



SUPREME COURT OF KENTUCKY
2013-SC-000555-D



STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY

APPELLANT

v.

APPELLANT'S BRIEF

LONNIE DALE RIGGS

APPELLEE

APPEAL FROM COURT OF APPEALS OF KENTUCKY
2012-CA-000354

Submitted by:
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CERTIFICATE OF SERVICE

It is hereby certified that copies of this Appellant Brief were served via regular U.S. mail, postage prepaid this 11th day of August, 2014 upon: Hon. Ken Howard, Judge, Hardin Circuit Court, Division II, Hardin County Justice Center, 120 East Dixie Avenue, Elizabethtown, KY 42701; Samuel Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and Timothy R. McCarthy, Nutt Law Office, Starks Building, Suite 490, 455 South Fourth Street, Louisville, KY 40202. I further certify that the record on appeal was not withdrawn by the party filing this Brief.

Counsel for Appellant

I. INTRODUCTION

This action arises from a motor vehicle accident on August 26, 2008 involving Lonnie Riggs (“Riggs”) and Phillip Richards (“Richards”). Riggs first filed suit against Richards in Hardin Circuit Court in August 2010 to recover damages for bodily injuries sustained in the accident, and later filed an Amended Complaint against his automobile insurer, State Farm Mutual Automobile Insurance Company (“State Farm”), for underinsured motorist (“UIM”) benefits in August 2011. The Hardin Circuit Court dismissed the UIM claim on summary judgment because Riggs filed his UIM claim beyond the contractual limitations period contained in his State Farm policy, but the Kentucky Court of Appeals reversed and found that the contractual limitations provision was unreasonable and unenforceable.¹ This Court granted State Farm’s Motion for Discretionary Review to address the enforceability of the UIM contractual limitations provision.

¹ Hardin Circuit Court Order entered on February 6, 2012 and Court of Appeals Opinion dated July 19, 2013 attached as **Exhibits 1 and 2**.

II. STATEMENT CONCERNING ORAL ARGUMENT

State Farm believes that oral argument is important in order for this Court to fully appreciate the significance of a ruling on the enforceability of a contractual policy provision which will have widespread impact on automobile insurance policies in the Commonwealth of Kentucky and related litigation.

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IV. STATEMENT OF THE CASE

A. Automobile Accident

On August 26, 2008, Riggs was involved in an automobile accident with Richards on Kentucky Highway 313 in Vine Grove, Hardin County, Kentucky.² Riggs claims that he sustained severe and permanent bodily injuries resulting in medical treatment, pain and suffering, and lost wages, all as the result of the negligence of Richards in causing the accident.³

Riggs is a police officer with the City of Vine Grove in Hardin County and was on the job when the accident occurred.⁴ Accordingly, Riggs applied for and received workers' compensation benefits for injuries sustained in the accident.⁵ Riggs, however, did not receive basic reparation benefits for any loss from the accident.⁶

B. Lawsuit

Riggs filed a lawsuit against Richards in Hardin Circuit Court on August 9, 2010.⁷ Richards filed an Answer denying that he was negligent in the operation of his motor vehicle.⁸ The parties engaged in written discovery and Riggs made a demand for Richards' policy limits with Allstate Insurance of \$100,000.⁹ After concluding a settlement of the claims against Richards, the parties agreed to a dismissal of Richards and the Circuit Court entered an Order of Partial Dismissal of Richards on October 31, 2011.¹⁰

Prior to this dismissal of Richards, on August 10, 2011, Riggs filed a motion for leave to file an Amended Complaint adding State Farm as a defendant and asserting a claim for UIM

² Complaint, ¶3 - Trial Record ("TR") p. 2.

³ Complaint, ¶4 - TR p. 3.

⁴ Plaintiff's Response to Motion for Summary Judgment, p. 1 - TR p. 37.

⁵ *Id.*

⁶ Plaintiff's Responses to Requests for Admissions, Request No. 2 - TR p. 25.

