

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 10-1091

**THOMAS BARBEE; DARLENE BARBEE; HARVEY BARBEE; MARGARET
BARBEE; MATTHEW BARBEE**
Plaintiff-Appellees

-vs-

**ALLSTATE INSURANCE COMPANY; NATIONWIDE MUTUAL INSURANCE
COMPANY**
Defendant-Appellant.

MERIT BRIEF OF PLAINTIFF-APPELLEES, THOMAS BARBEE, et al.

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Any misunderstandings that have generated by the insurers' poor draftsmanship can easily be rectified through policy amendments. Rather than undertake such efforts, Nationwide and Allstate are insisting that this Court judicially bless their own interpretation and allow coverage to be denied to those who had, in good faith, read the inherently contradictory provisions differently. Given that Allstate and Nationwide are solely to blame for the confusion that has been produced by the confounding policy provisions they alone had fashioned, the Ninth District's unanimous ruling should be upheld.

STATEMENT OF CASE AND FACTS

The salient background of this action maybe succinctly stated as follows. Plaintiffs are all residents of Lorain County, Ohio. On October 12, 2002, they were traveling near Madison, Wisconsin in two vehicles. Two separate motorist insurance policies that had been purchased from Nationwide and Allstate were covering the occupants. Both policies included UM/UIM protection. *Stipulations, paragraphs 1 – 5; Supplement to the Merit Brief of Appellant, Nationwide Mutual Insurance Company (“Nationwide’s Supp.”), p. 0001.*

An accident ensued on the highway when two vehicles collided that were being operated by Danielle Skatrud (“Skatrud”) and Vaughn R. Larson (“Larson”). The cars careened across the median and into Plaintiffs’ automobiles. Another motorist, Faith C. Donley (“Donley”) was also caught up in the wreckage. Skatrud was killed in the collision while Plaintiffs and Donley suffered serious injuries. *Stipulations, paragraphs 8 – 14; Nationwide’s Supp., pp. 0003-4.*

Both Nationwide and Allstate were promptly notified of the accident and Plaintiffs were approved for medical payment coverage. *Stipulations, paragraph 6; Nationwide’s Supp., p. 0002.* Both insurers were also advised by Plaintiffs’ counsel of “potential underinsured motorists claims.” *Stipulations, paragraph 7.*

Because Larson was an employee of the United States, Plaintiffs’ personal injury claims were subject to the Federal Tort Claims Act. *28 U.S.C. §2671 et. seq.* A lawsuit was commenced in the United States District Court, Western District of Wisconsin, on April 22, 2005. Based upon the virtually identical “compliance clauses” set forth in the applicable insuring agreements, Plaintiffs’ counsel determined that no suit could be

brought against Nationwide or Allstate for UM/UIM coverage at that time. The attorney representing Donley had either overlooked these provisions or interpreted them differently, as a separate lawsuit was filed on her behalf against Allstate on October 12, 2004. *Lorain County Court of Common Pleas Case No. 04CV139887*. Those proceedings were stayed pending the outcome of the Wisconsin litigation. *Stipulations, paragraphs 13 – 15; Nationwide’s Supp., pp. 0003-4*.

In a ruling dated June 7, 2005, District Judge John C. Shabaz determined that Larson was 30% responsible for the collision while Skatrud’s Estate was 70% liable. Following further proceedings, damages were determined for each of the Plaintiffs in a final order dated December 7, 2005. The federal government paid its 30% share of the award, but the Estate lacked sufficient liability insurance coverage to satisfy the remainder. Each of the Plaintiffs was thus left with a claim for underinsured motorist claim. *Stipulations, paragraphs 18 – 21; Nationwide’s Supp., pp. 0004-5*.

Because the contractually mandated period for commencing litigation had purportedly lapsed on October 12, 2005, Allstate and Nationwide advised Plaintiffs’ counsel that no UIM benefits would be paid. Shortly thereafter, on January 18, 2007, Plaintiffs commenced the instant action against the insurers in the Lorain County Court of Common Pleas. *Case No. 07CV149278*. Stipulations were submitted and the parties filed cross-motions for summary judgment upon the issue of UIM coverage. Judge James Miraldi entered final judgment for Plaintiffs on May 5, 2009.

