previous paragraphs of this Complaint.

5. Plaintiff had an insurance policy (the "Policy") with Defendant that included both (a) Uninsured/underinsured Motorist coverage for bodily injury ("UMBI"), pursuant to which Defendant generally agreed to pay all sums that an insured person is legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by such insured person; and (b) Medical Payments coverage ("Med. Pay"), pursuant to which Defendant agreed to pay the reasonable expenses incurred by an insured person for necessary medical treatment sustained by the insured person and caused by a motor vehicle accident.

6. Defendant charged, and Plaintiff paid, a separate premium for UMBI coverage and Med. Pay coverage. The declaration page of automobile insurance policies issued by Defendant identify separate limits of coverage and UMBI coverage and Med. Pay coverage.

7. Defendant included in the Policy a clause addressing duplication of benefits (hereinafter "non-duplication clause"). This is a standard Ohio insurance policy issued to Plaintiff.

8. The non-duplication clause provided that Defendant would not pay both (a) all sums that an insured person is legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by such insured person under the UMBI coverage limit of the policy, and (b) also the reasonable expenses incurred for necessary medical treatment sustained by the insured person and caused by a motor vehicle accident under the Med. Pay coverage limit of the policy.

9. In *Berrios v. State Farm Insurance Co.*, 98 Ohio St. 3d 109 (2002) the Ohio Supreme Court held that an insured paying separate premiums for medical payments coverage and uninsured/underinsured coverage must recover under each separate coverage.

10. Defendant also insures other persons like Plaintiff (hereinafter "Plaintiffs" or putative class members"), under a standard, form policy as is described above: a policy that provides for both UMBI coverage and Med. Pay coverage, for which Defendant charges and persons pay separate premiums for, and which policy contains a standard non-duplication clause.

11. Plaintiffs paid separate premiums for UMBI coverage and Med. Pay coverage, but could not recover for damages under each such coverage.

12. Some Plaintiffs suffered bodily injury due to the fault of an uninsured/underinsured driver, and submitted a claim to Defendant under the insurance policy issued by Defendant. Defendant refused to pay for elements of loss under each coverage Plaintiffs paid a premium for, Med. Pay coverage and UMBI coverage.

13. Plaintiff brings this action on behalf of herself and for all other persons similarly situated ("Plaintiffs" or "putative class members") who were insured persons: (a) under a policy of insurance issued by Defendant that included UMBI coverage and Med. Pay coverage, for which Defendant charged separate premiums; and (b) said policy included a non-duplication clause; (c) and such insured persons (1) paid separate premiums for UMBI coverage and Med. Pay coverage and/or (2) suffered a bodily injury and incurred medical bills for which Defendant refused to pay under both coverages. Not included in this class are Defendant and its officers, directors, employees, and agents.

14. This class numbers over 1,000 persons and is so numerous that joinder of all members is impracticable, and it is further impracticable to bring all such persons before this Court.

15. The injuries and damages to these class members present questions of law and fact that are common to each class member, and that are common to the entire class as a whole. Among such common questions of law and fact are the following:

a. Whether Defendant violated Ohio law by charging separate premiums for UMBI coverage and Med. Pay coverage, when Defendant would not pay benefits under both of those separate coverages to its insured;

b. Whether Defendant's refusal to pay the full amount that would have been recoverable from the uninsured or underinsured tortfeaser under UMBI coverage, along with Med. Pay benefits, is unlawful;

c. Whether Defendant devised and employed a fraudulent scheme or artifice to deny benefits when Defendant would not pay benefits under each coverage its insured paid a premium for, UMBI coverage and Med. Pay coverage;

d. Whether Defendant used misleading and false declaration pages with Plaintiffs and the class members to obtain premiums;

e. Whether the purported nonduplication clause that Defendant has inserted into its standard policy forms violates Ohio law and Ohio public policy; and

f. Whether Defendant misled its customers by falsely portraying the limits of UMBI coverage and Med. Pay coverage on its insurance declaration pages, due to the fact that the purported limits were overstated.

16. Defendant has engaged in the same conduct regarding all of the other members of the class asserted in this suit.

17. The claims, defenses, and injuries of the representative Plaintiff are typical of the claims, defenses and injuries of the entire class, and the claims, defenses and injuries of each class member are typical of those of the entire class.