⁷ TR pp. 2-4.

⁸ Answer filed on September 1, 2010 - TR pp. 9-10.

⁹ Plaintiff's Response to Motion for Summary Judgment, p. 2 - TR p. 38.

¹⁰ TR p.29.

benefits.¹¹ The Hardin Circuit Court entered an Order on August 26, 2011 granting the motion.¹² Riggs claimed in the Amended Complaint that he was entitled to UIM benefits and had made a proper demand upon State Farm to pay UIM benefits which State Farm had wrongly refused to pay.¹³

C. Court Rulings

On December 2, 2011, State Farm moved for summary judgment alleging that Riggs' UIM claim was time-barred pursuant to a contractual limitations provision contained in State Farm's insurance policy.¹⁴ That provision mirrors the limitations period for tort claims set forth in KRS 304.39-230(6) of Kentucky Motor Vehicle Reparations Act ("MVRA") and provided in relevant part as follows:

5. CONDITIONS

Item 2.d. is replaced by the following:

2. Suit Against Us

There is no right of action against us:

- d. under underinsured motor vehicle coverage and underinsured motor vehicle coverage unless such action is commenced no later than two (2) years after the injury, or death, or the last basic or added reparation payment made by any reparation obligor, whichever later occurs.¹⁵

Because Riggs did not receive basic reparation benefits and he filed his Amended Complaint requesting UIM benefits approximately three years after the accident, his claim was filed outside of the flexible two-year contractual limitations period and was therefore time-barred.

¹¹ TR p. 13.

¹² TR p. 15.

¹³ Amended Complaint, ¶3-5 - TR pp. 16-17.

¹⁴ See Certificate of Record on appeal "other" Notice-Motion filed 12-02-11.

¹⁵ State Farm's Motion for Summary Judgment, p. 2, Certificate of Record on appeal "other" Notice-Motion filed 12-02-11.

The Hardin Circuit Court agreed and granted State Farm's motion for summary judgment by Order entered on February 6, 2012.¹⁶ The Circuit Court relied on and quoted the 2006 Sixth Circuit decision *Pike v. Governmental Employees Ins. Co.*¹⁷ where the Court performed an exhaustive review of Kentucky case law and concluded that a nearly identical contractual limitations provision was reasonable and enforceable as a matter of law. Riggs appealed the grant of summary judgment.

On July 19, 2013, the Kentucky Court of Appeals issued a split decision reversing the Hardin Circuit Court's decision on the grounds that State Farm's contractual limitations clause was unreasonable and therefore unenforceable. The Court of Appeals thus found that the fifteen-year statute of limitations for contract claims in KRS 413.090(2) applied and ruled that Riggs had timely filed his UIM claim against State Farm.

V. ARGUMENT

State Farm's UIM Contractual Limitations Provision Which Follows the MVRA Limitations Period for Tort Claims is Reasonable and Enforceable.

Kentucky courts have consistently upheld limitations provisions contained in insurance policies so long as they are not directly contrary to statute and are reasonable. Courts have extended this general principle to contractual limitations provisions contained in automobile insurance policies and have specifically held that provisions relating to UIM claims are reasonable if they follow the tort limitations period set forth in the MVRA. Other jurisdictions have likewise held that UM/UIM contractual provisions which follow the tort statute of limitations provide injured claimants sufficient time to pursue their claims and are reasonable and enforceable. Because State Farm's UIM contractual limitations provision likewise mirrors

¹⁶ TR pp. 73-79.

¹⁷ 174 Fed. App'x. 311 (6th Cir. 2006).

the Kentucky tort limitations period contained in the MVRA, it is reasonable and enforceable as a matter of law.