Both Nationwide and Allstate appealed this decision. The Ninth District rejected their contention that the pertinent provisions had unambiguously required any lawsuit to be brought within three years from the date of the accident and reasoned

that:

The exhaustion and limitations period provisions of the Allstate and Nationwide underinsured motorists conflict, creating an ambiguity under the facts of this case. Accordingly, the limitations provisions are not enforceable as to the [Plaintiffs'] claims. The trial court correctly denied Allstate and Nationwide's summary judgment on that ground. ***

Barbee v. Allstate Ins. Co., 9th Dist. No. 09CA009594, 2010-Ohio-2016, 2010 W.L. 1839113 ¶ 33.

Allstate opted against seeking further review of the appellate court's determination within the time period imposed by Sup. Ct. Prac. R. 2.2. Nationwide did submit a Notice of Appeal on June 23, 2010. *Sup Ct. Case No. 10-091*. When the Ninth District certified a conflict with the *D'Ambrosia v. Hensinger*, 10th Dist. No. 09-AP-496, 2010-Ohio-1767, 2010-Ohio-1767, Nationwide filed a separate Notice of Certified Conflict on July 28, 2010. *Sup. Ct. Case No. 10-1314*. In a ruling dated September 29, 2010, this Court accepted discretionary jurisdiction over Nationwide's appeal. *Sup. Ct. Case No. 2010-1091*. On that same date, a determination was made that no conflict actually existed between the Ninth and Tenth District rulings. *Case No. 2010-1314*.

ARGUMENT

ALLSTATE PROPOSITION OF LAW NO. 1: A contractual limitations period is an insurance policy that unambiguously requires the insured to bring a claim for underinsured motorist coverage benefits within three years of the date of the accident is valid and enforceable.

Allstate's First Proposition of Law is purely superfluous. No one has ever disputed that motorist insurers are authorized in Ohio to "unambiguously" require UM/UIM claims to be filed within three years of the date of the accident. *R.C. §3937.18(H)*.

That said, the standards governing time-to-sue clauses that had been previously developed by the judiciary should still be consulted to the extent they remain consistent with *R.C. §3937.18(H)*. "Not every statute is to be read as an abrogation of the common law." *Bresnik v. Beulah Park Ltd.* (1993), 67 Ohio St.3d 302, 304, 617 N.E.2d 1096, 1098. This Court has cautioned that:

Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the Legislature will not be presumed or held to have intended a repeal of the settled rules of the common law, unless the language employed by it clearly expresses or imports such intention. [emphasis added]

State ex rel. Morris v. Sullivan (1909), 81 Ohio St. 79, 90 N.E. 146, syllabus; see also, *Danzinger v. Luse*, 103 Ohio St.3d 337, 339, 2004-Ohio-5227, 815 N.E.2d 658, 660 ¶11; *State ex rel. Wilson v. Board of Edn. of Shelby Cty.* (2nd Dist. 1956), 102 Ohio App. 541, 543, 144 N.E.2d 323, 324. A legislative intention to override existing judicial precedents thus will not be implied. *Lynn v. Supple* (1957), 166 Ohio St. 154, 159, 140

N.E.2d 555.

For sound policy reasons, Ohio courts have historically subjected time-to-sue clauses to strict scrutiny, as this Court has cautioned that:

By definition, contractual limitations are in derogation of the time period fixed by the legislature for bringing such actions. And they arise from adhesion contracts where the insured rarely, if ever, has a voice in bargaining.

Hounshell v. American States Ins., Co. (1981), 67 Ohio St.2d 427, 431, 424 N.E.2d 311, 314, quoting *Schafer v. Buckeye Union Ins. Co.* (Ind. App. 1978), 178 Ind. App. 70, 381 N.E.2d 519, 522.

A reasonable period of time to bring the suit must be afforded before a time-to-sue clause can be enforced.

A provision by way of limitation in a contract of insurance which does not leave to the assured a reasonable time in which to bring suit after his cause of action accrues is void and of no effect, and, if acting in good faith, and with proper diligence, it happens in a particular case that other provisions of the policy required to be complied with by the assured as a condition precedent to his right to sue cannot be performed by him and leave a reasonable time thereafter in which to bring suit, the limitation will be held unreasonable and inoperative. Or, if in any case such provisions should be used and employed by the insurer for the sole purpose of delay, they would be held to be held to be suspended or waived. [emphasis added].

