COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO.: 2013-SC-000555-DG

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY

APPELLANT

VS.

LONNIE DALE RIGGS

APPELLEE

*** *** *** *** *** *** *** *** *** *** *** *** *** *** ***

BRIEF FOR APPELLEE, LONNIE DALE RIGGS

Submitted by:

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CERTIFICATE OF SERVICE

It is hereby certified that copies of this Appellee Brief were served via regular U.S. mail, postage prepaid this 3rd day of October 2014 upon: Hon. Ken Howard, Judge Hardin Circuit Court, Division II, Hardin County Justice Center, 120 East Dixie Avenue, Elizabethtown, Kentucky 42701; Samuel Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; David Klapheke, Boehl, Stopher & Graves, 400 West Market Street, Suite 2300, Louisville, Kentucky 40202; Kevin Burke, Counsel for Amicus Curiae, Kentucky Justice Association, 125 South Seventh Street, Louisville, Kentucky 40202; and Thomas Glassman, Counsel for Amicus Curiae Insurance Institute of Kentucky, Smith Rolfes & Skavdahl, Co., 300 Buttermilk Pike, Suite 324, Ft. Mitchell, Kentucky 41017

Timothy R. McCarthy
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INTRODUCTION

This case involves personal injuries received by Appellee Lonnie Riggs in a motor vehicle accident on August 26, 2008. Suit was filed in Hardin Circuit Court against the tortfeasor in August 2011. Appellee resolved his case against the tortfeasors insurance carrier. Tortfeasor's carrier paid their policy limit. Upon the tender of the policy limit, Appellee's counsel presented a Coots letter to Appellant State Farm Insurance in October 2011. Appellant State Farm waived subrogation against tortfeasor, and denied that Appellee was entitled to underinsured coverage benefits. Appellant conducted discovery and soon thereafter moved for Summary Judgment in Hardin Circuit Court. The Hardin Circuit Court granted Summary Judgment finding that the Appellant's contractual limitation was reasonable. On appeal the Kentucky Court of Appeals reversed and found that the contractual limitation provision was unreasonable holding the limitation was contra to established Kentucky Law. Appellant moved for discretionary review from the Supreme Court, and said motion was granted.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee moves this Court for oral argument. Oral argument would be helpful in answering any questions this court may have in regards to the issues presented.

STATEMENT OF POINTS & AUTHORITIES

APPENDIX

1. Gordon v. Kentucky Farm Bureau Insurance Company, Ky. 914 S.W. 2d 331 (1996)

2. Kentucky Farm Bureau v. Ryan, Ky. 177 S.W. 3d 797 (2005)

3. Brown v. State Auto Insurance, 189 F.Supp.2d 665 (2001)

4. Court of Appeals opinion

5. Law Review Article, When Does the Clock Start Ticking? A Primer on Statutory and Contractual Time Limitation Issues Involved in Uninsured and Underinsured Motorist Claims. 47 DRAKE L. Rev. 689.

STATEMENT OF THE CASE

Factually this case is not complex and the relevant facts are not disputed. This case concerns personal injuries received by the Appellant Lonnie Dale Riggs ("Appellant") in a motor vehicle accident on August 26, 2008. Appellant is a police officer with the City of Vine Grove in Hardin County, Kentucky. On August 26, 2008 he was injured by an automobile that was negligently operated by Phillip Richards ("Tortfeasor"). The accident occurred in Vine Grove, Kentucky. The Appellant was on the job when this accident occurred. The Appellant applied for and received Worker's Compensation benefits for this accident. Appellant received salary continuation benefits pursuant to his Worker's Compensation case, and therefore had no excess wage loss. Therefore, he was not eligible to receive any personal injury protection benefits from any motor vehicle insurer.