A. Reasonable Contractual Limitations Provisions are Enforceable Under Kentucky Law.

For well over a century, Kentucky courts have upheld provisions contained in insurance contracts which shorten the statutory limitations period in which an insured has to file a lawsuit against his insurer so long as the provision is reasonable and not directly contrary to statute.¹⁸ A reasonable shortening of a statutory limitations period serves the interest of the insured in having a claim “speedily adjusted and paid.”¹⁹ These holdings are consistent with general insurance contract law that courts “will not disregard the plain terms of a contract between private parties on public policy grounds absent a clear and certain statement of strong public policy in controlling laws or judicial precedent.”²⁰

The Kentucky Court of Appeals in *Webb v. Kentucky Farm Bureau Ins. Co.*,²¹ expounded upon this long line of case law. In *Webb*, the insured sued his homeowners’ insurer to recover for the loss of his home destroyed by fire. The Court addressed whether a policy provision requiring suit to be brought within twelve (12) months after the loss conflicted with the 15-year statute of limitations applicable to breach of contract actions. The Court held that “where there is no statute prohibiting the contractual shortening of statutory periods of limitation, ...

¹⁸ See, e.g., *Smith v. Herd*, 110 Ky. 56, 60 S.W. 841 (1901) (reasonable contractual periods to file suit enforceable and not inconsistent with statutes of repose); *Johnson v. Calvert Fire Ins. Co.*, 298 Ky. 669, 183 S.W.2d 941 (1944) (12-month contractual limitations period which shortened statutory period reasonable and enforceable).

¹⁹ *Smith, supra*, 60 S.W. at 843.

²⁰ *State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875, 880 (Ky. 2013).

²¹ 577 S.W.2d 17 (Ky. App. 1978).

contractual limitations are valid and not in conflict with statutes prescribing longer periods of limitations.”²²

In enforcing the provision the Court reasoned that Kentucky’s public policy permits the contractual shortening of limitation periods applicable to claims against insurers and referenced a “solid line of case law in Kentucky that upholds the validity of contractual terms that provide for shorter limitation periods than the general statute of limitations” so long as the shortening of the statutory period is reasonable.²³

The Kentucky Supreme Court then in *Edmondson v. Pennsylvania Nat. Mut. Cas. Ins. Co.*²⁴ upheld a one-year limitation provision in a fire policy even though the insurer offered a sum of money to settle the claim three days before the expiration of the one-year period. Citing *Webb*, the Court held “there is no question in this case as to the validity of the limitation provided in the conditions of the policy”²⁵ which allows insurers to limit actions against them to one year. In sum, Kentucky law fully recognizes the validity of contractual limitations provisions contained in insurance policies.

B. State Farm’s UIM Contractual Limitations Provision Complies with Kentucky Precedent.

The Kentucky legislature enacted a comprehensive statute governing automobile accident claims by passing the Kentucky Motor Vehicle Reparations Act, KRS 304.39-010 *et seq* (“MVRA”). In the MVRA the legislature included a statute of limitations for tort claims arising out of automobile accidents in KRS 304.39-230(1) which provides in relevant part as follows:

²² *Id.* at 18.

²³ *Id.* at 19.

²⁴ 781 S.W.2d 753, 756 (Ky. 1989).

²⁵ *Id.*; *see also Smith v. Allstate Ins. Co.*, 403 F.3d 401 (6th Cir. 1995) (applied Kentucky law affirming dismissal of action on insurance policy with a one-year limitation provision where the insured filed suit one year and nine months after the fire loss).

If no basic or added reparation benefits have been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two (2) years after the injured person suffers the loss and either knows, or in the exercise of reasonable diligence should know, that the loss was caused by the accident, or not later than four (4) years after the accident, whichever is earlier. If basic or added reparation benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant, may be commenced not later than two (2) years after the last payment of benefits.

State Farm's contractual limitations provision tracks this flexible statutory time period for UIM claims.

