**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| ERNESTO MARRA and JOANNE MARRA, wife, Plaintiffs, | ) | |
| v. | ) | |
| ROBIN K. WILSON and NEW CASTLE COUNTY, Defendants, | ) | C.A. No. 00C-08-019 RRC |
| and | ) | |
| DELAWARE INSURANCE GUARANTY ASSOCIATION, Intervenor. | ) | |

Submitted: December 6, 2002
Decided: February 20, 2003

# MEMORANDUM OPINION

**UPON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT. DENIED.**

**UPON INTERVENOR DELAWARE INSURANCE GUARANTY ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT. GRANTED.**

L. Vincent Ramunno, Esquire and Glenn C. Ward, Esquire, Ramunno, Ramunno & Scerba, P.A., Wilmington, Delaware, Attorneys for Plaintiffs.

Michael L. Sensor, Esquire, Law Offices of James T. Perry, Wilmington, Delaware, Attorney for Intervenor Delaware Insurance Guaranty Association.

COOCH, J.

# I. INTRODUCTION

Before the Court are two competing cross-motions for summary judgment which ask the Court to decide on a stipulated set of facts the narrow issue of how a statutorily-mandated monetary credit is to be applied when a tortfeasor's source of insurance has been declared insolvent before liability has been determined; this issue is apparently a matter of first impression in the Delaware courts. Ernesto Marra and his wife Joanne ("Plaintiffs") urge the Court to apply the credit ($100,000 recovered from their own insurer) to the total amount of damages that they may recover, while intervenor Delaware Insurance Guaranty Association ("DIGA") urges the Court to apply that credit to its statutorily-proscribed maximum potential exposure of $300,000.[1] After analyzing the relevant sections of Delaware's Insurance Guaranty Association Act ("the Act" or "the Insurance Guaranty Act") together with caselaw from other jurisdictions and treatment in the relevant treatises, the Court has determined that the $100,000 credit should be applied to DIGA's $300,000 liability cap. The Court therefore denies Plaintiffs' Motion for Summary Judgment and grants DIGA's Motion for Summary Judgment.

[1] The parties have advised the Court that all other claims by and between the parties have been resolved.

# II. FACTS AND PROCEDURAL HISTORY

The Stipulated Facts for purposes of these cross-motions follow:

1. This case arises out of an automobile accident which occurred on September 13, 1999 in which a vehicle operated by plaintiff Ernesto Marra collided with a vehicle operated by defendant Robin Moore [nee Wilson] and owned by defendant New Castle County while defendant Moore was in the course and scope of her duties as a New Castle County paramedic.
2. Plaintiff Ernesto Marra sustained significant bodily injuries as a result of this accident.[2] The amount of his damages, if liability were to be favorable to him, would likely be in excess of the available insurance coverage.
3. At the time of the accident, defendant New Castle County was insured by a liability policy issued by Reliance Insurance Company ("Reliance") with effective dates of October 1, 1998 to October 1, 1999. The Reliance policy provided liability limits of $1,000,000.00 per occurrence, with New Castle County assuming a $250,000.00 self-insured retention.
4. By order of the Commonwealth Court of Pennsylvania dated October 3, 2001, Reliance was declared insolvent. Accordingly, Reliance's obligations were assumed by intervenor DIGA in accordance with the Delaware Insurance Guaranty Association Act…[title 18, sections 4201-4223 of the Delaware Code].
5. At the time of Reliance's insolvency, plaintiffs had not resolved their claim against New Castle County. Thus, pursuant to…[title 18, section 4212], which requires all persons having claims against DIGA to exhaust all forms of secondary insurance coverage before submitting their claims to DIGA, plaintiffs filed a claim against State Farm Mutual Automobile Insurance Company ("State Farm"), their Uninsured Motorist ("UM") carrier.
6. State Farm has tendered, and plaintiffs have accepted, its $100,000.00 UM limits. New Castle County subsequently tendered its $250,000.00 self-insured retention to plaintiffs.

