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2013-SC-000555-D

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY — APPELLANT

v.

ON APPEAL FROM THE KENTUCKY COURT OF APPEALS, CASE NO. 2012-CA-000354

LONNIE DALE RIGGS — APPELLEE

AMICUS CURIAE BRIEF OF INSURANCE INSTITUTE OF KENTUCKY, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND KENTUCKY DEFENSE COUNSEL, INC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Amicus Curiae Brief was served via U.S. Mail, First Class, postage paid, this 26th day of August, 2014, upon David T. Klapheke, Esq., Boehl Stopher & Graves, LLP, 400 West Market Street, Suite 2300, Louisville, KY 40202; Timothy McCarthy, Esq., Nutt Law Office, Starks Building, Suite 490, 455 South Fourth Street, Louisville, KY 40202; Hon. Ken Howard, Judge, Hardin Circuit Court, Division II, Hardin County Justice Center, 120 East Dixie Avenue, Elizabethtown, KY 42701; and Hon. Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

Thomas F. Glassman

STATEMENT OF POINTS AND AUTHORITIES

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I. STATEMENT OF THE CASE

"[L]ong dormant claims have more of cruelty than justice in them."

- 28 Halsbury's Laws of England 266 (4th ed. 1979).[1]

The Insurance Institute of Kentucky (hereinafter "IIKY"), the National Association of Mutual Insurance Companies (hereinafter "NAMIC"), and Kentucky Defense Counsel (hereinafter "KDC") (IIKY, NAMIC, and KDC hereinafter are collectively referred to as "Amici") respectfully submit this Amicus Curiae Brief in support of the Appellant, State Farm Mutual Automobile Insurance Company (referred to hereinafter as "State Farm"). This case presents the Kentucky Supreme Court with an opportunity to correct the holding of the Kentucky Court of Appeals that a limitations period contained within an underinsured motorists (UIM) policy that directly mirrors the Kentucky Motor Vehicle Reparations Act ("MVRA") is unreasonable and unenforceable. Such a ruling is both unfair and contrary to established Kentucky law, and the Court of Appeals' decision should be overturned.

Moreover, the ruling of the Court of Appeals below, if adopted by this honorable Court, would have wide-ranging negative effects beyond a simple extension of the effective statute of limitations. Both claimants and insurance carriers will be forced to re-litigate issues of damages and liability for automobile accidents long after evidence has gone stale or been lost, witnesses have moved, and memories have faded. Further, tortfeasors, who remain liable to UIM carriers for subrogation, will be left with uncertain liability for an indefinite period of time and may face real financial liability for a long-forgotten accident. Finally, the ruling by the Court of Appeals threatens to destabilize

[1] *Citing A'Court v Cross* (1825) 3 Bing 329 at 332-333, per Best C.J.

Kentucky insurance markets because carriers are required by statute to offer UIM coverage, and the decision of the Court of Appeals would unexpectedly, unpredictably and substantially lengthen the statute of limitations for UIM claims far beyond what was ever contemplated.

Because of this, it is imperative that the Kentucky Supreme Court overturn the decision by the Kentucky Court of Appeals and again allow insurance carriers and insureds by contract to reasonably limit the time in which an action under a policy of UIM insurance coverage may be asserted.

II. ARGUMENT

A. The limitations period found in State Farm's policy is reasonable and enforceable under long-standing Kentucky case law.

State Farm correctly argues that the limitations period in its policy is reasonable. Kentucky law provides that insurance carriers may shorten the applicable limitations period for a claim to be filed under a policy of insurance. *Webb v. Kentucky Farm Bureau Ins. Co*, 577 S.W.2d 17 (Ky. App. 1978). The limitation language used by State Farm directly mirrors the statute of limitations found in the MVRA at KRS 304.39-230(6) by providing two years from the date of the subject accident or from the last payment of basic reparations benefits, whichever is longer, in which to bring suit for UIM benefits.

As reflected in the General Assembly's initial enactment of the MVRA, as well as the consistent enforcement of the statute of limitations for bodily injury claims arising from motor vehicle accidents, this limitations period is reasonable. The statute of limitations, as well as the period of limitations included in the policy, strikes a balance

between claimants' need to investigate and bring their potential claims with reasonable diligence and the preservation and protection of crucial evidence.

The reasonableness of State Farm's period of limitations is further supported by Kentucky case law that expressly preserves an insurer's right to restrict the time in which an insured has the right to file suit under a UIM policy. In *Gordon v. Kentucky Farm Bureau Mut. Ins. Co.*, 914 S.W.2d 331, 333 (Ky. 1992), the Supreme Court held that, while a one-year limitations period for an uninsured motorists ("UM") claim was unenforceable:

> ...this should not be construed to inhibit the insurance companies from contracting with their insureds for a shorter period of time to file a contractual claim. Such a period of time must be "reasonable" as required under *Elkins*, which required *at least two years* to file a contractual claim."