Appellant's initial counsel made demand upon the tortfeasor's insurance company, Allstate Insurance Company, for Appellee's personal injuries. Allstate denied the claim. Suit was then filed in Hardin Circuit Court by the Appellee against tortfeasor on August 5, 2010. Tortfeasor, through counsel, filed an answer to the Complaint denying that he was negligent in operation of his motor vehicle, and also stated that all claims asserted by the Appellee for economic loss were barred in whole or in part. Appellee's deposition was taken on October 13, 2010. Tortfeasor Richards' deposition was not taken at that time due to the very severe injuries he received in the subject matter motor vehicle accident. Appellee treated for an extended period of time due to his injuries which included surgery.

After discovery was conducted, Appellee moved for a trial date, and simultaneously, made demand upon tortfeasor's counsel for his policy limits of $100,000.00 through his insurer Allstate Insurance. Tortfeasor, through counsel, made an initial offer of $70,000.00.

On August 26, 2011 the trial court assigned a trial date and allowed the Appellee to amend his complaint to include an underinsured claim against Appellee's insurance carrier, State Farm. On October 31, 2011 Appellee resolved his personal injury claim against tortfeasor as Allstate Insurance finally tendered Richards' $100,000.00 liability policy limit.

Appellee's counsel presented a Coots letter to Appellant. Appellant waived subrogation against tortfeasor and Appellee accepted the $100,000.00 policy limit from tortfeasor's carrier Allstate Insurance in November, 2011. Appellant filed an answer denying they owed UIM benefits to the Appellee on September 21, 2011. Written discovery proceeded between Appellant and Appellee. On December 2, 2011 Appellant filed a Motion for Summary Judgment stating that the Appellee's cause of action against Appellant State Farm is barred pursuant to a contractual limitation clause in the policy. This limitation states:

> **2. Suit against us.**
>
> There is no right of action against us;
>
> d. Under uninsured motor vehicle coverage and underinsured motor vehicle coverage unless such action is commenced no later than (2) years after the injury, or death, or the last basic reparation payment made by any reparation obligor, whichever later occurs.

Appellant maintains that this language is practically identical to the language in the Kentucky Motor Vehicle Reparation Act, KRS 304.39 – 230 (6), which of course, is based in tort.

Appellee filed a Motion in Opposition to the Summary Judgment arguing that the

Appellee's contractual limitation was void. By order dated February 6, 2012 the Hardin Circuit Court entered Summary Judgment in favor of Appellee, relying upon an unreported federal case, that being *Pike v. Government Employees Insurance Company*, 174 Fed. Appx. 311, 2006 WL 890147 (C.A. 6 Ky.)

Appellee appealed the Summary Judgment to the Kentucky Court of Appeals. In their opinion dated July 19, 2013 the Kentucky Court of Appeals reversed the Grant of Summary Judgment. In its opinion at page 7-8 the Court of Appeals declined to follow the rationale of *Pike v. GEICO*, supra. They held that the holding in *Pike* ran contra to the Kentucky Supreme Court's decision in *Gordon v. Kentucky Farm Bureau Insurance Company*, Ky. 914 S.W. 2d 331 (1995). Specifically, at page 8 they held as follows:

> However, in *Gordon*, our Supreme Court found it illogical to adapt a general rule which would require a plaintiff to sue his own insurer before discovering whether or not the tortfeasor is in fact an uninsured motorist. A contractual limitation clause that parrots the language of KRS 304.39 230(6), like the one in *Pike* and in this case, might very well require the insured to do just that – to bring suit against his insurer before discovering whether the tortfeasor is uninsured or underinsured.

Also, in the Court of Appeals opinion, they refused to follow an unreported case that Appellant still relies upon as authority, that being *Perry v. Kelty*, infra. Ultimately, the appeals court found that the contractual limitation at issue in this case is unreasonable, and the fifteen year period for commencing contract claims applies.

Appellant moved for discretionary review which of course, was granted by this Court. Again they argue that their two year contractual limitation provision is reasonable and enforceable relying upon *Pike v. GEICO*, supra and *Perry v. Kelty*, infra

The Court of Appeals opinion in this case is correct and should be affirmed. Appellant's arguments are without merit and run contrary to both Kentucky Case Law and Kentucky Statutory Law, that being the underinsured motorist statute KRS 304-39.320.