18. Representative Plaintiff will fully and adequately protect and represent the entire class, and all of its putative class members.

19. The identity of all members of this class cannot be determined at this time, but will be so determined at a later time upon obtaining discovery from Defendant and others.

20. The prosecution of separate actions by each member of this class would create a substantial risk of inconsistent or varying adjudications with regard to individual members of the class that would establish incompatible standards of conduct for Defendant.

21. The prosecution of separate actions would also create a substantial risk of adjudication with respect to individual members of the class which, as a practical matter, would be dispositive of the interest of other members not parties to the adjudication, thereby substantially impairing and impeding their ability to protect these interests. Further, the maintenance of this suit as a class action is the superior means of disposing of the common questions which predominate herein.

22. The total of all damages and all other relief in this matter, excluding interest and costs, does not exceed $5 million, and Plaintiff and the class do not seek, and will not accept, damages of any type in an amount greater than $4,999,999 for all recovery, damages, or any other relief (exclusive of interest and costs).

COUNT ONE: FRAUD

23. Plaintiff realleges and incorporates herein all previous paragraphs of this Complaint.

24. Defendant represented to Plaintiffs separate coverage under UMBI coverage and Med. Pay coverage. Separate UMBI coverage limits and Med. Pay coverage limits were listed on

Plaintiffs' policy declaration page. Additionally, Defendant charged Plaintiffs separate premiums for UMBI coverage and Med. Pay coverage.

25. Plaintiffs relied on this representation to their detriment, by paying separate premiums for both UMBI coverage and Med. Pay coverage when Defendant combines the limits of coverage for the two separate types of coverage and does not pay benefits on both.

26. Defendant made such representations falsely, with knowledge of its falsity, or with utter disregard and recklessness as to whether this representation was true or false that knowledge of falsity may be inferred.

27. Defendant intended Plaintiffs to rely on the representation in order to receive payment of two separate premiums.

28. As a direct and proximate result, Plaintiffs have been damaged in an amount to be determined at trial.

COUNT TWO: BREACH OF CONTRACT

29. Plaintiff realleges and incorporates herein all previous paragraphs of this Complaint.

30. Under the insurance agreements, Defendant provided (a) UMBI coverage for bodily injury pursuant to which Defendant generally agreed to pay all sums that an insured person is legally entitled to recover as damages from the owner or operator of an uninsured or underinsured motor vehicle because of bodily injury sustained by such insured person; and (b) Med. Pay coverage pursuant to which Defendant agreed to pay the reasonable expenses incurred by an insured person for necessary medical treatment sustained by the insured person and caused by a motor vehicle accident.

31. Defendant charged and Plaintiffs paid separate premiums for UMBI coverage and Med. Pay coverage under the parties' insurance agreements.

32. Those agreements contained a non-duplication clause, which is invalid and unenforceable under Ohio law.

33. Defendant breached its duties under the insurance agreements with Plaintiffs by refusing to pay insurance benefits under each coverage Plaintiffs paid a premium for, UMBI coverage and Med. Pay coverage.

34. As a direct and proximate result of the foregoing, Plaintiffs have been harmed and damaged in an amount to be proven at trial.

COUNT THREE: UNJUST ENRICHMENT

35. Plaintiff realleges and incorporates herein all previous paragraphs of this Complaint.

36. The amount of money Defendant has retained through receipt of Plaintiffs' payment for two premiums, one for UMBI coverage and one for Med. Pay coverage, when benefits are only provided under one coverage and/or money Defendant has retained by failing to pay Plaintiffs benefits under both UMBI coverage and Med. Pay coverage, is money that is unjust for Defendant to retain.

37. As a direct and proximate result of the foregoing, Plaintiffs have been harmed and damaged in an amount of Defendant's unjust enrichment.

COUNT FOUR: BREACH OF FIDUCIARY DUTY

38. Plaintiff realleges and incorporates herein all previous paragraphs of this Complaint.

39. Defendant, as Plaintiffs' insurer, owes Plaintiffs a fiduciary duty.

40. As a direct and proximate result of Defendant's foregoing conduct, Defendant has breached this duty.

41. As a direct and proximate result of the foregoing, Plaintiffs have been harmed and damaged in an amount to be proven at trial.