[2] Plaintiffs averred (but the parties did not stipulate to) injuries to Mr. Marra consisting of a "fractured skull, neck, chest, loss of right eye vision, nerve damage to right side of face, collapsed lung, nine broken ribs, [and a ] heart punctured in two places…[,]" Compl. ¶ 7, and medical expenses (as of the time of the filing of the Complaint) in the amount of approximately $900,000. Compl. ¶ 8.

7. Plaintiffs have one "covered claim" against DIGA as defined by…[title 18, section 4205(6)].

8. Pursuant to…[title 18, section 4208], DIGA's liability is limited to $300,000 per claimant on a covered claim.[3] However…[section 4212(a)] provides as follows:

> Any person having a claim covered under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim shall be required to first exhaust the rights under such policy. Any amount payable on a covered claim under…[the Insurance Guaranty Act] shall be reduced by the amount of any recovery under such insurance policy.

DIGA has agreed that the value of plaintiffs' claim is in excess of the available insurance coverage. DIGA, however, has taken the position that…[section 4212(a)] entitles it to a credit against its statutory maximum of $300,000.00 in the amount of $100,000.00, being the amount plaintiffs were paid by State Farm under their UM policy, such that its maximum obligation to plaintiffs is $200,000.00. Therefore, DIGA has offered plaintiffs $200,000.00 in full settlement of their claim, which plaintiffs have rejected.

[9.] The issue to be presented to the Court, based upon the stipulated facts as set forth above, is whether DIGA is entitled to a credit against its maximum obligation of $300,000.00 in the amount which plaintiffs were paid by State Farm [or whether that amount is deducted from Plaintiffs total damages, thereby setting DIGA's limit at its statutory maximum, $300,000].[4]

## III. CONTENTIONS OF THE PARTIES

Plaintiffs argue that title 18, section 4212(a) of the Delaware Code is ambiguous because it does not explicitly reference DIGA's monetary exposure limit and that the Court should therefore hold that the $100,000

[3] Title 18, section 4208(a)(1)(iii) of the Delaware Code provides that DIGA's obligations vis-à-vis "valid covered claims existing prior to [an] order of liquidation of the insolvency" of an insurer "shall be satisfied by paying to the claimant an amount not exceeding $300,000…."

[4] Stip. Facts and Br. Schedule (Dkt. #65).

credit resulting from State Farm's tender of its policy must be deducted from the Plaintiffs' damages, and not from DIGA's $300,000 statutorily-proscribed maximum potential obligation.

In support of their argument, Plaintiffs rely upon the Delaware Supreme Court's language in Hurst v. Nationwide Mutual Insurance Company[5] that "uninsured [motorist] coverage shall not be undercut by restrictive policy provisions, unless such restrictions are specifically authorized by statute";[6] Plaintiffs contend "there is no language in [section] 4212 that expressly requires that the calculation of any credit be limited to the maximum limit…set forth in [section] 4208, rather than a[ny] damages award[ ]"[7] and that therefore "this Court should construe [s]ection 4212(a) as the Hurst Court construed [s]ection 3902 and hold that DIGA is only entitled to setoff against…total damages [recovered]."[8]

[5] 652 A.2d 10 (Del. 1995) (en banc) (holding that under Delaware's uninsured motorist "anti-stacking" statute, title 18, section 3902(c), any reduction from an insurer's liability for "other insurance" payments made to a claimant should be made from the total amount of a claimant's damages recovered from the tortfeasor).

[6] Hurst, 652 A.2d at 14 (citation omitted).

[7] Pls.' Mot. for Summ. J. ¶ 4.

[8] Id. ¶ 5.

Additionally, Plaintiffs cite language from Witkowski v. Brown[9] to the effect that the Insurance Guaranty Act "was intended to protect the public from nonpayment of claims due to the insolvency of [an] insurer"[10] as support for their contention that DIGA should place injured parties "in the same position had the carrier continued to do business," *i.e.*, a payment in this case of $300,000.[11] Plaintiffs contend that this result is justified "given the remedial nature of the [Insurance Guaranty] Act and given the fact that [s]ection 4212 is ambiguous regarding the method of calculating the credit owed[ ][.]"[12]

In contrast, DIGA "maintains that it is entitled to a credit in the amount of $100,000.00 against its statutory maximum liability of $300,000.00[ ] such that its obligation to [P]laintiff[s] is limited to $200,000.00"[13] DIGA maintains that "under no circumstances would [it] be

[9] 576 A.2d 669 (Del. Super. Ct. 1989) (holding that a plaintiff who had settled a claim with his insurer for less than the total amount of the uninsured motorist coverage available under his policy had failed to "exhaust" the coverage available and therefore any claims against DIGA were barred).