The Kentucky Justice Association has filed an Amicus brief in this case. Appellee adopts and incorporates that brief in this appeal.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT APPELLANT'S CONTRACUAL LIMITATION IS UNREASONABLE AND THEREFORE VOID.

The Court of Appeals in this case correctly held that Appellant's contractual limitation for filing a UIM claim that parrots the tort statute of limitation, set forth in KRS 304.39-230(6) to be unreasonable. In its opinion the Court of Appeals relied in part upon two cases from the Supreme Court, *Gordon v. Kentucky Farm Bureau Insurance Company*, Ky. 914 S.W. 2d 331 (1996) and *Kentucky Farm Bureau v. Ryan* Ky. 177 S.W. 3d 797 (2005).

The Court of Appeals opinion is correct. While the Appellee in this case agrees with other briefs filed in this case that claim our Supreme Court has not "explicitly" held when exactly an UIM case "accrues" (which will be dealt with later on in this brief), it appears Kentucky Law has "implicitly" taken the position that a UIM case accrues at the time of settlement with the tortfeasor. This is supported by both case law and the underinsured statute, KRS 304.39-320. Case law will be addressed first.

A. Kentucky Case Law has long held that a contractual limitation of two years in the Appellant's policy is unreasonable and invalid under Kentucky Law.

Again, the Court of Appeals correctly held that the Appellant's contractual limitation is void. In coming to this conclusion, the Court relied upon well-established Kentucky Law. The Court of Appeals discussed the line of cases beginning with *Elkins v. Kentucky Farm Bureau* Ky. App. 844 S.W. 2d 423 (1992). Of course, in the *Elkins* case, the Court of Appeals held that a statute of limitations restriction and a written contact may be enforceable as long as it is reasonable. However, as the Court of Appeals correctly pointed out, since *Elkins* has been decided, the Kentucky Supreme Court has decided two cases that clearly state, in regards to underinsured coverage, it is a first party contractual action that is governed by the fifteen year statute of limitations rather than a tort statute of limitations as set forth in the Kentucky Motor Vehicle Reparation Act, KRS 304.39-230(6).

The first of these cases is *Gordon v. Kentucky Farm Bureau Insurance Company*, Ky. 914 S.W. 2d 331 (1996). In the *Gordon* case, the Supreme Court dealt with an insured filing an action for injuries received in a motor vehicle accident caused by an uninsured driver more than two years after the date of the accident. In *Gordon*, Kentucky Farm Bureau had a contractual limitation in its policy stating all claims must be brought against them within one year. In *Gordon*, the Court of Appeals held that any uninsured motorist claim must be brought within the two year period as provided by the Kentucky Motor Vehicle Reparation Act. The Court of Appeals relied upon *Elkins v. Kentucky Farm Bureau*, supra.

Once *Gordon* reached the Supreme Court, the Court held the contractual limitation was unreasonable. The *Gordon* Court held that uninsured coverage is first party coverage, and an action for uninsured benefits is contractual, not tort. Therefore, the Court found that the tort statute of limitations in the Kentucky Motor Vehicle Reparation Act did not apply. At page 332 of the Supreme Court in *Gordon*, the Court stated as follows:

> In the present case, the Court of Appeals, referring to the dicta in *Elkins*, specifically held that the two year statute in the MVRA does apply. This Court agrees with Judge Huddleston's dissent, in which he notes that KRS 304.39-230(6) does not purport to limit actions on contracts, but by its very terms limits "an action for tort liability not abolished by KRS 304.39-060." This Court finds it illogical to adopt a general rule which would require a plaintiff to sue his own insurer before discovering whether or not the tort-feasor is in fact an uninsured motorist.
>
> Neither the result nor the rationale of Elkins requires application of the of the MVRA statute of limitations to an action on a first party insurance contract, nor is it necessarily controlling that the alleged tort-feasor is not a party to the action. (Id. at 332) *emphasis added.*

Accordingly, the Supreme Court in *Gordon* reversed the Court of Appeals opinion that relied upon *Elkins* and held that the fifteen year written contract statute of limitation, KRS 413.090 applied for actions dealing with first party coverage. *Gordon* is attached as Exhibit 1 in the Appendix.