COUNT FIVE: BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

42. Plaintiff realleges and incorporates herein all previous paragraphs of this Complaint.

43. There is an implied covenant of good faith and fair dealing between Defendant and Plaintiffs requiring Defendant to refrain from impairing, frustrating, or injuring the rights of insured persons under policies issued by Defendant.

44. As a direct and proximate result of Defendant's foregoing conduct, Defendant has breached this covenant.

45. As a direct and proximate result of the foregoing, Plaintiffs have been harmed and damaged in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs demand judgment as follows:

1. For an Order determining at the earliest possible time that this matter may proceed as a class action under Civil Rule 23 and certifying this case as such;

2. For actual and compensatory damages in an amount to be proven at trial;

3. For reasonable costs and attorney fees necessarily incurred;

4. For an award of pre- and post-judgment interest;

5. For punitive damages;

6. An award of such other of further relief that this Court may deem just and equitable;

7. For an Order preliminarily and/or permanently enjoining Defendant from pursuing the policies, acts and practices complained of herein;

8. However, the named Plaintiff and the class of Plaintiffs do not seek, nor will they accept, any monetary award, or relief of any other type (exclusive of interest and costs) in any amount greater than $4,999,999 for all recovery, damages, or any other relief (exclusive of interests and costs) – it being the specific intent not to provide any United States District Court with jurisdiction under the terms of the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005), the diversity statutes of 28 U.S.C. § 1332, the supplemental jurisdiction statute of 28 U.S.C. § 1367, or any other law.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury as to all claims so triable.

Respectfully submitted,

Nicole T. Fiorelli

Patrick J. Perotti, Esq. (#0005481)
Nicole T. Fiorelli, Esq. (#0079204)
DWORKEN & BERNSTEIN CO., L.P.A.
60 South Park Place
Painesville, Ohio 44077
(440) 352-3391 (440) 352-3469 Fax
Email: *pperotti@dworkenlaw.com*
nfiorelli@dworkenlaw.com

Edwin E. Schottenstein, Esq. (#0016834)
SCHOTTENSTEIN LAW OFFICES
100 East Broad Street, Suite 1337
Columbus, Ohio 43215
(614) 462-2266 (440) 462-2406
Email: *schott100@sbcglobal.net*

Attorneys for Plaintiff

FILED
COURT OF COMMON PLEAS
2008 OCT 22 A 11: 37
GREGORY A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

CIVIL DIVISION

RICHARD GALLOWAY, et al.,	:	**Case No. 07-CV-10521**
Plaintiffs,	:	**Judge Dennis J. Langer**
	:	
v.	:	**DECISION, ORDER AND ENTRY SUSTAINING DEFENDANT STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S PARTIAL MOTION FOR SUMMARY JUDGMENT**
PAMELA K. HENRY, et al.,	:	
Defendants.	:	
	:	
	:	

This matter is before the Court on *Defendant, State Farm Mutual Automobile Insurance Company's Partial Motion for Summary Judgment* (hereinafter "*Motion*") filed on August 25, 2008. On September 15, 2008, Plaintiff Paul Snowden (hereinafter "Snowden") filed a *Response*. On October 3, 2008, Defendant State Farm Mutual Automobile Insurance (hereinafter "State Farm") filed a *Reply*. This matter is properly before the Court.

I. FACTS & PROCEDURAL HISTORY

On December 24, 2006, Plaintiff Richard Galloway (hereinafter "Galloway") was driving in the northbound direction on North Paul Dunbar Street in Dayton, Ohio. *Complaint* at ¶1. Snowden was a passenger in the car. Id. At the same time, Defendant Pamela Henry (hereinafter "Henry"), an uninsured motorist, was traveling in the eastbound direction on

West Third Street. Id. At the intersection of North Paul Dunbar Street, Henry allegedly caused an accident by driving her vehicle into Galloway's vehicle. Id.

After the accident, State Farm paid $8,995.54 in medical bills on Snowden's behalf. *Affidavit of Edward Beaty,* ¶ 6, attached as Exhibit A to *Motion* (hereinafter "*Affidavit of Beaty*).