Appel v. Cooper Ins. Co. (1907), 76 Ohio St. 52, 60-61, 80 N.E. 955, 958. It has further been explained that:

What shall be regarded as a reasonable time in any particular case, or class of cases, will depend upon circumstances. It should in any event allow sufficient opportunity to a party to investigate his claim, and prepare for the controversy.

The Order of United Comm. Travelers of Am. v. Duncan (6th Cir. 1955), 221 F.2d 703,

705, quoting *Fellowes v. Madison Ins. Co.* (Ohio Super. 1858), 1858 W.L. 4565, p. *5. When the equities of the situation so require, courts will toll the running of time-to-sue clauses. *Walton Baking Co. v. Hartford Acc. & Indem. Co.* (6th Dist. 1940), 66 Ohio App. 349, 34 N.E. 2d 78 (holding that time limit did not start until issuance of insurer's notice that claim was being denied); *Order of United Comm. Trav. of America v. Etchen* (10th Dist. No. 1928), 27 Ohio App. 422, 162 N.E. 636 (tolling time-to-sue clause due to the insured's disability.)

ALLSTATE PROPOSITION OF LAW NO. II: An "exhaustion clause" in an automobile insurance policy, requiring exhaustion of all applicable liability coverage before the insurer is obligated to make a payment pursuant to UIM coverage, does not preclude the insured from filing suit based upon UIM coverage prior to the exhaustion of the underlying liability.

ALLSTATE PROPOSITION OF LAW NO. III: An "exhaustion clause" in an automobile insurance policy, requiring exhaustion of all applicable liability coverage before the insurer is obligated to make a payment pursuant to UIM coverage, does not render ambiguous an otherwise enforceable limitations period of three years from the date of the accident for claims for UIM benefits.

Allstate's Second and Third Propositions of Law are indistinguishable from each other. At the time of the multi-vehicle collision, an endorsement in the carrier's motorist insurance policy had directed the:

Legal Actions

Any legal action against Allstate must be brought within three years of date of the accident. No one may sue us under this coverage unless there is full compliance with all the policy terms and conditions. [emphasis added]

Nationwide's Supp., p. 0078 & 117. The second sentence of this provision will be referenced herein as the "compliance clause." For purposes of underinsured motorists

(UIM) benefits, the “exhaustion clause” further specified that:

We are not obligated to make any payment for bodily injury under this coverage which arises out of the ownership, maintenance or use of an underinsured motor vehicle until after the limits of liability for all liability protection in effect and applicable at the time of the accident have been fully and completely exhausted by payment of judgments or settlements.

Nationwide’s Supp., pp. 00074 & 0115. As previously noted, both the trial judge and the Ninth District held that these two clauses conflicted under the facts of this case, and Plaintiffs had reasonably concluded that the three year deadline commenced when Judge Shabaz apportioned damages in his entry of December 7, 2005. *Barbee*, 2020-Ohio-2016 ¶ 36. The instant proceedings were commenced a little more than a year later, once the UIM claims were denied by the insurers.

Undoubtedly by design, Allstate’s Brief makes only a passing reference to the compliance clause. *Allstate’s Brief*, p. 2. Neither of the lower courts ever once suggested that there was anything unclear about the exhaustion clause, by itself. The ambiguity only arises when one considers the compliance clause, which can be reasonably interpreted as precluding any litigation until the exhaustion clause has been satisfied. *Barbee*, 2010-Ohio-2016, ¶ 9-37.

Ignoring the compliance clause has allowed Allstate to assert – over and over – that the policy “does not in any way purport to prevent the insured from filing suit.” *Allstate’s Brief*, p. 14. In plain and unmistakable terms, the compliance clause does prohibit the filing of a civil action until all the policy terms have been satisfied. *Nationwide’s Supp.*, p. 00078. The insurer’s argument barely references this contradictory policy provision, which speaks volumes. Pretending that critical

language does not exist is hardly an intellectually appealing approach to interpreting a policy of insurance.

NATIONWIDE'S PROPOSITION OF LAW: A policy provision that requires uninsured/underinsured actions to be brought against the insurer within three years from the date of the accident is unambiguous and enforceable even when read in conjunction with the exhaustion provision and the provision requiring the insured to fully comply with the terms of the policy before filing suit.