The Kentucky Supreme Court has decided a second case directly on point with this issue, *Kentucky Farm Bureau v. Ryan*, Ky. 177 S.W. 3d 797 (2005). In this case *Ryan* filed suit for underinsured coverage. The Court held that a suit to recover UIM coverage was a direct action against the UIM carrier, and the action sounded in contract. At page 801 of this opinion the Supreme Court stated as follows:

> As this Court has stated with regard to UM coverage, it is first party contractual insurance that "must be honored even if the tort-feasor cannot be identified." *Gordon v. Kentucky Farm Bureau Insurance Co.*, 914 S.W.2d 331, 332 (Ky.1995) The distinction is further illustrated by the fact that the fifteen-year statue of limitations governs the bringing of these contractual actions rather than the tort statute of limitations set out in the Motor Vehicle Reparations Act, KRS 304.39-230(6).
>
> Appellee's action against KFB was based in contract, seeking UIM coverage for damages that exceeded the payments by

> Ashby's liability carrier. This is not a tort case against Ashby because Appellees have previously released him in exchange for his insurer's payment of policy limits. *Id. (emphasis added)*

Therefore, it is clear based upon the above cases that the Kentucky Supreme Court has held that uninsured and underinsured cases sound in contract, not tort, and the tort statute of limitations pursuant to the Kentucky Motor Vehicle Reparation Act does not apply. These direct actions, as the *Ryan* court so clearly stated, are governed by the fifteen year statute of limitations for written contracts, KRS 413.090. *Ryan* is attached as Exhibit 2 in the Appendix.

The rule in *Gordon* and *Ryan* certainly make sense. The insurance policy is a contract in writing therefore the fifteen year statute applies. The action against the insurer is a direct action according to *Ryan*, and does not sound in tort. Therefore, the motor vehicle reparation statute of limitation does not apply. The Courts logic for this rule is sound too. As the Court in *Gordon* stated, it is illogical to adopt a rule which would require an insured to sue his own insurer before discovering whether the tortfeasor is in fact uninsured, or in this case underinsured. Keeping in mind the tortfeasor's carrier Allstate did not tender their limits until October 2011, an underinsured claim was not ripe until the policy limit offer was made.

Furthermore, while a federal case may be cited, of course, Kentucky Courts shall not be bound by federal cases interpreting Kentucky law. See *Thornton v. Carmeuse Lime Sales Corporation* Ky. App. 346 S.W.3d 297 (2000). One of these cases is directly on point. It is a published opinion from the Western District of Kentucky, *Brown v. State Auto Insurance*, 189 F.Supp.2d 665 (2001) (Attached as Exhibit 3 in the Appendix). The *Brown* case dealt with underinsured coverage as in this case. The facts in *Brown* are as follows:

On June 23, 1996, the Plaintiff Brown was injured in a motor vehicle accident. On October 1998, Brown settled her claim against the tortfeasor for the policy limits. Demand was

sent to the underinsured carrier, State Auto, who refused to pay policy limits. Suit was then filed by Brown against her underinsured carrier, State Auto, on March 30, 2001 which was more than four (4) years after the motor vehicle accident had occurred and more than two (2) years after Brown had settled her claim against the tortfeasor for her policy limits. State Auto's policy contained a contractual limitation for filing suit that is identical to the Appellant's in this case. The Federal Court discussed both *Elkins* and *Gordon*, and at page 670 in the opinion, the Court stated as follows:

> The Court believes that a fair reading of Gordon demonstrates three key points: (1) that the MVRA does not govern contract-based actions seeking underinsured motorist benefits: (2) that any contractual limitations period must be reasonable; and (3) that it is illogical-in other words, unreasonable, to require a plaintiff to sue her own insurer for uninsured motorist benefits before being required discover whether or not the torfeasor is in fact an uninsured motorist. This court believes that the Kentucky Supreme Court would not make any distinction between uninsured motorist and underinsured motorist in this context, and would likewise find it unreasonable to require an insured to sue her insurer for underinsured motorist benefits prior to being required to sue the tortfeasor, and thus to determine whether or not he tortfeasor is in fact underinsured.
>
> According, the Court finds that the two-years contractual limitation on bringing underinsured motorist benefits claims is unreasonable and therefore invalid. (*Emphasis added*)

The Court in *Brown* correctly applied the Kentucky Supreme Courts opinion in *Gordon*, keeping in mind that the Supreme Court decided *Ryan* in 2005 which directly stated this principle. In the *Brown* case, suit was not filed until four years after the wreck occurred, and well after two years when the Plaintiff settled with tortfeasor. In this case much less time is involved. Applying this logic to the case at bar, and the well settled principles of *Gordon* and *Ryan*, clearly the two year contractual limitation to file suit as set forth by the Appellant is unreasonable.

The Appellant relies on an unreported federal case as authority, that being *Pike v. Government Employees Insurance Company*, 174 Fed. Appx. 311 (2006) WL 890147 (C.A. 6 Ky.) In the case at bar the Court of Appeals discussed *Pike* at length and declined to follow *Pike* as it felt it was contrary to the Supreme Court's decision in *Gordon.* At page 8 of the Court of Appeals opinion they held as follows:

> In *Pike*, the sixth circuit found the contractual limitation unreasonable because inter alia, "the time limit in which the claim for UIM benefits must be brought as exactly the same time as that in which suit must be filed against the tortfeasor" 174 Fed. Appx. at 316. State Farm adopts and forcefully reiterates this logic. However, in *Gordon*, our Supreme Court found "it illogical to adopt a general rule which would require a Plaintiff to sue his own insurer before discovering whether or not the tortfeasor is in fact an uninsured (or underinsured) motorist." 914 S.W. 2d 332 *(emphasis added)*

> A contractual limitation clause that parrots the language of KRS 304.39-230(6), like the one in *Pike* and in this case, might very well require the insured to do just that – to bring suit against his insured before discovering whether the tortfeasor is uninsured or underinsured. ...While the contractual limitation at issue here and in *Pike* does not require the injured party to sue his/her UIM carrier prior to suing the tortfeasor, the limitation has the possibility of compelling an injured party to file a protective suit against the carrier before the two years lapses, even though a prior suit against the tortfeasor might not yet have yielded discovery that would disclose any need to pursue UIM coverage, i.e. "before discovering whether or not the tortfeasor is in fact an uninsured (or underinsured) motorist." *Gordon*, 914 S.W. 2d 332. To require the filing of a protective lawsuit is not only unreasonable, it is a waste of legal and judicial resources. See *Brown*, 189 F. Supp. 2d 671 (declaring "it unreasonable to require an insured to sue her insurer for uninsured motorist benefits prior to being required to sue the tortfeasor, in thus to determine whether or not the tortfeasor is in fact uninsured"). It could also create an issue under CR11.

Thus, the Court of Appeals correctly held that the unpublished federal decision in *Pike* did not accurately follow well established Kentucky Law and refused to follow it.

The Appellant also cites an unreported Court of Appeals case, *Perry v. Kelty*, 2011-CA-000160-MR 2012 WL1556311 (Ky. App. May 4, 2012) The *Perry* Court summarily stated that "this Court has previously held a two year limitation of this nature for suits against an uninsured carriers not unreasonable." Again, the Court of Appeals correctly held that *Perry* should not be followed for three reasons. First, it was designated not to be published. Second, the issue in *Perry* was not the reasonableness of the limitations, but whether a genuine issue of material fact existed concerning the insured's notice and receipt of the new insurance policy along with its amendatory endorsement limitations. Third, and most important, the Court of Appeals found that the dicta in *Perry* that relied upon *Elkins* did not accurately interpret it. *Elkins* simply held that any period less than the two year period of KRS 304.230(6), including the one year period at issue in that case, must necessarily be unreasonable, it did not hold that a two year period was necessarily reasonable. The Court of Appeals opinion is attached as Exhibit 4.