On December 17, 2007, Plaintiffs Galloway and Snowden brought a personal injury action against, among others, Henry, GEICO General Insurance Company (GEICO) (Galloway's automobile insurer), and State Farm (Snowden's automobile insurer). See generally *Complaint.*

Defendant Snowden's contract with State Farm for insurance included medical payments coverage and uninsured motorist coverage (hereinafter "UM coverage"). *Complaint* at ¶¶20 & 29. Snowden began contracting with State Farm for insurance in May of 2004. *Affidavit of Beaty* at ¶ 4. At the time of accident, Snowden had a Policy Number 149 0386-E06-35A insurance contract (hereinafter "Policy") with State Farm. Id. at ¶2. This Policy provided UM coverage in the amount of $100,000 per person, and medical payments coverage in the amount of $25,000 per person. Id. at ¶3. The Policy included a "6083VV Uninsured Motor Vehicle – Coverage U" endorsement. This endorsement included a nonduplication clause that provided:

> We will not pay under Uninsured Motor Vehicle Coverage any medical expenses paid or payable under:
>
> 1. Medical Payments Coverage of this policy; or
>
> 2. the medical payments coverage, no fault coverage, personal injury protection, or other similar coverage of any other motor vehicle policy.

Id. at ¶5. See also *Exhibit 1* attached to *Motion.*

This matter is now before this Court on State Farm's *Motion,* asserting that Snowden is not entitled to payment for his medical bills under UM coverage when State Farm has already paid these medical bills under his medical payments coverage.

I. LAW AND ANALYSIS

A. Summary Judgment Standard

"Trial courts should award summary judgment with caution." *Leibreich v. A.J. Refrigeration, Inc.* (1993), 67 Ohio St.3d 266, 269. In *Harless v. Willis Day Warehousing Inc.* (1978), the Ohio Supreme Court stated in order for summary judgment to be appropriate, it must appear that:

> (1) There is no genuine issue as to any material fact;
> (2) The moving party is entitled to judgment as a matter of law; and
> (3) Reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor.

54 Ohio St.2d 64, 66.

The moving party bears the initial burden of informing the court of the basis of the motion and identifying those portions of the pleadings, depositions and other such material which it believes demonstrates the absence of a genuine issue of material fact. *Misteff v. Wheeler* (1988), 38 Ohio St.3d 112, 114; *Harless,* 54 Ohio St.2d at 66. The burden on the moving party may be satisfied by "showing" that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 323-325. Thus, "if the movant is able to demonstrate that the non-moving party's case lacks the necessary evidence to support its claims, he has successfully discharged his burden." *Pack v. Christman* (Nov. 9, 2000), 2nd Dist. No. 18291, 2000 Ohio App. LEXIS 5189, 5.

Furthermore, any inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Leibreich,* 67 Ohio St.3d 266, 269; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152.

Thereafter, the non-moving party bears the burden of coming forward with specific facts and evidence showing that there is a genuine issue of material fact for trial. *Van Fossen v. Babcock & Wilson Co.* (1988), 36 Ohio St.3d 100, 117. The non-moving party has the burden "to produce evidence on any issue for which that party bears the burden of production at trial." *Leibreich,* 67 Ohio St.3d at 269; *Wing v. Anchor Media, Ltd.* (1991) 59 Ohio St.3d 108, 111 (citing *Celotex Corp.,* 477 U.S. 317, 322-323). Therefore, the non-moving party may not rest upon unsworn or unsupported allegations in the pleadings. *Benjamin v. Deffet Rentals* (1981), 66 Ohio St.2d 86. The non-moving party must respond with affidavits or other appropriate evidence to controvert the facts established by the moving party. *Id.* Further, the non-moving party must do more than show there is some metaphysical doubt as to the material facts of the case. *Matsushita Electric Ind. Co. v. Zenith Radio (*1980), 475 U.S. 574.

Notably, the non-movant's reciprocal burden is only applicable when the movant has satisfied the initial burden. Ohio courts have cautioned that when the movant fails to meet the initial burden, summary judgment is not proper, regardless of whether an opposing memorandum is filed by the non-movant. *Brandimarte v. Packard* (May 18, 1995), 8th Dist. Case No. 67872, 1995 Ohio App. LEXIS 2095, *4 (citing *Glick v. Dolin* (1992), 80 App. 3d 592, 595) ("[W]hen the movant's evidentiary materials do not establish the absence of a genuine issue of material fact, summary judgment must be denied even if no opposing evidentiary matter is presented."); *Morris v. Ohio Cas. Ins. Co.* (1988), 35 Ohio St. 3d 45,

47; *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St. 3d 157, 161) ("[T]he nonmoving party's failure to respond, by itself, does not mandate granting summary judgment because the moving party bears the burden of showing that all of the requirements of Civ. R. 56(C) are satisfied.)