A. THE APPLICABLE POLICY PROVISIONS

In contrast to Allstate, Nationwide does appear willing to recognize the existence of the compliance clause. The insurer had adopted a provision stating that:

10. SUIT AGAINST US

No lawsuit may be filed against us by anyone claiming any of the coverage provided in this policy until the said person has fully complied with all the terms and conditions of this policy, including but not limited to the protection of our subrogation rights.

Subject to the preceding paragraph, under the Uninsured Motorist coverage of this policy, any lawsuit must be filed against us:

- a) within three (3) years from the date of the accident;
or
- b) one (1) 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. [emphasis added]

Nationwide's Supp., p. 00035. Nationwide's policy appears to be relatively unique in that the time-to-sue provision is explicitly "[s]ubject to" the compliance clause. *Id.* Exhaustion is also required for UIM coverage, as the policy provides that:

- 6. No payment will be made until the limits of all other

liability insurance and bonds that apply have been exhausted by payments.

Nationwide's Supp., p. 00031.

The General Assembly plainly envisioned that insureds should be afforded three years in which to bring ripened UM/UIM claims. *R.C. §3937.18(H)*. This provision appears to have been adopted for the benefit of the policyholders, since two-year limitations periods had been generally enforceable prior to that. *Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St.3d 619, 624-625, 1994-Ohio-160, 635 N.E.2d 317, 321. Accordingly, this aspect of the enactment should be construed and applied in a manner that furthers this remedial objective. *Stanton v. Nationwide Mut. Ins. Co.*, 68 Ohio St.3d 111, 113, 1993-Ohio-75, 623 N.E.2d 1197, 1199; *Clark v. Scarpelli*, 91 Ohio St.3d 271, 275, 2001-Ohio-39, 744 N.E.2d 719, 724.

Due to the inherent conflict that had arisen between the exhaustion and compliance clauses in this instance, the Ninth District held that the limitations period commenced when damages were apportioned on December 7, 2005. *Barbee*, 2010-Ohio-2016, ¶ 36. The commencement date could have started even earlier than that on June 7, 2005, when the first finding was made that Skatrud was primarily at fault for the collision. *Stipulations, paragraph 17; Nationwide's Supp., p. 0004*. In either instance, the time-to-sue clause was satisfied when the Complaint was filed against Nationwide on January 18, 2007 once the application for UIM benefits had been rejected.

While the parties disagree over the proper commencement date, there appears to be no serious dispute that a minimum of three years to bring suit has been mandated by *R.C. §3937.18(H)*. As previously observed, this Court recognized over a

century ago that any clause in an insurance policy “which does not leave to the assured a reasonable time in which to bring suit after his cause of action accrues is void and of no effect ***.” *Appel*, 76 Ohio St. at 60-61. This remains the law in Ohio. *Montgomery v. State Auto Mut. Ins. Co.* (Dec. 18, 2000), 4th Dist. No. 99CA639, 2000-Ohio-2010, 2000 W.L. 332261965, p. *4 (“courts must consider whether or not it is equitable to commence a limitations period in a policy of insurance on the date of the accident that gave rise to the insured’s claim for uninsured or underinsured motorist benefits”).

B. THE POTENTIAL AMBIGUITY

Nationwide’s primary contention is that the exhaustion clause does not preclude a lawsuit from being filed, only the payment of benefits. *Nationwide’s Brief*, pp. 6-7. This view has been adopted in decisions such as *Regula v. Paradise*, 7th Dist. No. 07-MA-40, 2008-Ohio-7141, and *Chalker v. Steiner*, 7th Dist. No. 08-MA-137, 2009-Ohio-6533, 2009 W.L. 4755431. While it is true that the exhaustion clauses mention nothing about precluding litigation, the compliance clause plainly does. While perhaps Nationwide’s proposed resolution of the resulting conundrum is plausible, Plaintiffs’ construction is certainly reasonable as well.