The Court of Appeals correctly held that our Supreme Court takes the position that UIM claims are contractual, therefore the KMVRA statutory limitation does not apply. Since the contractual limitation at issue in this case parrots the KMVRA tort limit, it was found to be unreasonable, and that holding is sound. Statutory law, that being the UIM statute, will now be addressed.

B. Pursuant to the Underinsured Motorist Statute, KRS 304.39-320, an underinsured cause of action is not created until a liability settlement or judgment has been reached.

The underinsured motorist coverage statute 304.39-320 states in pertinent part:

> (2) Every insurer shall make available upon request to its insureds underinsured motorist coverage, whereby subject to the terms and conditions of such coverage not inconsistent with this section the insurance company agrees to pay its own insured for such uncompensated damages as he may recover on account of injury due to a motor vehicle accident because the judgment recovered against

> the owner of the other vehicle exceeds the liability policy limits thereon, to the extent of the underinsurance policy limits on the vehicle of the party recovering.
>
> (3) If an injured person or, in the case of death, the personal representative agrees to settle a claim with a liability insurer and its insured, and the settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an underinsured motorist claim, then written notice of the proposed settlement must be submitted by certified or registered mail to all underinsured motorist insurers that provide coverage.... (*Emphasis added*)

In this case the above language in the underinsured motorist coverage statute is extremely important for two reasons.

First, despite the fact this appeal turns on underinsured coverage, the Appellant does not cite the statute at any place in their brief. The reason for this is simple, and that is their contractual limitation is clearly inconsistent with the above language. The underinsured motorist statute does not give an underinsured statutory limitation of two years from the date of the last no fault payment. According to paragraph (3), it appears an uninsured motorist claim is "created" when the injured person agrees to settle a claim with a liability insurer and its insured, and the settlement does not fully satisfy the claim for personal injuries. In this case there was no agreement to settle until October 31, 2011 when Appellant resolved his personal injury claim for the policy limits of the tortfeasor. According to the clear language of the statute this is when an underinsured claim is "created". The UIM statute only allows contractual terms and conditions if they are "not inconsistent" with the UIM statute. Clearly a contractual limitation of two years in this case is inconsistent as the statute states the claim is not created until a settlement is reached. As stated clearly in the Amicus brief filed by the Kentucky Justice Association, contrary to Kentucky's UIM statute, Appellant State Farm seeks to "create" an UIM action tied to the KMVRA tort limitations period instead of the date of the liability settlement or judgment. This

argument is plainly at odds with the statutory language in sub-section three of the underinsured motorist coverage act.

While the underinsured motorist coverage does not specifically state a "drop dead" date as to when the underinsured limitation clock start ticking, clearly it contemplates that a settlement must be reached first in order for an underinsured claim to be created or accrued. The Supreme Court in this case certainly has the option of electing to use the statutory limitation, that being fifteen years as a statute of limitations for an underinsured claim, as it sounds in contract.

However, if in fact the Supreme Court in this case does decide that some contractual limitation may be reasonable, the issue will become at precisely what time does the clock start ticking to bring an underinsured claim. As previously stated, it appears under Kentucky Law the most consistent approach for this court to use is the date that an official settlement is reached with the tortfeasor. However, the vast majorities of jurisdiction in this country hold that the clock does not start ticking on an UIM claim, thus the claim does not "accrue", until there is an actual breach of the underinsured contract.