B. Caselaw and Statutory History regarding UM Coverage.

The Supreme Court of Ohio addressed an issue similar to that before the Court, under the prior version of R.C. 3937.18, in *Berrios v. State Farm Ins. Co.* (2002), 98 Ohio St.3d 109, 2002-Ohio-7115, 781 N.E.2d 149. Under the prior version of R.C. 3937.18 (1999 Senate Bill 267) (hereinafter "S.B. 267"), insurance companies were required to offer UM and underinsured motorist (hereinafter "UIM") coverage with every automobile liability insurance policy.

In the case, Berrios was involved in an automobile accident and suffered damages that included $6,354 in medical bills. Id. at ¶1. At the time of the accident, Berrios was insured under an automobile insurance policy with State Farm. Id. at ¶2. Barrios' insurance policy provided $100,000 per person in UIM[1] coverage and $25,000 in medical payments coverage. Id. at ¶2. Berrios paid separate premiums for the UIM coverage and medical payments coverage. The medical payments coverage policy provided that the insurance company had a right of subrogation over medical payments paid. Id. at ¶10. State Farm paid $6,354.37 for Barrios' medical bills under the medical payments coverage. Id. at ¶17. Thereafter, Berrios filed a declaratory judgment action with regard to "the question of whether State Farm could enforce a right of subrogation for the medical payments from the

[1] Although *Berrios* involves UIM coverage, the Court finds this case still applicable based on *Clark v. Scarpelli* (2001), 91 Ohio St.3d 271, 276, 2001 Ohio 39, 744 N.E.2d 719 (finding beneficiaries of UIM and UM coverage are entitled to the same final result").

proceeds of Barrios' settlement with the tortfeasor in light of the fact that State Farm had also paid Barrios' UIM coverage benefits." Id. at ¶20. The trial court granted State Farm's motion for summary judgment and denied that of Berrios. Id. at ¶21. The Tenth District Court of Appeals affirmed the trial court.

However, the Supreme Court of Ohio reversed the judgment of the court of appeals. The Court found the contractual setoff to be in derogation of the public policy and purpose underlying S.B. 267, because the setoff was "a whittling away of the underinsured motorist protection insurers were required to provide." Id. at ¶22-23 (citing *Shearer v. Motorists Mut. Ins. Co.* (1978), 53 Ohio St.2d 1, 7 O.O.3d 1, 371 N.E.2d 210). Moreover, the Court noted:

> In addition to the public-policy reasoning behind *Shearer* was a more practical issue - that people who pay separate premiums for separate coverages should get what they pay for: "'[A] policy provision which the insured considers to be additional protection and for which he pays a premium with such extra protection in mind cannot be transposed by the insurer into the reduction of the mandatory minimum coverage.'" Id.

Id. at ¶26. In support of its decision, the Court analyzed the case of *Grange Mut. Cas. Co. v. Lindsey* (1986), 22 Ohio St.3d 153, 22 OBR 228, 489 N.E.2d 281:

> In *Grange Mut. Cas. Co. v. Lindsey* (1986), 22 Ohio St.3d 153, 22 OBR 228, 489 N.E.2d 281, this court considered whether a subrogation clause, rather than a setoff clause as in *Shearer*, could allow insurers to reduce UM coverage payments by the amount paid under medical payments coverage.
>
> In *Lindsey*, the insured was injured in an automobile collision caused by an uninsured motorist. The insurer paid the insured's medical bills pursuant to his medical payment coverage. The insured's UM claim went to arbitration. The arbitrator arrived at an award well within the policy limits. The insurer sought to reduce the amount of the arbitration award by the amount it had previously paid under the medical payments coverage. The insurer argued that its case was different from the insurer in *Shearer* because of the subrogation clause, which had been lacking in *Shearer*. This court, concerned less with terminology than with the practical effect of the subrogation clause, rejected that distinction:

> "An insurance policy clause which provides to the insurer a contractual right of subrogation as to payments made under the medical payments portion of the policy does not enable the insurer to avoid obligations it incurs pursuant to the uninsured motorists provision of the same insurance policy. Thus, even where the policy provides for subrogation as to payments made as medical payments coverage, a contract provision which would, in essence, enable the insurer to set off such medical payments against amounts due to the insured pursuant to uninsured motorist coverage is void as in derogation of the public policy and purpose underlying R.C. 3937.18."
>
> The court in Lindsey realized that, as in *Shearer*, its decision resulted in a "double recovery" -- i.e., recovery under both the UM and medical payments policy provisions -- for the insured. *Lindsey*, 22 Ohio St.3d at 155, 22 OBR 228, 489 N.E.2d 281. Double recovery did not trouble the court. Instead, it was more concerned that insurers would use subrogation clauses to avoid their obligations to provide full coverage:
>
> "We cannot accept [the] argument that the presence of a subrogation clause prevents the medical payments coverage provided under one portion of an insurance policy from being considered as 'collateral' to uninsured motorist coverage provided under a separate portion of the same policy.* * *
>
> "'Permitting offsets of any type would allow insurers, by contract, to alter the provisions of the statute and to escape all or part of the liability which the Legislature intended they should provide. * * *' *Bacchus v. Farmers Ins. Group Exchange* (1970), 106 Ariz. 280, 282, 475 P.2d 264." *Lindsey*, 22 Ohio St.3d at 155-156, 22 OBR 228, 489 N.E.2d 281.
>
> The court concluded that "so long as the insured pays separate premiums for medical payments coverage and uninsured motorist coverage, each of which the insured considers to be additional protection, the mere inclusion of a subrogation clause within the policy, which will enable the insurer to pursue collection from the tortfeasor of both types of payments made, does not alter the result mandated by *Shearer*." Id. at 156, 22 OBR 228, 489 N.E.2d 281.

Id. at ¶¶27-33. Thus, the Court held that Berrios was entitled to recover under both the medical payments coverage and the UIM coverage, because of the payment of separate premiums as well as the applicability of *Shearer* and *Lindsey*. Id. at ¶40.

R.C. 3937.18 was amended in 2001 S.B. 97 (hereinafter "S.B. 97"), effective October 31, 2001. S.B. 97 eliminated any requirement of mandatory offering of UM or UIM coverage. See R.C. 3937.18(A).

In *Wayne Mutual Insurance Co. v. Bradley*, Stark County App. No. 2005 CA00200, 2006-Ohio-1517, the Fifth Appellate District declined to find that the *Berrios* decision was overruled by the enactment of S.B. 97. In the case, the Bradleys were struck in their vehicle by an uninsured motorist. Id. at ¶3. The Bradleys' policy with the insurance company, Wayne Mutual Insurance Co. (hereinafter "Wayne Mutual"), provided both UM coverage and medical payments coverage. Id. at ¶4. After the Bradleys completed the required forms, Wayne Mutual paid the Bradleys' medical bills under the medical payments coverage. Id. at ¶5. The Bradleys then submitted their UM claim and a dispute arose regarding whether Wayne Mutual was entitled to set-off of medical payments coverage. Id. at ¶6. Wayne Mutual filed a declaratory judgment action regarding this issue, and the trial court granted the Bradleys' motion for summary judgment, finding that Wayne Mutual was not entitled to set-off the amount of medical payments coverage under UM coverage. Id. at ¶9-11. On appeal, Wayne Mutual appealed "the trial court's rejection of its argument that S.B. 97, which became effective October 31, 2001, overruled the cases upon which the trial court relied in finding that the set-off was [not] proper in the case sub judice," those cases being *Berrios, Lindsey, and Shearer.* Id. at ¶24. The Fifth Appellate District affirmed the decision of the trial court, finding:

> Upon review, we find that like the insurer in *Lindsey*, Wayne Mutual treated UM coverage separately from medical payments coverage by setting out separate conditions for payment under the contract and charging separate premiums.
>
> We therefore find that the trial court did not err in finding that [Wayne Mutual] was not entitled to a set-off in this matter.