Fully appreciating that the policy provisions are susceptible to more than one rational interpretation, Nationwide has proclaimed that “ambiguities no longer have to be resolved in favor of extending coverage to insurance policyholders.” *Nationwide’s Brief*, p. 7. Not a single judicial opinion has been cited in support of this revolutionary proposition, which is certainly telling. *Id.* This Court took care to explain in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 220, 2003-Ohio-5849, 797 N.E.2d 1256, 1262,

that:

It is generally the role of the finder of fact to resolve ambiguity. See, e.g., *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St.3d 64, 609 N.E.2d 144. However, where the written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party. *Cent. Realty Co. v. Clutter* (1980), 62 Ohio St.2d 411, 413, 16 O.O.3d 441, 406 N.E.2d 515. In the insurance context, the insurer customarily drafts the contract. Thus, an ambiguity in an insurance contract is ordinarily interpreted against the insurer and in favor of the insured. *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380, syllabus. [emphasis added]

This fundamental principle of contract interpretation was found to be inapplicable in *Galatis* only because the plaintiffs were not the actual policyholders. *Id.* 100 Ohio St.3d at 224-225 ¶ 34-39. It has been stipulated in the case *sub judice* that Plaintiffs are indeed the policyholders and Nationwide has never once suggested that they had any input in the drafting of the policy terms and conditions. *Stipulations, paragraph 3; Nationwide's Supp., p. 0001.*

Despite Nationwide's protests to the contrary, Plaintiffs remain fully entitled to the benefits of the principle that an ambiguities in a contract of insurance will be construed most strongly in their favor. *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 566-567, 2009-Ohio-3718, 913 N.E.2d 426, 430 ¶ 17-18. As this Court recognized just last year, whenever "the parties have offered their own separate interpretations of the language of the policy, both of them plausible, we must resolve any uncertainty in favor of the insured." *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 330, 2010-Ohio-1829, 928 N.E.2d 421, 424, ¶ 17, citing *Buckeye Union Ins. Co. v. Price* (1974), 39 Ohio St.2d 95, 68 O.O.2d 56, 313 N.E.2d 844, syllabus.

The Ninth District's application of these time-tested rules of contract was fully justified in this instance. A drafting party should never be allowed to profit from confusing terminology. So long as Plaintiffs' construction is reasonable, UIM coverage cannot be denied on the basis of the time-to-sue clause. *Neal-Pettit*, 125 Ohio St.3d 330. Nationwide can always revise the standardized insuring agreements if a different outcome is truly necessary.

If this Court does opt to endorse Nationwide's construction, the opinion should be afforded only prospective effect. Plaintiffs' counsel had relied in good faith upon their view that the compliance clause precluded any litigation until an identifiable underinsured motorist actually existed. Rather obviously, they did not have the benefit of this Court's guidance at that time.

C. PLAINTIFFS' CONTINGENT CLAIM

The ambiguity in the policy aside, the authorities Nationwide is touting have no application to these relatively unique circumstances for another compelling reason. In each instance, they involve insureds who (1) failed to properly investigate the potential availability of UM/UIM coverage or (2) assumed that the time-to-sue clause was tolled until the liability insurer finally issued payment. Neither circumstance is present in the case at bar. Plaintiffs' entitlement to UIM benefits was purely contingent until (at the very earliest) the District Judge issued his ruling on June 7, 2005. There was nothing they could do that would force the claim to ripen prior to that.

As one example, a simple two-car accident had been at issue in *Regula*, 2008-Ohio-7141, and the tortfeasor's liability appeared to be undisputed. Since the only unresolved issue was the amount of the plaintiff's damages, the court concluded that

“nothing prevented the [plaintiffs] from commencing an action against [their insurer] for UIM benefits within the three-year contractual limitation period ***.” *Id.*, ¶ 49. This was also the case in *Chalker*, 2009-Ohio-6533, where another two-car accident had been caused “solely” by the negligence of the tortfeasor. *Id.*, ¶ 2. The Court rejected the argument that the three-year time-to-suit clause did not begin to run until liability policy limits were paid. *Id.*, ¶ 64.