The MVRA does not prescribe a statutory limitations period for UIM claims. Although the MVRA requires minimum liability coverage, the statute provides that UIM coverage is optional.²⁶ Kentucky courts have permitted reasonable exclusions for optional vehicle coverages including UIM coverage.²⁷ In general, however, the purpose and intent of UIM coverage is to treat the injured victim as if the tortfeasor is fully insured.²⁸

Further, at trial of a UIM claim, other than the named defendant being identified as the injured party's automobile insurer, the proof to be presented to the jury is identical. Namely, the injured party must prove liability and damages which are "essential facts that must be proved before the insured can recover judgment" on a UIM claim.²⁹ Similarly, a UIM carrier is entitled to the same credits and offsets as a liability carrier on behalf of the tortfeasor.³⁰ Keeping these principles in mind, Kentucky courts have interpreted and enforced UM and UIM contractual limitations provisions in reference to the MVRA statutory limitations period for tort claims.

²⁶ KRS 304.39-320.

²⁷ See, e.g. *Hodgkiss-Warick*, *supra*, 413 S.W. 3d at 881.

²⁸ *Robertson v. Vinson*, 58 S.W.3d 432, 434 (Ky. 2001).

²⁹ *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895, 899 (Ky. 1993).

³⁰ See, e.g., *Progressive Max Ins. Co. v. Jameson*, 431 S.W.3d 452 (Ky. App. 2013) (UIM carrier entitled to credit for basic reparation benefits coverage).

The Kentucky Court of Appeals first in *Elkins v. Kentucky Farm Bureau Mut. Ins. Co.*³¹ held that a one-year contractual limitations period to assert a UM claim was unreasonable and unenforceable because it conflicted with the MVRA statute of limitations for tort claims which is two years from the date of the accident or the last payment of basic reparation benefits, whichever is later. The Court noted that “it makes no sense to allow two years (or more) to file suit against an uninsured or underinsured tortfeasor and yet permit the insurer to escape liability if the suit involving it is not filed within one year.”³²

In reaching this conclusion, the Court concluded that a one-year period of limitations period would be “an unreasonably short time” that would “completely frustrate the no-fault insurance scheme.”³³ Significantly, however, the Court also reasoned that a claimant asserting a UM claim “should have the *same rights* as he would against an insured party” and cautioned that its ruling “in no way derogates the rule enunciated in *Webb*” permitting a shortening of the limitations period if reasonable.³⁴

Next, the Kentucky Supreme Court in *Gordon v. Kentucky Farm Bureau Ins. Co.*³⁵ ruled that the MVRA limitations period applied only to tort actions and not a UM contract action. Because the one-year contractual limitations period contained in the Farm Bureau policy was unenforceable under *Elkins*, the Court ruled that the fifteen-year statute of limitations for contracts in KRS 413.090(2) applied. The Court in part found it illogical to adopt a rule “which

³¹ 844 S.W.2d 423 (Ky. App. 1992).

³² *Id.* at 424.

³³ *Id.*

³⁴ *Id.* at 425 (emphasis added) (citations omitted).

³⁵ 914 S.W.2d 331 (Ky. 1995).

would require a plaintiff to sue his own insurer *before* discovering whether or not the tort-feasor is in fact an uninsured motorist.”³⁶

Importantly, however, as the Court in *Elkins* stated, the Court also noted:

However, 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.³⁷

Relying on this language, some insurers then revised their contractual limitations periods to provide claimants two years from the date of the accident to assert a UM or UIM claim.

The Western District of Kentucky in *Brown v. State Auto*³⁸ then found that such a contractual limitations period for a UIM claim was still unreasonable and unenforceable because an insured could file a tort action more than two years after the accident if basic reparation benefits had been paid. After reviewing *Elkins* and *Gordon*, the Court concluded that it would be “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 the tortfeasor is in fact underinsured.”³⁹

In response to *Brown*, some insurers (including State Farm) again revised their policies to provide contractual limitations provisions for UM and UIM benefits which mirrored the flexible limitations period for tort claims set forth in the MVRA. Courts applying Kentucky law thereafter approved these limitations periods as reasonable and enforceable.

³⁶ *Id.* at 332 (emphasis added).