Id. at ¶36 & 38.

C. Summary Judgment is proper with regard to this motion as a matter of law. State Farm is entitled to a set-off of the UM claim based on amount paid under the medical payments coverage.

State Farm moves for partial summary judgment on Snowden's uninsured motorist claim. State Farm asserts that the Policy excludes coverage for payment of medical bills under UM coverage when State Farm has already paid the medical bills under the medical payments coverage. State Farm maintains that the nonduplication clause was in effect at the time of the accident and is applicable to the facts at bar.

State Farm contends that the nonduplication clause is enforceable. State Farm asserts that this Court should enforce the Policy's plain terms. State Farm argues that the public policy discussed in *Berrios* no longer exists, because Senate Bill 97 eliminated the requirement for insurers to offer UM coverage with every offer of automobile liability insurance. State Farm also argues that *Berrios* is distinguishable, because the "*Berrios* contract contained a subrogation clause stating that the insurer was entitled to reimbursement" while the Policy in the case at bar "excluded coverage for Mr. Snowden's bills already paid under the medical payments coverage." *Motion* at 8. Thus, State Farm asserts that the "*Berrios* court's public policy reasons for striking the contract's medical subrogation provision do not apply to this case." *Motion* at 9.

In the *Response,* Snowden argues that summary judgment is not proper on this issue as a matter of law. Snowden asserts, "the nonduplication clause is contrary to Ohio law," "void," and "inapplicable to this case," because of public policy. *Response* at 4. Snowden asserts that in *Berrios* the Court also held, "it is against public policy for policy holders to pay two separate premiums for two separate coverages and to then not receive the benefit of

both of these coverages." Id. at 5. Snowden maintains that this public policy reason for the voiding of such provisions remains applicable. State Farm notes that Snowden paid two separate premiums for the medical payments coverage and the UM coverage. Snowden also notes that State Farm failed "to reduce Snowden's premium for Uninsured Motorists coverage when the nonduplication clause went into effect, which allowed an offset for the amounts up to $25,000 paid under the medical payments coverage." Id. at 7. Snowden asserts that this was "clearly unfair to the policy holder and against public policy." Id.

In the *Reply*, State Farm contends that "the nonduplication clause is consistent with Ohio's public policy under R.C. 3937.18, as amended through Senate Bill 97." *Reply* at 1. State Farm contends that *Berrios* is no longer applicable, because the current version of R.C. 3937.18 no longer requires insurance companies to offer UM coverage with every automobile liability insurance. State Farm noted that the purpose behind R.C. 3937.18(F) was to allow insurance companies to contractually eliminate insurance stacking. State Farm argues, "Paul Snowden agreed to a contract and already received his benefit from the bargain." Id. at 6. State Farm contends Senate Bill 97 allows insurers, in their policies terms and conditions, to eliminate stacking and preclude coverage under specific circumstances. Thus, State Farm argues that the terms of the contract should be enforced and State Farm should not be liable under UM coverage for medical payments that State Farm already paid under medical payment coverage.

This Court finds that State Farm in entitled to set-off the UM claim by the amount paid under the medical payments coverage. The applicable nonduplication clause is unambiguous and an enforceable contract provision.

Under Ohio law, an insurance policy is considered a contract between the insurer and the insured. *Nationwide Mut. Ins. Co. v. Marsh* (1984), 15 Ohio St. 3d 107, 109. A Court, therefore, may interpret an insurance policy as a matter of law. *Ambrose v. State Farm Fire & Cas.* (1990), 70 Ohio App. 3d 797, 799; 592 N.E.2d 868. Generally, the contract should be interpreted to give effect to the words' plain meanings. *Cleveland Elec. Illuminating Co. v. Cleveland* (1988), 37 Ohio St. 3d 50. Where the plain meaning of the contract is clear, the Court need not go beyond the text of the contract. *Seringetti Constr. Co. v. Cincinnati* (1988), 51 Ohio App. 3d 1, 5, 553 N.E.2d 1371.

According to the clauses' plain terms, State Farm will not pay medical expenses under UM coverage that have already been paid under medical payments coverage. This clause is enforceable and not against public policy.