[10] Witkowski, 576 A.2d at 671.

[11] Pls.' Mot. for Summ. J. ¶ 7.

[12] Id.

[13] DIGA's Mot. for Summ. J. ¶ 4.

obligated to pay the full value[ ]"[14] of Plaintiffs' claim because its obligation is statutorily capped (thereby negating any contention that Plaintiffs' total amount of damages is the starting point of DIGA's potential liability), and that the Hurst decision on which Plaintiffs rely does not apply here because "DIGA…is not attempting to assert a credit against plaintiffs' UM proceeds…."[15] DIGA characterizes the effects of the Insurance Guaranty Act as providing a "modicum" of recovery, and argues that the Act was not designed to put an injured party in the position they would have been in had other potential insurance sources not dissipated.

In support of its arguments, DIGA cites judicial decisions from foreign jurisdictions, chiefly the Superior Court of Pennsylvania's opinion in Blackwell v. Pennsylvania Insurance Guaranty Association,[16] which DIGA argues "is on all fours with the instant matter…."[17] DIGA contends that

[14] DIGA's Br. in Supp. of Mot. for Summ. J. at 13.

[15] Id. at 8.

[16] 567 A.2d 1103 (Pa. Super. Ct. 1989) (holding that the monetary amounts an injured automobile passenger recovered from her own and from the driver's uninsured motorist carriers would be deducted from the statutorily-proscribed $300,000 maximum payout limit of the Pennsylvania Insurance Guaranty Association).

[17] DIGA's Br. in Supp. of Mot. for Summ. J. at 9.

these foreign decisions, "with fact patterns identical or similar to the one at bar, have [all] agreed with DIGA's position.…"[18]

DIGA further argues that the entirety of section 4212 itself supports a finding in its favor. As DIGA summarizes, section 4212 "provides further limitations on recovery against [it] [other than those found in 4212(a)] to the extent there is other available insurance coverage[ ],"[19]such limitations including sections 4212(b)[20] and 4212(c).[21]

## IV. STANDARD OF REVIEW

Summary judgment is granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[22] Where there are cross-motions for summary judgment, as here, "the parties implicitly concede the absence of material factual disputes and acknowledge the sufficiency of the record to support their respective

[18] DIGA's Mot. for Summ. J. ¶ 6.

[19] DIGA's Br. in Supp. of Mot. for Summ. J. at 6 n.2.

[20] Title 18, section 4212(b) of the Delaware Code provides that "[a]ny person having a claim which may be recovered under more than 1 insurance guaranty association or its equivalent shall seek recovery first from the association of the place of residence of the insured…."

[21] Title 18, section 4212(c) of the Delaware Code provides that "[a]ny person having a claim or legal right of recovery under any governmental insurance or guaranty program which is also a covered claim shall be required to exhaust the rights under such program prior to recovery under…[Delaware's Insurance Guaranty Act]."

[22] SUPER. CT. CIV. R. 56(c); Burkhart v. Davies, 602 A.2d 56 (Del. 1991).

motions."[23] Thus disposition of the current motions requires the Court to apply the law to those stipulated facts of record.

## V. DISCUSSION

In this case of apparent first impression, the Court must determine how the credit that DIGA receives from monetary payouts by other insurance sources is applied. No Delaware legislative history or Attorney General or Insurance Commissioner opinions appear to be on point. Nonetheless, and as indicated by DIGA in its motion, Pennsylvania courts have interpreted their insurance guaranty act's very similar provision as indicating that any insurance payout credit should be applied to reduce a guaranty association's statutory liability, and not applied to a plaintiff's total amount of damages. This Court likewise finds that the application of any insurance credit to DIGA's statutory liability—rather than to Plaintiffs' total amount of damages—is warranted by section 4212(a), and accordingly holds that DIGA's liability in this case is limited to $200,000.