It is this question of reasonableness upon which the Court of Appeals based its decision to undo over a decade of case law and policy provisions adopted in reliance thereon.

While the Kentucky Supreme Court has not ruled directly on the language found in the State Farm policy at issue as it applies to UIM claims, the United States Court of Appeals for the Sixth Circuit discussed Kentucky law regarding this type of provision, and correctly concluded that "the flexible limitation period contained in [the applicable UIM] policy, which period was coextensive with that contained in the MVRA, was reasonable." *Pike v. Government Employees Ins. Co.*, 174 Fed. App'x. 311 (6th Cir. 2006). While a federal court opinion interpreting or applying Kentucky law is not binding on this Court, the *Pike* decision demonstrate that a sound analysis of Kentucky's case law supports the language used by State Farm. The Sixth Circuit correctly held that because "the policy limitation does not conflict with the period of time prescribed by

Kentucky law for filing a personal injury claim arising from a motor vehicle accident, we conclude that it is reasonable, and enforceable." *Id.* at 316.

B. The Court of Appeals' concerns do not present problems in the day-to-day practice of law.

The Court of Appeals below expressed concern claimants would be forced to sue their own insurance carriers prior to knowing whether or not they were underinsured. As a practical consideration, that is simply not the case. First, since UIM coverage is always first-party coverage, its existence is no mystery to a claimant and should not be to claimant's counsel. In fact, in situations where UIM coverage is *not* apparent, the Court of Appeals' decision creates a disincentive to explore for coverage with reasonable diligence because it could always be done many years later.

Second, while it is true Kentucky law does not require a liability insurer to produce a policy of insurance or disclose the applicable limits prior to the institution of suit, the practical reality is that liability insurers commonly do so pre-suit because they know it is inevitable that the policy will be produced through discovery. In those situations where the policy is not being produced, it is highly unlikely an attorney would negotiate a significant settlement of a substantial claim. Therefore, as soon as litigation is instituted, the policy of insurance is available for discovery. CR 26.06(2).

The *only* parties who face potentially negative consequences are those who wait a significant amount of time to enter into litigation. However, that hurdle is significantly diminished by remembering that, since UIM coverage is first-party in nature, the claimant has significant access to the policy and the ability to contact his or her own carrier. This both provides leverage with a tortfeasor's insurance carrier and, in all likelihood, allows

the UIM carrier to toll the limitations period for a claim under the policy because doing so creates the possibility that a suit may be avoided altogether.

In addition, it is already common practice for plaintiffs' attorneys to join UIM insurers in their complaints, so enforcing State Farm's policy as written would not have a substantial impact on how these types of cases are already litigated. Just a few appellate decisions illustrating this practice include *Auto-Owners Ins. Co. v. Omni Indem. Ins. Co.*, 298 S.W.3d 457 (Ky. App. 2009); *Malone v. Kentucky Farm Bureau Mut. Ins. Co.*, 287 S.W.3d 656 (Ky. App. 2009); and *Occidental Fire & Cas. Co. v. Harmon*, 2009 WL 4406065 (Ky. App. 2009).

C. Kentucky case law provides that underinsured and uninsured motorists carriers are entitled to all defenses afforded a tortfeasor.

Despite the Court of Appeals' attempt to restrict insurance carriers' ability to contract for shorter periods of limitation, Kentucky case law has long held that, in order for a claimant to recover pursuant to UM coverage, the liability of the uninsured tortfeasor must be established. *Phillips v. Robinson*, 548 S.W.2d 511 (Ky. 1976), *rev'd on other grounds, Robinson v. Murlin Phillips & MFA Ins. Co.*, 557 S.W.2d 202 (Ky. 1977). This same principle applies equally to UIM coverage, which has been described as the "younger sibling" to UM coverage. *Coots v. Allstate*, 853 S.W.2d 895, 898 (Ky. 1993).

In fact, the Kentucky Court of Appeals has held that an accurate predictor of the treatment of a UIM issue is how a similar issue is treated under UM jurisprudence because "the Kentucky Supreme Court has also held that the difference between UM and UIM coverage is more illusory than real." *Adkins v. Kentucky Nat. Ins. Co.*, 220 S.W.3d 296 (Ky. App. 2007), *citing Allstate Insurance Company v. Dicke,* 862 S.W.2d 327

(Ky.1993). Undoubtedly, both UM and UIM carriers must be permitted to present all defenses available to a tortfeasor, and this principle should not be abrogated by the Court of Appeals' determination.

D. An extension of the limitations period for UIM claims will require re-litigation of issues and thereby harm judicial economy.