The Court is not convinced that *Berrios* decision is applicable to the case at bar, because the public policy reason for the voiding of nonduplication clauses is no longer applicable. The decision of the Supreme Court of Ohio in *Berrios* is based on the premise that Ohio law, specifically R.C. 3937.18, mandates UM coverage with every automobile liability insurance policy.

However, S.B. 97 changed this mandate and eliminated any requirement of a mandatory offering of UM coverage. "The legislature appears to have swapped an interest in providing compensation for 'uninsured' motorists with an interest in providing reasonable rates." *Howard v. Howard*, Pike App. No. 06CA755, 2007-Ohio-3940, ¶20. See also Section 3(A) of S.B. 97. Under S.B. 97, UM coverage "may include any terms and conditions precluding coverage, as long as these circumstances are specified in the policy." *Kelly v. Auto-Owners Ins. Co.*, Hamilton App. No. C-050450, 2006-Ohio-3599, ¶7 (citing

R.C. 3937.18(I)[2]). See also *Howard*, ¶18 (finding that "R.C. 3937.18(I) contains a non-exhaustive list of terms and conditions that insurers may include in their policies to preclude coverage for bodily injury or injury that an insured suffers"); *Green v. Westfield Ins. Co.*, Medina App. No. 06CA0025-M, 2006-Ohio-5057, ¶16. Moreover, the Court notes that the Ohio General Assembly expressly noted, in enacting R.C. 3937.18, that it was its intent to "provide statutory authority for the inclusion of exclusionary or limiting provisions in [UM] coverage, [UIM] coverage, or both [UM] and [UIM] coverages. Section 3(B)(3) of S.B. 97.

The Court is not persuaded by the Plaintiff's argument that the *Berrios* case is binding, regardless of the changes in R.C. 3937.18, because of the following language in *Berrios*:

> In addition to the public-policy reasoning behind *Shearer* was a more practical issue - that people who pay separate premiums for separate coverages should get what they pay for: '"[A] policy provision which the insured considers to be additional protection and for which he pays a premium with such extra protection in mind cannot be transposed by the insurer into the reduction of the mandatory minimum coverage."' Id.

Id. at ¶26. First, this reasoning ends with the phrase, "cannot be transposed by the insurer into the reduction of the mandatory minimum coverage." As discussed above, there is not mandatory minimum UM coverage now. Second, although Snowden paid separate premiums for separate coverages, the Court finds Snowden is getting what he paid for: UM coverage, excluding payment paid or payable under other coverages as provided by the

---

[2] The first part of R.C. 3937.18(I) provides:

> 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:

The five circumstances enumerated following this section are not applicable to the case at bar.

nonduplication clause. State Farm is permitted to enforce the nonduplication clause, because UM coverage is no longer mandatory. Moreover, based on the reasoning discussed above, the Court is not persuaded by the *Wayne Mutual Ins. Co.* case.

Finally, the Court is not persuaded by Snowden's argument that it is unfair and against public policy to change the Policy to allow for offset under UM coverage while, at the same time, failing to reduce the premium for UM coverage. Snowden failed to cite any case law in support of this assertion that the State Farm was required to reduce the premium in this situation.

III. CONCLUSION

Based on the foregoing, Defendant State Farm's *Motion for Partial Summary Judgment* is sustained.

SO ORDERED:

_____

Dennis J. Langer, JUDGE

Copies of this Decision, Order and Entry were forwarded to all parties listed below by ordinary mail this filing date.

Jeffrey G. Chinault
DYER, GAROFALO, MANN & SCHULTZ
Attorney for Plaintiffs
131 North Ludlow Street, Suite 1400
Dayton, Ohio 45402

Robert M. O'Neal
BREIDENBACH, O'NEAL & BACON
Attorney for Defendant,
Pamela Henry

1060 Talbott Tower
Dayton, Ohio 45402

T. Andrew Vollmar
FREUND, FREEZE & ARNOLD
Attorney for Defendant,
State Farm Mutual Automobile Insurance Company
One Dayton Centre, Suite 1800
1 South Main Street
Dayton, Ohio 45402-2017

Gregory P. Dunsky
Assistant U.S. Attorney
Attorney for Defendant,
United States Department of
Health and Human Services
602 Federal Building
200 W. Second Street
Dayton, Ohio 45402

JULENE POWERS, Bailiff 937-225-4055