The purpose of Delaware's Insurance Guaranty Act is statutorily described as "provid[ing] a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to

[23] Browning-Ferris, Inc. v. Rockford Enterprises, Inc., 642 A.2d 820, 823 (Del. Super. Ct. 1993).

avoid financial loss to claimants…because of the insolvency of an insurer…and to provide…[DIGA as a means] to assess the cost of such protection among insurers."[24] However, as previously stated, the pertinent part of title 18, section 4212(a) provides that after other potential sources of insurance have been exhausted, "[a]ny amount payable on a covered claim under…[Delaware's Insurance Guaranty Act] shall be reduced by the amount of any recovery under such insurance policy." The Act further provides that DIGA's obligations "shall be satisfied by paying to the claimant an amount not exceeding $300,000…."[25] Thus it is clear that the Act specifically proscribes the maximum amount a claimant may recover from DIGA; it is equally clear that the Act provides a framework within which DIGA's liability can be reduced. The question is the manner in which that reduction takes place, and whether it applies to the current situation.

In an issue of first impression in the Pennsylvania courts, and construing statutory language nearly-identical to that contained in Delaware's Act,[26] a Pennsylvania appellate court has recently held that the

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[24] DEL CODE ANN., tit. 18 § 4202 (1999).

[25] DEL CODE ANN., tit. 18 § 4208(a)(1)(iii) (1999).

[26] The Pennsylvania "non-duplication" statute at issue read, in pertinent part, "[a]ny amount payable on a covered claim under…[the Pennsylvania Insurance Guaranty Act] shall be reduced by the amount of any recovery under…[any provision in an insurance policy other than a policy of an insolvent insurer]."

amounts which an injured automobile passenger had received from both her own and the driver's uninsured motorist carriers would be deducted from the insurance guaranty association's statutory limit of $300,000.[27] The passenger's injuries "[we]re serious and amount[ed] to at least $365,000.00 in monetary damages[ ][,]"[28] and the tortfeasor's insurance carrier had been adjudicated insolvent while the lawsuit was pending.[29] The insurance guaranty act provided that the Pennsylvania Insurance Guaranty Association was "obligated to make payment on the extent of the covered claims of an insolvent insurer…but [that] such obligation…include[d] only that amount of each covered claim which [wa]s in excess of…[ ]$100[ ], and [wa]s less than…[ ]$300,000.00[ ]."[30]

After determining that Pennsylvania's "non-duplication" statute was "unambiguous as a matter of law"[31] (and using a rule of "plain and obvious meaning" in construing such statute), the Pennsylvania Superior Court noted that if Pennsylvania's legislature had intended the result urged by the injured

[27] Blackwell v. Pennsylvania Ins. Guar. Ass'n, 567 A.2d 1103 (Pa. Super. Ct. 1989).

[28] Blackwell, 567 A.2d at 1104.

[29] Id.

[30] Id. at 1105.

[31] Id.

passenger (the same result as is urged by Plaintiffs here), "[it] could have easily achieved [th]at [goal] by simply stating…that 'a covered claim under th[e] act [rather than 'any amount payable on a covered claim'] shall be reduced by the amount of any recovery…' of alternative insurance coverage."[32] While recognizing that the issue "was not without difficulty" given the extent of the injured passenger's injuries and the pre-insolvency policy limits of $6,000,000, the Blackwell Court nonetheless affirmed the Court of Common Pleas's determination that summary judgment in the Pennsylvania Insurance Guaranty Association's favor was appropriate.[33]

The Blackwell decision has received treatment in insurance law treatises as standing for the propositions that "[t]he liability of the [guaranty] association is…reduced by the amount recovered under…other insurance[ ][,]"[34] and "[t]he [guaranty] fund also generally has the right to seek recovery from any collateral source…[which] allows deductions from the guaranty fund's liability…."[35] And the District of Columbia Court of Appeals, citing the Blackwell opinion, has found that "where an injured

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[32] Id. at 1106 (emphasis in original).

[33] Blackwell, 567 A.2d at 1107.

[34] 44 C.J.S. Insurance § 150.