Because UIM carriers remain entitled to the same defenses available to the alleged tortfeasors, the extremely long extension of the applicable statute of limitations that would result if this Court affirms the Court of Appeals will require substantial re-litigation of all aspects of the claim against the UIM carrier. In fact, even though UM and UIM claims are based on the contractual relationship between the insurer and insured:

> proof of the amount of damages caused by the offending motorist are not preconditions to coverage, but only essential facts that must be proved before the insured can recover judgment in a lawsuit against the insurer on the contract of insurance.

Coots v. Allstate, supra, 853 S.W.2d at 899. Specifically, a UIM carrier's "contractual liability to the [insured] is defined and determined by the extent to which [the tortfeasor] was found to be an underinsured motorist. Part of the equation in fixing that liability involves establishing [the insured's] damages, which necessarily requires a determination of [the tortfeasor's] percentage of liability or fault." *Kentucky Farm Bureau Mut. Ins. Co. v. Ryan*, 177 S.W.3d 797, 803 (Ky. 2005). There is no basis to eliminate this requirement or otherwise deprive insurance carriers of their right to fully litigate these issues. Since this right remains after trial against the tortfeasor, litigation on the *exact same issues* must be subsequently undertaken.

While the doctrine of *res judicata* exists under Kentucky case law, it would not apply in these circumstances because under Kentucky law:

> First, there must be identity of the parties. Second, there must be identity of the two causes of action. Third, the action must be decided on its merits. In short, the rule of *res judicata* does not act as a bar if there are different issues or the questions of law presented are different."

Louisville v. Louisville Professional Firefighters Assn., Local Union No. 345, 813 S.W.2d 803 (Ky. 1991). Therefore, if the UIM carrier was not brought into the underlying suit, *res judicata* would simply not apply.

Further, collateral estoppel, a related but distinctly different doctrine, would not apply because, as noted in *Moore v. Cabinet for Human Resources*, 954 S.W.2d 317 (Ky. 1997):

> The essential elements of collateral estoppel to be gathered from [prior case law] are as follows:
> (1) Identity of issues;
> (2) A final decision or judgment on the merits;
> (3) A necessary issue with the estopped party given a full and fair opportunity to litigate;
> (4) A prior losing litigant.

Again, this is necessarily inapplicable because the only party to the prior litigation would be the claimant. A claimant could not estop the UIM carrier from litigating essential issues, and therefore, trial courts will be faced with an untold number of cases tried on the same facts on two separate occasions.

The larger problem does not lie with the presentation of proof but with the *development* of proof. Under the Court of Appeals' ruling, a claimant could receive a judgment against a tortfeasor and wait well over a decade to present a claim against a UIM carrier. While the more likely scenario is a presentation of the claim immediately after receipt of a judgment, this could still represent years of delay. This presents a

problem with an accurate and efficient investigation of the claim because people move, evidence is lost or destroyed, memories fade, and vehicles are repaired or scrapped. There is simply no way to recapture much of this information once it is lost.

Further, a typical automobile accident litigation may involve two party-drivers, one or more fact witnesses, and, generally, at least two expert medical witnesses. With re-litigation, each witness would need to be re-deposed, documents re-gathered and issues of fact re-investigated. This would come at substantial expense for both the claimant and the UIM carrier. Beyond just those with a financial interest in the litigation, fact witnesses, if they can be found at all, will be burdened with again providing testimony for an accident that occurred potentially years earlier. Even with such proof developed, a jury, when presented with the facts by different counsel, may well come to an entirely different conclusion as to liability and/or damages. Such a scenario would fly directly in the face of promoting judicial economy and could create absurd, potentially contrary, and unintended and unforeseen results.

E. The current standard limitations period protects both UIM carriers and tortfeasors from uncertainty and stale claims.

In addition to the protection provided to the UIM carriers against whom a claim may be asserted, the current limitations period being widely used by insurance carriers provides protection to alleged tortfeasors. Under KRS 304.39-320, a UIM carrier who is caused to make payment pursuant to their policy has a right of subrogation against the tortfeasor. This subrogation is not limited to the amount of the torfeasor's underlying liability policy; rather, the UIM carrier's liability can be recovered personally against the tortfeasor. If the claimant does not bring suit against the UIM carrier until significantly after the underlying suit is settled, the torfeasor is left uncertain as to his or her potential

financial obligations arising from an accident. This means that under the Court of Appeals' application of the statute of limitations, a driver could be in an accident and not know if he or she faces personal liability for the damages arising therefrom for significantly more than a decade. During the pendency of the original suit, various life decisions, like secondary education, purchase of a home, and starting a family, may present themselves. All the while, the tortfeasor, who may well have forgotten about an accident from a decade earlier, is likely unaware of the potential personal liability he or she is facing.