The instant action is distinguishable. Because of the relatively unique circumstances created by the multiple-vehicle collision, an identifiable uninsured/underinsured motorist did not even exist until District Judge Shabaz apportioned liability on June 7, 2005. *Stipulations, paragraph 17; Nationwide’s Supp., p. 0004*. No UIM coverage would have been available at all if Larson had been found to be over 50% liable, since Wisconsin’s joint and several liability standards would have allowed all the damages to be recovered from the United States government. *Wisc. Stat. §895-045(1) (2001)*. Unlike the settings that were presented in *Regula* and *Chalker*, the instant Plaintiffs have not been forced into the position of having to argue that the three-year deadline commenced only after damages were determined and the liability insurers had issued payment.

This critical distinction justifies this Court’s determination that no actual conflict exists between the Ninth District’s ruling below and *D’Ambrosia*, 2010-Ohio-1767. *See Judgment Entry dated September 29, 2010, Sup.Ct. Case No. 2010-1314*. In that instance, the insured had claimed that it had taken him six years to determine that the tortfeasor did not have liability coverage. *Id.*, ¶ 11. Despite the supposed ignorance of the true conditions, all of the necessary elements for a UM/UIM had actually existed

from the moment of the collision.

As this Court's ruling of September 29, 2010 (Case No. 2010-1314) tacitly recognizes, the case *sub judice* is quite different. A precondition for UIM coverage remained unfulfilled until the District Judge's ruling of June 7, 2005 created the potential that an underinsured motorist could exist. If Nationwide's reasoning is correct and there is no meaningful difference between these circumstances and those that were examined by the Tenth District in *D'Ambrosia*, then this Court must have necessarily erred in determining that no conflict had been produced.

Because there was no identifiable uninsured/underinsured motorist for a substantial period of time following the accident, Plaintiffs' situation falls into the category controlled by *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 635 N.E.2d 323. The tortfeasor had been insured in that action, but his carrier had been declared insolvent approximately nineteen months after the automobile accident. After the uninsured motorist policy's two-year time-to-sue clause expired, State Farm denied coverage to the insureds.

In the ensuing appeal, a majority initially recognized that time-to-sue clauses are generally enforceable. *Id.*, 69 Ohio St. 3d at 632-633. But they held that:

The condition precedent to uninsured motorist coverage of the insured is a determination that, for the reasons identified in the policy, the tortfeasor is uninsured.

Id., at 633. They then reasoned that:

This insolvency was therefore the triggering event for uninsured motorist coverage. Without such an event, uninsured motorist coverage would not be operative. Accordingly, any demand by [the insureds] upon [State Farm] to provide uninsured motorist coverage prior to the insolvency determination would have been properly

rejected by [the insurer] under the terms of the policy. ***

Id., at 634. In finding that State Farm did indeed have to furnish coverage, this Court's opinion concluded that "a provision in a contract of insurance which purports to extinguish a claim for uninsured motorist coverage by establishing a limitations period which expires before or shortly after the accrual of the right of action for such coverage is *per se* unreasonable and violative of the public policy of the State of Ohio as embodied in R.C. 3937.18." *Id.*, at 635.

Nationwide has pinned its hopes upon *Angel v. Reed*, 119 Ohio St.3d 73, 2008-Ohio-3193, 891 N.E.2d 1179. In *Angel*, the tortfeasor's coverage had been cancelled before the accident and thus an uninsured motorist claim existed as soon as the injuries were sustained. *Id.*, at ¶ 2. The plaintiff could have determined that the tortfeasor was uninsured by contacting his former liability carrier, but never did so. *Id.*, ¶ 17.

This Court was careful to distinguish *Kraty*, 69 Ohio St. 3d 627, on the grounds that: "No subsequent event rendered [the tortfeasor] uninsured; he already was uninsured." *Angel*, 119 Ohio St. 3d at 76 ¶ 19. The plaintiff in *Angel* could have filed the uninsured motorist claim from the moment of the accident, and thus enjoyed the full benefit of the entire two year limitation period. That was certainly not the case below, as Plaintiffs' uninsured motorist claim was not triggered, at the very earliest, until Judge Shabaz's ruling of June 7, 2005 created the potential that Skatrud would be a liable underinsured motorist.

Likewise, *Griesmer v. Allstate Ins. Co.* (Feb. 19, 2009), 8th Dist. No. 91194, 2009-Ohio-725, 2009 W.L. 406558, is similarly distinguishable. The single tortfeasor

was easily identifiable from the moment of the accident and a “standard underinsured motorist case” thus existed. *Id.* ¶ 2 & 30. The Eight District held only that the time-to-sue clause was not tolled until his liability limits were exhausted by settlement. *Id.* ¶30-31.