II. THE VAST MAJORITY OF JURISDICTIONS HOLD THAT AN UIM CLAIM ACCRUES FROM THE DATE OF BREACH OF THE UNDERINSURED CONTRACT, AND REFUSES TO ENFORCE SHORTER CONTRACTIONAL LIMITATIONS.

Kentucky Law has long held that a contract action accrues upon breach of the contract. See *Hoskins Administrator v. Kentucky Ridge Coal Company*, 305 S.W. 2d 308 (311) Ky. 1957. In *Kentucky Farm Bureau v. Ryan*, supra, our Supreme Court has held that an uninsured motorist action, although statutorily created, is still a contract action. It is axiomatic that Kentucky has long recognized breach of contract as the trigger for accrual of a contact action, beginning with

Payne v. Smith 7J.JMARSH 500 (1832). Therefore the statute of limitation in Kentucky does not begin to run against the Plaintiff until his cause of action accrues.

The vast majority of jurisdiction in this country hold that UIM claims "accrue" at the date of the breach of the underinsured contract. This is outlined in an excellent law review article, that being *When does the Clock Start Ticking? A primer on statutory and contractual time limitation issues involved in uninsured and underinsured motorist claims*, 47 Drake Law Review 689. (Said article attached as Exhibit 5 to this brief). As outlined in this article, there are three different approaches used in jurisdictions in this country for determining the UIM accrual date that being; (1) The date the insurance company allegedly breaches the insurance contract by denying the UIM benefits, (2) the date of the accident, or (3) the date that the insured settles with or obtains judgment against the tortfeasor thereby exhausting the limits of the tortfeasors liability. As this law review states, "Almost all jurisdictions now hold that the statute of limitations for actions based on UM/UIM cases is the date the UM/UIM contract is breached." These jurisdictions have held that liability for benefits arises from contractual agreement between the two parties – it is the breach of the agreement, not the underlying tort that gives rise to the claim. See *American States Insurance v. LaFlam*, 69 A. 3d 831 (R.I. 2013) (collected cases).

As a matter of fact, in the absence of legislation setting a date, only two states in the entire country, that being Georgia and South Carolina, still apply the statutory limitation period for tort claims in regards to a UIM claim. See *Cal. Ins. Code* 11580.2(i)(1) (West 1998).

In the Appellant's brief at page 14, they argue that finding State Farm's limitations provision to be enforceable would be consistent with courts and other jurisdictions. Again this is patently incorrect. The case that they cite, *Robinson v. Allied Property and Casualty Insurance Company* 816 N.W. 2d 398 (Iowa 2012), is not applicable because the Iowa Supreme Court found that the

Iowa legislator had decided this issue by setting the statute of limitations in an UIM context. Obviously, this is not the case in Kentucky. In a tort claim it certainly makes sense to run the statute of limitations from the day that the Plaintiff received bodily injury. However, the same cannot be said for the UIM claim. The date of accident may set the chain of events in motion, but the defining event in an UIM context is when the carrier denies the insureds claim for benefits. That sets the issue between the UIM carrier and their insured, the injured party.

Appellant's argument that a longer statute of limitations would make it prejudicial for them or prejudice them, or have the claim become "stale" is simply unfounded. Insurance companies are not forced to stand by and do nothing in regards to an underinsured claim. They absolutely have the option of investigation and obtaining documents to help them understand the claim being presented against them, or that could be presented against them. The Appellant's prejudice claim has been rejected by all the jurisdictions who hold this majority rule. As the Court in *LaFlam*, supra stated:

> When are hard pressed to envision a scenario in which an insured who is in need of benefits and who has a viable UM/UIM claim... would delay asserting the claim and remain less than fully compensated any longer than necessary.