³⁷ *Id.* at 333 (emphasis added).

³⁸ 189 F.Supp.2d 665 (W.D.Ky. 2001).

³⁹ *Id.* at 671 (emphasis added).

The Sixth Circuit in *Pike v. Governmental Employees Ins. Co.*,⁴⁰ first addressed this type of contractual limitations period for UIM claims contained in a GEICO policy. After an exhaustive review of Kentucky case law on contractual limitations provisions, the Court noted that there was no Kentucky case that specifically addressed this type of provision but concluded that enforcement of the provision satisfied the dictates of *Elkins* and *Gordon* and cited with approval the District Court's reasonableness analysis:

Thus the time limit in which the claim for UIM benefits must be brought is exactly the same time as that in which suit must be filed against the tortfeasor, no less than two and possibly more than two years from the date of the injury. This period, which dovetails with the tort liability period of limitations, is reasonable inasmuch as it does not require the insured *under any circumstance* to file suit for UIM benefits prior to the expiration of the limitation period for filing suit against the tortfeasor.⁴¹

The Hardin Circuit Court in the case at hand found *Pike* persuasive and directly on point.

Most recently, the Kentucky Court of Appeals in *Perry v. Kelty*⁴² addressed the same contractual limitations period language present in Riggs' State Farm policy. In *Perry*, the Jefferson Circuit Court granted State Farm's motion for summary judgment dismissing the UIM claim on the grounds that the insured filed her claim more than two years after the last payment of basic reparation benefits. Though the primary issue on appeal was whether Perry had received the endorsement containing the limitations period, in affirming summary judgment the Court noted that State Farm's contractual limitations period was consistent with Kentucky law:

A review of the law of this Commonwealth establishes that the two-year limitation to commence an action for underinsured benefits set forth in Perry's policy is the same limitation as that set

⁴⁰ 174 Fed. App'x. 311 (6th Cir. 2006)

⁴¹ *Id.* at 316. See also *Hill v. State Farm Mut. Auto. Ins.*, 939 F.Supp.2d 754 (E.D. Ky. 2013) (recognizing without challenge that a UIM limitations period which tracks the MVRA tort period is enforceable).

⁴² 2012 Ky. App. Unpub. LEXIS 326 (May 4, 2012) – attached pursuant to CR 76.28(4)(c) as **Exhibit 3.**

for an action against a tortfeasor in the Kentucky Motor Vehicle Repairs Act, as codified at Kentucky Revised Statute (KRS) 304.39.230(6). As this Court has previously held, a two-year limitation of this nature for suits against an underinsured carrier is not unreasonable.⁴³

Here, the Court of Appeals acknowledged these prior decisions but chose to ignore its recent pronouncement on *Perry* on the grounds that the cited language was merely *dicta* and not central to the decision. The Court of Appeals simply elected not to follow the well-reasoned *Pike* decision on the grounds that it was a non-binding federal decision. The Court of Appeals failed to grasp, however, that both the prior appellate panel and the Sixth Circuit fairly and correctly interpreted Kentucky precedent as indicating that a contractual limitations period which follows the flexible two-year tort limitations period contained in the MVRA is reasonable and enforceable.

C. A UIM Contractual Limitations Provision Which Follows the Tort Limitations Period is Reasonable.

The primary basis for the split decision of the Court of Appeals is that a UIM contractual limitations period that follows the MVRA tort limitations period is unreasonable because it could require a claimant to file a “protective lawsuit” asserting a UIM claim before a claimant has a reasonable opportunity to determine whether the tortfeasor is underinsured during the course of litigation of the tort claim. The Court of Appeals reasoned that a claimant may only discover the liability limits and other facts necessary to make this determination after it files suit and engages in adequate discovery at which time the UIM contractual limitations period may have expired. This reasoning conflicts with the conclusions by the Kentucky legislature and Kentucky courts that the MVRA two-year flexible statute of limitations for tort claims is reasonable and misinterprets actual litigation practice in Kentucky courts.