Plaintiffs have no quarrel with those cases recognizing that an insured’s failure to appreciate a ripened UM/UIM claim is no excuse for violating an unambiguous time to sue clause. In contrast to *Angel* and *Griesmer*, only a potential prospect existed for UIM coverage until the District Court ruled on June 7, 2005. The lawsuit against Nationwide was timely filed approximately one-and-a-half years after that.

D. IMPACT OF KINCAID’S “ACTUAL CONTROVERSY” REQUIREMENT

As odd as it seems, Nationwide appears to believe that so long as a UM/UIM claim is a conceivable potentiality, the insurer must be sued within three years of the date of the accident. According to this twisted logic, the instant Plaintiffs should have commenced litigation even though there was a strong likelihood, prior to June 7, 2005, that no UIM claim would exist at all. Nationwide is advocating, in essence, that this Court force countless insureds to file lawsuits that are premised upon mere contingencies. The presence of a ripened dispute over UIM coverage is unnecessary.

This counterintuitive view plainly cannot be reconciled with this Court’s recent ruling in *Kincaid v. Erie Ins. Co.*, ___ Ohio St.3d ___, 2010-Ohio-6036, ___ N.E.2d ___. In that class action proceeding, the plaintiffs had maintained that certain “additional payments” benefits were due under their motorist insurance policies even though a claim had not yet been submitted to and rejected by the insurer. *Id.*, ¶ 1-8. Citing numerous authorities, Justice Lundberg Stratton’s majority opinion recognized

to commence litigation before insurance benefits had been requested and denied. *Sup.Ct. Case No. 2009-1936*. This Court was warned that allowing such suits “will throw Ohio’s insurance industry into a state of confusion and disarray, and open the courts to a flood of easily-avoided litigation on matters that are not ripe, about which there is no real dispute or justiciable controversy.” *Id.*, p. 1. The 32-page fulmination culminated with a plea to encourage parties to resolve claims amicably without resort to the court system. *Id.*, pp. 31-32.

Nationwide apparently has had no qualms about adopting precisely the opposite position when necessary to deny a few claims to insureds who had been dutifully paying their premiums. An “actual controversy” could not have existed prior to June 7, 2005 since only a hypothetical claim for uninsured motorist coverage was present. District Judge Shabaz’s ruling could have easily foreclosed a UM claim from ever ripening in the first place. And it must be remembered that the UIM benefits were never formally denied by the insurers until after the filing deadline of October 12, 2005 had purportedly lapsed. If Plaintiffs had sued their insurer prior to that, Nationwide would be poised to argue that the lawsuit was “baseless” and sanctions were warranted under Civ.R. 11 and R.C. §2323.51. *Kincaid*, 2010-Ohio-6036 ¶ 20. This insurer shown a willingness to pursue attorney-fees against its insureds in the past. *See e.g.*, *Nationwide Mut. Ins. Co. v. Fallon-Murphy* (June 17, 1993), 10th Dist. No. 93AP-222, 1993 W.L. 212845 (sanctions unsuccessfully sought against insured seeking underinsured motorist coverage).

Nationwide’s *amicus* brief in *Kincaid* advocated the more sensible position. Ohio’s judicial system is congested enough without having to entertain a myriad of

UM/UIM claims that are not yet ripe for adjudication. And it is difficult to fathom why any insurer would want to advocate such a nonsensical requirement, given that attorneys would have to be retained to respond to and defend claims that may well prove to be unnecessary. While perhaps many such lawsuits can be stayed while the actions against the tortfeasors proceed to final adjudication, lawyers will still have to enter appearances, file their pleadings, and submit the appropriate motions that the judges will have to review. Consistent with the wisdom of *Kraly*, 69 Ohio St. 3d 627, this Court should hold instead that a time-to-suit clause does not begin to run until the UIM claim has been denied by the insurer and an actual controversy exists between the parties.