III. APPELLANT'S "SUITS AGAINST US" POLICY LANGUAGE IS AMBIGUOUS.

In their brief Appellant argues that the "suits against us" clause in their policy should be applied to limit the contractual action however, a reading of this shows that the key word, that being "injury", is undefined and therefore ambiguous. Of course, in construction of insurance policies exclusions, like the policy limitation provision, are to be narrowly interpreted and all questions resolved in favor of the insured. *St. Paul Fire and Marine Insurance Company v. Powell-Walton-Milward, Inc.* 870 S.W. 2d 223-227 (Ky. 1994). An ambiguous policy is to be construed

against the drafter so as to effectuate the policy of indemnity. See *Bituminous Casualty Corp v. Kenway Contracting, Inc.*, 633, 638 (Ky. 2007). Looking at the suits against us provision, the key word that being "injury" is undefined. It is interesting to note that the Appellant State Farm's policy did not track the language of GEICO in *Pike v. Government Employees Insurance Company*, supra. Appellant argues that injury means bodily injury or personal injury applicable to torts. However, again injury is not defined. Kentucky Law has long held that a UIM claim is a contract action not a tort action. The clear meaning of injury in regards to a contract action means breach. There can be no other definition as Appellee was injured by another motorist whose car crossed the center line and struck Appellee's vehicle. State Farm caused no "bodily injury" to Appellee. The only injury they could inflict upon Appellee is breach of the underinsured contract, which is exactly what happened. Therefore, in looking at the Appellant's own language, the only reasonable interpretation for injury in this scenario means breach of the underinsured claim. Again as previously stated Appellee amended his Complaint to add Appellant as a Defendant in this action well before two years from the date of Appellant's wavier of the Coots notice, and refusal to pay the UIM benefits.

IV. APPELLANT'S PUBLIC POLICY REASONS FOR ENFORCING THE CONTRACUTAL LIMITATION PERIOD ARE SIMPLY UNFOUNDED.

Appellant claims that applying the fifteen year statute of limitations would likely result in duplicative litigation and be a waste of party and judicial resources. As previously argued, practically every court in the country that has addressed this argument has rejected it. In the majority of the courts that hold that an underinsured claim accrues when a breach occurs have all rejected this argument as simply unfounded. What severely injured person would wish to wait

years down the road before being compensated for unpaid medical expenses, unpaid wages and/or other pain and suffering?

Appellant also argues that pre-suit tolling agreements would remedy this matter. That argument is simply not based in reality. There is no law, statute, case law, or policy provision for that matter which states that pre-suit tolling agreements will be granted. There is simply no guarantee that any insurer would agree to the tolling.

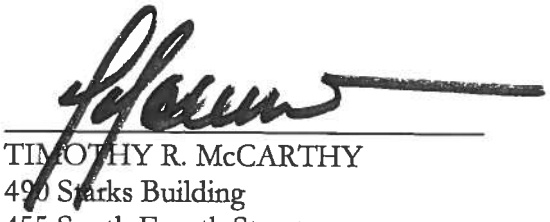
The Appellant argues potential prejudice however, nowhere are any facts, data or any hard evidence showing that a longer limitation period would in fact "prejudice" them. This same argument has been rejected in practically every other state that has considered it. Furthermore, who is the only party that would be helped by a shorter contractual limitation? Of course, that would be the insurance company, and not injured individuals. As in this case, the Appellee was severely injured and his treatment lasted several years. A shorter limitations rule only helps the insurance companies deny legitimate underinsured claims from the severely injured persons who paid for this coverage and need it the most. If in fact public policy is the paramount issue here, clearly the public policy resides in favor of the injured insureds that are in need of the coverage that they already paid for.

In conclusion, Appellee moves this Court to affirm the decision of the Court of Appeals. Appellant's own contractual limitation is ambiguous as the term injury is not defined. The Appellant's contractual language parrots the KMVRA tort statute of limitation and Kentucky Law has held that a contractual limiting parroting the tort statute of limitations in an UIM claim is unreasonable and therefore void. Appellee moves this Court to adopt the accrual date of an UIM claim as the date of official settlement with the tortfeasor, or the majority rule of when the

UIM contract is breached. This would give a bright line approach as to when the clock starts ticking in regards to the statute of limitations for an UIM claim.

Respectfully submitted,

NUTT LAW OFFICE



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