⁴³ *Id.* at *7-8.

Kentucky courts have long recognized that the MVRA's two-year statute of limitations adopted by the Kentucky legislature is sufficient to "give adequate opportunity to all litigants and counsel to familiarize themselves with the complexities of the system without cutting off anyone's essential rights in the process."⁴⁴ This Court similarly described the two-year statute of limitations as "both sensible and reasonable."⁴⁵ This Court further noted that the rationale underlying the MVRA's longer statute of limitations applied "regardless of whether the tort claim to be pursued is against a motorist or a non-motorist."⁴⁶

A contractual limitations period for UIM claims which mirrors the MVRA's two-year statute of limitations likewise gives potential UIM claimants an adequate opportunity to investigate their claims without resulting in unnecessary or premature litigation. There is no reason that a two-year statute of limitations is reasonable when applied to a tort claim but unreasonable when applied to a UIM claim. The Court of Appeals in *Elkins* recognized the logic that "a claimant should have the same rights [against a non-motorist defendant] as he would have against an insured third party."⁴⁷

The Court of Appeals' concerns about unnecessary lawsuits and potential Rule 11 sanctions are unfounded. In *Robinson v. Allied Prop. & Cas. Ins. Co.*⁴⁸ the Iowa Supreme Court in finding that a UIM contractual limitations period which mirrored the limitations period for a tort claim was reasonable and enforceable carefully considered and rejected the same arguments raised by the Court of Appeals in the case at hand.

⁴⁴ *Everman v. Miller*, 597 S.W.2d 153, 154 (Ky. App. 1979).

⁴⁵ *Bailey v. Reeves*, 662 S.W.2d 832, 834 (Ky. 1984).

⁴⁶ *Id.*

⁴⁷ *Elkins, supra*, 844 S.W.2d at 425.

⁴⁸ 816 N.W.2d 398 (Iowa 2012).

The Court found claims that having the same limitations period will result in unnecessary lawsuits “overstated and belied by the common practice in Iowa of filing UIM claims together with tort claims against the other driver.”⁴⁹ The Court further rejected concerns about possible sanctions for attorneys filing unsupported claims:

We do not see this case as presenting claimants with a *Hobson’s* choice between filing frivolous claims or losing what might be a potentially meritorious UIM claim. If the UIM claim potentially has no merit, no Iowa court should impose sanctions for filing to toll the contractual deadline.⁵⁰

The Court also noted that another “reasonable course of action is simply for the plaintiff’s counsel to request a tolling agreement from the UIM insurer.”⁵¹

The same rationale applies to the practice of tort and contract claims for accident victims in the courts of Kentucky. When a claimant is forced to bring a tort action for personal injuries against the alleged tortfeasor, counsel for the claimant has three options if a UIM claim is possible. First, counsel can obtain a tolling agreement from the UIM insurer that tolls the running of the limitations period. Counsel has access to the client’s own insurer and usually can obtain this agreement as insurers are more than willing to take the chance that suit will never be filed against it rather than forcing the claimant to join the insurer as a party.

Second, if unable to obtain a tolling agreement, counsel when suing out the tort claim can add a UIM claim in the Complaint. The UIM claim is then simply stayed until a determination is made as to whether the available liability limits are adequate to fairly compensate the claimant for injuries sustained in the accident.

⁴⁹ *Id.* at 406.

⁵⁰ *Id.*

⁵¹ *Id.* at 407.

Third, counsel can always file suit well before the expiration of the limitations period for a tort claim. This permits counsel sufficient time to engage in any needed discovery on the liability claim to decide whether to request leave to amend the Complaint to add a UIM claim prior to when the contractual UIM provision expires.