E. NATIONWIDE'S DIVERSIONARY DISCOURSE

Nationwide's argumentation devolves into specious nonsense in the final few pages of the Brief. For example, the insurer has mused: "We may never know why [Plaintiffs' counsel] chose to take this risk" by waiting for an identifiable underinsured motorist to exist before commence litigation in the Lorain County Court of Common Pleas. *Nationwide's Brief*, p. 16. Why should that matter? If the motivations of Plaintiffs' counsel are somehow significant, it should be evident that they reasonably construed the policy's compliance clause as prohibiting any litigation against Nationwide until a UIM claim actually existed. And as this Court would later confirm, the attorneys could have justifiably determined that no suit could be brought until the UIM claim was denied and an "actual controversy" was ripe for adjudication. *Kincaid*, 2010-Ohio-6036 ¶ 20. One would have thought that Nationwide would be applauding Plaintiffs' counsel for their anti-litigious restraint.

Nor should it matter that Donley filed her own separate Complaint against Allstate within three years of the accident. *Nationwide's Brief*, p.16. In practical terms, her lawsuit in the Lorain County Court of Common Pleas accomplished nothing except the incursion of a needless filing fee. Her counsel took the risk that, if the federal employee was found to be primarily liable for the accident by the federal judge in Wisconsin, her premature suit would be found to be baseless and perhaps even deserving of sanctions. Indeed, as was held in *Kincaid*, the state court judge should have immediately dismissed Donley's complaint pursuant to Civ. R. 12(B)(6) since Allstate had not yet denied the UIM claim at the time of filing. *Id.*, 2010-Ohio-6036 ¶ 20. Nationwide has plainly failed to establish that either logic or common sense require the Ninth District's eminently sensible ruling to be overturned.

ALLSTATE PROPOSITION OF LAW NO. IV: The "exhaustion clause" in an automobile insurance Policy does not prevent the insured from filing suit for UIM coverage and therefore, *res judicata* bars the insured from raising a claim for UIM coverage in a subsequent action arising from the same transaction or occurrence as one previously litigated.

Allstate's final Proposition of Law is misplaced. The insurer's *res judicata* defense is predicated upon the tired assertion that "nothing prevented the [Plaintiffs] from raising a UIM claim in the action in Wisconsin." *Allstate's Brief*, p. 23. As four esteemed jurists have now properly concluded, the policy's compliance clause did prevent any action from being commenced until an identifiable underinsured motorist existed. That contingency was not eliminated until the federal judge determined on June 7, 2005 that Skatrud's liability was greater than that of Larson. Even then, Justice Lundberg-Stratton's majority opinion in *Kincaid*, 2010-Ohio-6036 ¶20,

confirms that a denial of UIM coverage had to be issued by the carrier before a justicable controversy existed. As the Ninth District properly concluded, *res judicata* had no application under these circumstances. *Barbee*, 2010-Ohio-2016, ¶36.

CONCLUSION

Allstate never appealed the Ninth District's ruling in compliance with Sup. Ct. Prac. R. 2.2(A). Accordingly, the appellate court's resolution of those particular claims should be affirmed in all respects. Jurisdiction was never conferred with regard to the non-appealing party. *State v. Davie*, 74 Ohio St.3d 232, 233, 1996-Ohio-274, 658 N.E.2d 271, 272; *Village of South Russell v. Budget Comm'n of Geauga County* (1984), 12 Ohio St.3d 126, 127, 465 N.E.2d 876, 878.

If Nationwide, on the other hand, remains convinced that its own policy has been misinterpreted by the unanimous appellate panel, the trial judge, Plaintiffs' counsel, and countless others, then the inherently confusing language should be revised. Overturning the lower courts' rulings will serve only to reward the insurer for its sloppy draftsmanship, and punish those who had relied in good faith upon a reasonable interpretation of the provisions. And irrespective of any ambiguities, *Kincaid*, 2010-Ohio-6036 ¶20, instructs that no insured can be required to commence litigation until an "actual controversy" exists over coverage. Since the final precondition for UIM coverage had not been fulfilled (at the earliest) until the federal judge apportioned liability on June 7, 2005, the instant action was timely commenced on January 18, 2007. The Ninth District's unerring opinion should be affirmed in all respects.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that the forgoing **Brief** was served via regular U.S. Mail on this

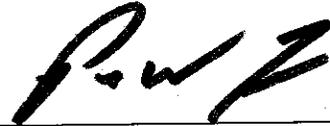
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