Of course, the rationales for enacting a statute of limitations in the first place – requiring meritorious claims to be brought with reasonable diligence while memories are relatively fresh, avoiding loss or destruction of evidence – would be frustrated by the Court of Appeals' approach to this issue. While it is true that an insurance policy providing UIM coverage is a written contract, for which the statute of limitations is generally fifteen years (in the absence of a reasonable, shorter period that is contractually agreed upon), the damages the UIM claimant is seeking arise from bodily injury caused by the tortfeasor. Fifteen years is an extraordinarily long amount of time for a party acting with reasonable diligence to seek damages arising from bodily injuries. Limitations for claims seeking damages for personal injuries are typically relatively short – in most cases one year. *See, e.g.*, KRS 413.140(1)(a). The MVRA doubles that time to two years from the last payment of no-fault benefits. Providing fifteen years to make a claim for damages arising out of injuries to the person is inordinate and unreasonable, and runs afoul of the foregoing principles underlying limitations statutes generally.

In addition, while one may attempt to characterize any claim for UIM benefits as arising from a "breach of contract," in reality if the carrier does not dispute coverage but rather challenges the underlying value of the tort claim, it may never actually deny the claim. Moreover, until there is a judgment in excess of the liability policy limits, there has been no "breach" of the policy. Rather, while the claim arises from the insurance policy, where the tortfeasor has settled with the claimant the UIM claim is just a dispute as to the amount owed, and the plaintiff must prove the claim just as in any other tort claim. Thus, referring to all UIM claims generally as "breach of contract" actions is a loose description if not an outright legal fiction.

In short, to the extent the goal of the law on this point is "reasonableness," it militates in favor of reversing the Court of Appeals rather than affirmance.

F. Insurance carriers draft policy language and determine company policy based upon Supreme Court precedent.

As discussed more extensively in the Appellant's Brief, *Brown v. State Auto*, 189 F.Supp.2d 655 (W.D.KY 2001), was the earliest reported case suggesting that any statute of limitations less than the MVRA's prescribed limitations period was unreasonable. Since then, insurance carriers have understandably and quite reasonably operated under the logical inference that a limitations period matching or exceeding the MVRA's limits is in fact reasonable. This inference was confirmed in the *thirteen years* since that decision, in which Kentucky trial and appellate courts have consistently upheld the limitations clause found in the State Farm policy. *Elkins v. Kentucky Farm Bureau Mut. Ins. Co.*, 844 S.W.2d 423 (Ky. App. 1992), one of the first cases dealing with the UIM statute of limitations, was decided in 1992. *Gordon, supra,* which effectively extended the limitations period from one year to a flexible two years, was decided just three years

later. *Brown* was then decided six more years later. For all intents and purposes, at that time, the matter was settled under Kentucky law. However, the Court of Appeals, *thirteen years* after *Brown*, now seeks to extend the statute of limitations – from two years after the accident or last payment of no-fault benefits to 15 years.

An illustration of the mischief that can result from reversal of well-reasoned and long-held insurance coverage law can be seen in an example from the State of Ohio. In *Scott-Pontzer v. Liberty Mut. Ins. Co.*, 710 N.E.2d 1116 (Ohio 1999), the Ohio Supreme Court, in a 5-4 decision, held that an employer's UIM policy provided coverage to an employee for damages received in an automobile accident that occurred both after hours and in a personal vehicle. Once that decision was issued, plaintiffs' attorneys immediately saw the opportunity to make claims on long-stale claims that fell within the new and unexpected limitations period. In response, insurance companies were forced to increase their reserves, and their premiums to customers, in order to account for uncertain and entirely new liabilities. Due to the turmoil caused by the original decision, it was expressly overruled by the Ohio Supreme Court in *Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256 (Ohio 2003).

Similarly, the Court of Appeals' novel interpretations of Kentucky case law will create an entirely new area of exposure for insurance carriers. Insurance companies have spent well over a decade determining the appropriate premiums to charge for automobile and UIM coverage and the appropriate reserves to allot for such coverage based upon well-established case law. The Court of Appeals' decision threatens to undo this by inserting uncertainty into an industry based upon the calculation, reduction and spreading of risk. The very real financial effects will be felt by not only the insurance companies

who write UIM coverage but also the citizens of the Commonwealth of Kentucky who purchase UIM to coverage.

III. CONCLUSION

In short, the Court of Appeals' ruling incorrectly interprets prior Kentucky case law, and would, if upheld by this honorable Court, have numerous adverse and unintended consequences on claimants, tortfeasors and insurance carriers. State Farm's period of limitations mirroring that of the MVRA is reasonable and enforceable. Further, the lengthening of the period of limitations will force parties to re-litigate issues of fact, create uncertainty for tortfeasors and carriers, and destabilize the insurance market in Kentucky. Because of this, the Court of Appeals' decision should be overturned.

Respectfully submitted,

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