Thus, contrary to the worries of the Court of Appeals, applying the same two-year contractual limitations period for UIM claims does not result in unnecessary lawsuits. At most it results in the assertion of a potentially unnecessary claim which is simply stayed. As with the underlying tort claim, it is completely reasonable to expect counsel representing the claimant to engage in the due diligence necessary to determine whether a UIM claim may be a *possible* viable claim during the same period in which counsel is required to file the tort claim.

In the instant case, Riggs' attorney could have elected one of these three options and avoided the running of the UIM contractual limitations provision. Namely, counsel could have obtained a tolling agreement from State Farm for the UIM claim; included a UIM claim in the tort lawsuit and pursued that claim once he settled his bodily injury claim for the tortfeasor's liability limits; or filed suit sooner than mere days before the tort limitations period expired permitting sufficient time to later amend his Complaint to assert a UIM claim on a timely basis.

In fact, invalidating State Farm's contractual limitations period and instead applying the fifteen-year contract statute of limitations would likely result in duplicative litigation and a waste of party and judicial resources. If a claimant could delay filing a UIM claim until resolution of the tort claim, a UIM claim could be raised after years of litigation on the underlying claim. The tort litigation could include depositions of the parties and key witnesses, taking of proof from medical, vocational and accident reconstruction experts and even trial of the bodily injury claim. As Kentucky courts have recognized and as the court in *Robinson* noted, though UIM claims are

contract actions, trial of the UIM claim “requires juries to consider evidence and make findings typical of motor vehicle negligence actions, including the comparative fault of both drivers and the extent of personal injuries.”⁵²

An automobile insurer then later sued on a UIM claim after this litigation has taken place would not be bound by the prior litigation and would be fully entitled to engage in the same discovery and even try the case a second time. If, on the other hand, a claimant asserts the UIM claim at the outset of the tort claim, the UIM carrier has the choice to participate in the action and is bound by the discovery that takes place and the verdict.

Indeed, if UM and UIM claims are governed by a separate limitations period longer than the tort limitations period as proposed by the Court of Appeals, then UM and UIM claimants will have *more* rights than claimants who sue fully insured tortfeasors. For example, a person injured in a motor vehicle accident who fails to file within the flexible MVRA two-year statute of limitations will still have a source of recovery if the tortfeasor’s vehicle is uninsured or underinsured, whereas if the vehicle is fully insured the claimant will be without a remedy. Granting UIM claimants *more* rights than a tort claimant would be inconsistent with the intent of the MVRA in providing UIM coverage: “[t]he purpose of UIM coverage is to place the insured in the same position he would have occupied had the tortfeasor been fully insured,...not in a better position.”⁵³

D. Other Jurisdictions Have Ruled that UM/UIM Contractual Limitations Provisions Which Follow the Tort Limitations Period Are Reasonable and Enforceable.

Finding State Farm’s limitations provision to be enforceable would be consistent with courts in other jurisdictions which have also ruled that UM/UIM contractual limitations periods

⁵² *Robinson, supra*, 816 N.W.2d at 404.

⁵³ *Cincinnati Ins. Co. v. Samples*, 192 S.W.3d 311, 316 (Ky. 2006) (internal citations omitted).

that follow the limitations period for tort claims are reasonable and enforceable. For example, in *Robinson*, the Supreme Court of Iowa in 2012 considered the same issue under nearly identical facts: whether to judicially invalidate an insurance contract requirement that the insured file its UIM claim within the same limitations period applicable to personal injury actions. In *Robinson*, the injured party settled her personal injury claim within two years of the accident but did not assert her UIM claim until almost six years after the accident. The Iowa District Court found that the insurer's two-year contractual limitations period limitation was reasonable and granted summary judgment dismissing the UIM claim as untimely, but the Iowa Court of Appeals found that the two-year limitation was not reasonable and reversed.