[35] 1 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 6:32, at 6-69 (3d ed. 1997).

plaintiff has alternative sources of insurance covering the same claim as the claim against an insolvent insurer, the courts interpret the non[-]duplication provision as requiring the plaintiff to exhaust the solvent policy and deduct the amount recovered from the obligation due by the state guaranty association."[36]

This Court finds DIGA's arguments to be ultimately persuasive. The Court is sympathetic to Mr. Marra's apparently extensive injuries and accumulated medical expenses. As section 4212(a) itself states, however, "any amount payable on a covered claim under…[the Act] shall be reduced…" and section 4208(a)(1)(iii) indicates that such a "covered claim" will never exceed $300,000, *i.e.*, a covered claim will never be a claimant's full amount of damages. And "[w]hen statutory language is both clear and consistent with other provisions of the same legislation and with legislative purpose and intent, a court must give effect to that intent…."[37] Thus the fact that this limitation is contained in a separate statutory section does not, as Plaintiffs suggest, render ambiguous the method by which such reduction will apply. If the legislature wanted to alter the effect of what this Court

[36] Zhou v. Jennifer Mall Rest., Inc., 699 A.2d 348, 354 (D.C. App. 1997) (collecting cases in support of the proposition (and adopted by this opinion) that an insurance guaranty association is entitled to offset its liability by any amount received from a claimant's uninsured motorist carrier).

[37] Seth v. State, 592 A.2d 436, 440 (Del. 1991).

deems the plain and unambiguous meaning of these sections when read together, it could have amended the language of the statute in a manner similar to that suggested by the Blackwell Court.

The cases that Plaintiffs rely upon do not persuade this Court to hold in their favor. Witkowski v. Brown[38] stands for the proposition that an insured must first "exhaust" any other uninsured motorist coverage he or she may recover from before bringing a claim against DIGA; the parties have agreed that such "exhaustion" has already occurred here. Hurst v. Nationwide Mutual Insurance Company[39] was decided in the context of the statutory language and public policy of Delaware's uninsured motorist statute (title 18, section 3902 of the Delaware Code), and not within the context of Delaware's Insurance Guaranty Act, which this Court finds has a separate and distinct rationale.

In contrast to the purpose of the Insurance Guaranty Act, this Court has previously characterized the intent of the Delaware uninsured motorist statute as contemplating "plac[ing] the insured in the same position as…[the insured] would have been if the tortfeasor had carried the same liability

[38] 576 A.2d 669 (Del. Super. Ct. 1989).

[39] 652 A.2d 10 (Del. 1995) (en banc).

coverage which the insured carried…."[40] But with regard to insurance guaranty statutes, and as was aptly stated by the Blackwell Court, "it was anticipated by the [l]egislature that some claimants would suffer some amount of financial loss due to the insolvency of an insurer[ ] because…[the guarantee association]'s obligation to a claimant is limited to $300,000.00…."[41] Furthermore, at least one treatise has described the purpose behind insurance guaranty acts as "not completely step[ping] into the shoes of the insolvent…[but] obligated to pay claims only to the extent provided by statute."[42]

Given Delaware's statutory framework and this Court's reading of sections 4212(a) and 4208(a)(1)(iii), combined with what this Court perceives as the policy behind such statutes, the Court finds that the $100,000 policy tendered by State Farm is properly deducted from DIGA's $300,000 limit so that DIGA's liability to Plaintiffs in this case is $200,000.[43]

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[40] Brown v. Comegys, 500 A.2d 611, 614 (Del. Super. Ct. 1985).

[41] Blackwell, 567 A.2d at 1106.

[42] 44 C.J.S. Insurance § 147.

[43] Given that the Court needs only to analyze sections 4212(a) and 4208 of the Delaware Code to dispose of the motions currently before it, the Court does not need to consider DIGA's argument that subsections (b) and (c) of 4212 also support its position.

## VI. CONCLUSION

For all of the above reasons, Plaintiffs' Motion for Summary Judgment is **DENIED** and DIGA's Motion for Summary Judgment is **GRANTED**.

**IT IS SO ORDERED.**

_____/s/_____
Richard R. Cooch

oc: Prothonotary