The Supreme Court of Iowa reasoned that "it makes good sense for an insurer to provide for a UIM limitations period matching the two-year statutory deadline to file suit for personal injuries" because UIM trials require juries to consider the same type of proof and make similar findings.⁵⁴ It recognized that the Iowa "legislature has determined it is reasonable to require tort claimants to file lawsuits for personal injuries within two years after their causes accrue."⁵⁵ On that basis, the Court held that a two-year deadline to file a UIM claim that matches the deadline prescribed by the legislature for filing personal injury tort actions is "reasonable, as a matter of law."⁵⁶ The Supreme Court of Iowa believed its holding "was consistent with other jurisdictions that enforce UIM contractual deadlines matching the state's statute of limitations for personal injury tort actions."

⁵⁴ *Robinson, supra*, 816 N.W.2d at 404.

⁵⁵ *Id.*

⁵⁶ *Id.* at 405.

Similarly, in *Coyne v. Country Mut. Ins. Co.*,⁵⁷ an Illinois Court of Appeals addressed the contention that a two-year contractual limitation provision for UM coverage was void as against public policy in part because it shortened the ten-year statute of limitations for contracts. The Court rejected this argument because the contractual limitations provision gave the injured party the same two years to file a UM claim as the injured party had to file a tort claim against an insured motorist.⁵⁸

The rationale underlying these holdings is the same rationale at the heart of *Pike* and *Perry*: “a two-year limitations period to file a UIM claim is reasonable because it matches the time statutorily allowed to sue the tortfeasor—a deadline the legislature had deemed reasonable.”⁵⁹ “In both situations, the injured party must file suit...even if the full extent of the injury is not reasonably discovered until later.”⁶⁰

In the case at hand, the Court of Appeals failed to even address this rationale. Instead, it misinterpreted Kentucky precedent and cited unfounded fears of unnecessary and frivolous lawsuits. For all of these reasons, and as stated above, this Court should find that State Farm’s UIM contractual limitations period that tracks the MVRA statutory limitations period for tort claims is reasonable and enforceable as a matter of law and reverse the Court of Appeals’ Opinion of July 13, 2013.

⁵⁷ 349 N.E.2d 485 (Ill. App. 1976).

⁵⁸ *Id.* See also *Sarmiento v. Grange Mut. Cas. Co.*, 835 N.E.2d 692, 697 (Ohio 2005) (two-year contractual limitations period for filing UM/UIM claims that matches tort limitations is reasonable and enforceable); *Shelton v. Country Mut. Ins. Co.*, 515 N.E.2d 235, 240 (Ill. App. 1987) (two-year contractual limitations period for UIM claims follow tort period does not violate public policy and is enforceable).

⁵⁹ *Robinson, supra*, 816 N.W.2d at 405.

⁶⁰ *Id.* at 400; see also *Shelton, supra*, 515 N.E.2d at 240 (“Clearly, the legislature has put the insurer in the boots of the tortfeasor, whether he be insured or underinsured; accordingly, the insured, in all fairness and justice, should not be conferred with rights any different from those inhering in the person whom the insured supplants.”).

VI. CONCLUSION

Kentucky courts have consistently upheld limitations provisions contained in insurance policies so long as they are not contrary to statute and are reasonable. Courts have extended this general principle to contractual limitations provisions contained in automobile insurance policies and have specifically held that provisions relating to UIM claims are reasonable if they follow the tort limitations period set forth in the MVRA. Other jurisdictions have likewise held that UM/UIM contractual provisions which follow the tort statute of limitations provide injured claimants sufficient time to pursue their claims and are reasonable and enforceable. Because State Farm's UIM contractual limitations provision likewise mirrors the Kentucky tort limitations period contained in the MVRA, it is reasonable and enforceable as a matter of law.

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SUPREME COURT OF KENTUCKY
2013-SC-000555-D

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY

APPELLANT

v.

LONNIE DALE RIGGS

APPELLEE

VII. APPENDIX

	<u>NO.</u>
Hardin Circuit Court Order entered February 6, 2012	1
Court of Appeals opinion dated July 19, 2013	2
<i>Perry v. Kelty</i> , 2012 Ky. App. Unpub. LEXIS 326 (May 4, 2012)	3